ANATOLIE STATI and others

v.

REPUBLIC OF KAZAKHSTAN

OPINION

Introduction

1. I have been asked on behalf of the Republic of Kazakhstan (the "RoK") to provide an Opinion providing an explanation of the English proceedings which have taken place between Anatole Stati and others (the "Stati parties")[1] and the RoK concerning the enforcement of an arbitral award issued by an arbitral tribunal in an arbitration initiated by the Stati parties against the RoK under the Energy Charter Treaty ("ECT" and the "ECT Award"). I understand that it is the RoK's intention to provide this Opinion to courts in various countries where there are proceedings involving the Stati parties and the RoK.

2. I have no other part or interest in either the English or any other proceedings concerning any of the parties named above, except that on the instructions of the RoK's lawyers I have prepared an Opinion for submission to the Belgian courts and I am currently instructed to prepare another Opinion for submission to courts in the United States. Those instructions relate to the proceedings between the RoK and the Stati parties which I discuss in this Opinion. The views I express herein are my genuinely held independent views. I am not qualified to express any view about any laws other than those of England and Wales and the European Union. The facts stated herein are known to me from the various judgments referred to herein and from the documents which have been provided to me referred to in paragraph 4 below.

3. I was admitted to the Bar of England and Wales in 1976 after studying law at Oxford University in England and then in Munich (Germany), Strasbourg (France) and Pescara

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[1] Anatole Stati, Gabriel Stati, Ascom Group SA ("Ascom") and Terra Raf Trading Ltd ("Terra Raf").

(Italy). I have been in private practice in England since being admitted to the Bar, and in recent years I have specialized in private international law. I have practiced at all levels of English courts including the Supreme Court of the United Kingdom. I was awarded the rank of Queen's Counsel in 1995 and I am authorized to sit as a Deputy High Court Judge. I am a Visiting Professor at King's College London and I have written extensively on European civil practice, including jurisdictional issues. A *curriculum vitae* providing a more extensive account of my qualifications and experience is attached at Annex A to this Opinion.

4. The documents I have been provided with for the purposes of this Opinion (copies of some of which, as indicated, are attached to this Opinion) are:

   (1) Application by the RoK pursuant to 28 USC §1782 for an order directing discovery from Clyde & Co LLP, dated March 2015;

   (2) RoK's application to the Svea Court of Appeal to set aside the ECT Award on grounds of fraud, dated 5 October 2015;

   (3) Judgment of the Svea Court of Appeal dated 9 December 2016;

   (4) Expert Opinion of Professor Schöldström dated 13 January 2017;

   (5) Fifth Witness Statement of Patricia Nacimiento dated 13 January 2017;

   (6) Bundle Index for Hearing in the English Proceedings (relating to the hearing on 6-7 February 2017) – Annex B;

   (7) Second Witness Statement of Egishe Dzhazoyan dated 13 March 2018 ("Dzhazoyan 2");

   (8) Declaration of Philip Maitland Carrington dated 1 April 2019 (the "Carrington Declaration"); and

   (9) Stati et al. v RoK – Table of Quotes – The Statis' representations of the Knowles Decisions before other courts – Annex C.

5. I have also been provided with or accessed from on-line legal databases the following English judgments and Orders:

(10) Judgment of Mr Justice Knowles dated 6 June 2017 (the "Knowles Fraud Judgment");

(11) Order of Mr Justice Knowles of 27 June 2017, with Reasons for refusing permission to appeal – Annex D;

(12) Judgment of Mr Justice Knowles dated 11 May 2018 (the "Knowles Discontinuance Judgment");

(13) Order of Mr Justice Knowles dated 21 May 2018;

(14) Judgment of the Court of Appeal dated 10 August 2018 (the "CA Discontinuance Judgment"); and

(15) Judgment of Mr Justice Jacobs, dated 2 July 2019 (the "Jacobs Costs Judgment").

Questions

6. I am asked to address the following questions:

(1) Please explain the English enforcement proceedings starting from the Stati parties' application of 28 February 2014 to enforce the ECT Award to the Judgment of Mr Justice Jacobs, dated 2 July 2019 on the costs of the enforcement proceedings.

(2) Please explain the legal nature of the Knowles Fraud Judgment, dated 6 June 2017. Please explain in particular:

a. Whether the Knowles Fraud Judgment is a summary decision as per the English Civil Procedure Rules ("CPR"). If not, why not.

b. On what basis and evidence, and with what procedural consequences, did Mr Justice Knowles rule that there is a prima facie case that the ECT Award was procured by fraud.

c. What does "prima facie" mean under the circumstances.

d. What is the status of the Knowles Fraud Judgment in circumstances where it was not the subject of an appeal and where the Stati parties have

discontinued the proceedings and undertaken not to bring enforcement proceedings in England again.

(3) Please explain the test of English public policy in the Knowles Fraud Judgment and why Mr Justice Knowles found on that basis that there was a sufficient prima facie case that the ECT Award was procured by fraud. Please explain in particular:

a. If and to what extent Mr Justice Knowles assessed the evidence on, and decided the merits of, the RoK's fraud allegations.

b. Whether and how Mr Justice Knowles established a genuine link between the alleged fraud and the ECT Award.

c. Whether and if so how Mr Justice Knowles found that Swedish public policy must significantly differ from English public policy.

Background and factual outline

7. The Stati parties commenced arbitral proceedings against the ROK pursuant to the Energy Charter Treaty (the "ECT Arbitration") relating inter alia to a liquid petroleum gas plant ("LPG Plant"). These resulted in the ECT Award in the Stati parties' favour dated 19 December 2013. The ongoing disputes between the Stati parties and the RoK concern the enforcement of the ECT Award, which the RoK contends was procured by fraud. The RoK's case in essence is that it first became aware of various facts, described more fully below, on dates after the handing down of the ECT Award, which evidence fraud on the part of the Stati parties and which would, had they been known at the time, have caused the arbitral tribunal not to issue the ECT Award.

8. The English courts first became involved when the Stati parties commenced enforcement proceedings in respect of the ECT Award in England (the "English Enforcement Proceedings"). In line with normal practice, they applied without notice to the RoK (*ex parte*) for permission to enforce the ECT Award in England, which resulted in an initial order for enforcement dated 28 February 2014. Before serving that initial order on the RoK, on 30 September 2014 the Stati parties started enforcement proceedings in the United States District Court for the District of Columbia (the "DC Court").

9. The English court's initial order was not served on the RoK until 14 January 2015 and on 7 April 2015 the RoK applied for that initial order to be set aside (the "English Fraud Application"). Before that application was decided, there were certain material developments.

10. First, the RoK made an application to the Swedish courts to set aside the ECT Award (the "Swedish Set-Aside Application").

11. Secondly, there were judicial assistance proceedings in the United States (the "US Disclosure Proceedings")[2] by which the RoK sought and obtained documents and materials from related arbitration proceedings between the Stati parties and their joint venture partner Vitol FSU BV. That application had been heavily contested but resulted in a subpoena requiring the production of documents. The RoK's case is that the documents thus disclosed contained evidence that the Stati parties had been guilty of fraud in their pursuit of the ECT Arbitration against the RoK. The nature of the RoK's case on this aspect is summarised in the Carrington Declaration. Having explained that in quantifying the ECT Award, the arbitral tribunal had proceeded on the basis of evidence of an indicative offer for the LPG Plant by KMG E&P, the Declaration continues (paragraph 7),

> *7. Kazakhstan contends that the Award was obtained by fraud on the following grounds:*
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> *a) First, the Stati Parties directly and knowingly misled the Tribunal in the arbitration by submitting that the KMG Offer was a credible guide to the true value of the LPG Plant and/or a reliable cross-check of their approach to the valuation of the LPG Plant, when they were fully aware that the KMG Offer was based on deliberately false information that had been provided by them concerning the construction costs of the LPG Plant, and which had been massively and fraudulently inflated.*
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> *b) Secondly, and in any event, the underlying fraud perpetrated by the Stati Parties in relation to the construction costs of the LPG Plant resulted in the Tribunal being misled in relation to the valuation of the LPG Plant, since this fraud directly affected the level of the KMG Offer, on which the Tribunal*

[2] An application by the RoK dated 27 March 2015 pursuant to 28 US Code §1782, for an order directing discovery from Clyde & Co LLP.

based its valuation of the LPG Plant (and the quantum of damages that it awarded).

c) Thirdly, and at a more general level, all of the statements made by or on behalf of the Stati Parties in the arbitration to the effect that they had invested some USD 245,000,000 in the development and construction of the LPG Plant were false, and necessarily informed the Tribunal's overall perception of the nature of their investment in the LPG Plant.

*8. In broad summary, the underlying fraud perpetrated by the Stati Parties consisted of the deliberate falsification and misrepresentation of the costs incurred by the Stati Parties in the construction of the LPG Plant through a number of separate schemes. These schemes were each based on the involvement of a purportedly independent, arms-length company, Perkwood, at various stages of the project to construct the LPG Plant. Documents that Kazakhstan obtained through the US Disclosure Proceedings included a contract between Perkwood and TNG dated 17 February 2006 ("**the Perkwood Contract**"). The Perkwood Contract shows TNG agreeing to buy equipment from Perkwood relating to the construction of the LPG Plant for USD 115,000,000 (a figure later significantly increased). Kazakhstan's case is that most if not all of this equipment had already been purchased at a far lower cost (USD 35,000,000) from a German supplier, TGE.*

9. In reality, Perkwood was not an independent arms-length company. It was simply a creature of the Stati Parties, a post-box company with nominee directors which contributed nothing to the construction of the LPG Plant and which filed dormant accounts for all of the relevant years, yet which received substantial sums in respect of services purportedly provided. Perkwood was part of a scheme to enable the Stati Parties to inflate the apparent construction costs on a fictitious basis and a massive scale.

12. Thirdly, on 7 April 2015 the RoK applied in England to amend the English Fraud Application to add a contention that the enforcement of the ECT Award would contravene English public policy on the basis of the Stati parties' fraud, and applied on 5 October 2015 in Sweden to set aside the ECT Award on the additional basis of the newly-discovered evidence of fraud.

13. Fourthly, on 9 December 2016 the Swedish court, the Svea Court of Appeal, dismissed the Swedish Set-Aside Application. I am not qualified to offer an expert analysis of that decision but I do note that it applied what it termed a "very narrow" test of public policy to the fraud issue in declining to set aside the ECT Award.

14. Against this background the English Fraud Application was heard on 6-7 February 2017 and led to the Knowles Fraud Judgment of 6 June 2017.[3] I discuss this judgment at paragraphs 20 to 42 below.

15. In short, Mr Justice Knowles gave permission for the RoK to amend its application, found that there is a sufficient prima facie case that the ECT Award was obtained by fraud and directed that the allegations of fraud should be determined at a trial. He gave directions and established a timetable for the steps to be taken in preparation for the trial which he directed should take place not before 1 October 2018.[4] This meant, in accordance with normal practice in England, that the parties would prepare for the trial by setting out their respective cases in Statements of Case (also known as pleadings), each party would be required to give disclosure of relevant documents, statements containing evidence of factual and expert witnesses would be exchanged and the case would then proceed to an oral hearing at which witnesses could be cross-examined, documents would be examined by the court and legal arguments would be addressed to the court.

16. On 26 February 2018, shortly before the parties were due to disclose to each other the relevant documents in their possession, the Stati parties served a Notice of Discontinuance of the English enforcement proceedings. In normal circumstances, if a party serves a Notice of Discontinuance this would bring the proceedings to an end and the discontinuing party would come under an obligation to pay the counter-party's costs. But the counter-party can apply for the Notice of Discontinuance to be set aside in certain circumstances, and this is what the RoK did. That application was heard, again by Mr Justice Knowles, on 26 March 2018, leading to a judgment dated 11 May 2018 (the "Knowles Discontinuance Judgment"),[5] which I discuss at paragraph 43 below.

17. The Knowles Discontinuance Judgment was the subject of an appeal to the Court of Appeal which resulted in a judgment dated 10 August 2018 (the "CA Discontinuance

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[3] [2017] EWHC 1348 (Comm). In the event, the date of 5 November 2018 was fixed for the trial with a time estimate of 8 days: see Jacobs Costs Judgment, para. 6.

[4] See the Order of Mr Justice Knowles of 27 June 2017 (Annex D hereto).

[5] [2018] EWHC 1130 (Comm).

Judgment"),[6] which I discuss at paragraph 44 below. This reversed the Knowles Discontinuance Judgment, enabling the Stati parties to bring their enforcement proceedings in England to an end.

18. However, while that appeal was pending, the Stati parties came under obligations to provide disclosure of documents and to serve witness statements for the purposes of the fraud trial.[7] They served no witness statements, which meant that, had the discontinuance been disallowed and the case had proceeded to a trial of the fraud allegations, they would not have been permitted to call any oral evidence. They did, however, disclose documents which the RoK says lend further support to its case that the ECT Award was obtained by fraud and which contradict claims made by the Stati parties in their pleaded case in England and in the accounts which they had given to courts in other jurisdictions.

19. The CA Discontinuance Judgment did not, however, finally dispose of the English enforcement proceedings, because the RoK made two applications in relation to the costs of those proceedings, which were remitted by the Court of Appeal to the judge of first instance for decision. These applications were heard by Mr Justice Jacob on 1 July 2019 in the absence of representation of the Stati parties (although they had served certain witness evidence in opposition to the applications, which was before the court). Mr Justice Jacobs was satisfied that the Stati parties had had notice of the hearing, that they were aware that the applications were to be heard that day and that they had decided that they did not wish to attend. The applications resulted in a judgment the next day, 2 July 2019 (the "Jacobs Costs Judgment"), which I discuss at paragraphs 45 to 54 below.

<u>The Knowles Fraud Judgment</u>

20. English judgments usually set out the material facts and applicable principles of law in some detail, in order to clarify the reasoning which has led the court to its decision. They may well also record the arguments addressed to the court by the parties,

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6 [2018] EWCA 1896.

7 Witness statements were originally due to be served by 27 March 2018, later extended to 10 July 2018 following the Knowles Discontinuance Judgment: Order of Knowles J, 21 May 2108, para. 4.

although if that is done it will often be in a less formal way than might be characteristic of some other legal systems.

21. I am asked to explain the nature of the Knowles Fraud Judgment and of the legal standards that will have been applied in it. It is important to distinguish an application to set aside an order for enforcement of an arbitration award from an application for summary judgment. On an application for summary judgment or summary dismissal, the court does not have to form a nuanced view of the merits of the claim or defence, but merely whether the prospects of success are so strong, or so weak as to warrant a summary order in the applicant's favour.[8]

22. This is not the test which is applied on an application to set aside the enforcement of an arbitration award falling under the New York Convention. The starting point on such an application is that the award is entitled to recognition and enforcement in England unless one of the exceptions to that principle is shown to apply: Arbitration Act 1996, section 103(1). One of the exceptions is if the enforcement of the award is contrary to public policy: section 103(3). That includes a case where the award has been procured by fraud. That was the basis of the RoK's application (as amended) and it was for the RoK to satisfy the judge of that ground.

23. There are, broadly, two kinds of English civil proceedings, called "Part 7" and "Part 8" proceedings after the relevant sections of the Civil Procedure Rules by which they are regulated. Part 7 procedure is the normal procedure and it is this which most proceedings follow. In this procedure there is a focus on preparation for a trial. The procedural steps which precede the trial are all designed to identify the issues and the evidence which will be presented at the trial. It is important to recognize that the trial may (and very often is) conducted by a judge who has had no prior dealings with the case. At that stage, the documentary evidence will be examined by the trial judge for the first time. Factual witnesses and experts will have had written statements filed in advance, but those will not be considered by the trial judge until the witness attends

[8] Civil Procedure Rules ("CPR") 24.2. The test is whether "the claimant has no real prospect of succeeding on the claim or issue" or "the defendant has no real prospect of successfully defending the claim or issue." It is sufficient for the respondent to the application to show that he has some prospect of success, a prospect which is "real" in the sense of not being fanciful, false or imaginary.

the trial at which point the statements will constitute the witness's evidence in chief and he/she will be orally cross-examined on their evidence.[9] The parties will file written arguments shortly before the trial which will also be considered by the trial judge, but these will be in outline form only (they are called "skeleton arguments") and the trial will contain opening and closing oral arguments which the judge will consider before delivering his judgment. In modern practice, the judgment is usually delivered in written form after a short period although even then there is still an oral "handing down" – pronouncement in open court.

24. An application to enforce a foreign arbitration award follows the alternative procedure under Part 8.[10] This procedure does not normally involve a trial of the kind described above, but instead the case is usually decided on the basis of written evidence presented to the court. If, as in this case, the enforcement is disputed, the application (in this case the application to set aside the initial order for enforcement) will be heard by a judge in the course of an oral hearing, where documentary evidence will be examined and oral argument will be addressed to the court. Such a hearing will not ordinarily involve hearing witnesses in person. What happened in this case was that, once the RoK had raised the allegation of fraud, the court had to decide whether that allegation was or was not justified by the evidence. Because allegations of fraud *ex hypothesi* involve allegations of bad faith amounting to dishonesty, the courts are not willing to hold that parties are guilty of fraud unless the evidence has been tested in a rigorous process.

25. The law as laid down in the cases establishes that this enquiry by the court is a two-stage process. At the first stage the court will conduct an oral hearing at which the evidence of fraud in a written form will be carefully scrutinised and oral argument will be presented, in order to decide whether the applicant for the order setting aside the award has persuaded the court that it has a sufficiently strong case to warrant a trial of the fraud allegation. Secondly, if the evidence of fraud is held in the initial process to be sufficiently strong, then the court will order a trial of the kind described above

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[9] If other parties do not dispute the written evidence and do not wish to cross-examine the witness, then the written evidence will be presented to the court at that stage without the witness having to attend court.

[10] This is required by the rules: CPR 62.3(1).

under Part 7, in which the party accused of fraud has had an opportunity to rebut the allegations of fraud (which will have been set out in writing spelt out with a high level of particularity) by live oral evidence on which its witnesses have been cross-examined.

26. The Knowles Fraud Judgment was the product of the first of those two stages. I am instructed that the written material which was put before him was that set out in the Hearing Bundle for the English proceedings (the Index to which is Annex B to this Opinion) comprising 34 volumes containing some 237 items, including some 18 factual witness statements and 3 expert reports as well as numerous exhibits and other documents, which themselves included witness statements, expert reports, legal submissions, transcripts, and other documents in the ECT Arbitration and in the Swedish proceedings. The fact that Mr Justice Knowles is considering the evidence in a written form is why he says at paragraph 25 of his judgment that "[t]here has been no oral testimony, including cross examination, at this stage."

27. The issue I have to discuss is the standard by which the court will decide at this initial stage what is a sufficiently strong case to go to trial. If the applicant does not persuade the court that it has a sufficiently strong case to that standard, then the application to set aside the enforcement is dismissed and enforcement can proceed. If it does persuade the court that it has a sufficiently strong case, then the court will give directions for a trial.

28. The correct approach in deciding whether to direct a trial of the issue of fraud on an application to set aside an order for the enforcement of an arbitration award is to consider whether, if the allegations were proved at trial, they would establish that the arbitral award had been obtained by fraud. The matter was put this way in the Court of Appeal's decision in *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd.*:[11]

> *[N]ormally the conditions to be fulfilled will be (a) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) where perjury is the*

[11] [2000] QB 288, at p. 309F (Waller LJ).

> *fraud alleged i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result.*

29. That passage was considered by the Court of Appeal in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp.*[12] and explained thus:

> *The purpose of Waller LJ's test is to assess whether there is a prima facie case of fraud which is sufficient to overcome the extreme caution of the court when invited to set aside an award on the grounds of public policy. If an account is given of what occurred which, absent explanation, would reasonably be expected to be decisive at a hearing, the claim to avoid should not be ruled out of consideration because an answer has been put forward, which, on cross examination of the witnesses or otherwise, may, itself, prove false.*

30. It is apparent from an examination of the Knowles Fraud Judgment that Mr Justice Knowles had considered these principles (which he cited),[13] that he had them well in mind and that he applied them in considering the evidence put before him, referring on more than one occasion to "the necessary strength of prima facie case" and a "sufficient prima facie case".[14] It is clear that he did not treat this as a case analogous to an application for summary judgment.

31. In a section of the Knowles Fraud Judgment headed, "The Alleged Fraud", the judge referred to references in the ECT Award to Perkwood Investment Ltd and to the RoK's case that the Stati parties had not proved that US$245 million had been spent on the LPG Plant. He then turned to the evidence of Patricia Nacimiento, and in particular her Fourth and Fifth Witness Statements. In her Fifth Witness Statement, Dr Nacimiento explained that, in respect of the part of the ECT Award which related to the LPG Plant, the Stati parties had argued that the assessment of loss should be based on an investment cost basis, and that they had invested some $245 million in that plant. In support of that case they had relied in the ECT Arbitration on an indicative bid by KMG

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[12] [2015] EWCA Civ 1144, at para. 191 (Christopher Clarke LJ). The judgment was subsequently reversed by the Supreme Court in part on other grounds but without reference to this point: [2017] UKSC 16.

[13] Knowles Fraud Judgment, para. 11.

[14] Knowles Fraud Judgment, paras. 37, 47, 48, 92.

E&P (the "KMG Offer") in the sum of US$199 million and that the tribunal had based its assessment of the valuation of the plant on the basis of this bid, awarding damages against the RoK of US$199 million. She summarised the RoK's fraud allegations in the same terms as were later used in the Carrington Declaration quoted at paragraph 11 above and went on to explain in some detail why the RoK contended that the KMG Offer was a false guide to the valuation of the LPG Plant. In particular, she drew attention to the role of Perkwood Ltd which had been presented as if it were an independent arm's-length company but which it had later become clear (and as was admitted by the Stati parties) was actually a related party ("a puppet of Anatolie and Gabriel Stati"[15]).

32. Although Mr Justice Knowles did not repeat Ms Nacimiento's evidence comprehensively, it is clear that he read and had regard to it. In paragraphs 24 to 37 of the judgment, he drew attention, among other things, to:

    (1) the difference between, on one hand, the Stati parties' evidence to the Swedish court and that which they had submitted in another related arbitration and, on the other hand the evidence they had presented to the arbitral tribunal in the ECT Arbitration;

    (2) evidence from the US Disclosure Proceedings (including the Perkwood Contract) which was inconsistent with the evidence the Stati parties had presented to the arbitral tribunal in the ECT Arbitration;

    (3) the Stati parties' failure to disclose the Perkwood Contract in the ECT Arbitration, in apparent breach of the arbitral tribunal's order to disclose documents;

    (4) the Stati parties' failure to produce evidence before the Swedish court to support their answers to the fraud case being advanced there by the RoK;

    (5) the fact that much of what Ms Nacimiento had said in her evidence had not (at least yet) been answered in detailed evidence by the Stati parties, even though

[15] Nacimiento 5, para. 14.

that was a course that had been open to them at the current stage of the English proceedings.

33. He concluded (in paragraph 37) that there was "sufficient prima facie evidence" which he had summarised to amount to a prima facie case of fraud.

34. The Knowles Fraud Judgment went on to consider (in paragraphs 38 to 49) whether the alleged fraud would have affected the result of the ECT Arbitration, and in particular whether the alleged fraud has resulted in the arbitral tribunal delivering an award in the ECT Arbitration in the sum of US$199 million. More particularly, Mr Justice Knowles reasoned that if the KMG Offer was the result of the Stati parties' dishonest representation then the public policy test required by English law was satisfied. Having considered the role played by the KMG Offer in the reasoning of the tribunal, he continued at paragraphs 47 and 48 of his judgment,

> *47. If the KMG Indicative Bid was in fact the result of the Claimants' dishonest misrepresentation then it seems to me, at this stage of scrutiny on the English Application, there is the necessary strength of prima facie case that the Tribunal would no longer (to use its words) consider it as taking a place of "particular relevance" within "the relatively best source of information for the valuation of the LPG Plant"; still less being the one offer from which they took the damages figure. The Tribunal showed its interest in "undisputed indicative offers made by interested buyers in 2008". It looked at them critically, so as to assess whether these were "strategic offers to gain access to the data room", concluding that they were not.*
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> *48. [Counsel for the Stati parties] submits that "[I]t is absurd to suggest that the alleged fraud was a fraud on the Tribunal …, or would have made a difference to the Tribunal". I do not find it possible to accept that submission. In my judgment there is the necessary strength of prima facie case that the alleged fraud would have made a difference to the Tribunal. And that, in asking the Tribunal to rely on the KMG Indicative Bid in circumstances (concealed from the Tribunal, as from the bidder) of the alleged fraud, there was a fraud on the Tribunal.*

35. He then considered the decisions of the DC Court, refusing the ROK's permission to amend its grounds of opposition to enforcement in order to add allegations of fraud, and of the Swedish court declining to set aside the award. In each case he considered

whether those decisions had a preclusive effect in respect of the issues which he had to decide and concluded that they did not. He stated that,

> *No Court has decided the question whether there has been the fraud alleged. Neither the Swedish Court nor the US Court nor English Court has, although material has been put before those Courts that would allow them to decide that question.*[16]

36. In respect of the Swedish decision, he quoted material from the Swedish decision in which the Swedish court emphasized that the Swedish public policy test was very narrow and could not lead to the setting aside of an award in circumstances where it was not clear that the alleged misconduct was directly decisive to the outcome.[17] He then pointed out that, while the Swedish court had reasoned that the KMG Offer had been directly decisive for the issue which the tribunal had had to decide and that it was not (itself) false, the Swedish court had not reached any decision on the issue of whether there had been an indirect decisive influence on the reasoning of the tribunal. [18]

37. He also made the point that even if the issue had been decided by the Swedish court, the question of whether the ECT Award was to be denied enforcement on public policy grounds was an issue of English public policy, which was ultimately a matter for the English court,[19] and that while the Swedish court,

> *has held that its powers are limited so that it cannot intervene even if the arbitrators were deliberately misled by the Claimants' use of the KMG Indicative Bid it is important to record that the powers of the English Court, and the requirements of English public policy, are not so limited*.[20]

38. It is worth noting that in the Knowles Discontinuance Judgment (discussed below), Mr Justice Knowles referred to the present judgment and said,

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16 Knowles Fraud Judgment, para. 80.
17 Knowles Fraud Judgment, para. 59 at D.
18 Knowles Fraud Judgment, paras. 61 to 64.
19 Knowles Fraud Judgment, para. 87.
20 Knowles Fraud Judgment, para. 89.

> *I had found that there was prima facie evidence of fraud (as there described), and of fraud (again as there described) by the Statis on the arbitral tribunal, and that there was the necessary strength of [a] prima facie case that the alleged fraud would have made a difference to the tribunal. I was also satisfied that the [RoK] did not have access before the Award to the evidence of the alleged fraud on which it is now sought to rely, and that the evidence of the alleged fraud could not with reasonable diligence have been discovered before the Award.*[21]

39. He also reiterated the criteria established by the *Westacre* and *IPCO (Nigeria)* decisions and his conclusion that those conditions were met, and his conclusions as regards the decisions of the US and Swedish courts, which he said remained notwithstanding that matters had since been considered at a higher level in Sweden.[22]

40. Mr Justice Knowles having reached his decision, the Stati parties asked for permission to appeal against it. Permission was refused by Mr Justice Knowles[23] who (in line with normal practice) then gave written reasons for that refusal. These stated,

> *These brief reasons refer to draft Grounds of Appeal dated 12 June 2017. I do not consider that the Grounds offer a real prospect of an appellate court altering the conclusion (a) that the question whether the Award was obtained by fraud should be examined at a trial, and (b) that enforcement of the Award (by a judgment of this Court) should not take place without that examination. As to Ground I, my assessment is principally at Judgt [67]-[79], but please see also [21]-[49]. There was no request to cross examine Ms Nacimiento, and no request for further time to respond to her most recent evidence. As to Ground II,* ***it is not accurate to suggest that the Swedish Court rejected all the evidence before it. In fact with limited exceptions the Swedish Court did not in the event form a view on the evidence and material before it****. I examined the Swedish judgment at Judgt [60]-[66] and the US judgment at Judgt [50]-[54] in order to identify what had been decided and what had not. This examination is not*

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[21] Knowles Discontinuance Judgment (above, note 3), para. 8. See para. 43 below.

[22] Knowles Discontinuance Judgment (above, note 3), paras. 9 to 14. The consideration by the Swedish Supreme Court appears to have been confined to procedural considerations and not to have involved any review of the complaints of fraud.

[23] Order of Mr Justice Knowles, 27 June 2017, para. 19.

> *accurately engaged by the narrative under Ground II. Ground III is, with respect, without substance. There is no "second bite at the cherry" –* ***the question whether the Award was obtained by fraud in the manner alleged by the State has not been decided*** *…* [Emphasis added]. [24]

41. The Knowles Fraud Judgment is therefore final and has binding (*res judicata*) effect in respect of the issues which it necessarily decided. In order to reach his decision that there should be a trial of the application to set aside the enforcement order in the English proceedings, he had to decide whether the RoK had demonstrated, to the requisite standard (as described above) (1) that there was evidence of fraud which was not available to the RoK at the time of the hearing before the arbitrators, and (2) that it was so strong[25] that if examined at trial it would reasonably be expected to be decisive and, if it remained unanswered, would have that effect. He also had to decide whether the decisions of the US Court and/or the Swedish court precluded that decision and he concluded that they did not. Whereas Mr Justice Knowles had found, to the requisite standard, that there was a sufficiently strong case that there had been fraud on the Tribunal, on the basis that the Stati parties had submitted the KMG Offer in the full knowledge of that offer not being reliable evidence because it was based on false financial information provided to KMG by the Stati parties. But no such test appears to have been applied by the Swedish court, which concluded that the KMG Offer had not *itself* been false evidence because it was created by a third party (KMG) in good faith. The falsity or truth of the underlying evidence invoked by the Stati parties and which the RoK claimed was false is not an issue that the Svea Court of Appeal considered capable of being decisive, in circumstances where the KMG Offer itself had been what led the tribunal to its award.[26]

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[24] Reasons for refusing permission to appeal, p. 2 (Annex D hereto). The Stati parties made a further application to the Court of Appeal for permission to appeal, but that application was outside the time allowed for seeking such permission and it was refused by a member of the Court of Appeal: see Dzhazoyan 2, para. 7.10.

[25] "So strong" means, "sufficient to overcome the extreme caution of the court when invited to set aside an award on the grounds of public policy": see the passage from *Ipco (Nigeria) Ltd* quoted at para. 29 above.

[26] See Svea Court of Appeal judgment (para. 4(3) above), part 5.3.1 (page 45). This view is consistent with the opinion of Professor Schöldström (para. 4(4) above) but I have had no contact with him and my views are independently my own.

42. This judgment stands as a final and decisive ruling on those particular issues in any subsequent proceedings between the same parties in England or in any other country which accords recognition to the judgments of the English High Court. That is unaffected by the discontinuance of the enforcement proceedings.

The Knowles Discontinuance Judgment

43. In the Knowles Discontinuance Judgment, Mr Justice Knowles considered the application by the RoK to disallow the attempt by the Stati parties to bring an end to the English enforcement proceedings. He considered the reasons which the Stati parties advanced for wishing to discontinue the proceedings and said that he did not accept those explanations on the material available to him. He said that he considered the real reason for the Notice of Discontinuance was that the Stati parties did not wish to take the risk that the trial might lead to findings against them and in favour of the RoK.[27] He went on to consider the correct approach to an application of that sort and concluded that it was a matter for his discretion in light of the "overriding objective". That is a reference to the overriding objective of the Civil Procedure Rules, which is to enable the court to "deal with cases justly and at proportionate cost".[28] He decided that the RoK had a legitimate interest in its fraud allegation being heard at a trial and that setting aside the Notice of Discontinuance would therefore further the overriding objective.

The CA Discontinuance Judgment

44. By the CA Discontinuance Judgment, the Court of Appeal allowed the Stati parties' appeal against the Knowles Discontinuance Judgment, on the condition that they never again institute any proceedings in England to enforce the ECT Award.[29] The Court of Appeal examined and stated more fully the criteria which applied on an application to set aside a notice of discontinuance. It rejected the challenge which the Stati parties mounted to the judge's approach to such an application, but went on to

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[27] Knowles Discontinuance Judgment, para. 25.

[28] CPR, rule 1.1(1).

[29] The Stati parties' undertaking was "*not to see to enforce the [ECT] award in this jurisdiction at any time in the future*": see CA Discontinuance judgment, paras. 33 and 67.

allow an appeal against his order. It did so on the basis that the jurisdiction of the English courts is invoked, and invoked only, for the purpose of obtaining orders and declarations by the court. In circumstances where the Stati parties' purpose in seeking enforcement in England no longer existed, and the RoK's purpose in raising allegations of fraud amounting to a breach of English public policy was to mount a defence against the enforcement of the ECT Award, neither purpose still existed. In paragraph 16 of the CA Discontinuance Judgment, Lord Justice David Richards identified the issues which arose on the appeal. These did not (and could not relevantly) have included a challenge to the correctness of Mr Justice Knowles' findings in his Fraud Judgment, in respect of which the courts had reached a final decision, namely that the RoK's evidence of fraud was sufficiently strong to require that the issue of fraud be referred for a trial.

The Jacobs Costs Judgment

45. The Jacobs Costs Judgment took as its starting point the discontinuance notice served by the Stati parties. It was not part of this judge's function to review the correctness of the Knowles Fraud Judgment, and he did not do so. I am instructed that the Stati parties have raised arguments in Belgium and in the Netherlands to the effect that the determinations in the Knowles Fraud Judgment about the strength of the fraud allegation have been overtaken by the Jacobs Costs Judgment. I disagree. It is clear from the text of the judgment itself that Mr Justice Jacobs was not purporting to revisit or reevaluate the decision of Mr Justice Knowles in the Fraud Judgment that the evidence of fraud put forward by the RoK passed the high threshold required to justify a trial of the fraud allegations. Indeed, it would not have been open to him to do that, as the Knowles Fraud Judgment was *res judicata* by that time.

46. The Stati parties' Pleading Notes for the Hearing in the Exequatur Proceedings in the Netherlands, dated 27 August 2019, state at paragraph 13,

> *In all proceedings, the conclusion has been that the Award is upheld and that there are no grounds for refusing enforcement. In the United Kingdom too, the court has in the meantime ruled that, despite the Lungu deposition of April 2019, "(t)he present case cannot (...) be approached*

> *on the basis either that fraud against the Statis had been established, or indeed that there is an overwhelming case of fraud').*" [Underlining added, as discussed below.]

47. That quotation refers to footnote 12 of the Stati parties' Pleading Notes, which states,

> *Judgment of the English court of 2 July 2019 (Enclosure 167 Stati et al.), no. 19. See also no. 21 in which the English court held: "It is also true that some additional disclosure has taken place, and that Kazakhstan now has the deposition of Mr. Lungu. But I do not consider that these materials now mean that the court can be any more definitive about the strength of the allegation of fraud than was Robin Knowles J. in 2017"*.

48. Similarly, the Stati parties' submission in the Belgian Garnishment proceedings, 2 July 2020, at pages 253-254, contains partial quotations from the Jacobs Costs Judgment:

> ***The present case cannot, in my view, be approached on the basis either that fraud against the Statis had been established, or indeed that there is an overwhelming case of fraud*** *(…) I do not consider that any facts have emerged since May 2018 which enable the Court to go beyond these considered findings.* [emphasis in the Stati parties' quotation.]
>
> ***It is also true that some additional disclosure has taken place, and that Kazakhstan now has the deposition of Mr. Lungu. But I do not consider that these materials now mean that the court can be any more definitive about the strength of the allegation of fraud than was Robin Knowles J. in 2017.*** [emphasis in the Stati parties' quotation.]

49. Where Mr Justice Jacobs is referring to "the present case" he is referring to the applications concerning the costs of the proceedings which he was deciding in the light of the discontinuance of the action. He was expressly rejecting a suggestion that he could review the decision in the Knowles Fraud Judgment. Later in the same paragraph 19, Mr Justice Jacobs referred both to the 2017 Knowles Fraud Judgment and to the 2018 Knowles Discontinuance Judgment. The Stati parties in their submissions at paragraphs 46 and 48 above, omit a passage where the judge pointed to the determination in the latter judgment that,

> *the real reason for the notice of discontinuance was that the Statis did not wish to take the risk that the trial may lead to findings against them and in favour of the State.*

50. He further stated that,

> *I do not consider that any facts have emerged since May 2018 which enable the Court to go beyond these considered findings.*[30]

51. The Stati parties' submission in the Belgian Exequatur proceedings, 25 October 2019, states at paragraph 459,

> *The English High Court recognized in its judgment of July 2, 2019 that the premises of the English Judgment (namely that the alleged fraud could not have been discovered before the Arbitral Award) were shaky and that questions remained as to these premises: "there remained a topical issue [following the judgment of Mr. KNOWLES], as to whether or not the alleged fraud could be discovered by the exercise of due diligence." (Exhibit 3.10, § 21)*

52. The suggestion that the Jacobs Costs Judgment recognised that the premises of the Knowles Fraud Judgment were shaky is not justified by what the judgment actually says. Mr Justice Jacobs had already, in paragraph 19, said that there was no basis for him to go beyond the highly considered findings of Mr Justice Knowles in his two judgments. In saying, "there remained a topical issue" he was identifying, as was the case, that the issue of whether the evidence of fraud could have been discovered by the exercise of reasonable diligence was one on which the Stati parties would have an opportunity to put forward their case at trial. He accepted that some additional material had since become available, but,

> *I do not consider that these materials now mean that the court can be any more definitive about the strength of the allegation of fraud than was Robin Knowles J in 2017*.[31]

53. So far from casting doubt on the Knowles Fraud Judgment, I read that sentence as saying that the further material was not such as to undermine the strength of the fraud allegation so as to warrant some different order for costs than the one that he would otherwise make.

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[30] Jacobs Costs Judgment, para. 19.
[31] Jacobs Costs Judgment, para. 21.

54. In considering the quotations from the Jacobs Costs Judgment, it is important to recognise that the judge was dealing with the costs applications in circumstances where the Stati parties had chosen not to attend the hearing, and that he was making every effort to explore arguments that might have assisted the Stati parties in order to maintain fairness in the proceedings and in his decision. The judge went on carefully to examine the arguments that were addressed to him by counsel for the RoK and, in the event, he decided that part (but not all) of the RoK's cost of the English fraud proceedings should be paid on an enhanced, 'indemnity' basis because the risks of a trial will have been apparent to the Stati parties from the time of Mr Justice Knowles order of 27 June 2017 and that their delay until February 2018 in serving their Notice of Discontinuance was outside the normal and reasonable conduct of proceedings. He also ordered that there should be a partial payment on account of the costs pending their detailed assessment.

Conclusions

55. For the reasons given above, and subject to the more detailed points made in the body of this Opinion, my conclusions are:

    (1) that in his Fraud Judgment, Mr Justice Knowles decided that on an application to set aside a foreign arbitration award on the grounds that it had been procured by fraud, the law required that

        a. the court should be satisfied that

            (i) there was evidence of fraud which was not, by the exercise of reasonable diligence, available to the applicant at the time of the hearing before the arbitrators,

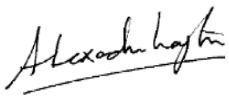
            (ii) that it was so strong that if examined at a trial that evidence would reasonably be expected to be decisive and, if it remained unanswered, would have that effect, and

            (iii) if the court reached that conclusion, it should not dismiss the fraud application but should give directions for the trial of the fraud issue;

b. that the RoK had produced evidence which satisfied those legal criteria; and

c. that the decisions of the US and Swedish courts did not preclude the RoK from arguing for that finding, and the court was thus not prevented by those decisions from reaching the conclusions that it did;

(2) that the Knowles Fraud Judgment is final and binding in relation to the matters which it decided, and that neither the Knowles Discontinuance Judgment, the CA Discontinuance Judgment nor the Jacobs Costs Judgment alters the final and binding (*res judicata*) nature of the Knowles Fraud Judgment.



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27 July 2020