ANATOLIE STATI,
GABRIEL STATI,
ASCOM GROUP, S.A.
and
TERRA RAF TRANS TRAIDING LTD

v.

REPUBLIC OF KAZAKHSTAN

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OPINION

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Introduction

1. I have been asked on behalf of the Republic of Kazakhstan (the "RoK") to provide an Opinion on certain questions of English law in relation to the judgment of the English High Court of Justice dated 22 April 2020 in the case of *National Bank Of Kazakhstan and others -v- The Bank Of New York Mellon SA/NV London Branch and others*, in which the National Bank of Kazakhstan (the "NBK") and the RoK were the claimants and the Bank of New York Mellon SA/NV London Branch ("BNYM") was the first defendant ("the Merits Judgment").[1] The Opinion is requested for the purpose of submission to the Belgian courts in proceedings concerning the RoK by the four parties who were the second to fifth defendants in the English proceedings which led to the Merits Judgment (the "Stati parties").

2. I have no other part or interest in either the English or Belgian proceedings (or any other proceedings) concerning any of the parties named above, except that on the instructions of the RoK I am currently preparing two other Opinions, one for submission to courts in the United States and one for submission to courts in Luxembourg and elsewhere. The views I express herein are my genuinely held independent views. I am not qualified to express any view about the laws of the United States or elsewhere apart from England and Wales and the European Union.

[1] High Court of Justice, Queen's Bench Division, Commercial Court, Financial List (Mr Justice Teare), Neutral Citation Number [2020] EWHC 916 (Comm)

The facts stated herein are known to me from the Merits Judgment and from the Jurisdiction Judgment referred to in paragraph 5 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, Italy. I have been in private practice in England since being admitted to the Bar, and in recent years I have specialized in 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 annexed to this Opinion.

Background

4. The background is fully set out in the Merits Judgment. In brief, the Stati parties had obtained from the Belgian court a garnishment order against BNYM which, following adjustment, now provisionally freezes some $530 million in cash held by the bank pursuant to a Global Custody Agreement ("GCA") which it had entered into with the NBK. In response to that order, BNYM made a declaration to the Belgian court that it "cannot fully exclude that the Republic of Kazakhstan … has or will have claims on BNYM or that BNYM holds assets of or for the Republic of Kazakhstan…". The RoK then applied to set aside the garnishment order, and its application was dismissed by a judgment dated 25 May 2018.

5. In the course of its judgment of 25 May 2018, the Belgian court considered the argument raised by the RoK that the garnishment order had no subject-matter. It said,[2]

> *"The argument that is raised by KAZAKHSTAN is about the subject-matter and the consequences of the attachment. KAZAKHSTAN's contention is actually*

[2] In the English translation I have been shown, pp. 12-13.

> *that the garnishment could not have any subject-matter, and that the garnishee still wrongly froze the accounts.*
>
> *The fact that the garnishee is not the debtor of the seized-debtor is not a ground for the withdrawal of the authorisation order nor for the lifting of the garnishment that has been authorised. The absence of a debt from the garnishee towards the seized-debtor only leads to the conclusion that the garnishment has no subject-matter.*
>
> *In the current case the attachment judge can only consider that the garnishment that has been authorised does indeed have a subject-matter. The subject-matter of the garnishment follows in fact from the declaration of the garnishee."*

It then quoted BNYM's declaration (including the passage quoted in the previous paragraph) and continued,

> *"The seized debtor [ie, the RoK] is entitled to challenge the declaration from the garnishee before the attachment judge. However, this challenge relates to the debt of the third party and must be referred to the trial court in the proceedings on the merits…. The competent judge on the merits is, as stated by Kazakhstan itself, the English court who must apply its own national substantive law."*

6. The Belgian court went on to consider an application by BNYM for declarations that it had properly executed the garnishment order and that it is discharged towards the NBK and the RoK. The judgment continued (at p.15),

> *"Both requests relate to the subject-matter of the attachment, notably whether or not a debt exists from BNYM towards KAZAKHSTAN. KAZAKHSTAN disputes the existence of such debt. The attachment judge cannot and may not settle such dispute, but only the judge on the merits. The judge on the merits is, as already mentioned above, the English court who must apply its own national law."*

7. What was referred to the English court, therefore, was the issue raised by the challenge, namely the existence or non-existence of a debt from BNYM to the RoK, the answer to which would in turn determine the substance of the question whether the garnishment order had subject-matter.

8. Against that background the English proceedings were started by the NBK and the RoK against BNYM and the Stati parties. As a preliminary step in the proceedings, the NBK

and the RoK obtained permission from the court to serve the claim form on the Stati parties out of the (territorial) jurisdiction of the English court.[3] In line with normal practice, that application was made without notice to the defendants (*ex parte*). At that stage the Stati parties had the right, which they exercised, to apply on an *inter partes* basis to set aside that order, which is the mechanism by which in such a case a defendant may dispute the personal jurisdiction of the court. That application, following an exchange of written evidence and an oral hearing led to a judgment dated 4 December 2018 ("the Jurisdiction Judgment").[4] Like the Merits Judgment, this was a decision of Mr. Justice Teare. Following that unsuccessful challenge by the Stati parties to the jurisdiction of the English court, the action proceeded through its various stages and eventually came to be tried, resulting in the Merits Judgment.

The issue

9. The questions which I am asked to consider concern the scope and effect as a matter of English law of the Merits Judgment, and in particular whether it is accurately characterized in the below-quoted passage from the Stati parties' submissions in the Belgian proceedings.

10. In the Second Submission on the Merits of the Opposition to the Attachment Enforcement Order dated May 27, 2020 (unofficial translation), it is stated:

> "*In summary, contrary to what had been argued by Kazakhstan/NBK and BNYM, the Judgment on 22 April 2020 on Part 7 of the Proceedings ultimately only ruled on aspects of contract law under English law (as the GCA is governed by English law)* ***(Exhibit 7.28****, para. 131). The English judge defers to the Belgian Judge of Attachments to rule on the aspects of Belgian law regarding the attachments concerning the subject of this attachment order (simulation, piercing the corporate veil, etc.), in accordance with what the Stati Parties had always maintained."* [5]

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[3] This will have been required in respect of those of the Stati parties not domiciled in a European Union country, namely the second, third and fourth defendants; no such permission will have been required in respect of the fifth defendant which was domiciled in Gibraltar, but for the present purposes that makes no material difference.

[4] High Court of Justice, Queen's Bench Division, Commercial Court, Financial List (Mr Justice Teare), Neutral Citation Number [2018] EWHC 3282 (Comm).

[5] The Stati parties' Second Submission On The Merits Of The Opposition To The Attachment Enforcement Order dated 27 May 2020, para. 114.

11. For the reasons which I give in more detail below, I believe that that is not a full or accurate characterization of what the English court decided. In particular, the English court held that the Belgian court had referred to it, and it decided, a wider question than *"aspects of contract law under English law"*. The English court's decision was not confined to a contractual debt under the GCA but decided, applying English law including English conflict of laws rules, that BNYM did not owe a debt to RoK, whether pursuant to the GCA or otherwise, and that there were no other claims that the RoK had on the cash deposits held by BNYM. Neither the question referred by the Belgian court, nor the English judgment and declarations are confined to deciding about the existence of a debt under the GCA. They were wider and the judgment decided, *inter partes*, the question on which the subject-matter of the Belgian garnishment order depends.

12. The four declarations made by the English court were in the following terms:[6]

    i) The contracting parties to the GCA are BNYM London and NBK (and not Kazakhstan).

    ii) The obligations owed by BNYM London under the GCA are owed solely to NBK (and not Kazakhstan).

    iii) BNYM London has no obligation to pay any debt due under the GCA to Kazakhstan.

    iv) Kazakhstan does not have any claims against BNYM in relation to the cash deposits held by BNYM pursuant to the GCA.

13. The first two declarations concern the question of who were the parties to the GCA and hence to whom BNYM owed the contractual duty to pay the debt constituted by the cash deposits. The third declaration flowed from the first two. But the fourth declaration is wider in scope and concerns <u>any</u> claim which, under English law, the RoK might have against BNYM in relation to the cash deposits. As I shall explain, and

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[6] Paragraphs 2 to 5 of the Order of Mr Justice Teare of 4 May 2020.

contrary to views expressed on behalf of the Stati parties, it is a ruling which is not confined to "aspects of contract law under English law".

Res judicata, issue estoppel and preclusive effect

14. A judicial decision which is final and on the merits made by a court which has jurisdiction over the parties gives rise to a judicial or *res judicata* estoppel. Several different principles are grouped together under the term "*res judicata",* as was explained in the majority judgment of the Supreme Court of the United Kingdom, in *Virgin Atlantic Airways v Zodiac Seats UK Ltd*,[7]

> *Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see* Conquer v Boot *[1928] 2 KB 336 . Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see* King v Hoare *(1844) 13 M & W 494 , 504 (Parke B)…. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties:* Duchess of Kingston's Case *(1776) 20 State Tr 355 . "Issue estoppel" was the expression devised to describe this principle by Higgins J in* Hoysted v Federal Commissioner of Taxation *(1921) 29 CLR 537 , 561 and adopted by Diplock LJ in* Thoday v Thoday *[1964] P 181 , 197–198. Fifth, there is the principle first formulated by Wigram V-C in* Henderson v Henderson *(1843) 3 Hare 100 , 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there*

[7] [2013] UKSC 46, [2014] AC 160. The judgment of Lord Sumption was agreed on these points with by all four of the other Justices.

> *is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger.*

15. It is important to observe that the preclusive effect of these principles extends not only to the existence or non-existence of a cause of action and the issues which have necessarily been determined by the judicial decision, but also, critically for present purposes, it extends also to issues which were not decided because, although they could and should have been raised, were not raised. The leading case is *Arnold v. National Westminster Bank plc,*[8] a decision of the House of Lords, at that time the supreme court of the United Kingdom. The decision was affirmed by the Supreme Court in *Virgin Atlantic* in which the majority judgment, having considered the *Arnold* decision, said (at paragraph 22) that the *Arnold decision*,

> *"is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."*

16. The exception referred to at point (3) in that quotation does not apply to cause of action estoppel, which is absolute and precludes the relitigation of any cause of action even on the grounds of material not previously argued. As the majority judgment in *Virgin Atlantic* put it (at paragraph 26),

> *"Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."*

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[8] [1991] 2 AC 93.

17. Additionally, the principle of cause of action estoppel overlaps with what is known as the *Henderson* principle[9] – the fifth of the principles referred to in the extract from the *Virgin Atlantic* decision quoted in paragraph 10 above. This is the principle whereby a party is obliged to bring forward his whole case and if he fails to do so he will be barred, on grounds that it would be an abuse of process, from relitigating it in subsequent proceedings.

Discussion

18. An examination of the judgment makes clear that the fourth declaration is not confined to the narrow question whether BNYM might owe a debt to the RoK under the GCA but, as noted above, is a wider decision, namely that BNYM did not owe such a debt, whether on that basis or any other basis. As an English court, applying the law selected by English conflict of laws rules[10], the court's decision is expressly that the RoK "*does not have <u>any claims</u> against BNYM in relation to the cash deposits held by BNYM pursuant to the GCA" (my emphasis).* The NBK and the RoK had asked him to declare that "*Kazakhstan does not have any claims (under any system of law) against BNYM in relation to the cash deposits held by BNYM pursuant to the GCA which constitute a subject-matter falling within the scope of the Belgian Garnishment Order."*[11] The difference between this and the declaration he actually made are (i) the omission of the words "*(under any system of law)"* and of the words "*which constitute a subject-matter falling within the scope of the Belgian Garnishment Order."* In omitting those words he was showing proper respect for the role (if any) that the Belgian Court might wish to exercise following his judgment, and hence was not giving an ultimate ruling on the fate of the Belgian garnishment proceedings; but that does not diminish or qualify his ruling on the non-existence of "any claim" by the RoK against the BNYM.

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9 *Henderson v Henderson* (1843) 3 Hare 100

10 For the most part, this was English law, although the judgment does apply Kazakh law, for example, when dismissing arguments of agency between the NBK and the RoK: see paragraphs 64 – 82 of the Merits Judgment.

11 See the order of Mr Justice Teare of 26 March 2020, para. 1.2.

19. Any cause of action which the RoK might have asserted against BNYM in relation to those deposits is *res judicata* in the sense discussed above and is foreclosed by the Merits Judgment. It would not be open to the Stati parties to assert the contrary in these or any other proceedings, whether in England or in any state which recognized the authority and effect of the Merits Judgment. For reasons which I elaborate at paragraphs 35 to 41 below, in my opinion the EU Member States are all such states.[12]

20. It appears from the Merits Judgment that two principal lines of argument were advanced by the Stati parties at the trial as to why the BNYM owed the RoK a debt in respect of the cash deposits. It was argued, first, that in entering into the GCA and making the deposits, the NBK had acted as agent for the RoK and, secondly "in essence", that the RoK was the beneficiary of a trust of which the NBK was the trustee, such that the RoK could enforce payment of BNYM's debt.[13] Both arguments were considered in detail by the judge. The reasons why it was argued that there was an agency relationship were each rejected (paragraphs 48 – 93 of the Merits Judgment), such that "the case of the Stati Parties on agency must be rejected". As regards the trust argument, the judge rejected that as a basis for saying that BNYM owed a debt to the RoK (paragraphs 94 – 104 of the Merits Judgment). He accepted that the RoK

> "*may ultimately be able to enforce the payment of the debt due from the BNYM to the NBK but in law the debt remains a debt which is payable to the NBK and not to the Republic. I have therefore concluded that the principles of equity do not enable the court to declare that sums are owed by the garnishee, BNYM, to the award debtor, the Republic"* [emphasis added].

21. He also considered a question which had perhaps not been clearly articulated by the Stati parties, namely whether the RoK was the "owner" of the cash deposits and concluded that the RoK's ownership of the National Fund did not enable it to claim from BNYM the cash sums owed by BNYM (paragraphs 105 – 109 of the Merits Judgment).

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[12] The same applies to Switzerland, Norway and Iceland, which are the non-EU Contracting States to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed on 30 October 2007 ("the Lugano Convention 2007"). That Convention forms part of EU law by reason of Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L147/1).

[13] Paragraph 47 of the Merits Judgment.

22. Those three issues – agency, trusts and ownership – were all decided against the Stati parties and the judgment clearly has preclusive effect in relation to those issues. But it is apparent that the Stati parties had various additional lines of argument which they have and/or could have advanced in the English proceedings but which in the event they decided not to pursue at trial. These have been referred to in various ways and for this purpose it is relevant to consider the Jurisdiction Judgment and the judge's subsequent ruling on costs.

23. In the court's earlier Jurisdiction Judgment, one of the issues which the court had to consider was the Stati parties' assertion that the claim did not give rise to a "serious issue to be tried". This led the judge to a detailed examination of the scope of the question referred by the Belgian court (paragraphs 26 to 38 of the Jurisdiction Judgment). In the course of that discussion, Mr Justice Teare said,

> *"29. The evidence of Mr. Nuyts (the Claimants' Belgian law expert) is that "[t]here is nothing in the Belgian judgment to show that the Belgian Court envisaged the English court deciding only some of the issues, and not the arguments raised by the Stati parties such as piercing of legal personality, sham trust, and abuse of law. These arguments had been raised at length by the Stati parties in written submissions in the Belgian proceedings, and the Belgian Court has distinctly decided not to address any of these arguments, leaving them to be decided by the English Court… The Belgian Judgment holds in general that the "challenge" relating to "the debt of the third party" must be referred to the English court… [and] that it is for the English court to decide in general "whether or not a debt exists from BNYM towards Kazakhstan"."*
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> *30. In my judgment it is clear from the passages of the Belgian judgment set out above that the Attachment Judge considered that the correctness of the view expressed in the BNYM declaration, that BNYM may hold money for the RoK, was a matter for this court. It was that issue, based upon the relationship between the RoK and NBK, which the RoK challenged and which the Stati parties sought to support in Belgium by reference to <u>the arguments of piercing corporate personality, sham trust and abuse of law,</u> which was referred to this court. There is nothing in the Attachment Judge's decision which suggests that it is only appropriate for this court to decide the "narrow contractual question" of who is the counter-party to the GCA.*

> *31. I accept Mr Nuyts' evidence that Belgian law provides for a distinction between the 'enforcement court' and the 'trial court', with the latter deciding on the merits of the case. …."* [emphasis added].

24. The judge then turned to the declarations then being sought in the English proceedings, which he said should be considered in the context of the Belgian proceedings. He continued,

> *"32. … In that context I do not accept Mr Sprange's[14] submission that the pleadings give rise only to a "narrow contractual point", or that "consciously absent from the Particulars of Claim is any claim for declaratory relief as to the more general question, on any legal basis outside the GCA, whether a debt is owed by BNYM to RoK". Instead, the Particulars of Claim, fairly read in their context, do raise these issues. The declarations sought are set out in full above. … Express reference could have been made to the arguments arising out of the relationship between RoK and NBK, which would have put the scope of the declarations beyond argument. But when one has regard to the context, namely, the decision of the Belgian court, the declarations are fairly to be read as encompassing such arguments.*
>
> *33. At trial, the Stati parties will be able to make submissions based upon the relationship between the RoK and NBK, which go beyond the narrow question of "who is the counterparty to the GCA?", and which will enable issues analogous to the issues of piercing legal personality, sham trust and abuse of law which the Stati parties have raised in their written submissions in Belgium, to be addressed. Those are all matters that can be determined by this court, applying what it determines to be the applicable law. All such claims will go to the central question: 'what assets, if any, does BNYM(L) hold for RoK?'. That is the question raised by the declarations sought by the Claimants. As Mr Malek QC submitted for the Claimants, this "is not limited to any liability of BNYM to RoK in contract: it includes any liability to RoK relating to the assets." The resolution of that question will necessarily, therefore, have a "material effect" on the Belgian executory attachment proceedings."*

25. At a later stage, rejecting an argument that there had not been any 'referral' by the Belgian court, the judge said (at paragraph 36),

> *"I am unable to accept that the Belgian court has not in substance, referred the question of the content of the attachment order to this court. Whether or not the Attachment Judge made a formal 'referral' as a matter of Belgian procedural law, it is in my judgement clear from the terms of the judgment set out above that the Attachment Judge considered that the correctness of*

[14] Tom Sprange QC was counsel for the Stati parties [footnote not in the judgment].

> *the BNYM declaration and the existence of a chose in action held by BNYM(L) for RoK to be questions for this court, as the "competent trial court"* [emphasis in the original].

26. These extracts from the Jurisdiction Judgment form part of the reasoning for rejecting the Stati parties' challenge to the jurisdiction and give rise to an issue estoppel between the parties to the action as to the scope of the issues for decision.[15] It is clear to me that the judge was stating that one of the issues the court would have to decide at the trial would be the existence of a debt owed by BNYM to the RoK, whether based on the GCA or on other wider questions such as issues of piercing legal personality, sham trust or abuse of law. The judge referred in the Merits Judgment to this part of his Jurisdiction Judgment and clarified (at paragraph 23) that whatever arguments might be addressed on the issue, the liability, if any, of the BNYM to the RoK "*must lie in contract, namely the GCA. The cash assets are, as a matter of English law, a liability in debt."*

27. In the event, as the judge observed (at paragraph 32 of the Merits judgment) and evidently to his surprise, the Stati parties chose to confine their arguments at the trial to those of agency and trust (and ownership), and although they could have done so, they did not, at the trial, seek to argue that,

> "*the English law question which has been referred to this court, that is, whether BNYM owes the debt in question to the Republic of Kazakhstan, required any issues such as sham trust to be addressed*".

The paragraph continued,

> *"They* [the Stati parties] *could have submitted, if they had wished, that in English law questions such as a sham trust were relevant to the question whether BNYM owed a debt to the Republic or that the foreign law on such topics was required to be assessed pursuant to the English law of conflicts but they chose not to do so. No such case was advanced either on the facts or in law. I cannot say why such a case was not advanced. The fact is that no such case was advanced either in fact or in law."*

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[15] A point which has been decided in interlocutory proceedings (such as the jurisdiction challenge) cannot be re-argued at the substantive hearing, "*unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter*." *Chanel Ltd. v. F.W. Woolworth & Co. Ltd* [1981] 1 WLR 485, at pp. 492-3, *per* Buckley LJ.

28. If there were any doubt (and in my opinion there is not) as to the scope of the preclusive effect of the Merits Judgment in respect of the issues which the Stati parties could have but did not argue, paragraph 32 just discussed and the following further passages from the Merits Judgment provide confirmation in this respect.

- Paragraph 24: this records that the pleadings in the case showed that there was an issue as to whether (as the Stati parties contended), Kazakh and/or Belgian law should be applied by the English court, and that they had referred both to Belgian law concepts of "simulation" or "pretence" and to the use of a trust structure in an abusive manner, and to Kazakh law, including concepts of "the abuse of civil rights". The Stati parties had also alleged that the TMA was a sham or mock agreement under Kazakh and/or Belgian and/or English law.[16]
- Paragraph 25: In accordance with standard practice, the parties had drawn up a List of Issues for the trial, which included this issue:

  > *"Does Kazakhstan have claims or rights against BNYM, or any capacity to enforce the GCA, arising out of any argument based on, or analogous to:*
  >
  > *(i) piercing legal personality;*
  > *(ii) sham trust; or*
  > *(iii) abuse of law?*
  >
  > *under whichever law that governs that question."*
- Paragraph 46: It is recorded that a witness called at the trial by NBK gave evidence that the TMA was not used to shield RoK's assets from creditors and she was not cross-examined on that evidence. If that evidence had been disputed by the Stati parties, they would have been required to cross-examine her.[17] The judgment continued:

  > *"In circumstances where these allegations have not been advanced in this trial the court has necessarily considered the question as to whom BNYM owes the cash sums covered by the GCA on the factual basis that*

[16] The TMA is the Trust Management Agreement entered into between the RoK and the NBK under which the National Fund (of which the cash deposits formed part) was placed under the "trust management" of the NBK: see paragraphs 7 – 9 of the Merits Judgment.

[17] It is a rule of English practice that if a party wishes to submit that the evidence of a witness called by an opposing party should be rejected on a given point, the challenging party is required to cross-examine the witness on that point: see *Phipson on Evidence* (19th edn), para. 12-12.

> *there has been no fraud, sham, simulation or pretence. The Stati Parties, if they consider that such matters are relevant to the question whether in English law a debt was owed by BNYM to the Republic, could have sought to establish the suggested sham but they chose not to do so. If the Stati Parties wish to allege in Belgium that there was fraud, sham, simulation or pretence and that on that basis in English law the cash was owed to the Republic it will, I think, be a matter for the Belgian Court to determine whether it is open to the Stati Parties to advance such arguments or whether they are estopped from advancing such arguments on the grounds of res judicata (as that principle is understood in Belgian law). It is the principle of res judicata which brings (desirable) finality to proceedings."*

29. An additional confirmation of the scope of the Merits Judgment is provided by the judge's ruling on the costs of the action.

> *There was of course evidence as to Belgian law and Kazakhstani law. It was thought, based on those laws, that the Stati parties would raise an argument based on sham trusts, fraud and various other ways of putting the same point, but, for reasons which are unexplained, those arguments were simply not advanced, either as a matter of fact or as a matter of what was said to be the applicable law under the English law of conflicts.*
> *…*
> *The fact remains that the issue joined between the parties was whether the bank -- that is BNYM -- owed money or held money to the order of the Republic of Kazakhstan. The Stati parties were free to argue whatever arguments they wished under that heading. They chose two to argue: agency and trust. They lost on them and it seems to me they should pay the costs of the action [subject to an exception]…."*, [18]

30. The consequence of the Stati parties' decision to confine their arguments to points of agency and trust (and ownership) and not to pursue at trial the other points that they had identified during the preparation of the trial, either principally or in the alternative, is that the Merits judgment has preclusive effect in respect of those issues. They fall squarely within the rule articulated in the *Arnold* decision mentioned at paragraphs [11 and 12] above. It is clear from the Merits Judgment that the issues other than agency and trust which the Stati parties had formulated in their pleadings could with reasonable diligence and should in all the circumstances have been raised. Indeed, the judgment records that the Stati parties "could have submitted, if they had

[18] Ruling, Monday 4 May 2020, 12.15pm, paras. 11 and 13.

wished", these issues at trial and chose not to do so. Accordingly, the preclusion in respect of those issues will be absolute in the absence of special circumstances.

31. There are no special circumstances of which I am aware in this case of the kind envisaged by Lords Keith in *Arnold*. In that case, which concerned a rent review in a lease, an arbitrator assumed that the rent could be further reviewed at the next review date. A first-instance judge reversed that and (this being an arbitration case) no appeal was available from his decision. His interpretation of the contract and his conclusion were "wholly wrong in law"[19] and held to be so by a higher court in another case. The headnote in the official report of *Arnold* states,

> *"Held, dismissing the appeal, that although issue estoppel constituted a complete bar to relitigation between the same parties of a decided point, its operation could be prevented in special circumstances; that where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings, it gave rise to an exception to issue estoppel, whether or not that point had been specifically raised and decided; that such further material was not confined to matters of fact but that where a judge made a mistake and a higher court overruled him in a subsequent case, justice required that the party who suffered from the mistake should not be prevented from reopening that issue when it arose in later proceedings."*[20]

32. I am not aware of any circumstances which could provide an exception in this case.

33. I have been shown the Order of Lady Justice Carr dated 8 July 2020 in which she refused the NBK and the RoK permission to appeal against one aspect of Mr Justice Teare's decision, namely his decision not to grant a declaration in the form quoted at paragraph 18 above. There is no automatic right of appeal in English law in respect of judgments such as the Merits Judgment and an appeal can only be pursued if the court's permission is obtained. An appellant applies first to the judge whose decision

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[19] [1991] 2 AC 93 at p. 110 (Lord Keith of Kinkel).

[20] The special circumstances which permitted an exception in *Arnold* were the "wholly incorrect" earlier decision, the fact that a subsequent development in the law had shown that to be the case (a fact which could not have been brought before the original court) and the fact (critical to the decision) that no appeal was possible from the original decision. See generally Handley, *Spencer Bower & Handley – Res Judicata* (5th edn, 2019), paras. 8.31 to 8.35.

they wish to appeal against and, it that application is refused, an application can be made to the Court of Appeal, which is decided by a single member of the Court of Appeal without oral argument. That is what occurred here. An application was made to Mr Justice Teare, which he refused,[21] and was then renewed in writing to the Court of Appeal and decided by a single judge of that court (in this case, Lady Justice Carr).

34. In line with normal practice, Lady Justice Carr gave short reasons for her decision, which was that such an appeal would not have "a real prospect of success" and that there was "no compelling reason why an appeal should be heard".[22] She said that there was no real prospect of an appellate court interfering with Teare J's decision not "to assume responsibility for the determination" of the Belgian proceedings and identified that he had explained his reasons for taking that approach, in particular at paragraphs 39 to 42 of the Merits Judgment, which she summarized very briefly. Neither that brief summary nor her wider reasons for refusing permission to appeal have any judicial effect on the meaning of the judgment in question. To the contrary, the refusal of permission to appeal is a clear and unequivocal decision to leave the Merits Judgment unaffected. She did not consider (and in the circumstances it would have been no part of her function to consider) the preclusive effects of the judge's decision, including the declarations based upon it, in respect of matters which could have been, but were not advanced during the trial, as described above.

<u>European law</u>

35. As an English lawyer, I am qualified to express an opinion not only on issues of English law, but also on the law of the European Union. The law of the European Union is given effect in the domestic law of the Member States pursuant to the various treaties which form the constitutional basis of the European Union and it is a fundamental precept of European law that it takes precedence over any inconsistent law of the Member States (the so-called "doctrine of supremacy"). Part of European law is a

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[21] Order of Teare J of 4 May 2020, para. 14.

[22] Those are the two limbs of the test for permission to appeal: CPR 52.6(1) states in respect of an appeal such as this, "*…permission to appeal may be given only where – (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard."*

Regulation governing jurisdiction and recognition and enforcement of judgments in civil and commercial matters, ("the Brussels Regulation").[23] Definitive rulings may be given on its meaning and effect by the Court of Justice of the European Union ("CJEU", formerly the European Court of Justice – "ECJ") and its case law on the Brussels Regulation and its predecessors now extends to several hundred decisions.

36. The United Kingdom left the European Union on 31 January 2020, but until the end of the transition period, which is currently set at 31 December 2020, the jurisdictional provisions of the Brussels Regulation and related instruments continue to apply in the UK as well as in the Member States in situations involving the UK.[24] They also apply to the recognition and enforcement of judgments given in proceedings instituted before the end of the transition period.[25]

37. The Brussels Regulation is a so-called "double" instrument. It provides a detailed code of jurisdictional rules which govern the personal jurisdiction of all courts and tribunals of EU Member States in all cases falling within its subject-matter and temporal scope and then provides for a strict regime of recognition and enforcement of their judgments in other Member States. The doctrine of "mutual trust" means that, with very few exceptions, the decisions of the courts of any Member State are to be given automatic recognition in other Member States.

38. Article 36(1) of the Brussels Regulation states,

> *A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*[26]

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[23] The current iteration is Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). It is the successor to an earlier Regulation (No. 44/2001), which in turn succeeded a Convention (the Brussels Convention) from 1968. Rulings by the ECJ on these earlier instruments remain authoritative in respect of the later instruments.

[24] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 19 October 2019 ("EU Withdrawal Agreement"), Article 67(1), given effect in UK law by the European Union (Withdrawal Agreement) Act 2020. Although the Withdrawal Agreement contains provision for the transition period to be extended, the UK government is legally bound not to agree such an extension: European Union (Withdrawal) Act 2018, s.15A.

[25] EU Withdrawal Agreement, Article 67(2).

[26] This provision reflects recital 26, where it is linked to the doctrine of mutual trust: "*Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure.*"

Article 45 sets out exhaustively the grounds on which recognition of a judgment is to be refused. I am not aware that any of those grounds could apply in this case. Article 52 states,

> *Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.*

39. Two decisions of the CJEU are of particular relevance in considering the *res judicata* effect of a judgment in other Member States, and specifically of the Merits Judgment in Belgium. The leading case is *Hoffmann v Krieg,*[27] in which the ECJ, citing the official Jenard Report,[28] stated that,

> *the [Brussels] Convention 'seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit'. Recognition must therefore 'have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given'.*

Applying that principle, which has since become known as "the doctrine of extension", the Court ruled that,

> *"A foreign judgment which has been recognized by virtue of [Article 36] … must in principle have the same effects in the State in which enforcement is sought as it does in the State in which the judgment was given."*

40. In *Gothauer Allgemeine Versicherung AG v Samskip GmbH*[29] the Court considered whether a ruling by a court in the Netherlands, dismissing a claim on the ground that it fell within the exclusive jurisdiction of the Icelandic courts, was binding in Germany when the claimant started fresh proceedings there on the same claim. The jurisdiction of the German courts had not been the subject of the Netherlands ruling, but the basis for it, namely that the claim was subject to the exclusive jurisdiction of the Icelandic courts was a necessary step in the decision of the Netherlands court. The CJEU said,

> *… the concept of* res judicata *under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the* ratio decidendi *of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it …*[30]

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[27] Case C-145/86 [1988] ECR 645, ECLI:EU:C:1988:61

[28] The official drawn up at the time when the original 1968 Brussels Convention was concluded: OJ 1979 C59 1, 42

[29] Case C-456/11, ECLI:EU:C:2012:719

[30] Paragraph 40.

41. In my opinion, the effect of the automatic recognition as provided for by Article 36, coupled with the absolute bar on review as to the substance in Article 52 means that as a matter of European law, the Belgian courts would be obliged to treat the authority of the Merits Judgment as it is understood in England as extending equally to Belgium. Such an approach is entirely in line with the rationale behind the Brussels Regulation and consistent with the case law of the CJEU.

Conclusion

42. It is clear from the Merits Judgment and the declarations made pursuant to that judgment, whether viewed alone or in conjunction with the Jurisdiction Judgment, that the debt in respect of the cash deposits held by BNYM is a debt owed by BNYM to the NBK and not to the RoK. That was the court's unequivocal conclusion and it is not confined to the question whether that debt arose purely as a matter of contract law under the GCA or whether additional issues such as sham trust, the piercing of legal personality or abuse of the law might, if they had been pursued at trial, have affected the outcome on the central question, namely the existence or otherwise of a debt owed by BNYM to the RoK. They could have been pursued at trial but were not. As a matter of English law they cannot now be raised afresh, as the non-existence of a debt by the BNYM to the RoK has been definitely and finally determined (subject to any appeal). In my opinion, that preclusive effect, which would prevent any attempt to re-litigate any of those issues in an English court would, as a matter of European law, apply equally in the courts of the Member States of the European Union.

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Alex is a specialist in private international law. His practice consists almost entirely of cross-border disputes over a wide range of commercial and other matters, including aspects of public international law and state immunity.

His practice is mainly in the Commercial Court and Chancery Division of the High Court as well as appellate work and arbitration. Alex has been admitted ad hoc to the Bars of Bermuda and the Cayman Islands. He also sits as an arbitrator in international commercial arbitrations both in the UK and abroad.

Alex has given expert evidence on English and European law for proceedings in proceedings in Europe, Russia, Canada, Latin America and the United States. He has also lectured on topics of European and international law in Britain, Europe and the United States. Alexander was a Visiting Fellow of New York University's Center for Transnational Litigation and Commercial Law in 2011 and 2018. He has been a Visiting Professor at King's College London since 2016, teaching private international law, and is a member of the Advisory Boards of the Journal of Private International Law and Oxford University's Institute of European and Comparative Law.

Alexander was appointed an Assistant Recorder in 1998 and a Recorder in 2000, sitting in both civil and criminal jurisdictions. He is also a Deputy High Court Judge. He was made a Bencher of the Middle Temple in 2004.

Recent key cases

- *Conversant Wireless Licensing Sàrl v Huawei Technologies Co Ltd* [2019] EWCA Civ 38 (CA), [2018] EWHC 1216 (Ch): Anti-competitive practices - EU law - Fair reasonable and non-discriminatory terms - Forum non conveniens - Infringement - Justiciability - Mobile telephony - Service out of the jurisdiction - Service - Standard-essential patents - Striking out - Third parties - Transfer – Undertakings.
- *Eli Lilly and Co v Genentech Inc* [2017] EWHC 3104 (Pat): declarations of non-infringement - European patents - Forum non conveniens - Jurisdiction - Revocation - Service out of jurisdiction – Validity.
- *Sabbagh v Khoury* [2017] EWCA Civ 1120; [2014] EWHC 3233 (Comm): arbitration clauses; Jurisdiction; Misappropriation; Share ownership; Stay of proceedings; Striking out; Succession.
- *Chugai Pharmaceutical Co Ltd v UCB Pharma SA* [2017] EWHC 1216 (Pat): act of state – Jurisdiction - Jurisdiction clauses - Licensing agreements - Patents - Pharmaceuticals - Royalties - Striking out - Summary judgments – Validity.
- *Fujifilm Kyowa Kirin Biologics Co Ltd v Abbvie Biotechnology Ltd* [2016] EWHC 2204 (Pat): anti-suit injunctions - Declarations of non-infringement - European patents - Patent grant - Pharmaceutical industry - Revocation - Service out of jurisdiction - Summary judgments.

- *Axa Corporate Solutions Assurance SA v Weir Services Australia Pty Ltd* [2016] EWHC 904 (Comm): anti-suit injunctions - Conflict of laws - Forum non conveniens - Global insurance - Indemnities - Jurisdiction - Liability insurance Parallel proceedings - Service out of jurisdiction.
- *XL Insurance Co SE v AXA Corporate Solutions Assurance* [2015] EWHC 3431 (Comm): Brussels I (Recast) regulation - Allocation of jurisdiction - Equitable contribution - Insurance companies - Payments – Torts.
- *Cox v Ergo Versicherung* [2014] UKSC 22: Applicable law; Dependency claims; Fatal accident claims; Maintenance; Measure of damages; Mitigation; Territorial application
- *Ocensa Pipeline Litigation* [2016] EWHC 1699 (TCC): Colombia - Compensatory damages - Expert witnesses - Foreign jurisdictions - Group litigation – Landowners – Oil – Pipelines - Schedule of expenses and losses – Witnesses.
- *Masri v Consolidated Contractors International Co Sal & ors* (2007-2009) – [numerous hearings in Commercial Court, Court of Appeal and House of Lords] Administration of justice - Anti-suit injunctions - Causes of action – Comity - Conflict of laws - Civil procedure - Enforcement - Equitable execution – Extraterritoriality - Freezing injunctions - Judgment creditors – Jurisdiction - Oil and gas industry – Receivers
- *Allianz SpA v West Tankers Inc* (C-*185/07) EU:C:2009:69 [2009] 1 AC 1138: Anti-Suit Injunctions - Arbitration – EU law – Jurisdiction.*

Publications

- "Interim Measures in English Law and their Circulation" (2020) YbPIL (forthcoming)
- "Arbitration and Anti-Suit Injunctions under EU Law" in Ferrari (ed), *The Impact of EU Law on International and Commercial Arbitration* (NYU, 2017)
- Contributor to *Encyclopaedia of Private International Law* (Edward Elgar, 2017)
- "Anti-Arbitration Injunctions and Anti-Suit Injunctions: An Anglo-European Perspective" in Ferrari (ed), *Forum Shopping in the International Commercial Arbitration Context* (2103)
- "Collective Redress: Policy Objectives and Practical Problems" in Fairgrieve & Lein (eds) *Extraterritoriality and Collective Redress* (OUP, 2012)
- "The Brussels I Regulation in the International Legal Order: Some reflections on Reflectiveness" in Lein (ed) *The Brussels I Review Proposal Uncovered* (2012)
- "The Prohibition on Anti-Suit Injunctions and the Relationship between European Rules on Jurisdiction and Domestic Rules on Procedure" in de Vareilles-Sommières (ed), *Forum Shopping in the European Judicial Area* (2007)
- General editor of *European Civil Practice* (Sweet & Maxwell 1989, 2004).
- Contributor, *Practitioners' Handbook of EC Law* (1998)
- Contributor, Hazell (ed) *The Bar on Trial* (1977)

Professional positions

- Academy of European Law: Trustee (2012 -)
- Bar European Group: Chairman (2005-2007)
- British Institute of International and Comparative Law: Chairman of the Board of Trustees (2005–2011)
- British-German Jurists' Association: Chairman (1988-1991)

- Chartered Institute of Arbitrators: Fellow
- Commercial Bar Association
- London Common Law and Commercial Bar Association

Recent lectures/talks

- 'The international litigation of patent disputes: law and practice': University of Alicante (25 November 2019)
- 'Brexit – The Impact on Jurisdiction and Private International Law': International Bar Association Litigation Committee, Milan (25 October 2019)
- 'Cross-Border Co-operation in Civil and Commercial Matters': Lecture to Latvian Judiciary, Riga (29 August 2019)
- 'Interim Measures in English Law and their Circulation': Swiss Institute of Private International Law (23 May 2019)
- *'Future perspectives on the European law of civil procedure': Court of Justice of the European Union (28 September 2018)*
- *'Provisional measures in cross border cases - English Law perspective':* University of Lausanne (1 November 2017).
- *'Brexit: Legal Consequences for the EU – Continuation of application of EU Law' (ERA, Brussels, 29 September 2017)*

Education

- Faculté International pour l'Enseignement de Droit Comparé in Strasbourg and Pescara (1975)
- Ludwig-Maximilians-Universität, Munich (1975)
- University of Oxford, Brasenose College (1974)