Neutral Citation Number: [2011] EWHC 2143 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Monday, 1 August 2011

Before:
MR JUSTICE BURTON
- - - - - - - - - - -
BETWEEN:
NOMIHOLD SECURITES INC
Claimant/Applicant

v

MOBILE TELESYSTEMS FINANCE SA
Defendant/Respondent

- - - - - - - - - - -
(Transcript of.
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Official Shorthand Writers to the Court)
- - - - - - - - - - -

Vernon Flynn QC and Tom Smith (instructed by **Latham & Watkins Solicitors**) for the Defendant / Respondent
Simon Salzedo QC and **Tony Singla** (instructed by **Simmons & Simmons Solicitors**) for the Claimant / Applicant
- - - - - - - - - - -

Judgment

MR JUSTICE BURTON:

1. This has been the hearing of an application by the Defendant, MTF SA ("MTF"), a Luxembourg company, to set aside paragraph 3 of the Order of Gloster J of 26 January 2011, by which, on the ex parte application of the Claimant ("Nomihold"), a BVI company, made on 25 January 2011, she entered judgment in the terms of an Arbitration Award dated 11 November 2010 ("the Award"), and the leave so granted to enforce the Award under s66 of the Arbitration Act 1996 ("the 1996 Act").

2. The Award was made in England at English law, by reason of a dispute under a Put Option Agreement, dated 22 November 2005 ("the POA"), which was expressly subject to English law and to arbitration under the Rules of the London Court of International Arbitration ("LCIA"). It is common ground that such Award would constitute a New York Convention award in any other jurisdiction, but when enforced in England and Wales under the law of the seat and in the jurisdiction of the supervising court it is strictly speaking not being enforced as a Convention Award (see s100 of the 1996 Act).

3. By virtue of ss70 and 73 of the 1996 Act the right to challenge the Award under ss67, 68 and 69 of the Act, or at all, was lost at the latest by 5 January 2011 and by Article 26.9 of the LCIA Rules the Award is final and binding.

4. The Arbitrators, consisting of a panel of Mr Stephen Jagusch as Chairman and Mr Peter Rees QC and Mr Peter Turner, delivered a lengthy and fully reasoned Award containing 308 paragraphs. Between 9 January 2007, when the Request for Arbitration was filed, and the date of the last submissions in September 2010, the Arbitrators held four hearings, the last in September/October 2009.

5. The Arbitrators heard nine live witnesses, including the principal of Nomihold, Mr Iskander Yerembetov, in London between 10 and 13 December 2007, two in March 2009 and a further four between 29 September and 2 October 2009 and they considered substantial submissions, witness statements, exhibits and other documents; and written submissions were continuously provided up and to including September 2010 by the lawyers representing both parties.

6. The Tribunal refers, at paragraph 38 of its Award, to being "*presented with 14 witness statements, 16 expert reports and numerous written submissions rehearsing arguments over many hundreds of pages, numerous applications and four separate hearings*."

7. The arbitration related to whether the Claimant, having previously sold to the Defendant 51 per cent of the shares of a Seychelles company called Tarino Ltd ("Tarino") by a Share Purchase Agreement dated 17 November 2005 ("SPA"), to which no challenge is or was made, was entitled to exercise its put option to sell to the Defendant the balance of 49 per cent of the shares in Tarino under the POA, by an exercise of its put option on 18 November 2006.

8. The Arbitrators concluded that the Claimant was entitled to sell the shares, rejecting various challenges to the Claimant's entitlement, so that the agreed purchase price of $170 million was due and payable.

9. The Tribunal's decision was as follows:

> "*The Tribunal hereby:*
>
> *(1) Orders* [MTF] *to pay to Nomihold the sum of US$170 million in exchange for the remaining 49 per cent of Tarino shares in respect of* [MTF's] *failure to comply with the Put Notice.*
>
> *(2) Orders* [MTF] *to pay to Nomihold the sum of US$5.88 million in damages in respect of* [MTF's] *breach of clause 3.5 of the* [POA]."

10. In addition there was an order for interest and costs.

11. The sum of damages was payable by reference to clause 3.5 of the POA and related to a cash amount thereunder. I have heard no separate argument as to this sum.

12. As to the purchase price of the shares, clause 4 of the POA provided that, in exchange for the price, the Claimant would deliver the option share certificates etc, which the Claimant has done, and Tarino now to be under the Defendant's 100 per cent control (and, since the SPA, its 51 per cent control) was to pass the necessary resolutions to register the new ownership of its shares in the name of the Defendant (clause 4.3(1)(d) and 4.3(1)(i)(e)).

13. By clause 4.4 the Defendant undertook to the Claimant to take all actions that may be necessary for Tarino to comply with those subclauses.

14. The dispute in the Arbitration arose because the purchaser, the Defendant, complained that Tarino did not own (indirectly through three Isle of Man companies) the shares in a Kyrghyz company called Bitel, whose shares were effectively confiscated and transferred to another owner, as of 14 December 2005, as a result of a court ruling of a Kyrghyz court on 21 November 2005.

15. The issues in the Arbitration were all dedicated towards extricating the Defendant from the POA and its obligation to purchase the remaining 49 per cent of the shares of Tarino thereunder, because Tarino did not, by the time of the exercise of the put option (they alleged by the time of the POA itself, but that was rejected by the Arbitrators), indirectly own the shares in Bitel.

16. The issues in the Arbitration can be summarised as follows:

    (i) Was the Claimant unable to convey clear title (indirectly through Tarino) to Bitel, because the Claimant had previously sold its interest in Bitel to a Kazakh group (dealt with in paragraphs 63 to 67 of the Award "the Kazakh Issue")?

(ii) Was there misrepresentation and mistake on the basis that Kyrghyz law required registration of shares as a prerequisite of ownership, to the intent that at the time of the SPA the Isle of Man companies, through which Tarino owned its interest in Bitel, were not so registered (paragraphs 68 to 196 of the Award "the Registration Issue")?

(iii) Did the Claimant breach the seller's warranties in the SPA, that Tarino (indirectly) owned Bitel when the Isle of Man companies were (allegedly) not registered at the time of the SPA (paragraphs 197 to 221 of the Award) ("the Warranties issue")?

(iv) Could the Claimant exercise the put option after Tarino lost its indirect ownership of Bitel because the shares in Tarino no longer satisfied the definition of "Option Shares" in the POA (paragraphs 228 to 260 of the Award) ("the Construction Issue").

(v) Did the Claimant breach the warranty in the POA (clause 5.2) that the Option Shares were free from encumbrances by reference to the alleged sale to the Kazakh group ("the Kazakh Misrepresentation Issue")?

(vi) Did the Claimant make a material misrepresentation that Tarino (indirectly) owned Bitel at the date of the POA ("the Bitel Misrepresentation Issue")?

(v) and (vi) were in paragraphs 261 to 277 of the Award.

(vii) Was the POA void for mistake either because of the alleged agreement with the Kazakh group or the non-ownership of the Bitel shares (paragraphs 278 to 284 of the Award: "the Mistake Issue")?

17. The sums which the Claimant now seeks pursuant to the Award to enforce as a judgment in England is of the order, including interest, of some US$208 million.

18. The procedural steps can be summarised as follows:

(i) When Gloster J made her ex parte order, giving leave to enforce the Award as a judgment, she also granted a worldwide freezing order in support. There was an unsuccessful challenge to that freezing order before me by the Defendant on 18 February 2011, but more significant was the Defendant's case, which was at that same hearing successful, to clarify the position relating to what is apparently the only asset of the Defendant, a debt of $400 million owed to it by its parent, MTS OJSC ("MTS"). MTS was instrumental in the issue of Loan Notes to third parties, which were structured through its subsidiary, the Defendant, so that the Defendant loaned $400 million to MTS, and MTS loaned that money to the third parties. MTS sought to do two things: (a) to eliminate a clause in the Notes which made it an event of default if the Defendant were to default, inter alia, in respect of payment of the Award, and (b) to restructure the Notes so as to eliminate the Defendant from the loop. This was because (i) MTS openly asserted that the Defendant was not going to pay the Award, (ii) it was clear that upon the restructuring the Defendant would hold "*minimal assets with which it*

could satisfy the Award". For reasons I then gave, I permitted steps to be taken to eliminate the default provision, but I did not sanction the proposed form of the restructuring as it then stood. I was also concerned at the apparent effluxion of a guarantee ("the Sistema guarantee") of the Defendant's liability for the Award by MTS's shareholders, which had been reported in MTS's accounts. The Notes remain in place.

(ii) Gloster J had removed from the worldwide freezing order on 4 February 2011 the proviso permitting transactions in the ordinary course of business, because she was persuaded that a freezing order in support of enforcement after an award should be treated in the same way as a freezing order in support of enforcement after a judgment (see **Soinco SACI v Novokuznetsk Aluminium Plant** [1998] QB 406 per Colman J and **Masri v Consolidated Contractors** [2008] EWHC 2492 (Comm) at 35, per Tomlinson J. David Steel J, on 18 July, refused to permit a variation of the freezing order to allow payment of $16 million interest due to the noteholders. The Court of Appeal, for reasons to be given later, allowed the Defendant's appeal against that order on 26 July. This hearing commenced immediately thereafter.

(iii) Meanwhile, the Claimant sought, by proceedings commenced on 1 February 2011 in Luxembourg, to enforce the Award there against the Defendant, which is, as I have said, incorporated in Luxembourg. An ex parte order for enforcement was granted, and the Defendant filed an appeal against that order on 3 March, the Claimant filing its response on 25 May. The Luxembourg proceedings continue. Insolvency proceedings commenced on the back of the ex parte enforcement order have been adjourned.

(iv) Finally there are proceedings in the Seychelles. These were brought by Tarino (whom the Defendant 51 per cent or 100 per cent controls). Tarino has brought before the Seychelles court the issue that it wishes directions as to whether it may register the transfer of its shares into the name of the Defendant, because of its alleged concern that there has been, or that such a transfer would constitute, breach of the Seychelles money laundering statute (s 3 of the Anti-Money Laundering Act 2006).

19. The Claimant has intervened in those proceedings to assert that there is no such breach, and the Defendant has now also intervened. The Claimant alleges, but the Defendant denies, that the Defendant's and Tarino's representatives have delayed those proceedings. There are before me two expert reports filed in the Seychelles proceedings, both referring to the evidence filed in the Seychelles hearing by a Dr Gross, a Swiss lawyer acting as attorney in fact for Tarino, namely Mr Francis Chang-Sam for the Claimant and Mr Kieran Bhogilal Shah for the Defendant.

20. Tarino filed a "Suspicious Transaction Report" in reference to the declaration which it seeks as to whether it should transfer the ownership of its shares into the name of the Defendant because of its concerns.

Enforcement?

21. It is common ground that there is no asset of the Defendant within the jurisdiction. The $400 million loan will apparently be repaid in January in Moscow. The Sistema guarantee is not available. No other assets are known.

22. There is no dispute that the freezing order will continue. Mr Vernon Flynn QC, who appears with Mr Paul Key and Mr Tom Smith for the Defendant, asserts that, even if the Award is not enforced in England, the freezing order can be continued by reference to s25 of the Civil Jurisdiction and Judgments Act 1982 ("CJJA").

23. It is not necessary for there to be any assets in the jurisdiction for a New York Convention award to be enforced by a judgment here (see **Rosseel NV v Oriental Commercial and Shipping Co UK Ltd** [1991] 2 Lloyd's Rep 625 at 629 per Steyn J) and the same must apply for an award such as this, which is only not a New York Convention award here, because the seat of the Arbitration was in London, and is not a 'domestic award' because neither of the parties is based here.

24. There is a discretion under s66 of the 1996 Act as to whether to enforce. S66 reads, in material part:

> *"(1) an Award made by the Tribunal pursuant to an Arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.*
>
> *(2) where leave is so given, judgment may be entered in terms of the Award*."

25. Mr Simon Salzedo QC, who appears with Mr Tony Singla for the Claimant, originally put his case on the basis that the Claimant could show a legitimate interest in enforcing a judgment here, by reference to **Fonu v Demirel** [2007] 1 WLR 2508. That was a case where a foreign claimant obtained leave from the High Court in England to serve out of the jurisdiction on a party resident abroad an action to enforce a Turkish judgment in this jurisdiction. The defendant had no assets within this country, and that was not found to be necessary. The Court of Appeal concluded that it was sufficient for the claimant to show that he had a legitimate interest, that he could reasonably expect to obtain some legitimate benefit in enforcing the foreign judgment against a foreign defendant here, and that there was such legitimate interest in that case by reference to the reasonable possibility that the defendant would in the future have assets in London.

26. Sir Anthony Clarke MR said at paragraph 27:

> "*We accept that the court should not automatically exercise its discretion in favour of permitting service out of the jurisdiction unless it is just to do so and that it will ordinarily not be just to do so unless there is a real prospect of a legitimate benefit to the Claimant from the English proceedings. We see no reason why that benefit should not be indirect or prospective*."

27. That was a case where this court's jurisdiction was being extended to bring a foreign defendant within the jurisdiction, who otherwise had no connection with it. Such extra-territorial effect has always been cautiously operated. However, in this case the parties have consented to the LCIA Arbitration here, and have thereby accepted the supervisory jurisdiction of this court.

28. Mr Salzedo submits now that, although he can establish such legitimate interest, he does not need to do so. He submits as follows:

    (i) Although the power under s 66 is discretionary and not automatically exercised, there should be a presumption of enforcement.

    (ii) Certainly so where this court is the supervising court.

29. As to this 'presumption' Mr Salzedo relies upon the Court of Appeal decision in **Middlemiss & Gould (A firm) v Hartlepool Corporation** [1972] 1 WLR 1643, CA. Lord Denning MR, with whom Edmund Davies and Stephenson LJJ agreed, said (confirming the earlier view of Diplock J, as he then was, in **Margulies Brothers Ltd v Dafnis Thomaidies & Co (UK) Ltd** [1958] 1 WLR 398, at 404) as follows:

> "*Once an Award has been made -- and not challenged in the court -- it should be entered as a judgment and given effect accordingly. It should not be held up because the losing party says he wants to argue some point or other or wants to set up a counterclaim or anything on that sort. He would not be allowed to do so in the case of a judgment not appealed from, nor should he do so in the case of an Award that he has not challenged. I am in agreement with what Diplock J said in* [Margulies]*: I think that it would be contrary to the purpose of section 26 of the Arbitration Act 1950 if in a case where the validity of the Award and the right to proceed upon it is beyond doubt, it should be given less effect than a judgment. In this case the judge was impressed by* ***In Re Boks & Co and Peters, Rushton & Co Ltd*** *[1919] 1 KB 491. But in that case the validity of the award was doubtful -- very doubtful I would say -- because of the illegality of the whole transaction. Naturally enough, no leave was given. But I think that Scrutton LJ went a good deal too far. He said at p497 that "this summary method of enforcing awards is only to be used in reasonably clear cases." I would put it just the opposite. I would say that it is to be used in nearly all cases. Leave should be given to enforce the award as a judgment unless there is real ground for doubting the validity of the award.*"

30. Mr Salzedo also relies on the words of Moore-Bick J in **Tongyuan (USA) International Trading Group v Uni-Clan Ltd** No 1143 of 2000, 19 January 2001, at page 13, as to the "*very strong public policy consideration in favour of enforcing awards*", and of Gross J in **Norsk Hydro ASA v The State Property Fund of Ukraine and Others** [2002] EWHC 2120 (Comm) at paragraph 17, where he refers to the "*important policy interest reflected in the country's treaty obligations* [that is under

the New York Convention] *in ensuring the effective and speedy enforcement of such international Arbitration awards ... the task of the enforcing court should be as 'mechanistic' as possible.*"

31. Mr Flynn refers to the Departmental Advisory Committee on Arbitration Law's report on the Arbitration Bill of February 1996, which notes the fact that the clause (66) does not require the court to order enforcement, but only gives it a discretion to do so, and it re-visits this in its Supplementary Report of January 1997. He also refers to the passage in **Mustill & Boyd's** 2001 Companion Volume to the second edition of their **Commercial Arbitration**, in which the editors say:

> "*Subsections 66(1) and (2) reenact with minor drafting amendments the Arbitration Act 1950, section 26(1) ... The law is unchanged. In particular enforcement under this section should only be granted in 'reasonably clear cases'. In other cases enforcement should be by an action on the award. The effect of subsection 66(4) is than an action on the award is still permitted and that such an action is still governed by the common law*."

32. However, it seems to me important to note that:

    (i) so far as the old law is concerned, which **Mustill & Boyd** there refer to as being "unchanged", the correct statement of law was that in the Court of Appeal, with the imprimatur of Lords Denning and Diplock, cited earlier.

    (ii) **Mustill & Boyd** do not say, as is apparent from the last quotation which I have cited, that enforcement under s66 should only be granted in "*reasonably clear cases*" and if not so clear, then enforcement should not be granted at all. The passage is addressing when enforcement should be left to an action on the award.

33. As Mr Salzedo has pointed out, the present **White Book** at volume 2, 2E-243, in its commentary on s66, still adopts the broad principle of Lords Denning and Diplock as good law, and, rather than refer to the Companion Volume of **Mustill & Boyd**, it refers to the passage in their second edition itself, at 419, to the effect that "*the court would probably now only refuse the application where the objection cannot properly be disposed of without trial*".

34. As for Mr Salzedo's reference to the English supervisory jurisdiction, he refers to both **The Naftilos** [1995] 1 WLR 299, at 304, and **Cetelem SA v Roust Holdings Ltd** [2005] 1 WLR 3555 CA per Clarke LJ at 62, to emphasise that a (worldwide) freezing order -- which does not require assets within the jurisdiction -- can be given in support of enforcement of an English Arbitration award after it has been made.

35. Mr Flynn points to two cases where there were declaratory awards and the question arose as to whether they could or should be enforced as a judgment. In **Margulies** in the Court of Appeal, [1958] 1 Lloyd's Rep 205, the Court of Appeal had concluded that the declaratory award in that case was not an award for a sum certain and should not in

that case be enforced as a judgment. The two cases to which Mr Flynn points are, first, the Australian case in the New South Wales Court of Appeal of **Tridon Australia PTY Ltd v ACD Tridon Inc** [2004] NSWCA 146, where the relevant statute, s33 of the Commercial Arbitration Act 1984, was in similar terms to s66. Giles JA, giving the lead judgment, concluded that there was a discretion not to enforce a declaratory award as a judgment, and said as follows:

> "*11. Enforcement is a plain word and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s 33 of the Act is a procedure with a purpose, the purpose of enabling the victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are binding on the parties and bind them for the balance of the Arbitration and beyond that.*
>
> *12. I agree with Smart AJ's view that there is no utility in making the order sought, but for the perhaps more fundamental reason that there is just no question of enforcement yet arising. In the absence of any question of enforcement arising, it would not be appropriate to grant leave to enforce the award*."

36. In **West Tankers Inc v Allianz SpA** [2011] EWHC 829 (Comm) Field J drew guidance from the decision in **Tridon**. He said as follows.

> "*28. In my opinion, s66(1) stands to be construed in the same manner as that adopted by the NSW Court of Appeal in Tridon in respect to s33 of the Commercial Arbitration Act 1984. The purpose of s66(1) and (2) is to provide a means by which the victorious party in an arbitration obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of a losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. In short, in such a case the grant of leave will not facilitate the realisation of the benefit of the award. Where, however, as here, the victorious party's objective in obtaining an order under s66(1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment the court will have jurisdiction to make a s66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award*."

37. It seems to me that the position may be different where there is a declaratory award only, when the court may be exercised whether is any utility in enforcing the award, from where there is a monetary award where enforcement would be straightforward, as intended by the New York Convention, the purpose of which was to render international arbitration awards simply enforceable in every jurisdiction -- see my recent judgment in **Dowans Holdings SA v Tanzania Electric Supply Company Ltd** [2011] EWHC 1957 (Comm) at paragraph 10.

38. There should not in my judgment be any general obligation -- for example in an ex parte application by a claimant for leave to enforce -- to show utility or legitimate interest. That would both hamper ease of enforcement and begin to place an onus on the claimant which is expressly removed from that party, so far as the raising of objections to enforce an award is concerned in Article V(1) of the New York Convention (and so in s103 of the 1996 Act).

39. There may, however, be cases in which utility or legitimate interest may need to be addressed, such as in the case of declaratory awards; and, given the discretionary nature of the power under s66, such matters can, in my judgment, always be raised by a defendant on any subsequent occasion, such as this, when the court comes to consider an objection to enforcement.

40. It is in those circumstances that I conclude that it is right to ask in this case whether there is a legitimate interest in enforcing the judgment, this Defendant having averred the contrary.

41. The reason why the Defendant has in this case averred the contrary can be derived from the existence of the Notes to which I referred earlier, in reference to which I delivered my judgment of 18 February 2011, and to which I refer in this context:

> *"32. The argument is very finely balanced and is in my judgment unusual. Mr Salzedo submits that this is the only way in which he can get his judgment paid. If the event of default clause is left in the Notes, then on 5 March the whole arrangement will come crashing down and there will all kinds of cross-default provisions involving potential loss to the parent company, it seems of a substantial kind. So that is the only way in which he can be sure of his clients getting paid, because otherwise it is apparent that the Defendant and its parent, who are the source of every payment, will take every possible steps to avoid making payment. That has become now apparent by virtue not least of the application under s66 to challenge registration in this country ...*
>
> *"38*. [Mr Salzedo] *is entitled to his award, he submits, and the only way he can get it* [paid] *will be by making life so difficult for the Defendant that its parent company will be caused to pay up. That, of course, would extend to any kind of action or injunction or order by a judgment creditor in relation to any kind of transactions which its recalcitrant judgment debtor was proposing to enter into*

whereby some order could be obtained which would be intended to mean that the Defendant will be forced by commercial embarrassment or commercial difficulties so caused into paying up or, as Mr Salzedo says, at least providing security ...

40. I conclude that that is not where post-judgment freezing orders have got to. They do not legitimise interference in ordinary commercial transactions simply because a judgment debtor is not paying up quickly enough. There has in my judgment to be some element of impropriety. In this case I do not see any impropriety. It was a public declaration that there will be a default and that steps had to be taken, not least in the interests of a number of third parties if that was going to have a catastrophic consequences. I do not conclude, even if one were to extend the ambit of Stuart-Smith LJ's enunciation of the jurisdiction, that it would go so far as to say that a judgment creditor can interfere in any transaction which would render it more likely that he would paid on a judgment which otherwise the judgment debtor is determined not to pay, particularly where the pressure is thus put on a third party, in this case the parent.

41. Accordingly I conclude that it is not appropriate to cover the consent solicitation by the freezing order, but to proceed with that transaction ought not to be a breach of the continuing freezing order."

42. I turn then to consider whether the Claimant has a legitimate interest in enforcing the award here. I shall assume, without deciding, that the onus rests with the Claimant.

43. The Claimant points, first, to the need for and entitlement to a worldwide freezing order from the supervising court. That is of itself a legitimate interest. As I said earlier, Mr Flynn submits however that such freezing order would be available, and would continue anyway if it were said (which it is presently not) to be in support under s25 of the CJJA of, e.g., the proceedings in Luxembourg.

44. However, Mr Salzedo raises a specific legitimate interest, which arises out of the way in which the case was run by the Defendant in the recent Court of Appeal hearing to which I have referred, and is plainly now espoused.

45. The Defendant's case is, and was before the Court of Appeal, that there is a difference between a post-judgment freezing order, which (as discussed earlier) does not exempt transactions in the ordinary course of business from its ambit and a post-award freezing order. If that distinction were correct and were accepted, then that would render the present freezing order "toothless" in this case on the facts, because come January it would be capable of argument by the Defendant that the only asset known of, the $400 million debt owed to the parent, MTS, could be repaid. It seems to me plain that that is a convincing reason why there is a legitimate interest in the Claimant's establishing prior to January a judgment, rather than simply an award.

46. Two other matters were canvassed as possible legitimate interests. The first rises out of Field J's decision in **West Tankers**. In that case he refers at the end of paragraph 28, which I have cited, to the "*objective*" of the party in that case as being a sufficient legitimate interest for him to enforce the judgment, and he concluded as follows:

> "*On an application under s66 or to set aside a s66 order, it is enough, in my view, in a case such as this for the party seeking to enforce the award to show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment. It is not necessary, nor is it appropriate, for the court finally to decide this hypothetical question -- hypothetical because the unsuccessful party to the Arbitration will not have obtained an inconsistent judgment in a member state at the time the court is dealing with the s 66 application*."

That arises in this case, by reference to parallel proceedings in Luxembourg, in which there is a parallel challenge to enforcement, and it seems to me appropriate for the Claimant to say that there is a legitimate interest in obtaining a decision first from the supervising court.

47. The second matter was that I raised the possibility, by reference to the argument recorded in my judgment in **Dowans**, referred to earlier, that if enforcement were sought in a jurisdiction where attention might be paid to whether enforcement of the award had been, or was being, objected to in the jurisdiction of the seat of the Arbitration, such as to put in doubt whether the award was (yet) binding (a minority view I rejected at English law in paragraphs 12 to 27 of that judgment) then there might be a legitimate interest in obtaining enforcement of such judgment in this court. There is, however, no evidence before me of Luxembourg, or any other projected jurisdiction, taking such a view, so the argument does not arise in this case.

48. I am, therefore, for the reasons I have given satisfied that now that the issue of legitimate interest has been raised, there is in two respects such legitimate interest in enforcement here, and I shall -- subject to the objections raised, in respect of which the onus is plainly upon the Defendant -- enforce the award under s66.

49. Four grounds were put forward by Mr Flynn as to why the Award should not be enforced:

(i) the Award or its enforcement involved money laundering, so that its enforcement would be contrary to English public policy.

(ii) the Award has been obtained by fraud, namely by perjury by Mr Yerembetov.

(iii) the Award should not be enforced because of its impact on third parties, particularly the parent company, MTS, but to an extent the noteholders.

(iv) the Arbitrators' order was in effect for specific performance of the Award, and by entering a judgment in the form ordered by Gloster J (which was exactly in the form of the order made by the Arbitrators which I have recorded earlier) the

court was effectively turning a specific performance order into a money judgment.

50. In the course of argument, Mr Flynn conceded that neither of the third or fourth grounds constituted a separate head of argument, but went to support or illustrate other parts of his argument and he expressly did not pursue them as such. I shall deal with them shortly.

    (i) He agreed that the effect relied on by him on third parties related to the aspects of what he asserted to be an illegitimate interest, in the intent of the Claimant to put pressure on the Defendant's parent, and that that was part and parcel of his case that there was no legitimate interest. That, in my judgment, falls away, once I make my conclusion, which I have reached, that there is a legitimate interest. Consequently, there is no separate argument. If the Claimant is entitled to enforce the award as a judgment, and the judgment has to be paid, then, as Mr Flynn accepted, any effect on third parties would be a proper consequence.

    (ii) Again he accepted, in the course of argument, that the "specific performance" argument was only part of his money laundering case. He pointed out that the Request for Arbitration sought specific performance, and that s48(5)(b) of the 1996 Act permits the Arbitrators to grant specific performance (as the Arbitrators themselves recognised in paragraph 284 of the Award). However, they effectively made an order for the award of money, and Mr Salzedo refers to the judgment of Briggs J in **Fraser Islington Ltd v Hanover Trustee Co Ltd and Others** [2010] EWHC 1514 (Ch) whereby the court is entitled to make an order in a contested case which ignores any issues that are not raised, such as, for example, in that case whether vacant possession can be given. In this case, there was no issue in the Arbitration about the performance of clause 4, to which I have referred, particularly where the obligation to ensure performance was, by clause 4.4, on Tarino, and hence on the Defendant. Mr Flynn submits that if there were proceedings in court, and an order made for specific performance, and it became clear subsequently that there were problems as to whether the court order could be performed, then there could be subsequent application to the court. But here the Arbitrators are functi. I concluded, and I believe Mr Flynn accepted, that the real argument is in the event not a procedural one as to the form of the order, but as to whether the Defendant can object to performance, can raise the allegation that the award has become unenforceable because of the Seychelles money laundering objections; and in those circumstances his fourth point in effect elides into his first, to which I shall now turn.

How to deal with the two grounds of objection?

51. In the Claimant's application and at all earlier interlocutory hearings, Mr Flynn had asserted that the two objections can and should be resolved at this two-day hearing. However, in his skeleton for this hearing, he put and supported another proposal, namely that this application be adjourned pending (i) the resolution of the issues of

money laundering in the Seychelles (ii) the resolution of the issues of fraud and perjury in Luxembourg.

52. This proposal seemed then to me, and remains now, a wholly unattractive one:

(i) This is the supervisory court, the court of the seat of the Arbitration, and is ready to deal with the issues. Under the New York Convention (ss103(3)(f) and 103(5) of the 1996 Act so illustrate) it is to the local court that the enforcing court would look, and this is that court.

(ii) There is little evidence as to the state of play in Luxembourg. I have referred earlier to the last step being taken in May. There are no assets in Luxembourg, and no freezing order in place, if one were available. In any event, this court is, in Judgments Regulation terms, if that arose, the court first seised, on 25 January as opposed to 1 February.

(iii) There has been alleged (and denied) delay in the Seychelles, to which I have referred, but in any event the issue is whether the Award can and should be enforced in this jurisdiction.

(iv) It is overwhelmingly sensible to gather up the issues in one place and resolve them, if there are any, in this jurisdiction.

53. Mr Flynn, conceding the sense of the above, did not pursue his suggestion in oral argument, and contended, rather, that there should be an adjournment of this application while issues are resolved here:

(i) He referred to the decision of Hamblen J in **Sovarex SA v Romero Alvarez** [2011] EWHC 1661 (Comm), and in slightly different circumstances, since the English proceedings were for a declaration that the foreign award was not enforceable, of mine in **HJ Heinz Co Ltd v EFL Inc** [2010] 2 Lloyd's Rep 727, in support of his case that issues as to whether an award was obtained by fraud can, in appropriate cases, be decided, with oral evidence and disclosure as applicable, as a discrete point by this court, and in this case for the purpose of resolution of the s66 application.

(ii) He recognised that such a hearing must be held and the issues resolved, including any appeals, before January, when the $400 million loan becomes payable by MTS to the Defendant.

(iii) As to a discretion to order security during such adjournment, raised by Mr Salzedo as appropriate in such eventuality by analogy with s103(5) and s70(7) of the 1996 Act, there would not -- see again my judgment in **Dowans** (paragraphs 45 to 53, referring to the leading cases) -- be a "need" for any security, as nothing would occur, provided that the issue was resolved before January, to cause the Defendant any loss of enforcement opportunity during the period of delay. I accept that proposition.

54. Accordingly, the issue has been whether I can and should resolve now that the Defendant has not proved any valid ground for challenging the enforcement of the award, or whether I should adjourn off one or other of the two issues to be tried as part of adjourned s66 application.

Money Laundering

55. There is a high threshold before an award will not be enforced, by virtue of the party, against whom it is sought to be enforced, alleging that enforcement would be contrary to the public policy of this jurisdiction:

    (i) It is the public policy of the country in which the award is to be enforced which is in question, not the public policy of some other country.

    (ii) The raising of a question of public policy must not lead to, or be based upon, a reargument of the issues already raised in the Arbitration, see again my judgment in **Dowans** at paragraph 11(iii)(e).

56. The clearest explanation is by Gross J in **IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation** [2005] 2 Lloyd's Rep 326, at paragraph 13, where he said:

> "*Thirdly, considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution: Deutsch Shachtbau-und Tiefbohrgesellschaft mbh v Ras Al Khaimah National Oil Co [1987] 2 Lloyd's Rep 246, at 254. The reference to public policy in s 103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead the public policy exception in s 103(3) is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice*."

57. Moore-Bick J, in **Profilati Italia SRL v Painewebber Inc** [2001] 1 Lloyd's Rep 715, at paragraph 17, said:

> "*Where the successful party is said to have procured the award in a way which is contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable on his part has contributed in a substantial way to obtaining a judgment in his favour. Moreover, I do not think that the court should be quick to interfere under this section. In those cases in which s68 has so far been considered, the court has emphasised that it is intended to operate only in extreme cases.*"

    See also his remarks in **Tongyuan**, a case to which I referred earlier.

58. The case here is made in the Seychelles proceedings by Dr Gross, and based upon evidence given in the Arbitration by Mr Yerembetov, who explained:

(i) that the Claimant, through the three Isle of Man companies, acquired shares in Tarino in 2004.

(ii) Tarino in April and June 2005 acquired the shares in Bitel from (among others) a Mr Akaev, the son of the former president of the Kyrghyz republic, who had to flee the country when his father's government fell.

(iii) Mr Yerembetov gave evidence, cited by Dr Gross, that Mr Akaev "*had to leave the country in haste, on an airplane, when the revolution started and all* [their assets] *were taken away from them*. *My objective was to make sure that ...Akaev no longer held any stake in Bitel, because I had to be in a position to say to people in Kyrgyzstan that: yes, this is the company that used to be owned by that person, but I bought it, I am now the owner ... I had to be in a position to show them contracts that would prove that I had bought 100 per cent of the shares in the company*."

(iv) he also gave evidence that the price for the shares in Bitel which Tarino had bought was expressed as an undervalue, but was topped up by paying other sums to Mr Akaev for plots of land.

59. It is clear that there is no argument here, as in relation to the fraud/perjury case, of there being any fresh evidence, within **Ladd v Marshall** 1954 1 WLR 1489, or at all, being relied upon. What is relied upon is what was given in evidence in the Arbitration.

60. The assertion by Tarino in the Seychelles court is that it is concerned that:

> *"(i) The transaction under which Nomihold acquired shares in Tarino was part of a conspiracy to defraud the Kyrghyz authorities to which Nomihold was a party (ii) performance of the sale of the Shares under the Option would realise for Nomihold part of the proceeds of the conspiracy to defraud while the transfer of the Shares in return for US$170 million would confer on Nomihold proceeds resulting from the criminal conspiracy; and (iii) any facilitation or assistance in the transfer of the Shares would contravene s 3 of the Anti-Money Laundering Act 2006*."

61. It seems entirely clear that what is thus alleged is that the transaction by which Tarino bought (indirectly) the shares in Bitel is said to be infected by the involvement of Mr Akaev, as described by Mr Yerembetov in the Arbitration. The Defendant bought 51 per cent of the shares in Tarino under the SPA, of which no complaint is made, and has then agreed to buy the remaining 49 per cent under the POA, which has been the subject of the Arbitration.

62. Looking at it as a matter of English law and English public policy:

(i) There is no suggestion as to any money laundering or other problem relating to the shares of Tarino. It is Tarino's (indirectly through the Isle of Man companies) purchase of Bitel which is said to be affected.

(ii) No issue has been raised by Mr Flynn by which the Arbitration itself is said to have been affected, and in any event, if relevant, it could have been and was not raised in the Arbitration. It is said that subsequently there is an alleged problem arising out of the registration of the transfer of the Tarino shares, as between the Claimant and the Defendant.

(iii) On the evidence relied upon by Dr Gross, Mr Akaev had been taken out of Bitel by Tarino. There is no case made out, nor evidence alleged, which supports the proposition that Nomihold's shares in Tarino "*represent the proceeds of criminal conduct*". That would require evidence that Tarino is a mere shell (with no other material assets or role) and that, in reality, what was being transferred were the shares in Bitel. Not only is there no such evidence, but by the time of the POA, the Defendant was already the owner of 51 per cent of Tarino.

63. As Mr Flynn was driven to accept, no case is made out either that Nomihold was a party to a conspiracy to launder Bitel or that a shell company called Tarino was set up to hold the shares in Bitel (via three Isle of Man companies), so that the subsequent sale of Tarino (with one of its assets being Bitel) constituted the method of transferring the assets of Bitel. The only evidence is that Tarino acquired Bitel at a time when Mr Akaev wanted to get rid of his assets and that Tarino was keen to show that it was shot of Mr Akaev, and that subsequently the Claimant sold the shares in Tarino to the Defendant.

64. Plainly, with regard to **Profilati**, the alleged money laundering has not "*contributed in a substantial way*" to the Claimant obtaining an award in its favour relating to the breach of contract by the Defendant. The Defendant has had many months since February to articulate a case, and has not done so, that there is any relevance to the alleged money laundering which could prevent enforcement of the award. The fact that Tarino, which the Defendant controls, has not registered the transfer of ownership from the Claimant to the Defendant does not, in my judgment, amount to a reason why the English courts should not enforce the Award. It seems to me that the same critique made with regard to the Claimant, in relation to its putting of pressure on the Defendant's parent in order to procure payment of the Award, can be made as to the conduct of the Defendant in relation to its steps taken to procure that its subsidiary, Tarino, does not register the shares in Seychelles, with a view to hampering such payment.

65. I see no basis for the case that the enforcement of this English award in this jurisdiction would be contrary to English public policy.

Perjury

66. I turn to the issue that the Defendant asserts that the Award should not be enforced because it was obtained by fraud/perjury.

67. The significant point here is that the Defendant relies on fresh evidence, which must, before it can be relied upon to reopen a rem which is otherwise judicatam, in court as in an arbitration a fortiori -- where the time for challenge to an award has expired --

comply with the **Ladd v Marshall** test. In employment tribunals up and down the country, parties on applications for reviews, and to a limited extent, in courts, parties on applications for retrials or for liberty to put in fresh evidence on appeal, are attempting to rely upon the provisions of **Ladd v Marshall** and "late discovered evidence", usually with little success because of the stringency of the rule and the priority of the principle 'sit finis litium'. The **Ladd v Marshall** test, at 1491, is as follows:

> "*To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. Thirdly, the evidence must be such that it is presumably to be believed, or, in other words, it must be apparently credible, though it need not be incontrovertible*."

68. The question was addressed in an arbitration context by the Court of Appeal in **Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd** [2000] 1 QB 288 CA, per Waller LJ, with particular reference to the case where (as here) the fresh evidence that was sought to be adduced was said to establish perjury by a witness in the Arbitration. I shall return to this.

69. Both counsel have made submissions as to what the test is. The Defendant refers to **Double K Oil v Neste Oil** [2010] 1 Lloyd's Law Rep 141, which was a case relating to an application to challenge an award by reference to s68(2)(g) of the 1996 Act. Mr Flynn submitted that such consideration would be different, because of the additional requirement of s68(2) that the Court has to consider that there had been substantial injustice to the applicant, but it seems to me clear, not only by reference to the requirements of **Ladd v Marshall** itself, that the position must be the same, or if anything a fortiori, where, as here, it is now too late to challenge the award, but only an objection to enforcement is in issue. Even though it is clear from **Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan** [2011] 1 AC 763 (e.g. at 812, 837) that a party who has not sought to set aside an award is not precluded from resisting its enforcement, nevertheless, as Waller LJ recognised in **Westacre** at 309H, given that a discretion is being exercised, the court will want an explanation:

> "*No good reason has been shown as to why the Defendant should not have applied to the Swiss court within the period of 90 days, raising the allegation that the award had been obtained by perjured evidence and that is an added factor against granting them leave to amend to raise the issue in this jurisdiction*."

70. Blair J in **Double K**, after referring to a number of previous authorities, stated:

> "*Whereas in the present case the allegation is fraud and the production of evidence, the onus is on the applicant to make good*

the allegation by cogent evidence."

He then referred to **Ladd v Marshall** and in that context to **Westacre Investments Inc**, among other cases.

71. Mr Flynn notes the reference by Lord Mance in **Dallah** at 814 to "*ordinary judicial determination*" of an issue (in that case the non-existence of an arbitration agreement). However, that does not rule out the exercise of ordinary judicial determination upon which I am now engaged. I am satisfied that the question is whether, on the balance of probabilities (**Rosseel** at 628), the defendant has shown a real ground for challenging the validity of the award (**Sovarex**) by reference to cogent evidence (**Double K**), which passes the **Ladd v Marshall** test, such that I can either set aside the award (**Double K**) or refuse its enforcement, or order a full hearing of the issue or issues to be effected by oral evidence and disclosure as appropriate, and relying upon such fresh evidence. It is quite clear that it is not a matter to take lightly, the possibility of rehearing issues which have been resolved by a distinguished tribunal, after four hearings and legal representations and a plethora of documents and submissions, resulting in a final and binding decision.

72. Mr Flynn has referred to the fact that, after the Defendant filed in these proceedings, exhibited to a witness statement of the Defendant's solicitor, Mr Clifford, (his third), an affidavit, not sworn in these proceedings, by a Mr Fortuna, to whom I shall return, the claimant has not adduced any evidence in response from Mr Yerembetov. It seems obvious to me that the Claimant was perfectly entitled to submit, as it does, that the Fortuna document does not constitute sufficient to raise a case to be answered in relation to challenging enforcement of the award. If they had adduced evidence from Mr Yerembetov, it might have led to applications for cross-examination, or at least would or might have detracted from the strength of its case that the arbitration is now closed, and should not be reopened.

73. The passage relied upon in that context by the Claimant from the judgment of Waller LJ is as follows (at 309F):

> "*Normally 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 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.*"

74. Mr Flynn submits that this would appear to be *per incuriam*, as being inconsistent with the intonation by the same judge of the **Ladd v Marshall** test, in the terms which I have earlier set out, at 306F. He cannot have meant, Mr Flynn submits, to say any more than that the evidence must "*have an important influence on the result*", as opposed to being "*decisive at a hearing ... if unanswered*". On the main point with which Waller LJ was dealing, Mantell LJ and Sir David Hirst agreed with him, and I am reluctant to consider that such an experienced commercial judge was speaking *per*

incuriam. It seems to me that he is emphasising the high degree of cogency and of significance to the result which is required (i) in an interlocutory challenge to a final and binding arbitration award and (ii) particularly where the suggested fresh evidence was not simply dealing with some omitted or overlooked aspect, but would allegedly falsify evidence already given before and accepted by the Arbitrators, if the issue, thus resolved, is to be reopened because of the evidence. That is what would happen here if Mr Flynn were successful, even in his limited ambition of an adjournment for the hearing of an issue. Hence Waller LJ's words at 306A:

> "*If it is open to a party to seek to get an enforcing court to retry issues of fact which the Arbitrators had before them and which they had to and did determine, it would appear to present an open invitation to disappointed litigants to relitigate their disputes by alleging perjury and a major inroad would be made into the finality of Convention awards*."

75. The affidavit of Mr Fortuna is what is relied upon by the Claimant, as exhibited by Mr Clifford. Mr Fortuna was employed as a senior position in Bitel from August 2003 onwards, and remained with Bitel after its acquisition by Tarino, and then after the Defendant's acquisition of Tarino, at least until January 2006. He said that, during the period that Tarino was owned by the Claimant, Mr Yerembetov was personally involved with those managing Bitel, and was thoroughly advised as to the status of the court proceedings involving Bitel. There is one paragraph relied upon by the Claimant, paragraph 12, which refers to Mr Asylov who was apparently heading up the Bitel legal team. It reads as follows:

> "*Mr Asylov's lawyers were always expressing their confidence that they would succeed in courts in quashing Order 1570. That is why the 21 November 2005 court ruling was an unexpected blow to them. This is evidenced by the fact that Ms Makhadiyeva, who took part in the court hearing, was very nervous when she got back to the office later the same day, after the hearing, and told me that Mr Yerembetov was angry with Mr Asylov because of the court ruling, as such ruling could derail the transaction with* [MTF]."

76. This constitutes multiple hearsay. Mr Clifford says that Mr Fortuna says that Ms Makhadiyeva said that Mr Asylov said (or maybe -- it is not made clear -- Ms Makhadiyeva was present, so that she heard) that Mr Yerembetov was angry about the court ruling on 21 November 2005. From this it is inferred that Mr Yerembetov was lying to the Tribunal when he said, as he did, that, when the POA was entered into on 22 November 2005, he did not know about the previous day's court ruling.

77. As to when the Fortuna affidavit was obtained for the purpose of the **Ladd v Marshall** test, which, I must repeat, required that it must be shown that the evidence "*could not have been obtained with reasonable diligence for use* [at the Arbitration]", the following account only is given. Mr Clifford says that it was sworn in Russian on 28 December 2010, and supplied to the solicitors for MTS, the parent company, on that

day, with an English translation, and subsequently passed on to him. No explanation is given (contrast **Heinz**) as to:

(i) how Mr Fortuna came to give the evidence. At the very least there could be an explanation as to why the evidence was not available prior to the Award on 11 November 2010.

(ii) whether he was in touch with the Defendant, and available to give evidence in the Arbitration at the hearings which took place as late as 2 October 2009. He was certainly in contact with the Defendant, and gave evidence for its subsidiaries in a court in the Isle of Man, relating to his "*recollection of events of December 2005*" in proceedings which came before HH Deemster Doyle on 30 November 2007.

(iii) No explanation is given as to why the Defendant did not attempt (if it needed to) to get in contact with Mr Fortuna at any time prior to delivery of the Award in November 2010 or, in particular, after the evidence said to have been false was given by Mr Yerembetov in December 2007.

78. As Waller LJ said in **Westacre**, cited earlier, in the exercise of my discretion this is a significant factor, quite apart from whether it complies with the **Ladd v Marshall** test. Mr Flynn says that I should not conclude that **Ladd v Marshall** is not satisfied without directing an issue to be tried, *inter alia*, as to the reasonable availability of the evidence. But the case put forward by the Defendant, said to show that the evidence was not reasonably available, is exiguous.

79. The multiple hearsay would establish, at best, an inference that (if each person who is a link in the chain is accurately reported) Mr Yerembetov must have known on the day before the POA was signed that the result of the hearing would be that 30 days later, i.e. after the date of the POA, there would be the compulsory transfer of the shares in Bitel away from the (indirect) ownership of Tarino and thus that (if unanswered) Mr Yerembetov lied, when he said in evidence that he did not hear the result of the hearing before the POA -- as opposed to having forgotten by four years later -- as to his state of mind in November 2005.

80. Mr Salzedo submitted that that is in any event not sufficient. Such a lie, if established, must have had an important influence -- if not been decisive in respect of -- the outcome of the Award. He submits that that is plainly not so, because of the carefully expressed conclusions of the Arbitrators. The crucial issue in question was the "Bitel Misrepresentation Issue" earlier referred to, namely (paragraph 263 of the Award) where:

> "*Nomihold falsely represented that Tarino indirectly owned Bitel, whereas the effect of the 21 November 2005 ruling was that it no longer did. This allegation depends on (a) the effect of the 21 November 2005 ruling being that Tarino no longer indirectly owned or controlled Bitel, (b) Nomihold's having the relevant knowledge, (c) the non-reliance clause in the* [POA]'s *being*

ineffective for this purpose and (d) [MTF]*'s not having affirmed the* [POA]. *As dealt with below, the Tribunal rejects each one of these contentions.*"

81. The conclusion of the Tribunal is set out in the following paragraphs:

> "*264. The effect of the 21 November 2005 ruling is dealt with earlier in this award, but in brief it was appealable and of no effect until the appeal was heard and disposed of. Thus it could not render any representation to the effect that Tarino indirectly controlled Bitel false. Furthermore, at all times until 14 December 2005 the IOM companies controlled Bitel. Therefore the misrepresentation argument falls on this ground.*
>
> *265. As to knowledge it is alleged by* [MTF] *that Mr Yerembetov was in fact aware of the 21 November 2005 Ruling and concealed it from* [MTF]. *The Tribunal has already noted that it considered Mr Yerembetov to be an honest witness and believes his testimony that he did not. This is moreover wholly credible on grounds* <u>*other than*</u> [my underlining] *Mr Yerembetov's credibility.*
>
> *266. First, the decision was not of the significant effect contended for by Nomihold. There was no particular reason for Bitel's Kyrghyz lawyers ... to have informed Mr Yerembetov of it in the time between its having been handed down and the signature of the* [POA] *(little more than one working day). It is more likely in the Tribunal's view that they would have waited until the next scheduled regular update to Nomihold ...*
>
> *267. Secondly, it is unlikely that they would have informed Mr Yerembetov of the impending decision before it happened, leaving him possibly asking them what happened on 21 November 2005. The evidence seems to show that Bitel only intervened in the proceedings on 18 November 2005, the Friday before the Monday, leaving little time for Bitel's lawyers to have informed Mr Yerembetov.*
>
> *268. For these reasons the Tribunal concludes that Mr Yerembetov was not aware of the 21 November 2005 ruling when the* [POA] *was signed.*"

82. The Arbitrators do not, however, stop there. They addressed the point in terms, at paragraph 270, as to what the position would be if they had, as they did not, rejected Mr Yerembetov's evidence:

> "*If Mr Yerembetov did know, then it is alleged that this knowledge rendered false a representation that he had told Ms Evtoushenkova all of the risks about the transaction. On the evidence before the*

Tribunal (Ms Evtoushenkova's absence once again being a handicap), this is rejected. It is to be assumed that all discussions about risk were made in the context of the overall deal and not separately for the SPA and the [POA]. *The only sensible understanding of the evidence is that Mr Yerembetov warned Ms Evtoushenkova and Ms Zhirikova that there were substantial risks and that Nomihold was making no representations. Mr Yerembetov's knowledge of the 21 November 2005 ruling, if he had such knowledge, could not have rendered any representation false*."

83. They then continue:

"*271. Moreover, Clause 12.1 of the* [POA] *is an entire agreement and non-reliance clause that would estop* [MTF] *from bringing any claim for innocent or negligent misrepresentation ...*

273. As to fraud, the Tribunal accepts the high standard of proof set out by the House of Lords in Re H (Minors). [MTF] *has not reached this standard. The Tribunal further notes that, as the misrepresentation argument only arose after the hearing in December 2007, Mr Yerembetov was not cross-examined on it and thus did not have the opportunity to defend himself against accusations of fraud. On this ground alone, the Tribunal would have been hesitant to conclude that there was a fraudulent misrepresentation ...*

275. Further, the Tribunal finds that [MTF] *affirmed the* [POA]. *At least ten days but perhaps a month after the signature of the* [POA], *Mr Zubov told Mr Yerembetov that '*[MTF]*'s lawyers regarded the* [POA] *as a valid agreement'. This amounts to an affirmation which would defeat even a fraudulent misrepresentation. Even on* [MTF]*'s own case, namely that Steiner und Zingerman LLP or Bitel told Mr Yerembetov of the 21 November 2005 ruling before the date of the* [POA], *and even if the effect of that knowledge were to falsify a representation given to* [MTF] *(neither of which propositions is accepted by the Tribunal), immediately thereafter* [MTF] *had the same knowledge, as it was managing Bitel and instructing Bitel's lawyers (including no doubt about an appeal from the 21 November 2005 ruling). It would be odd, to put it no higher, were Bitel and/or its lawyers not to have told its new managers that they had made Mr Yerembetov aware of the 21 November 2005 ruling. In the absence of evidence from Bitel's former managers and/or lawyers, the Tribunal must assume that* [MTF's] *managers asked Bitel's lawyers whether they had told Yerembetov. Given the absence of any allegation that they were asked and answered negatively, the Tribunal infers that their evidence would be unhelpful to* [MTF]. [MTF] *nonetheless, in the*

> *person of Mr Zubov, affirmed the agreement by confirming that it would be honoured.*
>
> *276. Finally,* [MTF]*'s delay in seeking rescission means that that remedy is no longer available to it, even if (which it has not) it had made out a case of actionable misrepresentation.*
>
> *277. For the avoidance of doubt, having found no deceit or misrepresentation the Tribunal also dismisses* [MTF]*'s non-contractual claims concerning or arising from the same matters, including the tort of deceit*."

84. It is thus utterly clear that even if Mr Yerembetov did know of the result of the 21 November hearing before the date of the POA, the Arbitrators would have been satisfied, for the reasons they gave, that there was no representation, no falsity, no reliance and that there was affirmation.

85. The underlying issue is whether the Defendant took the risk of buying Tarino without Bitel, and the Claimant relies on the evidence of an interview given in March 2011 by the chief financial officer of the Defendant's parent company, Mr Kornya, in which he accepts and asserts that MTF took a "*calculated risk*" that "*just did not work out*" in buying Tarino.

86. Mr Flynn's submission is that it is not enough to conclude that the Arbitrators resolved the Bitel Misrepresentation Issue in such a way that they did not rely upon the evidence of Mr Yerembetov for their conclusions. He submits that had they appreciated or concluded that he was lying, and was not the honest and credible witness which they had found at paragraph 265, and also earlier in their Award in paragraphs 63 and 248, then the "clock would have struck 13" and they would or might have taken a different view on other issues, and come to different conclusions.

87. This is obviously a very difficult submission to make when, on the face of it, the Arbitrators do not rely on his evidence to make the crucial finding and, indeed, reach that finding upon the alternative assumptions that they had not accepted his evidence. It also cannot simply result in an argument that the Arbitrators, had they formed an unfavourable view of Mr Yerembetov, might have had less sympathy to the Claimant's case and might have reached, for example, different conclusions with regard to the issues of construction. Not only would this have been a most unjudicial approach, but it could not be an approach adopted by a judge addressing the issues on the rehearing which Mr Flynn wishes to have. He must deal with how a different approach to Mr Yerembetov's evidence might properly have had an impact on other issues and, in substantial submissions put in, with my permission, after the hearing, in response to similar submissions from the Claimant, he does so, as I shall now describe.

88. I return to the seven issues which I set out earlier:

(i) The Kazakh Issue and (v) The Kazakh Misrepresentation Issue

The evidence of Mr Yerembetov was addressed by the Arbitrators, and they make the finding of his credibility to which I have referred in paragraph 63. However, they plainly resolved the two issues (which inter-react) independently of that conclusion:

> "*63.Despite the creativeness and vigour with which* [MTF] *pursued this argument, the Tribunal considers it hopeless.* [MTF] *has the burden of establishing the alleged agreement, yet it has failed to demonstrate who the proper parties to it were or that such parties were even capable of performing it. The only written evidence of the alleged agreement is hopelessly vague: the Memorandum of Understanding, which was not a binding agreement and did not even specify a precise buyer or seller of Tarino. Moreover, Mr Yerembetov gave evidence in relation to the Kazakh Group negotiations, including the late payment and subsequent refund in relation to that proposed, but not concluded, transaction. The Tribunal found Mr Yerembetov to be a straight-talking credible witness. The Tribunal accepts his evidence that no agreement was concluded orally or in writing with the Kazakh group.*
>
> *64. Even were this not the finding [*my underlining] *of the Tribunal*, [MTF]*'s claims would still fail.*
>
> *65. The Tribunal is entirely satisfied that there was no binding agreement with the Kazakh group that would possibly have amounted to an encumbrance upon the Tarino shares. Consistent with this finding no claim was in fact ever made by the Kazakh group. Moreover, the Tribunal is satisfied that even had there been a binding agreement with the Kazakh group, MTS would have defeated any such claim by the Kazakh group as a bona fide purchaser, which took the Tarino shares free of any encumbrance.*
>
> *66. Accordingly,* [MTF]*'s claims based on the existence of an encumbrance on the shares by virtue of an agreement with the Kazakh group (including mistake, misrepresentation and breach of warranty) fail*."

They refer to Mr Yerembetov's evidence as additional support ("*Moreover*"), but decide independently of it ("*even were this not the finding ...*").

(ii) The Registration Issue

The finding does not depend upon any evidence from Mr Yerembetov. It was plainly (see paragraph 107) an issue of Kyrghyz law.

(iii) The Warranties Issue

This too did not depend upon Mr Yerembetov's evidence. It was a matter of Kyrghyz law and construction (paragraph 219).

(iv) The Construction Issue

This was overwhelmingly how it is described -- namely, a construction issue (paragraphs 228-260). One of the five subissues, as Mr Flynn says, was a check against 'commercial purpose', as to which Mr Yerembetov's evidence was considered, for the purpose of seeing whether an unreasonable result would be achieved (paragraph 254), and it is in that context that the credibility of the Mr Yerembetov is again referred to (paragraph 248). It is, however, clear that the decision of the Tribunal was a straightforward one, by reference to the simple construction of the claim (e.g. paragraphs 231-3), and Mr Yerembetov's evidence is of little significance.

(vii) The Mistake Issue

This is not suggested to have any relevance to Mr Yerembetov's evidence. Mr Flynn refers to the equitable doctrine whereby the absence of clean hands can be a reason why the equitable remedy of specific performance should not be granted, and suggests that the Arbitrators, if they had concluded that Mr Yerembetov had lied, might not have granted that remedy. As Mr Salzedo points out, that would only arise if the Claimant had won on all issues, so that the lie was established, but not determinative. In such a scenario it is difficult to see how that would have affected the result and, given that the Defendant would have been, in those circumstances, plainly liable to pay the sums due under the POA by way of purchase price for the shares (or damages in lieu), the Arbitrators would no doubt have been able to conclude that they could award a remedy which reflected that position, if necessary at common law, even if they had been in some way inhibited, which I conclude they would not have been, from ordering specific performance.

89. It is plain that the Arbitrators themselves addressed the question of Mr Yerembetov's evidence in relation to the crucial (and indeed any other relevant) issue, and concluded that, even if they had rejected such evidence, they would still have reached the same conclusions.

90. Whatever the test, important influence or decisive if unanswered, the alleged lie of Mr Yerembetov, to be inferred from the Fortuna affidavit, in my judgment does not satisfy it. When there is added to that (i) the multiple hearsay nature of the affidavit which has remained in that form since December 2010, without any attempted supplementation in these proceedings, (ii) what I have called the exiguous nature of the case that the evidence was not reasonably available to the Defendant during the Arbitration, it seems to me that the test in Ladd v Marshall is not satisfied in respect of any of its three limbs. The Defendant has not, in my judgment, satisfied the onus of showing that there is a real ground for challenging the validity of the award.

91. In my judgment, a conclusion that there should be a reopening of the issue at which the issues of whether there was fraud and perjury should be reconsidered is not justified in those circumstances, and it would indeed do manifest violence to the purpose of finality in arbitration awards, if the credibility of Mr Yerembetov, expressly put in issue in the arbitration on this very aspect (see paragraph 265 of the Award) were again to be tested against the content of the inexplicably belated Fortuna Affidavit.

92. Notwithstanding the able arguments of Mr Flynn, I am entirely satisfied that I should dismiss the Defendant's application, and affirm Gloster J's decision that the Award should be enforced as a judgment.