Case No: FL-2018-000007

Neutral Citation Number: [2018] EWHC 3282 (Comm)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
FINANCIAL LIST
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 04/12/2018

Before :

MR. JUSTICE TEARE

- -

Between :

(1) National Bank of Kazakhstan **(2) The Republic of Kazakhstan**	**Claimants**
- and -	
(1) The Bank of New York Mellon SA/NV, London Branch **(2) Anatolie Stati** **(3) Gabriel Stati** **(4) Ascom Group SA** **(5) Terra Raf Trans Traiding Limited**	**Defendants**

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- -

Ali Malek QC and William Edwards (instructed by **Stewarts Law LLP**) for the **Claimants**
Tom Sprange QC, Ben Williams and Kabir Bhalla (instructed by **King & Spalding LLP**) for the **Second to Fifth Defendants**

Hearing date: 15 November 2018

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Judgment

Mr. Justice Teare:

INTRODUCTION

1. This jurisdictional challenge is part of a long-running saga relating to the enforcement of a Swedish arbitration award dated 19 December 2013 in favour of the "Stati parties", the Second to Fifth Defendants, and against the Second Claimant, the Republic of Kazakhstan ("RoK").

2. Enforcement proceedings are afoot in several jurisdictions but have been discontinued in this jurisdiction. By an Order of the Court of First Instance in Brussels dated 25 May 2018, upholding in a reduced amount a "conservatory" attachment order granted by the Belgian court on 11 October 2017 (the "attachment order"), the Stati parties obtained "a conservatory garnishment on *'debts and matters related to the "savings fund'"* held by the First Defendant ("BNYM(L)"), the First Defendant, for RoK, in the sum of US$ 530 million.

3. In these English proceedings RoK seeks a declaration that the debts or assets held by BNYM(L) and said to be subject to the attachment order are in fact held by BNYM(L) solely for the National Bank of Kazakhstan ("NBK"), the First Claimant. They therefore submit that the attachment order has no subject-matter, because there are no assets to attach. The Claimants contend that this question was referred to this court by the Belgian court.

4. The Stati parties now seek to set aside the order of this court dated 19 July 2018 which granted the Claimants permission to serve the Stati parties out of the jurisdiction.

BACKGROUND

The underlying arbitral proceedings

5. In arbitration proceedings pursuant to the Energy Charter Treaty, the Stati parties obtained an arbitral award against RoK, dated 19 December 2013, in a sum in excess of US$ 500 million ("the Award"). The arbitration was seated in Sweden. In very broad terms, the arbitration concerned the Stati parties' interest in the exploration and extraction of hydrocarbons in Kazakhstan. The Award included damages in the sum of US$ 199 million, being the value of a liquefied petroleum gas plant (the "LPG plant"). That valuation was based on an 'indicative bid' for the LPG plant submitted by KazMunaiGas ("KMG"), a state-owned oil and gas company, in September 2008.

6. RoK sought to challenge the Award in the Swedish courts. Its application to set aside the Award was rejected by the Svea Court of Appeal on 9 December 2016, which rejection was subsequently upheld by the Swedish Supreme Court.

Enforcement proceedings in England

7. The Stati parties have sought recognition and enforcement of the Award, under the New York Convention, in several jurisdictions. I am told that enforcement proceedings are currently afoot in Sweden, the United States of America, the Netherlands, Luxembourg, Italy, and Belgium.

8. On 28 February 2014, Burton J granted the Stati parties' application for recognition and enforcement of the Award in this jurisdiction. RoK applied on 7 April 2015 to set aside that Order, and on 27 August 2015 sought permission to amend its application

to include an allegation that the Award was procured by fraud. Those applications were heard by Knowles J in February 2017. In very broad terms, RoK contended that the valuation of the LPG plant was procured by fraud in that the 'indicative bid' was based in part upon the Stati parties' stated construction and development costs on the LPG plant being US$ 245 million. RoK contended that that sum had been fraudulently inflated.

9. In a judgment given on 6 June 2017 ([2017] EWHC 1348 (Comm), [2017] 2 Lloyd's Rep 201), Knowles J held (at [47]) that "[i]f the KMG indicative bid was in fact the result of the claimant's dishonest misrepresentation then it seems to me, at this stage of scrutiny on the English Application, there is the necessary strength of prima facie case that the tribunal would no longer (to use its words) consider it as taking a place of "particular relevance" within "the relatively best source of information for the valuation of the LPG plant"; still less being the one offer from which they took the damages figure." Knowles J concluded (at [92]) that there was "a sufficient prima facie case that the Award was obtained by fraud", and directed a trial of that issue.

10. On 26 February 2018, the Stati parties served a Notice of Discontinuance in respect of the English enforcement proceedings. RoK successfully applied to have that discontinuance set aside before Knowles J ([2017] EWHC 1348 (Comm), [2018] 1 WLR 3225). That decision was reversed by the Court of Appeal ([2018] EWCA Civ 1896, [2018] 2 Lloyd's Rep 263), which permitted the discontinuance on condition that Burton J's Order be set aside and no further enforcement proceedings take place in this jurisdiction.

Enforcement proceedings in Belgium

11. On 29 September 2017 the Stati parties applied to the Belgian courts for a 'conservatory' attachment order against assets held by BNYM(L) for RoK under a Global Custody Agreement (the "GCA"). That application was granted on 11 October 2017.

12. Following that application (and in accordance with Belgian procedure), BNYM was required to make a 'garnishee declaration' (the "BNYM declaration") concerning attachable assets held by it. That declaration was in the following terms:

> "Although (legal predecessors of) BNYM entered into a Global Custody Agreement dated 24 December 2001 ("Global Custody Agreement") with the National Bank of Kazakhstan (the "NBK") which is a *'state entity'* of the Republic of Kazakhstan […], as counterparty, the Bank cannot fully exclude that the Republic of Kazakhstan (including the National Fund) has or will have claims on BNYM or that BNYM holds assets of or for the Republic of Kazakhstan (including the National Fund) which are the subject of the garnishment in view of its contractual relationship with the NBK and uncertainties of the legal relationship existing between the latter and the Republic of Kazakhstan.
>
> Pursuant to the Global Custody Agreement BNYM holds *"certain securities of the National Fund and Cash on behalf of the [NBK] as Custodian and banker respectively"*.

> In addition, it is BNYM's current understanding that, under Kazakh law, the NBK is not capable of owning any assets which are not owned by the Republic of Kazakhstan, although NBK has the power to possess, use and dispose of assets of the National Fund pursuant to an agreement between the NBK and the Republic of Kazakhstan with the government as beneficiary. BNYM has been informed that this is the case even though the NBK, pursuant to Kazakh law, has separate legal personality towards third parties, has legal standing in courts and can hold and possess assets and liabilities that are separate from the Republic of Kazakhstan. […] ."

13. BNYM(L) accordingly froze the GCA accounts. At that time, BNYM(L) held cash and securities under the GCA in the sum of around US$ 22 billion.

Part 8 proceedings in England

14. Following the Belgian conservatory attachment proceedings, the Claimants initiated Part 8 proceedings in this jurisdiction against BNYM(L). The Claimants sought declarations that, under the terms of the GCA, BNYM(L) had not been entitled to freeze the GCA accounts. The Stati parties were not a party to those proceedings.

15. As is clear from the judgments of Popplewell J dated 21 December 2017 ([2017] EWHC 3512 (Comm)) and the Court of Appeal dated 19 June 2018 ([2018] EWCA Civ 1390), the Part 8 proceedings were limited in scope. They were concerned, essentially, with the effect of clause 16(i) in the GCA, which provides that BNYM(L) shall not be liable for "any delay or failure on the part of [BNYM(L)] to perform any obligation which, in whole or in part, arises out of or is caused by circumstances beyond its direct and reasonable control […]."

16. Popplewell J and the Court of Appeal favoured BNYM(L)'s interpretation of clause 16(i). Hamblen LJ concluded (at [74]) that "the language of clause 16(i) is clear and that, subject to causation, it applies to the Dutch and Belgian orders". The Claimants have sought permission to appeal the Court of Appeal's judgment to the Supreme Court. On the issue of causation, Popplewell J had noted (at [92]) that "[i]t will be a factual question in each case whether the causation test has been fulfilled and that is not a matter which in the present case can be resolved in this Part 8 claim." In several paragraphs of his judgment (for example, at [98] – [99]), Popplewell J noted that it would be inappropriate to grant declarations affecting the rights of the Stati parties without the Stati parties being party to the proceedings.

Further proceedings in Belgium

17. The Claimants then sought to challenge the Belgian conservatory attachment before an "Attachment Judge" of the Belgian court. The Attachment Judge upheld the attachment order in a judgment dated 25 May 2018. It is necessary to set out a number of passages from the judgment, which is central to the present application, in full:

> "3.1.4. Lack of legal relationship with the garnishee
>
> Kazakhstan asserts that there exists no legal relationship between itself and the garnishee and that the garnishee also does not have a restitution obligation towards itself. […]

> The argument that is raised by Kazakhstan is about the subject-matter and the consequences of the attachment. Kazakhstan's contention is actually that the garnishment could not have any subject-matter, and that the garnishee still wrongly froze the accounts.
>
> The fact that the garnishee [BNYM(L)] is not the debtor of the seized-debtor [RoK] 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. […]
>
> The seized-debtor 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, under article 1456, 2nd para. BJC.
>
> The competent trial court is, as stated by Kazakhstan itself, the English court who must apply its own national substantive law. […].
>
> 3.3 The Arguments by BNYM
>
> The garnishee BNYM is seeking to obtain a declaration that as a matter of law it has properly executed the garnishment order and that it is discharged towards the NBK and Kazakhstan.
>
> 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."

18. The attachment order was limited to cash held by BNYM(L) under the GCA in the sum of US$ 530 million.

19. The provision of Belgian law cited by the Attachment Judge, article 1456(2) of the Belgian Judicial Code, provides as follows:

> "If the third-party debtor disputes the debt claimed by the creditor, the case is brought before the competent trial judge or, as the case may be, the case is referred to the competent trial judge by the enforcement court."

20. Further proceedings are now pending in Belgium, in which the Stati parties seek to convert the 'conservatory' attachment order into an 'executory' attachment order. In those proceedings, the Stati parties have raised a number of arguments in support of their contention that the GCA assets are properly held for RoK (rather than merely NBK). These include Belgian-law arguments relating (*inter alia*) to piercing of legal personality, sham trusts, and "abuse of law".

The present proceedings

21. The Claimants issued these Part 7 proceedings on 28 May 2018, very shortly after the decision of the Belgian Attachment Judge. In these proceedings, the Claimants seek five declarations:

> "a. The contracting parties to the GCA are BNYM London and NBK (and not Kazakhstan).
>
> b. The obligations owed by BNYM London under the GCA are owed solely to NBK (and not Kazakhstan).
>
> c. BNYM London has no obligation to pay any debt due under the GCA to Kazakhstan.
>
> d. BNYM London has no obligation to transfer any security, or any interest in any security, held under the GCA to Kazakhstan.
>
> e. The BNYM Declaration:
>
> i. was materially inaccurate as to its description of the relationship between Kazakhstan and BNYM London; and
>
> ii. ought to have stated in terms that BNYM London was not indebted towards and held no assets of Kazakhstan capable of forming a valid subject-matter under the Garnishment Order."

22. On 19 July 2018, I granted the Claimants' applications (made on paper and without notice) to serve the Stati parties out of the jurisdiction and for alternative service. BNYM(L) does not dispute the jurisdiction of this court to determine the Claimants' claim for declaratory relief, and filed a Defence dated 27 July 2018. The Stati parties acknowledged service on 13 August 2018, indicating their intention to contest jurisdiction. They filed this application, seeking to set aside the 19 July order for service out, and otherwise contesting jurisdiction, on 10 September 2018.

JURISDICTION: SECOND TO FOURTH DEFENDANTS

23. The Second and Third Defendants are each natural persons domiciled in the Republic of Moldova. The Fourth Defendant is a company incorporated in Moldova. Counsel structured their submissions around the well-established test for service out: *(i)* there must be a serious issue to be tried against these Defendants in respect of the causes of action alleged; *(ii)* there must be a good arguable case that the claims fall within one or more of the "gateways" set out in paragraph 3.1 of Practice Direction 6B; *(iii)* in all the circumstances, England is clearly or distinctly the most appropriate forum.

Serious issue to be tried

24. It was common ground that a "serious issue to be tried" equates to a "real prospect of success" – that is, a claim capable of surviving a summary judgment application (see, for example, *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1084, at [71]).

25. Mr Sprange QC, for the Stati parties, submitted that there is no "serious issue to be tried" as between the Claimants and the Second to Fourth Defendants. He made four submissions. First, he submitted that "the declarations sought […] will not affect the Belgian Court's decision" since that Court "faces a number of Belgian law arguments unrelated to the GCA with regard to the ROK debt question". Second, he submitted that "the Belgian Court has already determined that the attachment has an object and dismissed the ROK's argument on this ground." On that basis, the Belgian Attachment Judge had not in fact "referred" any questions to this court. Third, he said that the claims made in these proceedings are *res judicata* on the basis of the earlier Part 8 proceedings, or alternatively that it would be an abuse of process for the Claimants to raise these arguments now when they ought to have done so in those earlier proceedings. Fourth, he submitted that declaratory relief as against the Second to Fourth Defendants would be inappropriate.

The scope of the declarations being sought

26. Mr Sprange's first submission concerned what it is that falls to be decided in these English proceedings. This question was at the heart of the parties' oral submissions. It can only be answered, in my judgment, by a proper analysis of the declarations sought in these proceedings and a proper understanding of the Belgian Attachment Judge's decision. It is appropriate to start with the latter decision since that was issued before the formulation of the declarations sought in these proceedings.

27. There was a dispute between Belgian law experts as to precisely what had been remitted by the Attachment Judge to this court. The dispute was whether it included the question whether, notwithstanding NBK was the named party to the GCA, such was the relationship between the RoK and NBK that sums owed to NBK were to be regarded as held to the order of the RoK. That question gave rise to the issues in the Belgian proceedings of piercing legal personality, sham trusts and abuse of law.

28. The evidence of Mr Brijs (the Stati parties' Belgian law expert) is that "a pure question of English contractual law will not resolve the core dispute" because "a Belgian enforcement court would still have to evaluate – amongst other things – the arguments raised by the Stati parties under Belgian attachment law" such as piercing legal personality, sham trusts, and abuse of law. Further, "the Belgian Enforcement court did not decide the arguments – not because the judge "envisaged" that these arguments should be resolved by an English Court or because the Belgian Enforcement Court found that it could not decide them (when in fact it can) – but solely because the Belgian Enforcement Court considered that it did not *need* to decide them… It is difficult to conceive why an English court should decide on e.g. matters that concern Belgian public policy, or on the question whether there is a sham trust structure to the prejudice of the creditors and what the sanction/effect thereof is on the Belgian attachment."

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"*."

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 the arguments of piercing corporate personality, sham trust and abuse of law, 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. Mr Brijs did not dispute this distinction, but merely stated that there are circumstances in which the enforcement court is competent to decide on the merits. In this case, however, the enforcement court has clearly decided that the English court is the competent court to decide the merits.

32. I can now return to the declarations sought in this court. They have to be understood in the context of the Belgian proceedings which gave rise to the English proceedings. In that context I do not accept Mr Sprange's 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. Of these, the first does indeed raise a narrow contractual question, but the others are wider, including a declaration that "BNYM [London] has no obligation to pay any debt due under the GCA to Kazakhstan" and a declaration that BNYM "ought to have stated in terms that BNYM London was not indebted towards and held no assets of Kazakhstan capable of forming a valid subject-matter under the Garnishment Order." 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.

The "referral" question

34. Mr Sprange's second submission was that there had been no "referral" of any question to this court, and that the Belgian court had determined that the attachment order did have subject-matter, on the basis of the BNYM declaration. Mr Brijs' evidence was that "the Belgian Court simply observed that if ROK were to challenge BNYM's declaration, the competent judge would be an English judge, on the basis that English law governs the GCA."

35. The following passages from that judgment, set out above, are worth repeating:

> "The seized-debtor 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 that trial court in the proceedings on the merits, under article 1456, 2nd para. BJC.
>
> The competent trial court is, as stated by Kazakhstan itself, the English court who must apply its own national substantive law.
>
> […]
>
> 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."

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 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". It is noteworthy that BNYM(L) shares this understanding, as pleaded in its Defence at para 35.1.

37. I also do not consider that the Attachment Judge positively determined the subject-matter of the attachment. Instead, the judge said:

> "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. […]
>
> The seized-debtor is entitled to challenge the declaration from the garnishee before the attachment judge…"

38. It follows from that passage that the judge thought that, on the strength of the BNYM declaration, a conservatory attachment order could properly be made, but left open the correctness of the BNYM declaration and therefore the content of the attachment order.

***Res judicata* / abuse of process**

39. Mr Sprange's third submission was that "the declarations sought in the present proceedings largely mirror those previously rejected by Popplewell J and the Court of Appeal in the Part 8 Claim" and "in any event there is *Henderson* [(1843) 67 ER 313] abuse of process". This abuse, he submitted, arose because (1) the Stati parties were not named as defendants to the Part 8 proceedings, and (2) the Claimants ought to have sought in those proceedings the declarations which they now seek. Mr Sprange expressly did not submit that the claims should be struck out as *res judicata* or as an abuse of process, but said that these matters go to the question of a "serious issue to be tried".

40. Mr Malek submitted that "no issue that arises for consideration in the present proceedings has previously been decided". He submitted that the Part 8 proceedings only resolved an issue of construction of clause 16(i) of the GCA, leaving open questions of fact; "the fact that the Claimants raised other matters which were not in fact decided gets the Second to Fourth Defendants nowhere." Further, he submitted that "it must be a rare case in which it is an abuse for A to sue C raising issues not adjudicated upon in the earlier proceedings between A and B", and that "the Stati parties made a conscious choice not to seek to involve themselves as parties" to the Part 8 proceedings.

41. The scope of the Part 8 proceedings is evident from paragraph 37 of Popplewell J's judgment, which sets out the declarations sought by the Claimants in those proceedings:

> "(1) The assets of the National Fund are held by BNYM subject to the terms of the GCA, which are governed by English law.
>
> (2) The *situs* of the cash and securities held under the GCA is England.
>
> (3) The debt and trust obligations owed under the GCA are governed by English law. All questions as to the performance and discharge of those obligations are to be determined by English law.
>
> (4) England (and not Belgium or the Netherlands) is the place of performance of the debt and trust obligations under the GCA.
>
> (5) No attachment or garnishment or charging order (or any other order to the like effect) in respect of the debt due from, and assets held by, BNYM London by virtue of the GCA made by any Court outwith England and Wales will be recognised by the courts of England and Wales; nor would any such order operate to discharge BNYM London from its obligations under the GCA.

> (6) Notwithstanding the Dutch Order and the Belgian Order (and any further Order that may be made in the courts of either of those countries):
>
> (i) BNYM London remains obliged to hold and deal with the assets of the National Fund pursuant to the terms of the GCA and on the instructions of the NBK;
>
> (ii) BNYM London is not entitled to freeze those assets; and
>
> (iii) BNYM London is not entitled to transfer any of those assets to the Stati Parties.
>
> (7) The assets of the National Fund are immune from enforcement as property of a central bank and/or as property of a state not being in use or intended for use for commercial purposes."

42. These declarations relate solely to the construction of the GCA and the proper law of the debt, and do not (being Part 8 proceedings) raise disputed questions of fact. At the core of the Part 8 proceedings was BNYM(L)'s entitlement to freeze the GCA assets, and the protection afforded to it by clause 16(i) (see, for example, paragraphs 70 and 71 of Popplewell J's judgment, and paragraph 24 of the Court of Appeal's judgment). Whilst it is arguable that declaration (6)(i) could be read as an implicit reference to the wider question raised in these proceedings, which is whether, having regard to the relationship between the RoK and NBK, any of the GCA assets are held for or to the order of the RoK, and whether the BNYM declaration in the Belgian proceedings was correct there is no express reference to such matters. It is to be noted that the Claimants did seek to raise something like the wider question in their skeleton argument but Popplewell J. refused permission to do so because the Stati parties might have a substantial interest in it and were not party to the proceedings; see paragraphs 38, 39 and 99. It is therefore very difficult to see why the dismissal of declaration 6(i) could give rise to *res judicata* on the wider question or on any issue between the Claimants and the Stati parties.

43. It is also of significance that the Belgian Attachment Judge's decision was handed down sometime *after* Popplewell J's judgment in the Part 8 proceedings, and indeed a few days after the hearing before the Court of Appeal. The present proceedings were issued three days later. The terms of the declarations sought in these proceedings, as I have explained above, mirror the questions referred to this court by the Attachment Judge. They go beyond the issues of interpretation of the English-law GCA (the subject of the Part 8 proceedings) to encompass the wider questions set out above arising out of the relationship between the RoK and NBK.

44. I therefore consider that the issue is not *res judicata.*

45. On the question of abuse of process, the legal principles were summarised by Lord Neuberger MR in *Henley v Bloom* [2010] EWCA Civ 202, [2010] 1 WLR 1770 at [16] – [20]:

"Abuse of process was considered by the *House of Lords in Johnson v Gore Wood & Co [2002] 2 AC 1* . As Lord Bingham of Cornhill explained at p 23:

"the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties … but, as Somervell LJ put it in *Greenhalgh v Mallard [1947] 2 All ER 255* , 257, [it] may cover 'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them'."

At p 31A, he described "the underlying public interest" as being that "there should be finality in litigation and … a party should not be twice vexed in the same matter".

As Lord Bingham emphasised at p 31 C , it would be "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive". He then went on to say that the question of whether later proceedings were an abuse involved "a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case". Lord Bingham also rejected the notion that the fact that the first proceedings had been settled, rather than going to trial, made any difference; indeed as he said at p 33 A : "often … that outcome would make a second action all the more harassing."

In his opinion Lord Millett explained at p 59 that "it does not at all follow" from the fact that a potential claimant " *could* have brought his action as part of or at the same time as the [earlier] action … that he *should* have done so or that his failure to do so renders [a later] action oppressive … or an abuse of the process of the court". He then made the point, at pp 59H -60 A , that there was no "presumption against the bringing of successive actions", and the "burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action". Lord Millett also agreed with Lord Bingham that the principle applied equally where the first action had ended in a settlement rather than a judgment, saying, at p 59 B-C , that it was "necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding".

In relation to abuse of process we were also referred to the subsequent decision of this court in *Stuart v Goldberg Linde [2008] 1 WLR 823* . At para 65, Lloyd LJ referred to the fact that the cases "include many reminders that a party is not

> lightly to be shut out from bringing before the court a genuine cause of action". At para 71, he rejected the "general proposition" that a claimant who "comes to know" in the course of proceedings "of an additional cause of action … which is quite different from that asserted in his existing claim" comes under an obligation to inform the defendant of that additional cause if "it would not be reasonable … to expect [the claimant] to seek to combine" the two causes of action. As Lloyd LJ indicated, the issue is highly fact-sensitive.
>
> Sir Anthony Clarke MR considered that "parties should [not] keep future claims secret merely because a second claim might involve other issues", and, "In particular", they "should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future": para 96. However, as he went on to indicate in para 98, much depended on the particular facts, and "the question is not simply whether the claimant acted unreasonably in not raising [the second] claim … or indeed whether his failure to do so was an abuse of process". "The question is", as he said, "whether the second action is an abuse of the process, which involves a consideration of all the circumstances"."

46. I do not consider that it is an abuse of process for the Claimants to raise in these proceedings issues not argued before Popplewell J or the Court of Appeal in the earlier English proceedings. First, those proceedings served a different purpose, namely, the determination of BNYM(L)'s contractual entitlement to freeze the GCA assets and in particular the scope of clause 16(i). Second, it appears that the Claimants did in fact seek to raise the wider issue, or something like it, before Popplewell J. but were not permitted to because the Stati parties were not before the court. Third, it would be odd, to say the least, for this court to hold that these proceedings were an abuse of process in circumstances where the issues raised by the proceedings had been referred to it by the Belgian court. It cannot, I think, be in the public interest to frustrate the order of the Belgian court. On the contrary, comity and the public interest point to these proceedings serving a legitimate and proper purpose.

Declaratory relief

47. Mr Sprange's final submission was that the requirements for declaratory relief set out in *Rolls Royce Plc v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318 are not met. The relevant principles are summarised in the judgment of Aikens LJ in that case, at paragraph 120:

> "For the purposes of the present case, I think that the principles in the cases can be summarised as follows.
>
> (1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant

> does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from *Meadows*).
>
> (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
>
> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

48. Based upon those principles, Mr Sprange submitted that: (i) "the Second to Fourth Defendants will not be "affected by the [declarations] concerning the legal right in question"; (ii) "there is no *"real and present dispute"* regarding *"the existence or extent of a legal right between"* RoK/NBK and the Stati parties in relation to the declarations sought; (iii) "this is not the *"most effective way"* of resolving the issues raised, because the Belgian Court will ultimately rule on the validity of the executory attachment under Belgian law.

49. I am unable to accept these submissions, essentially, for the reasons I have already set out. In my judgment, there is plainly a "real and present dispute" concerning the subject-matter of the conservatory attachment order obtained by the Stati parties in the Belgian court. That court has referred that question to this court, and it is a question that needs to be resolved. The Stati parties, being the parties who have obtained that conservatory attachment order, are plainly "affected" by this issue, which affects "the existence or extent of a legal right between" them and the other parties to these proceedings, namely, their right to attach the assets in question. Dealing with the matter by a declaration in these proceedings is clearly the most effective way of dealing with the questions arising out of the relationship between the RoK and NBK, with all the affected parties present, in circumstances where those questions have been referred to this court by the Belgian court.

50. For all of the above reasons I have concluded that there is a serious issue to be tried.

Jurisdictional Gateways

51. The Claimants relied upon two of the gateways in PD6B para 3.1: the "necessary or proper party" gateway (para 3.1(3)), and the gateway for a claim "in respect of a contract" governed by English law (para 3.1(6)(c)).

Necessary or proper party

52. The test to be applied under this gateway is as follows (see *Dicey, Morris & Collins*, at [11-162] – [11-165]): *(i)* an existing party (here, BNYM(L)) has been (or will be) served; *(ii)* there is as between the claimants and BNYM(L) a real issue which it is reasonable for the Court to try; and *(iii)* the parties against whom service out is sought must be either necessary or proper parties to that action.

53. The first limb of this test is plainly met. There is no dispute that BNYM(L) has been properly served.

54. The second limb of the test is also met, for the reasons set out above. A "real issue" equates, in general, to a "properly arguable case or serious question to be tried" (see *Lungowe v Vedanta Resources* [2017] EWCA Civ 1528, [2018] 1 WLR 3575 at [63]). For all the reasons set out above, there is in my judgment clearly a "serious question to be tried" in these proceedings.

55. As to the third limb, the Claimants do not suggest that the Second to Fourth Defendants are "necessary" parties to these proceedings, but say that they are "proper" parties. As Lord Collins explained in *Altimo Holdings v Kyrgyz Mobil Tel Ltd.* [2011] UKPC 7, at [87], this question "is answered by asking: 'Supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?'"

56. In my judgment, this question turns on the fundamental dispute between the parties (which I have addressed above) concerning the subject-matter of these proceedings. I do not accept the submission that it "would not assist the court" for the Second to Fourth Defendants to be party to these proceedings. There are, as I have found above, serious issues to be tried in these proceedings concerning the subject-matter of the attachment order. These are matters of some import to the Stati parties, who have already expressed their intention to raise various arguments to support their contention that there are GCA assets held for RoK over which an executory attachment order could properly be made. The Second to Fourth Defendants are clearly, in my judgment, proper parties. They will be affected by the court's decision and have a real and substantial interest in the subject matter of the decision. If they had been within the jurisdiction it would obviously have been proper to join them.

Claim in respect of a contract

57. In the alternative, the Claimants rely upon the gateway in para 3.1(6)(c), a claim "in respect of" a contract governed by English law. Given my conclusions above, this issue does not need to be decided. There has been considerable discussion as to the meaning "in respect of a contract" in this context; see *Green Wood & McClean LLP v Templeton Insurance Limited* [2009] 1 WLR 2013, *Global 5000 Ltd v Wadhawan* [2012] EWCA Civ 13 and *Alliance Bank JSC v Aquanta Corp* [2012] EWCA Civ 1588. Given the breadth of that discussion I would prefer not to add to it where it is unnecessary to do so. I would merely observe that in circumstances where the Stati parties have sought to benefit from the sums held pursuant to the GCA by obtaining

an attachment order in respect of them there is much to be said for the argument that the issues raised in these proceedings "relate to" the GCA.

Forum Conveniens

58. Mr Sprange, for the Stati parties, submitted that "England is not a proper forum for a claim against the Second to Fourth Defendants, where that claim seeks (on the Claimants' case) to conclusively determine issues of the validity of a Belgian executory attachment, which are properly the subject of Belgian attachment law for a Belgian attachment judge to decide".

59. Mr Malek, for the Claimants, submitted that the real dispute is not about "the validity of a Belgian executory attachment", but rather "whether there is an obligation owed by BNYM London to RoK capable of forming the subject-matter of a Belgian attachment." Further, he submitted that the effect of the Belgian Attachment Judge's decision was to determine that England was the appropriate forum. Mr Malek relied upon this decision as giving rise to "an estoppel of a particular, autonomous, EU kind"; in the alternative, he submitted that it was a strong factor to be weighed in the analysis of the appropriate forum. Finally, Mr Malek submitted that the only realistic alternative to the jurisdiction of the English court would be the Belgian court, and that "the Belgian court is materially worse placed than this Court because it would be investigating matters by reference to an English-law governed contract, the GCA (so far as issues of Kazakh law, or facts in relation to the relationship between NBK and RoK, are concerned, the Belgian court enjoys no advantage over this Court)."

60. I am unable to accept Mr. Sprange's submission. This court will not be asked to determine the validity of the conservatory attachment order made in Belgium. Rather, it will be asked to determine what, if any, assets constitute the subject-matter of that order. The Belgian Attachment Judge plainly considered that a dispute concerning the *content* of the attachment – which, on its terms, constitutes only such assets (if any) as are held by BNYM(L) for RoK under the GCA – is a question for this court.

61. The fact that the Belgian court has referred the dispute to this court is a cogent reason, indeed a compelling reason, for concluding that this court is a proper forum for determining the dispute. It would not be in accordance with comity to send the dispute back to Belgium. There is no need to consider Mr. Malek's further submissions.

JURISDICTION: FIFTH DEFENDANT

62. The Fifth Defendant ("Terra Raf"), which was a claimant party in the underlying arbitration, is a company incorporated in Gibraltar. It therefore falls within the regime of the Brussels Convention 1968 (under the Civil Jurisdiction and Judgments Act 1982 (Gibraltar) Order (SI 1997/2602)). The question is whether this court, as opposed to the court of the place where Terra Raf is domiciled, has jurisdiction to hear and determine the claim as against Terra Raf.

63. The claimants rely upon two grounds under the 1968 Convention:

> Article 5(5): "as regards a dispute arising out of the operations of a branch, agency or other establishment in the courts for the place in which the branch, agency or other establishment is situated."

> Article 6(2): "as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case."

64. Article 6(2) of the 1968 Convention is reflected in what is now article 8(2) of the Brussels I Regulation (Recast). It is clear that the phrase "third party proceedings" in this provision has an autonomous EU-law definition; it is not limited to "third-party claims" under the definition in English procedural law. For example, it has been held to extend to a claim by a third party against an existing defendant (Case C-521/14 *OVAG-Schwarzmeer und Ostee Versicherungs-Aktiengesellschaft v If Vahinkovakuutusyhtio Oy* [2016] QB 780).

65. In *Kinnear v Falconfilms BV* [1996] 1 WLR 920 Phillips J (as he then was) said:

> "In my judgment … where domestic procedure permits a third-party to be joined in proceedings, this is likely to be on the grounds which justify overriding the basic right of the Third Party to be sued separately in the country of his domicile and that those grounds are almost certain to be some form of nexus between the Plaintiff's claim against the defendant and the defendant's claim against the Third Party. Absent such nexus I would agree that domestic Third Party proceedings cannot properly be described as "any other third-party proceedings" in Art.6(2)."

66. In *Barton v Golden Sun Holidays* [2007] EWHC 3455 (QB) Wyn Williams J, having cited this passage from the *Kinnear* case, said (at [46]):

> "In my judgment it is beyond dispute that a connection must exist between the proceedings commenced by the claimant and the proceedings commenced by the defendant against a Pt 20 defendant before the Pt 20 proceedings can be considered to fall within Art.6(2) . It is not possible to define the nature of that connection notwithstanding the understandable desire that Art.6(2) is understood and applied by all contracting states in the same way. It seems clear, however, that the connecting factor must be a close one—see [11] in *Hagen* —and there must be good reason to conclude that the efficacious conduct of proceedings is best promoted by both the claim between claimant and defendant and claim between defendant and Pt 20 defendant being considered by one court."

67. In *Roberts v Soldiers, Sailors, Airmen & Families Assoc* [2016] EWHC 2744 (QB), Dingemans J said (at [27]):

> "A close connection is required between the original and third party proceedings. A close connection may occur where it is necessary to avoid the risk of irreconcilable judgments, but the connection must be such that it is rational, and that the harmonious and efficacious administration of justice requires

> the Court to hear both claim and third party proceedings in the same action."

68. Mr Sprange submitted that "this Article typically applies to classic third-party proceedings seeking an indemnification or contribution". That may be so, but I consider that the wording of article 6(2) is wide enough to encompass a situation in which a person is a proper party to a dispute between other parties to which he has a "close connection", so long as that dispute has not been "instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case" (see Case C-77/04 *Groupement d'Interet Economique (GIE) Reunion Europeenne and Others v Zurich España and Another* [2005] E.C.R. 4509, at [29] – [33]).

69. This is a case where there is a risk of irreconcilable judgments if the claims against the First to Fourth Defendants were to be heard in this jurisdiction but a claim against Terra Raf were to be heard in another jurisdiction. There is, in my judgment, a very close connection between Terra Raf and the claims by the Claimants against the other Defendants. This is a case in which "the efficacious conduct of proceedings" demands the presence of Terra Raf in this jurisdiction. I therefore find the requirements of article 6(2) to be satisfied.

70. On that basis, it is not necessary for me to decide whether the Claimants could also rely upon article 5(5) of the 1968 Convention. I will merely say that I have some difficulty with Mr Malek's submission that jurisdiction can be found *as against Terra Raf* on the basis that the dispute arises out of a branch *of BNYM*. It seems to me likely that the purpose of article 5(5) is to permit service on a company out of whose *own* branch or agency within the jurisdiction the relevant dispute has arisen. I do not, however, need to decide this point.

CONCLUSION

71. The application to set aside service on the Second to Fifth Defendants must be dismissed.