Neutral Citation Number: **[2020] EWHC 1584 (Comm)**

Case No: CL-2019-000630

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

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

Date: 18 June 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

Alexander Brothers Limited (Hong Kong S.A.R.)	**Claimant**
- and -	
(1) Alstom Transport SA **(2) Alstom Network UK Limited**	**Defendants**

- -
- -

Christopher Harris Q.C. and Sarah Tulip (instructed by **Charles Fussell & Co LLP**) for the **Claimant**
Orlando Gledhill Q.C. (instructed by **Enyo LLP**) for the **Defendants**

Hearing dates: 13, 14 May 2020
Draft Judgment sent to parties: 11 June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 18 June 2020 at 10:30am.

Mrs Justice Cockerill:

Introduction

1. This is the application of the Defendants ("Alstom") to set aside the without notice Order of Teare J enforcing an arbitration award ("the Award") in favour of the Claimant ("ABL") on the basis that it was contrary to public policy; alternatively for a trial of the public policy issue.

2. The Award orders Alstom to make payments under certain consultancy agreements, by which ABL was to and did assist Alstom in obtaining government railway contracts in China.

3. Alstom relies on two grounds. First, although this was not the major issue in the submissions before me, it submits that there was a failure to make full and frank disclosure on the without notice application.

4. Secondly, and in reality its primary case, Alstom says that the public policy ground under section 103(3) Arbitration Act 1996 is engaged. In essence, it contends that the underlying consultancy agreements are tainted by illegality in ABL's performance. Alstom places considerable reliance on the fact that enforcement in France has already been refused by the Paris Cour d'Appel, which held in May 2019 that there were "*serious, precise and consistent indicia*" that payments made to ABL by Alstom under the consultancy agreements had been used to bribe Chinese government officials and that the sums held to be due under the Award were "*intended to finance or remunerate acts of bribery*".

5. One central issue before me is the extent to which this argument is available to Alstom in the light of the fact that there is a crossover between the public policy argument and the documents in play and submissions made in the arbitration. ABL contends that the Tribunal had this argument before it and rejected it; and that on the authorities this means that I am bound to reject Alstom's argument.

6. There is also a dispute as to whether any issue estoppel arises out of the decision of the Cour D'Appel.

The Facts

Background and events to 2009

7. The First Defendant ("Alstom Transport") is a company incorporated in France. The Second Defendant ("Alstom Network") is a company registered in England. Both are wholly-owned subsidiaries of the Alstom group, which has its headquarters in France. The Alstom group,

primarily through Alstom Transport, is engaged in the business of the supply of railway locomotives and stock, in many countries worldwide.

8. ABL is a family run company incorporated in Hong Kong and managed by Ms Guo Qi, a highly qualified former employee of the Alstom Group.

9. In 2003, Ms Guo Qi was approached by Alstom to assist in the group's negotiations with the Chinese Ministry of Railways. Following completion of "rigorous" and "lengthy" due diligence and approval procedures, ABL and Alstom signed five consultancy agreements, in relation to various railway projects in China. Pursuant to these agreements, ABL was engaged to provide services and assistance in respect of Alstom's tenders for these projects and, if the tenders were successful, to assist in the performance of the resulting projects.

10. The agreements contained provisions (which varied somewhat between the agreements) for ABL to report to Alstom what work it carried out. Each of the agreements was governed by Swiss law and contained an arbitration clause providing for the settlement of any dispute to be referred to ICC arbitration in Switzerland.

11. Alstom made full payment to ABL under two of the five consultancy agreements. However, only partial payment was made in respect of the remaining three ("the Agreements"), two of which dated from 2004 and the third of which was entered into in 2009. This left several of ABL's invoices raised under the Agreements unpaid – the total sum in issue being some €2,975,480 plus default interest.

The investigation of Alstom for corruption

12. Alstom says that the backdrop to this refusal was the criminal investigation and proceedings in the UK and the United States against the Alstom group. The SFO commenced investigations into the Alstom group's activities in 2009. Criminal charges were brought in England against two Alstom group entities in 2014 for offences related to corruption in Tunisia, India, Poland, Hungary and Lithuania. In 2019 Alstom Network was ordered by the English Court to pay £16.4 million in fines and costs in respect of a conspiracy to corrupt in relation to a contract in Tunisia. Some inquiries were made by the English authorities about Alstom's business in China, but no charges were brought in respect of these.

13. In 2010, the United States Department of Justice started an investigation into possible acts of corruption by consultants employed by 4 entities within the Alstom group. These entities subsequently pleaded guilty in 2014 to acts of corruption. The total fine levied was US$772 million. Again, the fines did not relate to activities in China.

14. Alstom explains that these criminal investigations caused the Alstom group to adopt a more rigorous approach to the application of its

internal ethics and compliance policies. In 2012 and 2013, therefore, the Alstom group instructed its advisers to conduct audits in the United Kingdom to ensure that these policies were being correctly applied. The agreements with ABL were inquired into as part of this process.

15. I have not been taken to those audits but understand the position to be as follows:

    1) The report into the First Audit identified "*several accounting errors and internal control weaknesses*", including that the "*level of documentation is not deemed appropriate;*" it also stated that "*no unusual significant transactions were identified and the main cash transactions were reconciled*";

    2) The report from the Second Audit was not disclosed by Alstom in the arbitration or in these proceedings. Nor, in either proceedings, did it present evidence from any of those who were involved in the audit. It is to be inferred (as the Tribunal did) that the audit report from the Second Audit contained nothing which would assist Alstom's case that there was bribery.

2014-2016: The Arbitration and the Award

16. Nonetheless, Alstom took the view that the proofs of services required under the Agreements were insufficient and therefore suspended all payments to ABL. That suspension gave rise to the arbitration.

17. Alstom and ABL were therefore parties to a Swiss law-governed and Geneva-seated ICC arbitration commenced by ABL. ABL claimed punitive and compensatory damages in the total amount of €5,475,480. The arbitration was commenced in December 2013. The Tribunal was chaired by Dr Christian W Konrad (with co-arbitrators Dr Willi Diestschi, an experienced Swiss lawyer and Dr Daniel Schimmel, the head of international arbitration and litigation at Foley Hoag New York).

18. There has been considerable issue before me as to the nature of the defences in the arbitration and I have been taken through the proceedings in as much detail as time has permitted. Both parties said that the nature of the claims in the arbitration was clear – though they then disagreed fundamentally as to the overall nature of the claims, Alstom contending that the claims were fundamentally contractual, and ABL arguing that bribery and corruption was front and centre of the defence. I agree with neither of them.

19. The position as to the claims in the arbitration was less than clear. Given the importance of this point some detailed explanation is necessary.

20. The arbitration commenced in December 2013. There was no issue as to jurisdiction. Alstom submitted its Answer to the Request for Arbitration in March 2014. The main feature of this Answer was to request a stay of proceedings pending completion of the criminal investigations. I have not been provided with this document, but it is clear from the Award that it did place concerns about bribery and corruption at the heart of its response.

21. The essence of its initial case, as recorded by the Tribunal, was that "*[Alstom] could not effect payment … until such payment was officially cleared in particular by the SFO*". It was also said that "*it cannot be excluded that the SFO will subsequently bring corruption and conspiracy charges for project [sic] in China.*"

22. By April 2014 the Tribunal had circulated the draft Procedural Order and draft Terms of Reference. The Terms of Reference defined the issues which the Tribunal understood to be before it. As recorded in the Award they were these:

> "i. Can the fact that Respondents are subject to an investigation by the UK Serious Fraud Office influence their payment obligations towards Claimant and, if so, in which way? Is it necessary that payments under the Consultancy Agreements are officially cleared by the Serious Fraud Office? Is Claimant's alleged failure to provide a satisfactory level of information to Respondents in connection with the criminal investigation, and its alleged refusal of a complementary audit, of relevance to Respondents' payment obligations and, if so, in which way?
>
> ii. Is Respondents' internal compliance policy in relation to anti-bribery standards of relevance to Respondents' payment obligation under the Consultancy Agreements, and, if so, in which way, i.e. are Respondents allowed to withhold payment of the amounts claimed by Claimant?
>
> iii. Are Respondents under an obligation to pay the outstanding invoices under the Consultancy Agreements in case Claimant is not able to provide proof of the content of its service? Can the - alleged - nonfulfillment of this obligation be a valid reason for not paying the invoices?

> iv. Are Respondents under an obligation to pay these invoices if there is evidence of or arguments for corruption?
>
> v. What are the costs of the arbitration and how should they be borne by the Parties?"

23. The procedural history of the arbitration is somewhat busy, but had the following key points:

    1) ABL filed its First Memorandum on 31 July 2014;
    2) Alstom filed its First Memorandum on 10 October 2014;
    3) ABL filed its Second Memorandum on 8 December 2014;
    4) Alstom filed its Second Memorandum on 3 February 2015;
    5) The hearing took place in Paris on 23-24 March 2015;
    6) ABL submitted its post hearing brief on 25 June 2015;
    7) Alstom submitted its post hearing brief on the same date.

24. During the course of these events, Alstom's case shifted ground somewhat. In its First Memorandum it withdrew its request for a stay. Its first defence was that "*the suspension of Payment of Claimant's fees … is justified by issues identified during the different audits*". It then referred to concerns arising out of accounting errors and internal control weaknesses, to insufficiency of proofs of services submitted and third party payments made by ABL. These were summarised as matters which "*constitute serious indications of possible corrupt practices*" preventing payment to ABL.

25. It continued to hinge its defence on corruption, submitting that: "*It remains that the issues identified by the [Defendants] during the different audits conducted raised serious doubts on potential corrupted practices and a breach by ABL of its contractual obligations. Therefore, in the absence of satisfactory clarifications from [ABL] its claim for payment of consultancy fees shall be dismissed by the Arbitral Tribunal.*"

26. So far as concerned insufficiency of proof of services, this was described as "*not an issue of financial consideration but a compliance issue since paying a large amount of money without proof of relevant work is a potential sign of bribery activity.*"

27. Other grounds were raised (such as contractual conditions for payment not having been met) but it is fair to say that these were subsidiary to the main issue.

28. By the Second Memorandum the ground had shifted somewhat, but not markedly. The Second Memorandum has as Issue 1: "*The issue at stake is the performance by the Claimant of its ethics and*

compliance obligations". It then goes on to argue that Alstom's Ethics and Compliance Policy was enforceable through the provisions of the Agreements, and ABL had breached those obligations by: (i) third party payments to a Chinese State-owned entity known as SITICO; (ii) "*the concerns arising out of ABL's proofs of services*", one of which was the insufficiency of proofs of services submitted by ABL and (iii) "*the concerns arising out of the accounting errors and internal control weaknesses*".

29. Alstom made clear that it was not trying to allege that it had proof of acts of corruption, but rather said that whether ABL had performed what it claimed were ABL's Ethics and Compliance Obligations was the central issue. Rather than proving corruption, it asserted that ABL had to prove the opposite. Corruption therefore remained at the heart of the claim, but no positive case was run. Alstom claimed that in the circumstances it was entitled to refuse payment because making payment would expose it to a risk of criminal liability. I note here that it is not clear why Alstom did not run an overt and positive case of bribery and corruption.

30. During the course of these submissions perhaps most attention was given to the SITICO argument. This was the argument that ABL had, unbeknownst to Alstom, entered into a consultancy agreement of its own with a state-owned company called SITICO for SITICO to provide to ABL services in relation to the same government contract in relation to which ABL was providing services to Alstom. Alstom argued that this was a breach of a previous consultancy agreement between ABL and Alstom, in that it amounted to subcontracting without consent, which was not permitted under that consultancy agreement. Alstom argued that this breach of contract amounted to a wilful deceit.

31. All three subheadings of the argument were explored in detail. During the course of this exploration, reference was made to most of the documents which underpin the arguments made before me, and the Paris Cour D'Appel, that there are "*indicia of bribery*".

32. In essence the points on which Alstom relies as "*indicia*", and which were addressed in the evidence before the Tribunal (though not in this collected form) are the following allegations:

    1) ABL was an offshore shell company which, during the relevant period, received very substantial sums from Alstom only, pursuant to the Agreements.

    2) The sole individual who provided the services for ABL was Ms Guo Qi.

3) The services ABL claims to have provided appear to have no real substance, particularly when compared to the contractual obligations as to services in the Agreements and the large size of the sums which ABL claims to be entitled to.

4) ABL spent very significant amounts on entertainment and other expenses for which there is no transparency as to what was spent on whom and why.

5) ABL's accounts show that it paid €280,000 to SITICO, pursuant to the undisclosed SITICO contract, which was entered into just before Consultancy Agreement No. 1.

6) Ms Guo Qi at first denied that the SITICO contract was related to Alstom, but then reversed her position, confirming that it was in fact related.

7) Although on the face of the SITICO contract, the services purportedly provided by SITICO to ABL relate to a previous consultancy agreement, and not any of the Agreements, it was unclear what (if anything) SITICO did for the €280,000 it received from ABL and whether SITICO or individuals connected to it received further financial benefits from ABL in connection with Alstom, for example, through the very significant but opaque expenses recorded in ABL's accounts.

8) A SITICO manager, who was employed at the relevant time, was convicted in 2016 of bribery and corruption offences.

9) ABL obtained sensitive and confidential documents and information from officials connected to the Chinese Ministry of Railways and has repeatedly declined to provide any cogent explanation as to how it came to obtain them.

10) Two very senior officials with whom Ms Guo Qi dealt were later convicted of crimes relating to bribery and corruption in relation to the award of railways contracts in the relevant period.

11) By its own admission, ABL was able to influence the award of Chinese government contracts to the benefit of Alstom.

33. I should make clear that, as Mr Harris QC for ABL noted, the inferences sought to be drawn from those points were disputed. The submissions included detailed rebuttal evidence. To give one example, as to influence Ms GuoQi gave evidence as to how that influence was brought to bear in a particular case, and that it comprised what one might term ordinary commercial advocacy,

emphasising the negative effects on a local company which was involved as a joint venture. Another example is that there were detailed submissions on the SITICO contract.

34. At the hearing of the arbitration it appears that ground had shifted again. Alstom's counsel certainly placed greater stress on the contractual defences than had been done in the written briefs. He said in terms:

    1) "*So the real issue at stake, the one that the Arbitral Tribunal has to rule in this case is to know whether Claimant has performed its contractual obligations, and I insist on that.*"

    2) "*this Arbitral Tribunal knows how difficult it is to have material proof of acts of corruption. Respondents here have been clear in the memorandums; we're not saying that we have in this case the evidence of payments, of bribes to public officials*".

35. However at the same time it is clear from the transcript and from the Award that at no point did Alstom formally resile from the case which it ran as to corruption. It did not seek to have the Terms of Reference amended.

36. To deal with that fact it was submitted before me, at least in writing, that "*Alstom's case on the SITICO contract and also the breach of the obligation to provide sufficient proof of services necessarily involved showing how the circumstances appeared suspicious*", I do not accept that submission. It was open to Alstom to run a purely contractual case. It did not do so. The impression which I have received from the materials is that the case began as a case which was all about bribery and corruption. Although it did not formally raise an illegality argument, Alstom relied upon *indicia* of bribery as giving rise to a legal justification for refusing to pay. There was a tacit case of bribery.

37. By the time of the hearing Alstom may (subjectively) have lost faith in that argument, but it did not withdraw it. Its original case remained before the Tribunal. Further it continued to rely upon the *indicia* of fraud, albeit essentially by way of prejudice, to assist its contractual case.

38. This conclusion seems to be reflected in the way the matter is handled by the Tribunal in the Award. The Tribunal summarised the submissions made to it, and plainly considered that all of the issues in the Terms of Reference were still live and required to be determined by them. It was left with the dilemma of working out how Alstom's original case on bribery translated into Swiss Law and whether it was capable of affording a defence.

39. Accordingly the Tribunal, having reviewed the facts and the parties' submissions, turned at paragraph 257 and following of the Award to consider what legal routes that might offer Alstom as a matter of Swiss Law. I should make clear that this was not a passage which reflected the parties' own legal submissions. Under Swiss Law the Tribunal takes much of the burden of legal analysis upon itself, under the principle *jura novit curia*, by which courts and tribunals freely assess the legal consequences of acts and may rule based on rules of law other than those cited by the parties. That approach is not insignificant given the fact that the tacit bribery case was left to the Tribunal - it was plainly open to the Tribunal (and it would not be surprising if they considered it their duty) to consider that point as a live issue.

40. At paragraph 257 and following the Tribunal concludes that there are three routes whereby corruption can, as a matter of Swiss Law, have an effect on contractual agreements: contracts for a corrupt purpose (not applicable), contracts procured by corruption (also not applicable), and "*a contract may be tainted by corruption if one of the parties has engaged in corrupt practices in the execution of the contract*". This was plainly a possible fit.

41. As to this, the Tribunal noted that "*it has not been argued in this arbitration that the three Consultancy Agreements were procured by corruption*", but that Alstom had argued in the arbitration that it had concerns that ABL may have engaged in corrupt practices (the payment of bribes) in the execution of the Agreements. It concluded that "*the actual existence of corrupt practices has to be established by sound evidence*". The Tribunal considered whether a reverse burden of proof could be applicable, given the difficulties of proof and the policy considerations; but concluded that it could not.

42. It evaluated the documents which Alstom claimed gave rise to suspicions of corruption and noted that they had been submitted by ABL to Alstom many years before the commencement of the arbitration, and there was no attempt by ABL to disguise or conceal its activities. It also noted that ABL had submitted to two audits by the Alstom group's internal auditors, and no evidence of corruption was found.

43. Paragraph 273 then records that "*Respondents did not allege that Claimant was actually engaged in bribery, corruption or some other form of criminal conduct*." Paragraph 275 records that "*[t]his, however, is not a conclusive <u>claim</u> of corrupt activities or other criminal conduct, let alone conclusive evidence of any illegal activity.*"

44. It considered that the documentation referred to by Alstom did "*not establish evidence of any acts of corruption or criminal conduct.*" In

particular, the Tribunal referred to Alstom's audit report dated 15 January 2013 and the fact that it did not record any unsolicited payments or other established evidence of criminal conduct. It noted the absence of any evidence as to what the second audit report found. It also noted that the documents relied on had been provided to Alstom approximately ten years before.

45. The Tribunal also noted at paragraph 272 that under Swiss law "*the seriousness of the accusation of corruption moreover requires specifically clear and convincing evidence*". It referred elsewhere to the high standard of proof: "*conclusive evidence*" in the context of "*the necessary threshold of proving corrupt or otherwise criminal conduct*" (paragraph 275) and the "*high burden of proof under Swiss law*" (paragraph 276). The Tribunal held at paragraphs 277 and 280 that a mere suspicion of corrupt practices would not suffice to provide Alstom with a defence to ABL's claims to payment.

46. The result is that the Tribunal decided the question effectively *in limine*; it considered the hurdles which Alstom would have to cross to succeed on a corruption argument and concluded that it did not advance the case it would need to advance as a matter of law and could not begin to approach the standard of proof. The result was that the Tribunal did not engage in any detail with the facts said to give rise to Alstom's suspicions. They did however evaluate the factual evidence for the purposes of gauging where, in the scale of evidential value, it stood. I shall revert to the significance of this approach further below.

Late 2016: The challenge before the Swiss Court

47. Alstom then applied to set the Award aside in the Court of the seat in Switzerland on two grounds, one of which was that the Award was incompatible with public order, within the meaning of Article 190(2)(e) of the Swiss Federal Private International Law Act. The way in which this was put was that the Tribunal had "*rendered an award incompatible with public policy*". The basis for this was, effectively as before the Tribunal, on the basis of risk of criminal prosecution if Alstom paid, and based on alleged breaches of the Alstom compliance policies.

48. In addition Alstom argued that the Tribunal had committed a procedural irregularity by violating Alstom's right to be heard. This related to the Tribunal's approach to proofs of services - in other words to the contractual claim. Alstom did not suggest that the Tribunal had been wrong to consider the corruption issues at all or that its sole case had been a contractual one.

49. In November 2016 the Swiss Federal Court held that it was limited to ruling based on the facts found by the Tribunal as recorded in the Award, noting that it lacked jurisdiction to rectify or complete

findings of fact even if the facts "*were established in a patently inaccurate manner or in violation of the law*". It therefore did not look at facts outside those found in the Award. The Swiss Court said that what it described as Alstom's "*implicit allegation of corruption*" had been held by the Tribunal not to have been proven and that it could not re-examine that decision. The Court also noted that Alstom did not claim to have proof of acts of corruption committed in relation to the agreements in dispute. The Swiss Court rejected Alstom's argument that it was contrary to public policy for it to have to make payments which did not conform with Alstom's own compliance rules.

50. The Swiss Federal Court rejected Alstom's application for annulment, declining to investigate the facts concerning corruption. In respect of the public order argument, the Swiss Federal Tribunal explained that:

> "the Arbitral Tribunal, after having analysed the elements of proof that the appellants had provided to it in order to support their implicit allegation of corruption aimed at the respondent, considered that this allegation had not been proved… Such a conclusion arises from an assessment of the evidence that this Court cannot re-examine."

Late 2016-early 2020: The Paris Enforcement Proceedings

51. ABL then sought enforcement in France.

52. At first instance in France, the Paris District Court granted exequatur (i.e. an order enforcing the Award). Consequently, ABL took steps to enforce the Award in France and on 23 November 2016 obtained an order requiring Alstom to transfer c.€1.8 million to ABL pending the outcome of Alstom's appeal to the Paris Cour d'Appel.

53. In February 2017 Alstom transferred this sum to an account of ABL's French lawyers. ABL was entitled to take those funds, but in the event left them in the account pending the determination of the appeal.

54. On appeal to the Paris Cour d'Appel, that Court, in a decision dated 10 April 2018, noted that the arbitrators had held that Alstom "*did not allege that ABL had actually paid bribes*". It further noted that Alstom's argument was that mere non-compliance with contractual rules aimed at preventing corruption would by itself give rise to a public policy ground to refuse enforcement. It held that it was for the French Court to assess whether enforcing the Award met the French conception of relevant public policy and that in this regard it was not bound by the Award, nor by Swiss law. The Court invited the parties' submissions on various potential *indicia* which might

lead to a contract being characterised as a "*contrat de corruption*" and ordered that a second appeal hearing should take place.

55. Having received those submissions and evidence, in its decision dated 28 May 2019, a differently-constituted Cour d'Appel went into the facts relating to bribery and corruption in some detail, on the basis of the set of *indicia* set out in the 10 April 2018 decision. It noted that Alstom argued, in the light of the first Paris decision, "*there are serious, precise and consistent indications that ABL, without its knowledge, bribed Chinese public decision-makers*".

56. It further noted that "*due to the concealed nature of acts of bribery*" it was permissible to approach the question of whether there had been bribery "*solely on the basis of a set of indicia*" and it was not necessary to find "*precisely identified corrupt acts*".

57. The Cour d'Appel looked in detail at the contemporaneous documents and the inferences to be drawn from them and the surrounding circumstances and held that the facts "*provided serious, precise and consistent indicia that the sums Alstom paid to ABL financed and remunerated the bribery of public officials*".

58. The Cour d'Appel ordered ABL to return the sum of €1.8m to Alstom. Thus funds which had previously been held by ABL's French lawyers were frozen and transferred to a neutral escrow account on 9 July 2019. These funds were subsequently transferred to Alstom via its French bailiff on 29 January 2020.

59. The judgment of the Paris Cour d'Appel is currently under appeal to the Cour de Cassation.

The applications in this jurisdiction

60. ABL issued an Arbitration Claim Form seeking enforcement on 11 October 2019. In the usual way this was dealt with on the documents without notice to Alstom. Mr Justice Teare made an order for enforcement on 15 October 2019.

61. On 10 January 2020 Alstom applied to set aside that Order on the basis of (i) failure to give full and frank disclosure and (ii) the public policy ground under section 103(3) of the Arbitration Act 1996. Both parties served evidence. I do not need to deal with that evidence in any detail here except to note the evidential position on the merits of the bribery allegation. So far as ABL is concerned, much was made in oral submissions by Alstom of the fact that Ms Guo Qi had not given a statement specifically denying bribery. However, Mr Fussell's second statement deals in some detail with the "*indicia*", summarising the arguments advanced for ABL in the arbitration.

62. Before me the argument has centred very much on the questions of law as to whether enforcement should be impeded by arguments which were or could have been raised before the Tribunal. Little oral or written argument was addressed to the evidential value of the *indicia*. I therefore address the legal arguments first, though the evaluation of the *indicia* is something which requires to be considered in due course.

Section 103 and the public policy ground

The legal common ground

63. The Arbitration Act gives effect to Article V(2)(b) of the New York Convention by section 103 which provides:

> "103 Refusal of recognition or enforcement
>
> (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases….
>
> (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award."

64. As Merkin & Flannery note at paragraph 103.14.12 of *The Arbitration Act 1996,* the public policy exception dates back to the 1927 Geneva Convention. There was some discussion about the terms in which it should be translated into the New York Convention, the original proposal (objected to by *inter alia* the UK) being "*clearly incompatible with public policy or fundamental principles of the law ("ordre public")*" of the country in which the award is sought to be enforced.

65. It was not contentious that if it is possible to come to a decision on a challenge to enforcement without holding a full hearing, the Court will do so, on the basis of the usual test on summary judgment, i.e. whether there is a real prospect of successfully establishing a ground under section 103, or some other compelling reason why the issue should be disposed of at a trial. However at the same time, issues may arise which can only be decided after disclosure and cross-examination and in such cases a trial of the issue may be ordered: *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC) at paragraphs 68 to 71; *Stati v Kazakhstan* [2017] EWHC 1348 (Comm).

66. Pausing here, it might seem as a matter of first principles that what section 103 requires of this Court is that it refuse enforcement in every case where the evidence adduced before it establishes on the

balance of probabilities that there has been conduct which infringes public policy. So if a party challenging enforcement could prove on the balance of probabilities that there was bribery, section 103(3) would bite; and if there was a real prospect of that party successfully establishing bribery, the Court should order a trial of the bribery issue. However, the position on the authorities is far from being this simple. There are a number of factors which come into play.

67. Before turning to the key authorities in this specific area, I should note the broad effect of the legal backdrop.

68. First there is the public policy in favour of enforcement. The basic and fundamental policy underlying both the New York Convention and the relevant parts of the Arbitration Act is to promote enforcement of New York Convention awards: "*section 103 of the Act reflects and embodies the predisposition in favour of enforcing New York Convention awards that runs through the New York Convention itself.*" *Carpatsky Petroleum Corp v PJSC Ukrnafta (No 1)* [2018] EWHC 2516 (Comm) | [2019] 1 Lloyd's Rep. 296 [39], *Carpatsky (No 2)* [2020] EWHC 769 (Comm) [39].

69. That is reflected in the dictum from *IPCO (Nigeria) v NNPC* [2005] EWHC (Comm) 726, [2005] 2 Lloyd's Rep 326 that the section is "*not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards*".

70. In order to resist enforcement, a party must show that one of the grounds in sections 103(2) or 103(3) of the Arbitration Act is established. If none is established, section 103(1) makes clear that enforcement of the Award "*shall not be refused.*" Where a ground for refusing enforcement is established, the Court retains a discretion, albeit a narrow one, to enforce the Award; *Carpatsky (No 2)* [40].

71. "Public policy" as referred to in section 103(3) of the Arbitration Act means the public policy of England and Wales (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice. The classic formulation as to what is seen as contrary to public policy is: "*contrary to the fundamental conceptions of morality and justice*" of the forum. *IPCO (Nigeria) v NNPC* [2005] EWHC (Comm) 726, [2005] 2 Lloyd's Rep 326 [13], *Deutsche Schachtbau v SIP Ltd* [1987] 2 Lloyd's Rep 246, 254.

72. The public policy exception in section 103(3) of the Arbitration Act is given a "restrictive interpretation.": "*the public policy exceptions are a safety valve that should only be invoked in a clear case and which must be approached with extreme caution.*" *Carpatsky (No 1)* [41]. However that restrictive approach is not relevant here because

it is common ground that there are authorities which establish that illegality and bribery can give rise to a public policy case. It is also common ground that were the conduct alleged in this case established, it would be contrary to the 2010 Bribery Act.

73. Under the New York Convention regime, as it is applied in England & Wales, significant weight is given to determinations of the Court of the seat. Thus: "*a party faces a heavy burden where the competent supervisory courts in that state have previously considered and rejected challenges to the validity, made on grounds which on analysis bear a close resemblance to those deployed on the application in this jurisdiction.*" *Carpatsky* [50], *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

74. Perhaps the majority of cases brought under this section concern allegations that the award has been obtained by fraud, or perjury. In such cases it is well established that the Court will not refuse enforcement unless:

    1) There is a strong *prima facie* case (definitions differ but generally suggest that it must be at least of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and where perjury is alleged the evidence must be such that it would have been expected to be decisive);

    2) The evidence was not available or reasonably obtainable, either:

        i. at the time of the hearing of the arbitration; or

        ii. at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the tribunal's award if such procedure were available.

75. These principles are not directly applicable here, but they serve to provide a comparator for the authorities in this specific area.

The authorities on public policy and bribery - and the effect of Westacre

76. The first point at issue was whether, because of the decisions of this Court and the Court of Appeal in *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd. and Ors*, I am in effect bound to hold that Alstom's arguments are not open to them.

77. Another highly contentious, and related, point was whether the following passage from Dicey & Morris correctly represents the law as stated in the authorities:

> " … the court has to perform a balancing exercise between the finality that should *prima facie* exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the enforcement power of the English court is not abused: the nature of, and strength of the case for, the illegality, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal are factors in the balancing exercise between the competing public policies of finality and illegality. [Footnoted to *Westacre* at p 314*, R v V* [2008] EWHC 1531, *Soleimany* at p 800"].

78. These points, to which much argument was addressed, require a close consideration of the judgments.

79. *Westacre* was a case with some fairly obvious parallels to the present one. The parties entered into a Swiss law consultancy agreement, pursuant to which the Claimant was engaged to assist the Defendant in procuring contracts - in that case for the sale of military equipment in Kuwait. The Defendant refused to pay the Claimant's invoice, resulting in an ICC arbitration seated in Switzerland.

80. In the arbitration (part of the award is fortuitously published in the ICC's Yearbook of Commercial Arbitration Vol XXI 1996), a number of defences to payment were advanced, including purely contractual ones such as the effect of termination. There was an argument as to whether the agreement was "*invalid due to the alleged illicit activities of the claimant*". One part of this argument was that the Defendant argued that the parties had intended the use of personal influence and that it had suspicions (but no intention) that the Claimant intended to use part of the expected fees to bribe officials in the Kuwaiti Ministry of Defence. It was later argued that the Claimant had in fact bribed officials to exercise their influence. The Defendant also denied the jurisdiction of the Tribunal to deal with such issues.

81. The Tribunal rejected all of the Defendants' arguments and upheld the Claimant's claim for unpaid invoices. It rejected any argument of joint illicit intentions on the merits. It rejected an argument that the agreement was invalid because it was for lobbying, deciding that lobbying was not proven to be illegal under Kuwaiti Law. It held that it regarded the allegations of bribery, which emerged in its Final Brief (which appears to have been submitted after the submission of the initial written briefs and after the examination of the witnesses), as "*speculative, and insufficient to convince the majority of the Arbitral Tribunal…*". It referred to the fact that

"*bribery is a fact which has to be alleged and for which evidence has to be submitted.*"

82. The Defendant challenged the Award before the court of the seat in Switzerland on grounds that it would be contrary to public policy to enforce the Award because it was a contract to pay bribes or because the contract was illegal by the law of Kuwait. As in the present case, the Swiss Federal Tribunal dismissed the challenge as an attempt to rehear the issues before the Tribunal.

83. The Claimant then sought to enforce the ICC Award in England. The Defendant resisted enforcement on grounds of public policy, raising three issues: (i) the legality of the underlying consultancy agreement under Kuwaiti law in that the parties intended that personal influence should be used to procure the contracts; (ii) an allegation (supported by fresh evidence) that a number of witnesses called by the Claimant at the hearing had given perjured evidence and that the ICC Award had therefore been obtained by fraud; and (iii) an allegation of bribery, in part based on material before the Tribunal and in part supported by the fresh evidence.

84. A part of the debate was about an issue referred to as "the *Lemenda* issue" that:

    1) The contract was contrary to Kuwaiti public policy but would not have been contrary to Swiss public policy "*so there was no point arguing the matter before the arbitrators, before whom nothing short of corruption would be a defence*";

    2) In the light of the position in Kuwait, enforcement would be contrary to English public policy and enforcement should be refused.

85. This Court, via Colman J, [1999] QB 740 refused the Defendant's application to set aside on grounds of public policy and refused permission to adduce fresh evidence of fraud. One important point to bear in mind is that despite the considerable similarities in the facts of the case, the issues there were somewhat different. Here there is no jurisdiction argument, there is no question of the Award being obtained by fraud, and there is no question of reliance on fresh evidence. There is also a difference as to the precise allegations underpinning the public policy arguments – in that case there were questions as to the contract being one for use of influence as well as actual allegations of bribery.

86. It is against that background that at p. 767 of the judgment Colman J set out 6 propositions applicable to the enforcement of awards where illegality was alleged in relation to the underlying contract. The first of those propositions, which deal with jurisdiction, were

relevant in *Westacre*, but are not said to be relevant here. But considerable focus has fallen on the latter two propositions:

> "(v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular."

87. He then went on to consider the issue of whether English law should, in effect, run the risk of allowing arbitrators to have got such an important question wrong before saying:

> "I have no doubt that an English Court would give predominant weight to the public policy of sustaining the parties' agreement to submit the particular issue of illegality and initial invalidity to ICC arbitration rather than to the public policy of sustaining the non-enforcement of contracts illegal at common law. The importance of the former consideration would be held to outweigh the need to protect against the risk that arbitrators might by uncorrectable errors of fact enforce an illegal contract."

88. He then considered the new evidence saying:

> "In substance they seek to use the public policy doctrine to conduct a re-trial on the basis of additional evidence of illegality when it was open to them to adduce that evidence before the arbitrators. Such an exercise would appear to be clearly in conflict with the principles of issue estoppel."

89. He then went on to consider the balance between sustaining the finality of awards and the public policy of discouraging corrupt trading. Referencing mounting international concern, in particular as to contracts for public works, he made a reference to the OECD Convention on Combating the Bribery of Foreign Officials in International Transactions, which was being signed in the week in which judgment was given. He concluded:

> "On balance I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption … That conclusion is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of confidence that if the issue of illegality by reason of corruption is referred to high calibre ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission."

90. The next step is the judgment of the Court of Appeal *Soleimany v Soleimany* [1999] QB 785. That case was on the facts some way from the present. It concerned an arrangement to illegally export carpets from Iran for sale in the UK or elsewhere. The agreement to arbitrate was one to refer to the Beth Din, which naturally applied Jewish law, under which illegality would have no effect on the rights of the parties. It was however perfectly apparent from the face of the award that the contract was one which was founded on a joint intention to smuggle the carpets illicitly, and would therefore be illegal.

91. A strong Court of Appeal (Morritt and Waller L.JJ. and Sir Christopher Staughton) considered the issues in some detail, noting at the outset that "*there is a distinction, which may not be unimportant in the context of this case, to be drawn between a 'joint venture' agreement with an object of committing illegal acts in a foreign and friendly state which will be totally unenforceable, and a contract which does not have that objective*".

92. They also noted that it was important in that case that the illegality in question was apparent from the face of the award. At p. 795 they noted Colman J's judgment in *Westacre* before concluding that any judgment which recognised a contract which was entered into with the object of committing an illegal act in a friendly foreign state

would not be recognised by the English Courts and that the same principle applied to arbitral awards.

> "it is in our view inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers, any more than it would enforce an agreement between highwaymen, …. Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it."

93. The critical passage for present purposes is not part of the *ratio.* It spans pp. 800-803:

> "The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. Or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem, for it does not arise in the present case …
>
> In our view an enforcement judge, if there is *prima facie* evidence from one side that the award is based on an illegal contract, should inquire further to some extent … Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality?...
>
> Colman J. holds that *prima facie* the court would enforce the resulting award; and with that too we agree. But, in an appropriate case [the Court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found there was no illegality. We thus differ from Colman J., who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator".

94. Shortly thereafter a differently constituted Court of Appeal (Waller LJ, Mantell LJ and Sir David Hirst (formerly Hirst LJ)) considered the appeal in *Westacre* itself ([2000] QB 288). It cannot be said that the decision which resulted is entirely satisfactory, in that the most considered judgment is the partially dissenting one of the only incumbent commercial Lord Justice.

95. Waller LJ gave a lengthy judgment during the course of which he stated (at p. 305, while dealing with the issue known as "the *Lemenda* point", which concerned contracts for influence, not bribery) that:

> "The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the arbitral tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view."

96. As to the fraud amendment he said at p 309:

> "I would … agree with the judge that 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."

97. On both these points the other members of the Court of Appeal agreed with his reasoning. It was on bribery that they parted company. Here Waller LJ expressed the view at pp. 311 and 314:

> "[311] although normally at the enforcement stage a party who brings an action on the award will be estopped from attempting to re-argue the points on which he has lost the arbitration … there are exceptional circumstances where the court will not allow reliance on an estoppel….
>
> [314]…there will be circumstances in which, despite the prima facie position of an award preventing a party reopening matters either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators, the English court will allow a re-opening. The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should *prima facie* exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused. It is for those reasons that the nature of the illegality is a factor, the strength of case that there was illegality also is a factor, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal is a factor."

98. He then went on to conclude:

> "I have reached a different conclusion to that of the judge. I disagree with him as to the appropriate level of opprobrium at which to place commercial corruption. It seems to me that the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in M.M.'s affidavit are correct, is within that bracket recognised … as being based on public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world. I believe it important that the English court is not seen to be turning a blind eye to corruption on this scale. I believe that if unanswered the case at present made on M.M.'s affidavit would be conclusive against *Westacre* being entitled to enforce the agreement and thus the award as a matter of English public policy. I also believe that the judge did not sufficiently consider the extent to which the case now presented on bribery was examined by the arbitration tribunal. When one examines the circumstances of this case one can see that in truth

> the bribery issue has not been ventilated properly before the Swiss arbitral tribunal."

99. Mantell LJ took a different view both as a matter of analysis of the facts, but also application of the authorities:

> "It is of crucial importance to evaluate both the majority decision in the arbitration and the ruling of the Swiss Federal Tribunal, Swiss Law being both the proper law of the contract and the curial law of the arbitration and Switzerland, like the United Kingdom, being a party to the New York Convention. From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected… Authority apart in those circumstances I would have thought that there could be no justification for refusing to enforce the award..
>
> … in *Soleimany v. Soleimany* [1999] Q.B. 785, 800, it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever 'there is *prima facie* evidence from one side that the award is based on an illegal contract . . .'. For my part I have some difficulty with the concept and even greater concerns about its application in practice, but,.., it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to reopen the facts should be rebuffed. I so conclude by reference to the criteria given by way of example in *Soleimany v. Soleimany* itself. First, there was evidence before the tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award."

100. Sir David Hirst "entirely" agreed with Mantell LJ (indicating that he agreed as to whether it was open to the defendants to challenge the arbitrators' findings) and said that if the second question, as to whether enforcement should be allowed, had arisen, he would have answered it exactly as Colman J did.

101. The result is that there is actually no clear statement of principle in this area by the Court of Appeal. The decision of the majority in *Westacre* is effectively that the award is upheld because on the facts the majority concluded that the issue had been "*made, entertained and rejected*" by the tribunal. The *obiter* approach of the Court of Appeal in *Soleimany* was doubted, but no alternative approach was given.

102. The case of *R v V* is cited by Dicey and was referred to in passing in argument. That was a case concerning a consultancy in Libya, where the issue was whether the contract was one for personal influence. The Tribunal had held that R had failed to establish that the agreement or performance of it were illegal under Libyan law or violated public policy. Steel J considered *Westacre* and *Soleimany*, noting the difficulty of fitting together the judgments of the Court of Appeal in *Westacre*. Dealing with the *Westacre* Court of Appeal's doubts over the *Soleimany* Court of Appeal's approach, he went on to say:

> "The difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go. That must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference). Even assuming it is appropriate in the present application to conduct some form of assessment ...."

He then nonetheless went on to assess the question by reference to the *Soleimany* criteria, arriving at the conclusion that a reopening should not be allowed.

103. Finally in this context regard should be had to *RBRG Trading v Sinocore* [2018] EWCA Civ 838. That was a case where the unsuccessful party in an arbitration, RBRG, applied to set aside the order on the ground that enforcement would be contrary to public policy, as Sinocore's claim was based on forged bills of lading. Hamblen LJ, giving the judgment of the Court, stated at [25]:

> " (2) Where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts the English court should not allow the facts to be re-opened, save possibly in exceptional circumstances. In this connection, I consider that the views expressed on this issue by the majority of the court in *Westacre* are to be preferred to those

> put forward by Waller LJ in the same case and in *Soleimany*….
>
> As Mustill & Boyd comment … 'the opinion of the majority accords best with the principles of international arbitration and the great importance to international commerce of trusting foreign arbitrators and the courts of the forum, even in cases where the judge called on to enforce the award has grounds for concern'…
>
> (3) Where, on the facts found, there is no illegality under the governing law but there is illegality under English law, public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely domestic public policy….
>
> 4) In considering whether and, if so, to what extent public policy is engaged the degree of connection between the claim sought to be enforced and the relevant illegality will be important."

104. Despite what might be considered the deficiencies of the *Westacre* approach, the position on the authorities is therefore that it has recent eminent endorsement, albeit that endorsement does not form part of the ratio in *RBRG.*

105. Reverting to the two legal questions under this heading I conclude that:

    1) The authorities demonstrate that where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts, there is very nearly no scope for this Court to re-open the issue of illegality. The general rule is that the Court will not do so; though it remains conceptually possible that it might be done in exceptional circumstances.

    2) That result is probably best regarded as a position reached as a result of performing an overall balancing exercise between public policy in favour of finality and public policy against illegality; but it will in general preclude the need for the Court to perform a detailed balancing exercise in an individual case falling within this category.

    3) To that extent the summary in Dicey at paragraph 16-150 (which pre-dates *RBRG,* and which is also summarising across

the entire range of cases) is in broad terms accurate, but is less clear than it might be.

4) The basis for the court's approach of nearly always refusing to revisit an issue decided by the foreign tribunal is primarily grounded in the very great importance given to respecting the decision of international arbitration tribunals and foreign courts (taken together with the public policy in favour of finality). There are also however, as Steel J noted, practical issues with delimiting when an inquiry should be made, if the *Soleimany* approach were taken.

Was there a determination on the facts?

106. The first question for the purposes of this case is whether the Arbitral Tribunal determined the relevant question of bribery "on the facts" so as to bring this within the category alluded to by Hamblen LJ. In the end, although I can well see how another conclusion could be reached, I am persuaded that it should not be considered such a determination.

107. That question is one which in argument was primarily addressed by reference to *Westacre.* However that approach itself appears at its heart to be a manifestation of a form of issue estoppel analysis. Because the question of what *"on the facts"* means here is less obvious than it is in some cases, it is worth recalling the analysis of such questions in the broader issue estoppel context. Issue estoppel of course applies where "*an issue in the second proceedings is the same as one decided in or covered by the first*": Spencer Bower & Handley, *Res Judicata* paragraph 8.19.

108. Or, as Lord Keith said in *Arnold v National Westminster Bank plc (No 1)* [1991] 2 AC 93 (HL), (p.105D-E):

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."

109. The classic exposition of the test is that of Clarke LJ in *The Good Challenger* [2004] 1 Lloyd's Rep. 67 at [50]:

> "The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a

> foreign Court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings …"

110. The question which the authorities in this area beg, and which is acutely significant in this case, is what attitude this court takes to a determination by a foreign court or the parties' chosen tribunal according to a system of law which recognises the same issue but applies a significantly higher burden of proof than this court would. In other words, does the requirement for identity of issue require the issue to be defined in a way which includes the standard of proof?

111. I conclude that despite the caution which this Court adopts in its approach to looking again at issues which were before the tribunal, there is an at least balancing requirement for caution that one does not equate issues which are not truly equivalent. This is for two reasons. The first is that the authorities on issue estoppel are clear that care must be taken in establishing that the issue is the same. I have in mind here the *dicta* of Lords Reid at pp. 918–9 and Wilberforce at p. 967 in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, and also Lord Clarke in *The Good Challenger* at [54] "*The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.*" The same rigour must apply in this area where a quasi-issue estoppel approach is adopted.

112. The second is that this approach to identification may well be thought to be the more important where what is in issue is not simply a contractual argument but the question of public policy; this concerns matters so serious as to have given rise to a specific exception under the New York Convention. While upholding the policy in favour of enforcement, it is important not to stifle the right to legitimate challenge.

113. A further point is that while none of the authorities casts the question of identity of issue in terms of one which includes, as a necessary component for identity of issue, the standard of proof, and while it is obviously possible that to recognise a distinction based on standard of proof might in some cases seem to offend against comity, such that one would not expect broadly similar standards of proof to prevent an issue being recognised as the

same; there comes a point at which an issue subject to a significantly different standard of proof becomes a different issue.

114. So if a particular governing law required proof to a standard of 99% certainty in cases of bribery, and a tribunal found bribery proved to a 60% level but not to a 99% level, would it be right from this court's perspective to say that the issue of bribery had been decided against the party? Such a conclusion would appear very uncomfortable (as with the *Soleimany* situation). Perhaps equally so would be the case where because of the requirement for 99% certainty, the Tribunal rejected the argument without detailed evaluation of the evidence. This case has on its face the hallmarks of such a situation, though the facts are not entirely clear and less extreme.

115. In this case the Tribunal identified (broadly) the issue of bribery ("*if there is evidence or arguments for corruption*") as one which it had to determine. Plainly bribery in a broad sense was in issue. But the issue was not clearly the same. The difference is that the question (whether as posed by the parties or as assessed by the Tribunal) was not squarely whether on the facts there was bribery. Hence the witnesses were not cross-examined on that issue.

116. The facts outlined above and the Tribunal's lengthy determination make it quite clear that the parties engaged with the question of the relevance of any case of bribery to the right to be paid, and that the issue of suspected bribery was, at least at an early stage, seen as a key part of Alstom's defence. It remained, as I have noted, a live issue, albeit that the centre of gravity shifted towards the contractual analysis. If this was not in issue there would be no need to be any consideration of the position under Swiss Law. And no complaint was ever made that the Tribunal misconducted itself by deciding the issue as defined by it.

117. But it is the approach of the Tribunal which is key. It is true that the Tribunal plainly considered that it was its duty to evaluate whether Swiss Law gave rise to a defence based on illegality and to identify which limb of that doctrine could be applicable here. It also considered it was its duty to consider what evidence there was which could be relevant to such a decision. However there was no detailed consideration of the evidence (though there was some - for example in relation to the value of the audit report).

118. The absence of detailed consideration of the evidence was simply because it was apparent, without going any further, that (as Alstom effectively conceded) the suspicions and inferences relied on could not meet the high standard of proof under Swiss Law. So the Tribunal said: (i) there is a defence which could be applicable (ii) it

requires evidence to prove it to a high standard (iii) the evidence adduced is not strong and does not come close to doing so. The decision was not divorced from the facts; but it did not enter into a detailed evaluation of the facts because the standard of proof made that a pointless exercise.

119. I do not of course forget that Alstom's position on whether the issue was before the Tribunal has previously been somewhat different. The question of this issue forming part of the defence does not seem to have been disputed before now. In the Swiss Court's judgment it refers to "*an implicit allegation of corruption aimed at the respondent*".

120. Further the submissions of Alstom in the Paris Cour d'Appel seem broadly to accept that the point was in issue. The submissions made clear that Alstom "*had pointed out the existence of worrying elements possibly evidencing corruption … Such evidence contributed to the refusal to pay the compensation claimed by Alexander Brothers in accordance with the ALSTOM Group's E&C Policy*". This shows that the evidence was seen by Alstom as having been relied on as a reason why Alstom should not have to pay. As such it was relied on as part of a defence, albeit as a matter of contract. Those submissions also stated as one of the "*Disputed Reasons for the Award*" that "*the Award considered that there was no evidence of corrupt practices on the part of Alexander Brothers.*" In other words it appears to be being said that the Tribunal got it wrong by considering there was no such evidence (i.e. a factual determination). It also (consistently with this) said that "*the Arbitral Tribunal did not properly discern the seriousness of the evidence brought to its attention by the ALSTOM companies.*" Again the criticism of the Tribunal relates at least on one level to its evaluation of the facts.

121. Yet all of these are, in a sense, submissions made on a broad brush level and are perfectly well seen as referable to the aspects of Alstom's contractual case which were based on the ethics issues, and which did not involve a positive case of bribery, though they relied on much of the evidence which would be pertinent to such a case.

122. Here, because of the consequences, precision is centrally important. There are two aspects of concern: the actual issue considered and the standard of proof. As to the first, the submissions nowhere accept that the Tribunal evaluated the bribery argument as a positive argument on the facts. A detailed consideration of the issues demonstrates a cross-over of concept but not true identity of issue. As to the second, there is an indication in the Award that to the extent the Tribunal was considering bribery, it was applying a significantly higher standard of proof.

123. Thus despite these points, I regard the conclusion that the same point was determined *"on the facts"* by the Tribunal as unrealistic and, for the reasons given above, contrary to principle. Bearing in mind the need for caution, the requirement of showing the requisite identity of issue is not made out.

124. This view may gain some support, albeit tangential, from the authorities noted by Sir Michael Burton GBE in *Super Max v Malhotra* [2020] EWHC 1023 (Comm) at [122]:

> "A negative finding in the foreign court, such as a failure to establish something on the balance of probabilities, may not be as readily determined to create res judicata or an issue estoppel as a positive finding (Moss v Anglo-Egyptian Navigation Company (1865–66) LR 1 Ch App 108 , Blair v Curran (1939) 62 CLR 464 , The Popi M [1985] 1 WLR 948 and Kuligowski v Metrobus [2004] 220 CLR 363)."

125. I have of course given careful thought to the analogy of *Westacre,* not least because I ultimately find myself echoing the reasons given by Waller LJ dissenting in that case - in concluding that because of the difference of the question asked and the process followed to answer it, the key issue was not *"properly ventilated"*.

126. I have considered whether I am effectively driven by the approach of the majority (and of Colman J) in that case to a different conclusion. I conclude that I am not. *Westacre* was ultimately decided on its facts and not on the law and the facts have sufficient distinctions to permit of a different conclusion.

127. As I have noted, the present case has some striking similarities to *Westacre*. In that case it was (*pace* Mantell LJ) something of a stretch to say that bribery (as opposed to "*alleged illicit activities*", covering both bribery and influence) was a central issue; though a bribery case was as he said, made, entertained and rejected. In that case as in this, the issue was live in the Tribunal's mind, and failed by a long distance in circumstances where there was a heavy burden of proof under Swiss Law.

128. However ultimately I consider that the cases are distinguishable on the facts. In particular in *Westacre* the case was more positively and overtly made such that the issue of bribery was truly live on the facts; here it was made tacitly, by an approach inviting a reversal of the burden of proof and the deployment of relevant evidence in the

context of contractual submissions and by failure to withdraw the original issue.

129. But also in *Westacre* the rejection of the bribery issue was due to a consideration that the evidence was insufficient, not versus the burden of proof, but in circumstances where it was run at a late stage offering no chance to test the evidence fully. Also the findings on the evidence in *Westacre* include a finding that the evidence was speculative, which is a finding which resonates with a failed balance of probabilities test, as well as a failure of the higher hurdle imposed by Swiss Law.

130. I accordingly conclude that the present case should be treated as one where the relevant issue was not decided on the facts by the Tribunal.

The significance of failure to make the case before the Tribunal

131. On this there was some debate between the parties as to what the authorities said. Mr Harris for ABL submitted that *Westacre* effectively determined that the same principles applied and that even if the issue had not been decided, as Alstom could have raised the issue of bribery as a positive issue, Alstom would equally be shut out on this basis.

132. This was by reference to *Westacre*, p. 309 (as applied in *Honeywell International Middle East Ltd v Meydan Group* [2014] EWHC 1344, [89]) and *Westacre*, p. 314, where it was stated that the rule applies to prevent a party re-opening matters "*either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators*". Alstom contended that this approach involved a misreading of the authorities.

133. On this I accept the submission made on behalf of Alstom that there is no magic and no hard and fast rule to be found in those authorities. The reference to *Westacre* at p. 309 is one which relates specifically to the test on adducing evidence that the award was obtained by fraud, and thus does not read across directly (though of course both types of case are sub-types of the section 103(3) application, and one should not expect a markedly dissimilar approach). The reference at p. 314 merely records the *prima facie* position. As for *Honeywell*, I am of the view that the reference there is to a passage which (i) is *obiter*, the decision having already been made slightly earlier in the judgment and (ii) it takes the *Westacre* citation out of context. I am therefore not minded to follow it.

134. The legally correct approach to this is therefore one which the authorities take as being based on the estoppel authorities deriving from *Henderson v Henderson (1843)* 3 Hare 100, with appropriate

qualification for the fact that the issue is one of public policy (see Colman J in *Westacre* at p. 771).

135. Perhaps the best modern statement of that doctrine is to be found in *Johnson v Gore Wood* [2002] 2 AC 1 by Lord Bingham at 30-31:

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: …. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, … It is, however, 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. That is to adopt too dogmatic an approach to what should in my opinion be 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, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. …."

136. While a broad merits based approach must therefore be taken, and (as Lord Millett's speech in the same case makes clear) there is no presumption against the bringing of successive actions, the balancing exercise at this stage is one which puts into the equation, along with the public policy in favour of enforcement generally, the specific public policy against re-litigation.

137. Nor is the balancing exercise one which is taken in a vacuum or *de novo*, because this question has arisen in more or less this context in other cases. So it formed one basis for the decision of Colman J in *Westacre,* who touched on *Henderson v Henderson* at p. 771. In that case he concluded that the public policy in favour of enforcement outweighed the public policy in favour of discouraging international commercial corruption.

138. That conclusion is in line with the approach taken in *R v V* where Steel J considered that the fact that the applicant "*does not seek to deploy new evidence, let alone evidence that was not available at the time of the arbitration*", was a highly relevant factor, weighing very strongly in favour of granting enforcement.

139. The issue was also alluded to in *Honeywell* where Ramsey J said at [72]:

> "Given the limited grounds upon which the court may refuse to enforce a New York Convention award then, in applying the principles relevant to summary judgment and striking out, the court needs to assess what is put before it with a critical eye. In particular where a party has not raised a matter which they could have raised before the arbitral tribunal or where they have taken inconsistent positions to those they now urge upon the court, the court should not lightly accede to a submission that the matter needs to be determined at a trial where the underlying reason is often to cause further delay and costs in the hope that something may turn up either to strengthen an existing ground or to establish a new ground."

140. Even absent authority I should be minded to come to the conclusion that the saving of the bribery issue to the enforcement stages, rather than bringing it properly forward before the arbitral tribunal *prima facie* falls on the side of being abusive, rather than excusable. In the light of this authority, that this should be the starting point seems clear.

141. What is however more troublesome is the question of how the different attitudes to the public policy question between the law of the arbitration and the law of the enforcing court to which I have alluded above should be regarded in this context. What if the party seeking to resist enforcement has not run the point because the law of the arbitration makes the point hopeless?

142. While it is of course the case that the burden falls on the party relying on the *Henderson* principle to establish abuse, a deliberate decision not to take a point when it can be taken is *prima facie* abusive. Choosing the forum in which to bring a particular point so as to maximise chances of success, rather than bringing all arguments at once in the same (here contractually selected) forum, is a classic case of deliberate abusive behaviour which will generally result in a finding of *Henderson* abuse.

143. This aspect goes back to the original formulation of the point in *Henderson* itself, where Wigram V-C referred to "*every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time …*". It is echoed in the speech of Sir Thomas Bingham MR in *Barrow v Bankside Members Agency* [1996] 1 WLR 257 (CA), (p.260A-C):

> "In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion, but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

144. To similar effect is Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [22]:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

145. But the conclusion as to abuse will of course be subject to an assessment of whether "*could … and should*" are both present. There may be a good reason which means that an argument which could have been taken is not an argument which should have been taken. For example, as Colman J noted in *Minmetals* at p. 661, in the context of relitigating issues taken before the supervisory Court: "*there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so*". It seems to me only logical that the same argument should apply equally to failure to take a point before the original tribunal.

146. Thus if there were genuinely no point in taking a particular argument before the tribunal one might (depending on the reasons for that) conclude that there was a good reason for not doing so, such that one could not say that the point "should" have been taken. Going back, for example, to the 99% standard of proof example which I gave earlier, such a situation might, it seems to me, qualify.

147. But in a situation where it is clear that the point could have been taken, the burden effectively shifts to the party seeking to raise that point for the first time on enforcement, to explain why that point was not taken so that the Court can assess the question of "should". The requirement of "*could and should*" from the *Henderson* authorities in this context drives the requirement for a good reason. The significance of an explanation for the failure to pursue all points can be seen for example in *Playboy Club London Limited v Banca Nazionale De Lavoro Spa* [2018] EWCA Civ 2025. There the party seeking to make the new case explained in considerable detail that the case which was not run at trial was one where evidence only came to hand very late in the day, and pursuing it would have derailed a long-scheduled trial.

148. Mr Gledhill QC submits (by reference to the *Henderson* point) that I should be cautious about reaching the conclusion that someone in Alstom's position cannot succeed, because if the law was that whenever an issue was not raised before a tribunal, then a party is barred absolutely from raising it at enforcement, that would, in reality, be elevating the policy of upholding awards and finality permanently above illegality. But of course that is not the law. As I have indicated above, a party who has not raised an issue may be in a position to show that it does not fail the "*could and should"* test. In this case I conclude that Alstom does fail that test.

149. Here the tacit case was that Alstom chose not to run a fully-fledged illegality case before the Tribunal because there would, in effect, be no point. That was accepted in submissions by Mr Gledhill, who agreed that Alstom *"said [in the arbitration] it was not in a position to advance a bribery case that would meet the Swiss standard of proof that applied"*. The problem is that this decision has not been grappled with properly in evidence. There has been no explanation at all of what the Swiss Law standard of proof means in terms of how far it diverges from the balance of probabilities, no formal confirmation why the point was not squarely taken before the Tribunal or explanation, by reference to this evidence, of how it is said that there was no point in raising it such that this case should fall outside *Henderson* principles.

150. Thus, bribery being an issue which it seems plain could with reasonable diligence have been brought before the Swiss Tribunal for a determination on the factual evidence, and the argument

being based on exactly the same material as was before that Tribunal, and there being no explanation for why it was not so taken, it follows that Alstom will (absent some other "*special circumstances which would cause injustice*") be barred from raising this point. There would need to be some very good reason indeed why Alstom should be allowed two bites of the cherry.

151. Mr Gledhill argued (by reference to the "*exceptional circumstances*" exception which remains where a point has been run, but unsuccessfully) that this hurdle was met. The basis for this was that what is in issue here is "*the most serious kind of illegality… that there is a worldwide, near-universal public policy against*".

152. Before me Alstom referenced the following points in this regard:

    1) There is a strong English public policy against corruption and bribery, which has strengthened considerably in recent years and is embodied in part in the Bribery Act 2010.

    2) The United Kingdom being party to the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions and the United Nations Convention against Corruption.

    3) The Bribery Act 2010, which came into force on 1 July 2011, was the product of a considered reform process arising out of an international consensus against bribery, which developed in earnest in the 1990s.

    4) The Bribery Act makes it an offence to bribe foreign public officials (section 6) and by section 7 imposes on commercial organisations a form of strict liability for bribery by their associates, subject to a defence of having adequate procedures to prevent bribery.

    5) The Proceeds of Crime Act 2002 also embodies the English public policy against corruption.

    6) The Bribery Act and the Proceeds of Crime Act take a much stricter and more far-reaching approach to corruption, including international corruption, than the previous law.

153. It was passionately argued for Alstom that the English Court should not enforce an Award where the corruption could be established on the facts, and this would be entirely contrary to the expectation of the reasonable man as well as contrary to the approach evidenced by such documents as the OECD Convention. While as a submission it has a compelling sound, in my judgment on analysis it adopts entirely too broad a brush in relation to a delicate question.

154. At this point it is worth reverting to the *Lemenda* argument, because that is one which has involved a consideration of where English public policy stands in the context of prior determinations by the curial court and hence a weighing of seriousness and importance of the various aspects of public policy which can arise. As Colman J put it, with characteristic clarity:

> "The comment[1] that it was 'questionable whether the moral principles involved [were] so weighty as to lead an English court to refuse to enforce an agreement regardless of the country of performance and regardless of the attitude of that country to such a practice' is one which is, in my judgment, if anything, somewhat understated. Outside the field of such universally-condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia, it is difficult to see why anything short of corruption or fraud in international commerce should invite the attention of English public policy in relation to contracts which are not performed within the jurisdiction of the English courts. That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve an unjustifiable in-road into the principle of *pacta sunt servanda*."

155. Alstom naturally points to the reference to corruption as being in the "*universally condemned*" category. However the decision of the Court of Appeal on that point lends further clarity:

> "… albeit the award is not isolated from the underlying contract, it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as

[1] A reference to the judgment of Phillips J in *Lemenda*

> there may be, have been considered by the arbitral tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view."

156. That indicates that this Court will not, at the stage of enforcement, effectively prioritise English public policy over that of the public policy of the seat, unless: (i) on the facts as they appear from the award the underlying contract infringes one of those rules of public policy where the English Court would not enforce regardless of its proper law or place of performance or; (ii) failing to do so would also fail in comity towards the place of performance. This, it seems to me, is not irrelevant in understanding the line which the Courts here have taken. It also harmonises with the decision in *Soleimany* which was a case where something which one might call universally recognised illegality (contract to breach a foreign law) was clear from the face of the award, even if the Tribunal had not considered it.

157. The first aspect to consider is the situation in which the allegations are so serious that the Court would act, regardless of the determination of the curial court. In *RBRG* Hamblen LJ referred to where the illegality reflects considerations of international public policy and cited Phillips J in *Lemenda* referring to "*universal principles of morality*". Plainly that is right. It may even slightly understate the case, since it is highly dubious that this court would enforce awards upholding some types of contracts, even if another court might, and so the rule of public policy could not be said to be (quite) universal.

158. So if the parties had agreed to an arbitration pursuant to the law of the country of Erewhon, and Erewhon was a place where contract killing, or slavery, or terrorism were perfectly legal, it could not be said that the international position was universal, but this Court would doubtless still refuse to enforce an award which upheld a contract in any of those trades. As was said in *Soleimany:*

> "..it is in our view inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers, any more than it would enforce an agreement between highwaymen, *Everet v. Williams* (unreported): see

> Lindley on Partnership, 13th ed. (1971), p. 130, note 23[2].”

159. Of course, as I have said, corruption is mentioned by Colman J as falling within this category. But to take a “*one size fits all*” approach to corruption is to elide a number of different possibilities of differing degrees of seriousness. The next question is how the authorities treat these different possibilities. The authorities seem to indicate that a contract to bribe (i.e. with the intention of bribing) foreign public officials would be one which this court would not enforce. So too, but less clearly, would I expect it to treat a contract to bribe outside the sphere of public officials (e.g. a contract specifically to obtain valuable trade secrets by bribing an employee of a competing company). However while what is in this case sought to be prayed in aid is a case on bribery of public officials, and hence at the serious end of the subject matter scale, it is what one might call incidental bribery - not planned, not contracted for, not suspected. My conclusion is that this is something which is probably regarded as somewhat less serious.

160. What is in issue here may be a form of corruption, but it is therefore not the most acute form where a contract is a contract with the purpose of bribery. The distinction based on the nature of the illegality was a point remarked on in *Soleimany*, where illegality based on intent to commit an illegal act in the place of performance was the nature of the public policy trigger. It is also worthy of note that one basis for Waller LJ's disagreement with Colman J in *Westacre* was the nature of the illegality in that case: he referred to “*a corrupt bargain of the nature of this agreement*” and to “*corruption on this scale*”.

161. The extent to which this is relevant may be contentious. *Westacre* provides no clear guide. Waller LJ in *Westacre* suggested that regard should be had to the nature of the illegality, the strength of the case on illegality and the extent to which the asserted illegality was addressed by the Arbitral Tribunal. While the majority in *Westacre* concluded *obiter* that the seriousness of the allegation should not be a factor, they did not make clear whether they were speaking of the nature of the allegation or the strength of the case being made.

162. The better view appears to be that the type of corruption may be of significance. In *RBRG* Hamblen LJ noted that “*Whilst recognising that an award enforcing a contract to bribe would not be enforced, the courts have enforced awards where it has been alleged that the underlying contract has been procured by bribery.*” He went on to cite *Wilson v Hurstanger* [2007] 1 WLR 2351 and *National Iranian*

[2] Also discussed at pp. 76–8 of Sir Robert Megarry's first Miscellany-At-Law (1955)

Oil v Crescent Petroleum [2016] 2 Lloyd's Rep 147 where Burton J at [49] in the context of a failed attempt to bribe:

> "(1) English public policy applies so as to lead a court to refuse to enforce an illegal contract, even if not illegal at relevant foreign law, such as a contract to pay a bribe. The contract cannot be enforced because ex *turpi causa haud oritur actio*: out of a disgraceful cause an action cannot arise. The supply contract enforced by the Arbitrators was not and is not suggested to be an illegal contract, and the action to enforce it does not arise out of a disgraceful cause.
>
> (2) There is no English public policy requiring a court to refuse to enforce a contract procured by bribery. A court might decide to enforce the contract at the instance of one of the parties. It is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other.
>
> (3) There is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe, on the basis that such contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct…"

163. This was also a point accepted (obiter) by Ramsey J in *Honeywell* who said at [185]: "*whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which had been procured by bribes are not unenforceable*".

164. That line of authority obviously has a resonance here, though not a direct application, because it is not the contract procured by the supposed bribe which is in question, but the contract to do a legitimate thing which is said to have been done in part by bribery – and possibly procuring another contract by bribery. However it would seem odd if the contract procured by bribery could stand, whereas a contract to do something which could have been done legitimately, but was incidentally done with the use of bribery, should be unenforceable.

165. I therefore come to the conclusion that, based on the line discernible in the authorities to date, there are no overriding special

circumstances in this case based on the nature of the wrongdoing alleged, which would allow this court to consider a bribery case which was apparently deliberately not taken before the parties' chosen tribunal in ICC arbitration.

166. Further, though there seem to be doubts whether this can properly be a factor which can give rise to special/exceptional circumstances, it cannot be said that this is a case where (absent any established issue estoppel based on the French court decision) corruption is clear on the facts - or indeed that the evidence presented is particularly strong. In this there is a contrast with *Westacre* - where it is recorded that if the allegations made were proved it was common ground that contract would have been a contract to pay a bribe, and that enforcement should be refused, before being summed up at p. 315C "*if unanswered the case … would be conclusive*".

167. The position on the facts here is that there are a number of allegations made, which have been the subject of detailed evidence in the arbitrations. I summarise the main points relied on by Alstom and give a brief assessment of their value based on the evidence I have seen, thus:

    1) *ABL was an offshore shell company whose only income was the substantial payments under the Consultancy Agreements*: Offshore status is hardly unusual. Nor is a start-up company having only one client. The business was significant in value and significant fees would not be out of place.

    2) *The sole individual who provided the services was Ms Guo Qi*: As she was a consultant of a small start-up company, this is hardly sinister.

    3) *The services appear to have no real substance, particularly when compared to the contractual obligations and the large size of the sums claimed*: There was no complaint about the substance of the services. Ms Guo Qi seems to have been sought by Alstom because of her previous work for them, and because of her connections. It was never denied that her services led to Alstom winning contracts worth €1 billion in sales. Alstom had a "rigorous and lengthy" due diligence process before the contracts were agreed.

    4) *ABL spent very significant amounts on entertainment and other expenses for which there is no transparency as to what was spent on whom and why*: Proof of services is a question which the Tribunal went into very thoroughly because of the fact that it was the heart of the contractual case. The contracts did not

all have the same requirements. The Tribunal, having weighed all the evidence, concluded there were sufficient proofs of services for two contracts, but not the third. As for expenses, a lack of transparency does not denote bribery – and the sums in question € 30-50,000 do not seem to be of the size which might themselves lead to questions.

5) *ABL's accounts show that it paid €280,000 to SITICO, a state-owned company, pursuant to an undisclosed contract, which was entered into just before Consultancy Agreement No. 1*: The reason why this was in issue in the arbitration was not about corruption, but deceit. Alstom claimed this was unauthorised sub-contracting. The connection between this contract and an inference of corruption is hard to discern.

6) *Ms Guo Qi reversed her position on the SITICO contract*: The connection to corruption is not clear. This seems inadequate to provide any basis for an inference of entirely unrelated corruption.

7) *It is unclear what (if anything) SITICO did for the €280,000 it received from ABL and whether SITICO or individuals connected to it received further financial benefits from ABL e.g. via what are recorded as expenses in ABL's accounts*: As the SITICO contract does not relate to any of the Agreements it can provide no basis for an inference of corruption in the execution of those contracts.

8) *A SITICO manager, who was employed at the relevant time, was convicted in 2016 of bribery and corruption offences*: The conviction related to matters which had no connection with either ABL or Alstom and provides no evidence of corruption in connection with the relevant contracts.

9) *ABL obtained sensitive and confidential documents and information from officials connected to the Chinese Ministry of Railways and has repeatedly declined to provide any cogent explanation as to how it came to obtain them*: This is an area where ABL's evidence appears to be thin and explanations have not been consistent, as the Paris Cour d'Appel noted. Such documents might well, however, have been obtained without bribery. For example, the explanation given that there was a leak by the Chinese Government to "encourage" the most competitive bids is far from impossible.

10) *Two very senior officials with whom Ms Guo Qi dealt were later convicted of crimes relating to bribery and corruption in the relevant period*: However those convictions had nothing to do with Alstom, ABL or these contracts.

11) *ABL was able to influence the award of Chinese government contracts to the benefit of Alstom*: However this was the very service for which ABL was retained. Further the specific piece of influence is clearly explained as a legitimate piece of commercial persuasion as outlined above.

168. This is of course only a very basic summary because the facts were not primarily in issue. I cover this point solely lest the question of the strength of the evidence be thought to be relevant to the assessment of special circumstances (which the authorities seem to suggest it is not).

169. But the overall impression is that there is really very little indeed - apart from the inadequate explanation for access to confidential documents - which looks to be of any concern. In the result if the case had been argued (as it was not) on the merits, with the question being about whether this evidence disclosed a real (as opposed to fanciful) prospect of success on a section 103 application, my provisional view is that I would have hesitated to conclude that it met even that not very high hurdle. It is not, as was submitted, a strong *prima facie* case of bribery, and certainly the merits do not appear to be of that compelling type which might conceivably be considered "special circumstances".

170. Nor do I consider that issues of comity have a part to play in Alstom's favour here. It was submitted that they do, in that the Court would be enforcing an award to pay sums due under a contract that has been performed in a way which is illegal in both France and China. That appears to overstate the case. The Paris Cour d'Appel has held that there are "*serious, precise and consistent indicia of bribery*" and refused enforcement under French law. Unless there is an issue estoppel - a point which I consider below - I do not consider that for this Court to make a contrary Order could rightfully be considered such a "*just cause for complaint*" so as to raise public policy concerns. Further I find the evidence that if there was no agreement to bribe (which no-one alleges there is) and Alstom had no knowledge of the bribes and make the payment for the purposes of complying with a court order there would be no criminal exposure persuasive. This is the more so when the Paris Court is just another enforcement court and not the supervisory court.

171. As for the contention that if this Court orders Alstom to make payments under the Award and it does so, Alstom would be exposed to "*an obvious risk*" of prosecution in France, the basis for this assertion, given the existence of the Award, upheld by the supervising Court, appeared to me to be insufficient. As for the submission as to illegality in China, this was a submission based solely on the accession of China to the UN Convention.

172. Ultimately there was a tacit acknowledgement in Mr Gledhill's submissions that the authorities in this area were not in his favour. He suggested that the courts over the past 20 years had taken too loose a view, "*bending over backwards almost to enforce awards*" and hinted that the approach in *Westacre* was due to be updated, in the light of the fact that public policy is not immutable and that attitudes generally to corruption have undergone a change in that period. The submission was that if one used the touchstone of offensiveness to the ordinary, reasonable and fully informed member of the public (derived from the judgment of Donaldson MR in *Deutsche Schactbau v. Shell International Petroleum* [1990] 1 AC 295) the answer as to whether enforcement should be refused, or at least considered at a trial, could not fail to be in Alstom's favour.

173. I have considered the question of the mutability of public policy sensitivities. I accept that public policy is not immutable and that attitudes to corruption have changed somewhat in the twenty odd years which have elapsed since *Westacre* and *Soleimany*. It may be that the Court might now in some cases draw the line in a slightly different place. However, I am not persuaded that this is a factor which operates here, given the particular facts of this case. In particular, the line which one can see on enforceability of contracts procured by bribery has been noted without disapproval as recently as *RBRG v Sinocore* in 2018. Further as I note below in relation to the EU Law argument, there is a lack of consensus as to a rules-based approach to this particular area of corruption. That would seem to reinforce the conclusion that this sub-type of corruption argument probably does not reach the near universal level.

174. This is a case where the parties agreed a contractual forum - an ICC tribunal under Swiss Law. Alstom had in its mind, and had the materials for, a bribery case which therefore *prima facie* could and should have been brought before that Tribunal. There is no explanation for why this was not done. The allegation which is sought to be made is a serious one which engages concerns about corruption, and perhaps more so now than would have been the case in the early years of this century; but it is still not an allegation of the most serious type within that umbrella or one where one can point to a consensus that such contracts should fail. Nor is it a case where the evidence now relied on is particularly strong; indeed the case advanced remains entirely unspecific and based on suspicions and inferences.

175. It follows that regardless of whether one were looking for exceptional reasons to allow reconsideration of a case determined by the Tribunal or the special circumstances referred to by Lord Sumption to enable consideration of a case which *"could and*

should" have been brought in the arbitration, the facts of this case do not meet either test.

176. I have obviously given thought to whether the decision of the Paris Cour D'Appel either alone or taken together with the other factors could elevate this case to one where the appropriate test were met. In particular, there is a question of whether, if the decision would otherwise create an issue estoppel, that would suffice. I conclude that short of establishing that the decision would create an issue estoppel the decision cannot enable Alstom to surmount the hurdle; were it to do so that might make a difference. But for the reasons given below this does not arise, because there would be no issue estoppel.

EU law on public policy and the enforcement of arbitral awards

177. Another principle upon which Alstom sought to rely was one of EU law. It submitted that where enforcement is resisted in England on the basis of public policy, if the underlying contract between the parties is contrary to either a fundamental provision of EU law, or contrary to EU public policy, enforcement of the Award must be refused under EU law. This is an argument which can be traced through the following authorities: Dicey paragraph 16-152; *Eco Swiss China Time Ltd v Benetton International NV Case C-126/ 97*, [1999] E.C.R. I-3055; *Claro v. Cenro Movil Milenium SA Case C-168/ 05*; [2006] ECR I-10421; *Accentuate Ltd v Asigra Inc* [2009] EWHC 2655 (QB).

178. The two key authorities here are *Eco Swiss* and *Claro*. In *Eco Swiss*, the issue in question was one of competition law as enshrined in the EU Treaty. The issue of competition law had not been raised in the arbitration. The Netherlands Court held that under Netherlands law the fact of a breach of competition law would not of itself make the award contrary to public policy. The European Court held to the contrary at [41] that:

> "a national court to which application is made for the annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy".

179. This conclusion was not affected by the New York Convention because the Court held at [39] that the provisions of Article 85 "*may be regarded as a matter of public policy*" within the meaning of the New York Convention. The European Court specifically took into account at [35] the fact that:

> "it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances".

180. *Claro* concerned a provision of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and held that it was of sufficient importance to be treated as a matter of public policy. The European Court decided that an award based on a contract that breached the Spanish law giving effect to the Directive had to be annulled. It held at [35] that a national court "*must*" grant an application to annul "*where it is founded on failure to comply with Community rules of [public policy]*".

181. *Accentuate* is cited as the sole case where a court in this jurisdiction has followed these authorities as part of the ratio of the decision. *Accentuate* was a case concerning the Commercial Agents (Council Directive) Regulations 1993, which transpose an EU Directive into English law. The issue concerned whether section 9(4) of the Arbitration Act had the effect of depriving a party of the benefit of the compensation regime in the Regulations. Tugendhat J at [77, 87] accepted the submission, based on *Eco Swiss* and *Claro*, that "*any arbitration award that offended against a mandatory rule of EU law would itself have to be refused recognition by national courts in Member States*".

182. I should add that I have myself, albeit *obiter*, followed *Eco-Swiss* and *Claro* in the context of the Software Directive in *SAS v WPL (Enforcement)* [2018] EWHC 3452 (Comm), [2019] F.S.R. 30 at [156] and following, concluding that: "*The authorities in the analogous area of competition law demonstrate that these are the type of policy reasons which justify refusing to enforce an arbitration award. They are therefore seen as matters which do at least in modern terms deal with a sufficiently fundamental or essential principle or norm.*"

183. The problem for Alstom here is not in persuading me of the validity of the approach in *Eco Swiss*, *Claro* and *Accentuate*, nor even that it is not limited to the specific EU law rules considered therein and has the capacity to apply to any sufficiently important mandatory rule of EU law or of EU public policy – albeit that arguments in this area will necessarily be scrupulously evaluated since the Court will be reluctant to undermine the policy in favour of enforcement of foreign judgments and awards.

184. The problem for Alstom is that in this context it is necessary for it to persuade me first that there is a mandatory rule of EU Law or EU

public policy. This it has failed to do. It has of course pointed me to the OECD Convention and the United Nations Convention and cites the fact that the EU is itself a signatory to the UN Convention against Corruption in its own right, as are all member states. It submits that the EU public policy against corruption also appears from the Council Framework Decision 2003/568 JHA of 22 July 2003 on combating corruption in the private sector. Recital (9) thereof states:

> "Member States attach particular importance to combating corruption in both the public and the private sector, in the belief that in both those sectors it poses a threat to a law-abiding society as well as distorting competition in relation to the purchase of goods or commercial services and impeding sound economic development …."

185. Alstom also reminds me that there have been large volumes of anti-money laundering legislation emanating from the EU in recent years including Directive 2015/849 (the 4th Anti-Money Laundering Directive). The 5th Money Laundering Directive came into force on 10 January 2020.

186. But in a sense this submission, and the range of material prayed in aid, only serves to make the point against Alstom. It is plain from this material that the EU has, in general terms, set its face against corruption. But aside from the area of money laundering it has not put in place mandatory laws or rules. In the context of international corruption of the kind in focus here it has left it to the individual member states to adopt what measures seem good to them. There is, in short, no applicable mandatory rule or public policy. I conclude without difficulty that the conditions for the operation of the rule in *Eco Swiss* are not made out by Alstom.

Issue Estoppel

187. At the time of the service of the evidence and the skeleton arguments Alstom accepted that the decision of the Paris Cour d'Appel was not binding on this Court. It resiled from this position the day before the hearing and sought to contend before me that an issue estoppel arises out of that decision.

188. Its pursuit of this point on very short notice was resisted by ABL, but I ruled that the question appeared to be essentially one of law and that I would hear argument *de bene esse*.

189. The basis of that argument is that there is a finding of fact by the Paris Cour d'Appel that the sums paid to ABL under the First and Second Consultancy Agreements were used by ABL to finance and

remunerate the bribery of public officials, and that that finding of fact is binding on ABL, and ABL is precluded from arguing the contrary in these proceedings on the basis of issue estoppel.

190. Reliance was placed on the leading statement on the subject, that of Clarke LJ in *The Good Challenger* [2004] 1 Lloyd's Rep. 67 at [50], to which I have already made reference. The issues here are really as to whether there is a final conclusive judgment on the merits on an issue where there is identity of subject matter. Although Mr Gledhill did an admirable job of attempting to demonstrate that there was, those arguments did not convince, particularly bearing in mind the caution to which I have alluded above which is necessary when determining that the requirements of an issue estoppel have been met.

191. The problem is that while Alstom carefully (and for obvious reasons: see *Minmetals* at p. 329) did not try to elide the issues of French and English public policy and establish an estoppel based on a decision as to public policy, the factual issue on which it sought to rely was one which is not clearly a factual determination and/or either not identical, or is infected with the public policy issue such as to preclude identity.

192. What Alstom seeks to rely on is the factual allegation made by Alstom as part of its case to satisfy the relevant factual criterion for the French public policy question in the context of refusing enforcement. So Alstom alleged in the French Proceedings: "*Alexander Brothers had used the remuneration paid by Alstom or expected under the Consultancy Contracts to pay or promise bribes to Chinese officials, without the knowledge of the Alstom companies, for the purpose of facilitating the award of the contracts pursuant to the relevant calls for tenders*".

193. That is certainly a factual allegation. That however is not what the French Court found, which is that the evidence "*provide[s] serious, precise and consistent indicia that the sums Alstom paid to ABL financed and remunerated the bribery of public officials*."

194. The first issue is that because of the way in which this point emerged at a very late stage I have no proper evidence as to what the Paris Court was doing and the nature of the test it was applying here, so as to enable me to be satisfied that it is making a factual determination on the merits. All I have is the translation of the decision of the Paris Cour d'Appel (which translation was never scrutinised with a view to the absolute precision of translation - as it might have been had the point been live earlier). That does not, on its terms, suggest to me that it has engaged in a determination of any such fact, rather the contrary. What the Court says is this:

> "Due to the concealed nature of acts of bribery, a contention that an arbitration award orders the payment of sums intended to finance corrupt acts may be reviewed by a court ruling on whether to grant exequatur solely on the basis of a set of *indicia*. Therefore the rights of the defence in this case concern the admissibility, under the rules of civil procedure, of the evidence produced by the appellant, the reality of the *indicia* and whether the *indicia* are sufficiently serious, precise and consistent, rather than precisely identified corrupt acts."

195. Further the Court also appears to disclaim any attempt to determine whether bribery has been committed, saying slightly earlier:

> "the Court does not have jurisdiction to determine whether a party to the arbitration committed bribery ... under the criminal laws of a national legal system, but only to determine whether recognition or enforcement of the award would contravene the objective of combating bribery."

196. That passage appears to suggest that the *indicia* test is essentially an expression of a policy line drawn by the French Courts as to when it will refuse enforcement. This is important because not only may the conception of what constitutes public policy vary from country to country (as Mr Harris pointed out by reference to *Yukos v Rosneft* [2012] EWCA Civ 855, [2013] 1 WLR 1329 at [156]), so too may its line as to what needs to be proved to reach the hurdle for refusing enforcement. Different countries may place the public policy in favour of enforcement as a higher or lower priority against the public policy against corruption; and that will have an impact on what they require to have proved before refusal of enforcement is deemed appropriate. At the enforcement stage it is by no means a given that a determination that the test for refusing enforcement has been met is that there has been a determination on the merits that there has been bribery (or whatever the relevant public policy issue in the case is).

197. While later in the judgment the Court plainly does consider the evidence in some detail, and very late on it determines that "*it is appropriate to hold that the recognition or enforcement of the arbitration award that orders Alstom to pay sums intended to finance or remunerate acts of bribery is contrary to international public policy...*" that is not, in context, and bearing in mind these earlier passages, clear. While it may be the case, as Mr Gledhill

submitted, that "*serious, precise and consistent indicia*" is shorthand for the civil standard of proof under French Law, such that the court was making a determination of the facts on the merits, that also is not clear and I have no civil law expert evidence to assist on that point. At best I was told that this could be discerned inferentially from the criminal law expert evidence, though it was conceded that there was not a clear statement of it. That is not sufficient.

198. Mr Gledhill submitted that I needed no further evidence, pointing out that I had apparently made such a decision in *Eastern European Engineering v Vijay Construction* [2018] EWHC 2713 (Comm), [2019] 1 Lloyd's Rep. 1. But that is a false analogy. In that case there were two questions. On one "*bearing in mind the caution which is required in this area*" I did not find identity of issue. On the one where I did find identity of issue - as to what was clearly an ultimate issue for decision - I did so precisely because: "*It is a point which has no factual complications which can give rise to doubt as to whether the issue engaged was identical.... The determination is absolutely clear*".

199. I conclude that identity of issue is not established. Nor, given the nature of the materials before me, is the question of whether the issue was the subject of a final judgment on the merits.

Full and Frank Disclosure

200. Alstom submits that Teare J's Order should also be set aside on the separate ground that there was a breach of the duty of full and frank disclosure on ABL's without notice application. The breach which is asserted concerns ABL's failure to disclose the extent to which Alstom had complied with the Award as at October 2019, when ABL made its application. The critical point is that its statement in support of the application, "Fussell 1", said at paragraph 34 that Alstom "*has not complied with the Award in any respect*".

201. Alstom submits that there is a breach and a clear and serious one in circumstances where CPR 62.18(6)(c) expressly requires the Court to consider whether and to what extent there has been compliance with the Award and where the factual situation was in fact that:

    1) Alstom had in February 2017 paid ABL the full €1.8 million that ABL was then seeking following the initial exequatur decision in France. That sum was paid following the issue of a "*saisie-attribution*" by ABL which was served on Alstom's bank, Société Générale, and a failed attempt by Alstom to overturn that seizure.

2) That money seems to have been held by ABL's French lawyers in a "CARPA" client account. CARPA stands for Caisses des Règlements Pécuniaires des Avocats, which translates literally as "funds for the pecuniary settlements of lawyers". It is a system of deposit-taking entities organised and operated by each of the various French Bars

3) ABL had at least technically had free use of the €1.8 million between February 2017 and July 2019. In fact, ABL's lawyers did not pass on the money to ABL but held the full sum pending the outcome of the Paris Cour d'Appel.

4) Following the decision of the Paris Cour d'Appel ABL was ordered to pay the sum back.

5) In early July 2019 it was frozen under a "*saisie-conservatoire*", on Alstom's initiative, pending developments in the French proceedings. The money was then transferred to a neutral CARPA escrow account to which ABL had no right of access.

6) There is an issue between the parties as to whether, whilst frozen, the funds were held for ABL and in their name and whether ABL could give instructions to release the monies.

7) At the time of the signing of Fussell 1 the money had not yet been paid back to Alstom. It remained in the escrow account in France pending outcome of the French proceedings until 29 January 2020.

202. I should deal briefly with the submission that the funds were at the critical moment held for ABL's benefit.

203. This hinges on the expert evidence of Ms Gaëlle Le Quillec – a former Batonnier (member of the Paris Bar Council, which operates the relevant CARPA system) and a Partner in Eversheds Sutherland's Paris Office. That report was filed by ABL and no opposing report having been served by Alstom, it is unchallenged.

204. As I read her report it does not establish that, at the time of the Claimant's application, the funds in escrow were held "for ABL's benefit". The funds were owned by CARPA. They were held effectively in ABL's name, but ABL had no control over them, save possibly to the extent that ABL could have ordered their release to Alstom or Alstom's bailiff. At the same time, nor did Alstom have control over them. It would perhaps be most accurate to say that the funds were frozen in ABL's name pending transfer to Alstom.

205. I do not consider that this point affects the argument materially one way or another.

206. The legal backdrop to this argument is uncontroversial. CPR 62.18(6) provides, so far as relevant, that;

> "an application for permission [to enforce an award] must be supported by written evidence ...
>
> (c) stating either—
>
> (i) that the award has not been complied with; or
>
> (ii) the extent to which it has not been complied with at the date of the application".

207. As the initial application is made without notice there is a duty to make full and frank disclosure of all matters relevant to the application. For present purposes the key points can be taken from two sources. The first is the seminal judgment of Ralph Gibson LJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, at 1356–1357 the following principles that should apply in deciding whether there had been relevant non-disclosure:

> "(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts:' see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486 ,514, per Scrutton L.J.
>
> (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504".

208. The second is the equally classic quote from Bingham J in *Siporex Trade v Comdel Commodities* [1986] 2 LLR 428, 437, where he said that the Claimant:

> "Must show the utmost good faith and disclose his case fully and fairly … He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts

> relied on before applying and identify any likely defences."

209. The question is whether the statement made on 11 October 2019, "*I have been informed by the Claimant and believe that, as at the date of this Witness Statement, the Defendant has not complied with the Award in any respect*" was accurate and whether, taken in context, it complied with the obligation of full and frank disclosure.

210. Despite Mr Harris' best efforts I am not persuaded that, taken alone, the line in Fussell 1 was accurate or a proper characterisation of the position. It seems wrong to say that Alstom had not complied "*in any respect*" when it had (albeit pursuant to a Court Order) paid over the full amount. As at the date of ABL's application to enforce, the true position was that Alstom had complied with the Award, as a result of the payment made following the seizure performed on ABL's request, but that it had obtained an order for repayment of that sum.

211. While ABL says that there was no intention to mislead the Court, as neither Mr Fussell nor Ms Guo Qi understood the true position in October 2019, at the time of ABL's application to enforce, that can only be a partial excuse. Neither of them may have been aware of the finer points of the freezing regime in France. One or both of them may have been under the impression that the money had by this stage been returned to Alstom. Certainly that is Ms Guo Qi's evidence; she says she was told by her husband that the funds had been returned to Alstom. But both will have been aware of the fact that a payment had previously been made. A full and frank answer would have flagged, at least by reference, this fuller story.

212. However at the same time I am not persuaded that a fair presentation would have involved the (somewhat partial) summary which Mr Gledhill urged as the requirements of such a presentation.

213. My conclusion is that the specific statement at paragraph 34 fell somewhat short, as I have indicated. Had it been the sole account given it would most certainly have counted as a material breach of the obligation to give full and frank disclosure. However one has to read the whole of the evidence – subject to the cautions in the authorities such as *Siporex* as to the inadequacy of general statements and annexures to make good the position.

214. When one does so one can see that paragraph 34 comes a little way before the section which is headed "*Full and Frank Disclosure*". In that section Mr Fussell deals with the French Enforcement proceedings. He makes it quite clear that Alstom challenged the

Award in the French Court on the ground of bribery. He sets out in some detail the factors relied upon. At paragraph 43 he summarises the Cour D'Appel's decision. That is a lengthy paragraph, extending over the best part of two pages of text. The description of the decision concludes by saying "*the application to enforce the Award was dismissed and the Claimant was to release a preventative seizure of the Defendants' assets in the sum of EUR1,828,850.88.*"

215. The position therefore is that looked at overall the witness statement did explain that there had been a preventative seizure of the amount of the Award. It did not give the full details of that process or the fact that Alstom had itself made the payment ordered under the Seizure Order. But it enabled the judge to know that monies had been to some extent in ABL's hands during the course of the enforcement process.

216. Is this compliance with the obligation to give full and frank disclosure? Did it "*identify the crucial points for and against the application?*" The reality is that it was closer to the line than it should have been. It might be viewed as compliance, simply because the point was made to some extent in the "*Full and Frank Disclosure*" section. I do not think that the answer is so simple. The single line summary at paragraph 34 was neither full nor frank. Taken by itself it was to some extent misleading. The true facts as to the payment were given in part, but were slightly "buried" in a section which really dealt with the arguments and decision in the Cour D'Appel. The overall disclosure made enabled the overall picture to be pieced together. But piecing together can often fail to be compliance with full and frank disclosure.

217. In the end I do come to the conclusion that there was no breach of the obligation; but I do so by quite a narrow margin. The authorities indicate that the real evil is in the "tucking away" of material in exhibits, or in other witness statements (as in *Anglo Financial S.A. v Goldberg* [2014] EWHC 3192 (Ch)). Here the material was in the main witness statement. The story both of repayment, and of the reason why repayment was happening, were explained in a section which any judge reads with particular attention. Teare J will have been in no doubt that the French Court had formed the view that the contract was tainted by bribery and had refused enforcement. The reality of the situation was also that at the time the application was made ABL were again at square one - with no funds. Further it was the case that while Alstom technically did make the payment in France, they did so only when the alternative was imminent compulsion.

218. The facts which were disclosed, albeit a little piecemeal, are the key facts which the Court would wish to know to consider the appropriate course on enforcement in England. I do not accept that

had more been said about the status of the repayment the judge may well have considered the enforcement proceedings here to be premature and declined to make an Order.

219. It is also true that, as Jacobs J observed in *Leidos Inc v Hellenic Republic* [2019] EWHC 2738 (Comm) [28] "*the court's decision on a set aside application cannot focus exclusively on the position at an earlier point in time, but must take into account the fate of an award at the time that the application is determined.*" In the present case, there is no argument but that the relevant sums are now in the hands of Alstom.

220. Accordingly, the application to set aside the Enforcement Order for breach of the obligation of full and frank disclosure also fails.