Neutral Citation Number: [2016] EWHC 510 (Comm)

Case No: 2014 FOLIO 1028

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2016

Before :

THE HONOURABLE MR JUSTICE BURTON

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Between :

National Iranian Oil Company	**Claimant**
- and -	
(1) Crescent Petroleum Company International Ltd	**Defendants**
(2) Crescent Gas Corporation Ltd	

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- -

Barbara Dohmann QC, Sara Masters QC, Edward Ho & Leonora Sagan (instructed by **Eversheds LLP**) for the **Claimant**
Gordon Pollock QC, Salim Moollan QC & Emily Wood (instructed by **Hogan Lovells International LLP**) for the **Defendants**

Hearing dates: 23/24/25 February 2016

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Judgment

Mr Justice Burton:

1. The Claimant (NIOC) and the First Defendant (Crescent Petroleum) entered into a long term gas supply and purchase contract (the "GSPC") on 25 April 2001. It contained Article 22 "*Governing Laws and Arbitration"* which provided as follows:-

> *"22.1 Governing Law*
>
> *This Contract shall be governed by and interpreted in accordance with the Laws of Islamic Republic of Iran.*
>
> *22.2 Arbitration*
>
> *The Parties shall use all reasonable efforts to settle amicably within 60 days, through negotiations, any dispute arising out of or in connection with this Contract or the breach, termination or invalidity thereof. Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or validity or invalidity thereof shall be*

> *finally settled by arbitration before three arbitrators, in accordance with a "Procedures for Arbitration" (attached hereto as Annex 2) which will survive the termination or suspension of this Contract. Any award of the arbitrators shall be final and binding upon the Parties. Either Party may seek execution of the award in any court having jurisdiction over the Party against whom execution is sought*."

2. In 2003 Crescent Petroleum wished to assign the Contract to its subsidiary the Second Defendant (Crescent Gas). There was a clause of the GSPC by Article 16, which provided (materially): -

> *"16.1 Neither Party shall, without obtaining the prior written consent of the other, be entitled to assign this Contract or any rights and obligations hereunder to any other party, which consent in case of a subsidiary of a Party (an entity of which a Party owns or controls, directly or indirectly, majority of the voting rights) shall not be unreasonably withheld."*

3. In July 2009 the First and Second Defendants commenced an arbitration claiming that, in breach of the GSPC, NIOC had failed to deliver any gas. NIOC challenged the jurisdiction of the Arbitrators in respect of the claim by both Defendants: in relation to the First (and consequently the Second) Defendant by reference to grounds of alleged corruption, and in relation to the Second Defendant additionally on the basis that the assignment was not valid, such that Crescent Gas was not a proper party to the arbitration. The appointed Arbitrators (the Arbitrator appointed by the Claimant having been changed twice, in circumstances not material before me) were Dr Gavan Griffiths QC (presiding), Dr Kamal Hossain and Dr Assadollah Noori. After lengthy submissions and a 30 day hearing, the Arbitrators issued an Award (of 1387 paragraphs and 362 pages). By a majority (Dr Noori dissenting), they dismissed NIOC's challenge on jurisdiction and declared that the GSPC was valid and binding on the parties, that the Second Defendant was a party to the GSPC by assignment and a competent joint claimant in the arbitration, and that NIOC had been in breach since 1 December 2005, and remained in breach, of its obligation to deliver gas under the terms of the GSPC, dismissing NIOC's defences and counterclaim.

4. NIOC brings applications under s.67 and s.68 of the Arbitration Act 1996 (the "1996 Act") to appeal/set aside the Award on a number of bases set out in Grounds of Appeal and Relief dated 26 August 2014. By an Order dated 23 February 2015, on the application of the Defendants, Teare J ordered the trial of Preliminary Issues which came before me on 23 February 2016. At the outset, I summarised those issues as follows in a way which was substantially accepted by counsel:-

   (1) Is the issue of separability of the arbitration clause governed by English Law?

   (2) If yes, is the arbitration clause separable and unaffected by the corruption alleged?

(3) If the issue of separability is governed by Iranian Law, Iranian Law being the law of the GSPC, does it apply?

(4) If separability does not apply, then, Iranian Law being the law of the GSPC, is the result of the corruption alleged such as to render the contract void or ineffective at Iranian Law?

(5) Was consent to assignment obtained (within the meaning of Article 16.1, set out above)?

(6) If not, is the Iranian Law concept of *lazarar* available so as to deem consent to have been obtained?

(7) Is it unarguable that the Award is unenforceable at English Law by virtue of s.68(2)(g) of the 1996 Act, as contrary to English public policy?

5. It is apparent from the above that issues (3), (4) and (6) are all governed by, and need substantial consideration of, Iranian law, and there were learned Iranian law experts on both sides ready and willing to be cross-examined on their detailed experts' reports, which I have read. Issue (5) is prima facie a question of Iranian law also, but it was common ground between the parties that the test of construction (upon which alone this issue depended) was the same at Iranian law as at English law, namely that it is for a court or arbitrators to decide the meaning of the Article in an international commercial contract as between international businessmen: or, as it was put in Iranian law, by reference to reading it in the eyes of a reasonable (international) merchant looking at the contract as an objective bystander. So although some evidence was contained in the various experts' reports, the matter fell to be decided by me by reference to principles of law entirely familiar to the Commercial Court.

6. I concluded, after hearing submissions, at the outset of the hearing that I would deal with issues (1), (2), (5) and (7) first, on the basis that if I resolved them in favour of the Defendants, issues (3), (4) and (6) would not arise. I agreed to give a decision on the four issues, with short reasons, after the conclusion of the argument, and, dependent upon the result, that would either bring the hearing to an end or we would then restart the hearing to deal with the remaining issues (3), (4) and (6). In the event, the hearing of the four issues concluded effectively at the end of the second day, Wednesday 24 February, with some additional short matters outstanding on the third day, so I was able at 2pm on Thursday 25 February to give my decision and short reasons resolving the four issues in favour of the Defendants. I now proceed to give the full judgment.

Issues (1) and (2): separability

7. I take these two issues together. The parties agreed, subsequent to the arbitration agreement (at a time when the disputes had arisen and the issue of corruption had been raised) to hold the arbitration in London. The seat of the Arbitration (within s.3 of the 1996 Act) was accordingly England and Wales, such that by s.2 (1) the provisions of Part 1 of the 1996 Act applied. Of those provisions, s.7 is 'non-mandatory', i.e. the parties are entitled to make their own arrangements by agreement, but the 1996 Act provides rules which apply in the absence of such agreement (s.4 (2)).

8. S.7 provides: -

> "*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.*"

9. S.7 is headed up "*Separability of arbitration agreement*". This is well understood as a concept, particularly as a result of the decision of the House of Lords in ***Fiona Trust & Holdings Corp v. Privalov*** [2008] 1 Lloyds Rep 254, namely that s.7 is to be interpreted so that the main agreement and the arbitration agreement must be treated as having been separately concluded, and the arbitration agreement could be invalidated only on a ground which related to the arbitration agreement, and was not merely a consequence of the invalidity of the main agreement: the doctrine of separability requires direct impeachment of the arbitration agreement before it could be set aside. There is no suggestion in this case that there was any ground for the latter approach, the Claimant's allegation of corruption applying only so as to seek to impugn the GSPC itself, and not the arbitration agreement.

10. The submissions of Barbara Dohmann QC for the Claimant are founded upon the following two sections of the 1996 Act:-

(i) S.2 (5) which provides that "*Section 7 (separability of arbitration agreement)…* [applies] *where the law applicable to the arbitration agreement is the law of England and Wales… even if the seat of the arbitration is outside England and Wales... or has not been designated or determined*".

(ii) S.4 (5), which provides "*The choice of a law other than the law of England and Wales... as the applicable law in respect of a matter provided for by a non-mandatory provision of the Part is equivalent to an agreement making provision about that matter.*"

11. She submits that separability is a matter of substantive not procedural law, and that those sections direct reference to the proper law of the arbitration agreement, which in this case would be the same as that of the GSPC as a whole, namely Iranian law. The law applicable to the arbitration clause is not changed when the seat is chosen. She refers to paragraph 12 of the Departmental Advisory Committee on Arbitration Law of 1996 ("*the DAC Report)*".

12. Gordon Pollock QC, for the Defendants, responds that there is no relevance within the structure of the 1996 Act, and in particular the two sections to which Ms Dohmann refers, for any distinction between procedural and substantive law, given that the parties have chosen England and Wales as the seat of the arbitration, and hence the applicability of the provisions of the 1996 Act. S.2 (5) is of no relevance as it is directed to where the seat of the arbitration is <u>not</u> England and Wales, and it is noteworthy that it chooses to emphasize the applicability of s.7 *even* in that case. He points in particular, however, to the express provision of s.4 (5) whereby a non-mandatory provision is to be disapplied if a law other than the law of England and

Wales is chosen *"as the applicable law in respect of a matter provided for by a non-mandatory provision"*. Hence he submits that such exclusion must be what he calls *targeted* to the issue of separability. There is nothing in paragraph 12 of the DAC Report which would cause a different approach, indeed the DAC Report is entirely consistent with such approach when it provides that *if... a foreign law has been chosen to govern any particular aspect of the arbitration.. or is otherwise applicable to any such aspect, this is catered for by s.4 (5)... reference may be made to this Act in the first instance and then back to another law with respect to a specific issue* [my underlining]".

13. Mr Pollock points to two authorities which establish that s.4 (5) is not intended to apply a blanket cross-reference to the chosen law of the arbitration agreement, but only applies where there is a choice of *"the applicable law in respect of the matter provided for by a non-mandatory provision"*, in this case separability. He refers to the words of Lord Steyn in ***Lesotho Highlands v. Impregilo SpA***. [2005] Lloyds Law Rep 310 at 321, but he founds his argument on ***C v. D*** [2008] 1 Lloyds Law Rep 239. This Court of Appeal decision related to a non-mandatory provision for the finality of an arbitration award, in the sense of its not being subject to appeal or review (on any basis, as Mr Pollock submitted, a substantive rather than a procedural matter, if this were of any relevance). It was argued that the mere fact of a choice of a proper law of the arbitration agreement constituted a sufficient *agreement to the contrary* so as to disapply such non-mandatory provision. Longmore LJ, with whom Clarke MR and Jacob LJ agreed, concluded at para 19 that this was not sufficient:-

> *"That is reinforced by the terms of section 4 (5) of the Act, which refers not to a choice of law clause generally but to a choice of law as "the applicable law in respect of a matter provided for by a non-mandatory provision of this part" of the Act. In other words there has to be a choice of law with regard to the specific provision of the Act which the parties agree is not to apply."*

14. I am satisfied that there was in this case no *agreement to the contrary* disapplying s.7 simply by virtue of the fact that the proper law of the GSPC was Iranian law, whatever Iranian law may provide as to separability (which would itself be the subject of issue (3) and a matter of dispute).

15. If, contrary to my conclusion, any reference needed to be made to the GSPC, the relevant Article has been set out in paragraph 1 above. It is not entirely clear because, as there appears:-

    (i) The parties have agreed (in the first two sentences) that a dispute as to the invalidity of the Contract is to be first settled amicably, and if not then by arbitration. That plainly vests the decision as to whether the GSPC is valid or invalid in the Arbitrators – a clear confirmation of separability.

    (ii) The end of the second sentence refers to the fact that the arbitration *"will survive termination or suspension"* of the GSPC. Ms Dohmann submits that that means that it does not survive its invalidity. Mr Pollock submits that this would be inconsistent with (i) above and that the words are simply intended for the avoidance of doubt, in particular circumstances which might arise.

16. I agree with Mr Pollock's contention, and that in those circumstances the GSPC made express provision for separability. However, even if that were wrong, the Article does not disapply separability or the provisions of s.7.

17. I am therefore satisfied that the answer to Issues (1) and (2) is that English law governs the question of separability, such that the Arbitrators have jurisdiction to decide the issue of validity. They concluded that the GSPC was valid and so they dismissed the Claimants' challenge to their jurisdiction on that ground. I conclude that there is no basis for challenge to the Arbitrators' Award on that ground, and dismiss the Claimant's application under s.67 of the 1996 Act in that regard.

Issue (5): Assignment

18. I have set out the relevant Article in paragraph 2 above. The Claimant challenged the validity of the assignment to Crescent Gas and the position of Crescent Gas as a party to the Arbitration (and hence the jurisdiction of the Arbitrators in that regard) on the basis that its consent to such assignment was not *obtained.* There were two issues before me, that related to the meaning of *obtaining* (the '*obtaining* point'), and that relating to a recital in the Guarantee Contract of 10 July 2004 ('the *guarantee* point'). On the *obtaining* point, the Defendants succeeded before the Arbitrators and the Claimant challenges such decision under s.67. On the *guarantee* point, the Arbitrators found for the Claimant. It was accepted before me, after some discussion, that I should consider and resolve the Defendants' case that the Arbitrators were wrong in this regard, in case I differed from the Arbitrators on the *obtaining* point, such that it would be relevant to remedy under s.67 (3) of the Act.

19. As to the *obtaining* point, this is a matter of construction and I have already referred in paragraph 5 above to the common ground between the parties as to my role. The GSPC was written in English, and I therefore have to look at *obtaining* as an English word in the context of an international contract between commercial parties, and the reference by the Claimant's main expert Professor Damad to various Farsi words did not seem to me to help.

20. Consent to the proposed assignment to Crescent Gas was requested in writing by Crescent Petroleum on 27 April 2003. At the Claimant's request, a guarantee of Crescent Gas' obligations executed by Crescent Petroleum was provided to it, by letter dated 7 May 2003. This was eventually returned to Crescent Petroleum by fax on 28 July 2004, countersigned by a Mr Javadi, the managing director of the National Iranian Gas Export Company, in the form of the Guarantee Contract dated 10 July 2004, above referred to.

21. Consent was given by the Claimant by a Board Resolution dated 26 July 2003, but despite a number of chasing letters by the Defendants, no copy of that Resolution was ever supplied to the Defendants, even in the Arbitration. The issue before the Arbitrators was whether such consent in writing by the Claimants was *obtained* by the Defendants. The Arbitrators have set out their conclusions in the following paragraphs:-

> "*398. … there is direct evidence of the existence of a formal NIOC Board resolution authorising the assignment of the GSPC to Crescent Gas expressed, as emerged in the course of*

proceedings, as a statement of fact in the Verdict of the Tehran Court, which identifies both the resolution's date, being 26 July 2003, and its identifying number, namely 1383/242-23503. The Tribunal accepts this reference as constituting an explicit reference by the Tehran Court to a written document evidencing approval and consent to the assignment at the decision-making level of the Board.

399. While the issue of whether there had been such a formal minuted resolution remained wholly within its knowledge, NIOC elected during the hearings to bring forward no evidence, nor to admit or deny the existence of the resolution. The Tribunal contrasts NIOC's specific denial of the existence of any resolution approving the use of the Riser Platform as a Delivery Point.

400. As NIOC has led no evidence in denial of the fact of this minuted resolution being agreed by the Board, in the circumstances, the Tribunal accepts and relies upon the Tehran Court's statement as to the existence of such written consent as, in effect, a formal admission by NIOC as to this fact.

401. At the least, the maintained equivocation as to the existence of the Board resolution was inappropriately evasive.

…

403. … Article 16.1 merely requires that Crescent "obtain" NIOC's "prior written consent." It does not require that Crescent should obtain <u>by delivery</u> a copy of the resolution of approval to constitute such written consent. If suffices for compliance that NIOC's consent has been constituted by the decision of the Board, and the written evidence of this consent is the minuted resolution described above. The consent was sufficiently "obtained" when that resolution was passed and minuted. Subsequent written communication to the other party is not required before such consent may be characterised as having been obtained by Crescent.

…

406. *Finding. The Tribunal finds that prior written consent of NIOC to the assignment of the GSPC from Crescent Petroleum to Crescent Gas was obtained within the terms of Article 16.1 of the GSPC by NIOC's minuted resolution of 26 July 2003, number 1383/242-23503, and that the assignment was effective from that date."*

22. Ms Dohmann submits, as did Professor Damad in his report, that *obtaining* consent should be construed as requiring physical delivery and physical receipt. She submits that the requirement for the consent to be in writing supports the need for formality in *obtaining*, and that the fact that the consent was given in writing is only the first stage.

There must then be a delivery to the recipient of the consent, in order for the *recipient* to *obtain* it, in the sense of receiving it. Although she did submit that Iranian law in some way emphasises the need for formality, that was not supported by the expert evidence given in his report by her own expert Dr Amini, with which Professor Damad did not disagree, that in fact so far as Iranian law is concerned in this context oral approval or consent would have been sufficient. She referred to the fact that the Defendants were chasing for the consent in writing as indicative of at least a belief on their part that receipt of it was necessary for its validity. A submission she made in relation to the need for *prior* consent seemed at best to be neutral, and in any event was pointed out by Mr Pollock, rightly, not to be within the issues left by Teare J.

23. Mr Pollock submits that the word *obtaining* imports no requirement for delivery or receipt as between the giver of the consent and the recipient of it. There is a requirement for it to be in writing, but if consent in writing is obtained, then it does not matter that a copy of it should be supplied or 'cross the line' if in fact it existed, as was the case here. It is not surprising that the Defendants were chasing for a copy of the consent in writing, so that confirmation of it could be shown to third parties such as banks, but the fact that the Defendants were chasing for a copy is not relevant to the construction of the Article.

24. I am satisfied that the requirement for *obtaining* consent in writing meant that the Defendants were required to request consent, and that such consent had then to be granted or given by the Claimant. It was given, and it was given in writing. Receipt or delivery of such document was not necessary. I accordingly agree with the Arbitrators' conclusion on construction.

25. In those circumstances I do not need to resolve the second issue, but as it was argued, I proceed to do so. It is clear that the Claimant made it a requirement of its giving of consent that there should be a guarantee of the liabilities of the assignee by the assignor, even though perhaps that was not strictly necessary, but plainly understandable, given that Crescent Gas was not even incorporated until eight days after the request for such consent. This meant that when, as set out in paragraph 20 above, Crescent Petroleum supplied, at the Claimant's request, a copy of the executed guarantee, it also included copies of Crescent Gas' incorporation documents (paragraph 202 of the Award).

26. It appears then to have taken more than a year before the Claimant returned the Guarantee Contract, countersigned by Mr Javadi. The Guarantee Contract contained two relevant recitals:-

> "*WHEREAS NIOC is prepared to permit* [Crescent Gas] *to become a party to the Contract, only if and subject to* [Crescent Petroleum] *agreement to guarantee the obligations of* [Crescent Gas] *under the Contract as provided herein, and*
>
> *WHEREAS* [Crescent Petroleum] *is willing and financially and technically guarantees the obligations and responsibilities of* [Crescent Gas] *under the Contract, subject to the terms and conditions set forth therein."*

In his skeleton argument, Mr Pollock referred to this as being similar to the recital of a condition subsequent, but he did not pursue that analogy before me. He submitted that it was simply the recital, in one and the same document, of the consent of NIOC and the provision of the guarantee which the Claimant had required.

27. It appeared that the Claimant had not fully appreciated that this issue was within the ambit of Teare J's order, as I am satisfied it was, and consequently had not instructed Professor Damad to give any views upon it, and I gave permission for him to do so, although in the event nothing he said was contentious.

28. Once again the parties were agreed that the question of construction (and again of English words) was the same at both English and Iranian law, and depended on the interpretation of a commercial contract between international business parties. Ms Dohmann accepted that the word in the first of the two recitals, which I have set out above, "*prepared*" meant the same as "*willing*", so that the recital was a recital of the Claimant's willingness to permit Crescent Gas to become a party to the GSPC.

29. That *willingness* was expressed clearly to be upon the basis of the provision of the guarantee, which was provided in and by the very same contract. The Arbitrators rejected the Defendants' fallback case in this regard, in paragraph 397 of their Award, recording that "*a mere statement of NIOC's future intentions as to its consent does not suffice as "written consent"*". But Ms Dohmann herself did not support that reasoning. Her submission was that it was not a statement of future intention, but of willingness, and willingness did not suffice as written consent. I am satisfied however that the Claimant, having previously indicated that it would consent if the guarantee were provided, did consent by recording, in the document which supplied and constituted such guarantee, that it was (now) willing to consent. That was consent in writing, such that if (contrary to my conclusion) consent in writing was not *obtained* by the Board Resolution of 26 July 2003, because delivery was necessary, it was *obtained* [delivered] by the supply of the countersigned Guarantee Contract dated 10 July 2004, recording in writing the Claimant's consent.

30. I therefore conclude that the Arbitrators were right to dismiss the Claimant's challenge to their jurisdiction with regard to their conclusion that the assignment was valid, and that the Second Defendant was a party to the Arbitration. I dismiss the Claimant's application under s.67 in this regard also.

Issue 7: English Public Policy.

31. The Defendants seek to strike out the Claimant's s.68 challenge to the Award by reference to s.68 (2)(g), namely "*the award or the way in which it was procured being contrary to public policy*". Such strike-out, on the basis that the Claimant can be shown to have no arguable case, is the seventh of the preliminary issues ordered by Teare J. The basis of it in law is common ground, namely that the Defendants must satisfy me that the Claimant has no reasonable prospect of succeeding in its challenge. Ms Dohmann referred me to the helpful summary by Popplewell J in ***A.L.Challis Ltd v. British Gas Trading Ltd*** [2015] EWHC 141 (Comm) at para 7, itself collating a number of cases back to ***Swain v. Hillman*** [2001] 2 AER 91, and repeating a similar exercise by Lewison J in ***Easyair Ltd v. Opal Telecom Ltd*** [2009] EWHC 339 (Ch).

32. Ms Dohmann does not rely on any fresh evidence before me, but submits that on the basis of the evidence before the Arbitrators, as recorded in their Award, the Claimant can succeed in a challenge under s.68. Although the Arbitrators expressly found, having considered the facts over a 30 day hearing (and in the light of very full submissions), that the GSPC was not procured by corruption, she submits that a Court considering the principles of English public policy would – or might – take a different view of the enforceability of the GSPC.

33. Mr Pollock frankly accepts that his aim is to prevent a further 6-8 week trial of alleged corruption by this Court, but submits that he is entitled to do so, and to rely on the finding by the Arbitrators and to assert that the attempt to re-open the issue is unsustainable.

34. The Arbitrators set out their analysis of the evidence and their findings at length. They record at paragraphs 965ff the contents of a set of documents apparently evidencing an agreement for corrupt payments between a Mr Yazdi and a Mr Hashemi, with a view to influencing the outcome of a proposed contract between the Claimant and Crescent Petroleum. At paragraph 1006ff the Arbitrators set out the Defendants' explanation, including the stance that nobody at Crescent treated the proposed agreement seriously, and the fact (paragraph 1008) that a Mr Boreta "*fairly quickly realised that Mr Yazdi's proposals were not worth pursuing"* and that there was a "*short presentation on corruption to Mr Yazdi"* by Clifford Chance at the end of July 2000 as a way to "*let him (and his possible backers) down politely without causing offence"*.

35. The Tribunal analyses the evidence in paragraphs 1064ff, recognising (at paragraph 1068) that the Tribunal has to decide from "*circumstantial evidence"*, considering *"first, whether each of the alleged indicia of corruption is proven, and second, whether all these indicia add up to satisfy the Tribunal, on the balance of probabilities, that the approval of the GSPC (at all or on its specific terms) was obtained through corruption"*. The change of, or contradiction in, the Defendant's case is addressed in paragraphs 1084 to 1087, and in paragraph 1089 the Arbitrators record that "*Crescent's shifting explanations suggest to the Tribunal that Crescent has been less than frank in its explanation that the Draft Agreements were merely a "ploy" to "test" Mr Yazdi"*. However, after further analysing the evidence, the Arbitrators conclude, at paragraph 1098, that "*the Tribunal cannot find that Mr Hashemi aided Crescent in obtaining the Board's approval to the GSPC"*.

36. The Arbitrators conclude as follows:-

> "1105. *No alleged corrupt contractual arrangements between Crescent and Mr Hashemi were ultimately executed. There is evidence that Mr Hashemi eventually became hostile to Crescent. There is no evidence that would allow the Tribunal to surmise the effect that the agreement to pay confidential third-party fees may have had on the GSPC. There is no direct evidence of any corrupt arrangements involving Mr Rahgozar in the lead up to the conclusion of the GSPC. Perhaps more importantly, the Tribunal, as explained in Chapter X11.B above, has been unable to make a finding that the GSPC was*

imbalanced in a way that would show that it must been procured through corruption.

1106. The Tribunal recognises that corruption is difficult to prove. As stated in paragraph 658 above, direct evidence is rare and a finding of corruption may have to be made through inference from circumstantial evidence. The Tribunal has found the matter of whether the GSPC was obtained through corruption difficult to decide. And yet decide it must.

1107. Ultimately, the decisive factor for the Tribunal is that in the extensive record of this case, there is no indication that the individuals holding decision-making power with respect to the adoption of the GSPC, i.e., the members of the NIOC Board, were either corrupt or influenced by any corrupt arrangements. From the information in the record, it appears that the Board considered the draft GSPC attentively and with the interests of NIOC (and Iran) in mind. In the winter of 2000-2001, the NIOC Board was called upon to consider Crescent's proposals of a draft GSPC twice..... Both times, the Board rejected Crescent's proposals. In the finally agreed GSPC, signed on 25 April 2001… the base price… was 30 per cent higher than that which had been set out in the draft GSPC initialled by Messrs Jafar and Hashemi on 31 January 2000.

1108. Crescent formulates its argument in the following terms:

> *…. It would be fair to suggest that anything which Mr Hashemi and his team did was to be regarded as a preliminary, which received the Minister's approval in principle for the concept of a 25 year gas sale to the UAE but which was entirely subject to a final consideration by the Minister and the Board as regards the essential terms. In this context the idea that the Minister and the Board were mere ciphers who were duped by Mr Hashemi, or that Mr Hashemi had in some way tied the hands of either Mr Rahgozar, the Minister or the Board is simply fanciful.*

1109. The Tribunal agrees.

1110. As has been noted in paragraph 952 above, NIOC has not provided the Tribunal with a record of Board proceedings or agenda papers. Yet these documents must exist. Article 34 of the NIOC Statute provides for the holding of minutes of Board meeting, to be signed by all the members present. NIOC has also failed to provide the Tribunal with a record of key meetings between Crescent and Minister Zanganeh. While Mr Etesami claimed to have seen a note of the March 2001 meeting with the Minister, NIOC has not found it necessary to produce this document.

1111. Given NIOC has chosen not to put such documents before this Tribunal, the Tribunal must infer that they would not have assisted NIOC in

demonstrating that the approval of the GSPC by the NIOC Board was obtained through corruption.

1112. NIOC has thus not been able to demonstrate the causal link between any corrupt arrangements that may have been contemplated or entered into by Crescent in connection with the GDSPC and the finally agreed terms of the GSPC, as approved by the NIOC Board."

37. It is plain that the Arbitrators made a very careful analysis of the facts, and concluded that there had been discussions about a corrupt payment, but that it was never put into effect, not least in part because Mr Hashemi '*changed sides'*, and that, both by virtue of the absence of evidence and the fact that nothing in the terms of the eventual GPSC itself indicated any "*imbalance"*, they were satisfied that the earlier corrupt plan had no effect on the outcome.

38. Thus the Arbitrators concluded as follows: -

(i) The GSPC itself was not an illegal contract (such as those, for example, in ***Kaufman v. Gerson*** [1904] 1KB 591, ***Lemenda Trading Co. Ltd v. African Middle East Petroleum Ltd*** [1986] QB 448 or ***Soleimany v. Soleimany*** [1998] QB 785).

(ii) The GSPC was not procured by corruption.

(iii) There was misconduct by a number of named persons, but the Arbitrators did not conclude that any of it was of any material consequence in respect of the GSPC subsequently entered into.

(iv) The GSPC has not yet been terminated (by either side), although no gas had been supplied since a trial delivery in 2010. The Arbitrators recorded, at paragraph 1334 of the Award, that "*each Party* [has] *spent many hundreds of millions of dollars on pipeline and infrastructure costs in continuing performance of contractual obligations for upwards of nine years to the trial delivery of gas in 2010"*.

(v) The Claimant was in breach of the GSPC.

39. Ms Dohmann submits that the Claimant is entitled to rely, notwithstanding the Award, upon the basis of challenge that it was contrary to English public policy. She submits that public policy is not a closed category, and that public opinion and legislative approach has hardened in recent years against conduct which constitutes corruption or bribery such that, for example, a court would no longer form the same view as Colman J in ***Westacre Investments Inc v. Jugoimport-SPDR Ltd*** (at first instance) [1999] QB 740, whereby he concluded (at 773) that the public policy of sustaining international arbitration awards on the facts of that case outweighed the public policy in discouraging international commercial corruption.

40. In her skeleton she submitted that the GSPC was procured by corruption. However, she accepts that she has no case that there was evidence before the Arbitrators which they did not consider. Although she made reference on a number of occasions to a decision of the Tehran Criminal Court of April 2012 which was before the Arbitrators, she does

not indicate what is sought to be derived from that Court's decision which could or should have dictated a different decision by the Arbitrators. In any event, while the Defendants submitted before the Arbitrators that there was nothing admissible whatever to be gained from the verdict of that Court, (paragraph 673 of the Award), the Claimant's own counsel, Mr Malek QC, himself discouraged the Arbitrators from placing reliance upon it (as expressively set out in paragraphs 662 of the Award). She also accepted that there is no fresh evidence now before me which was not put before the Arbitrators.

41. In submissions before me she put her case differently, namely that the contract was '*tainted*' by the previous misconduct of Mr Yazdi and Mr Hashemi described above, or gave reason for '*sufficient concern'* as to such taint. However, all the authorities to which she referred me were cases in which the English courts had either refused to enforce an illegal contract, even if valid at its proper law (***Kaufman v. Gerson)*** such as a contract to pay a bribe (***Lemenda***) or an action to recover an amount paid over which was itself a bribe ***(Nayyar v. Denton Wilde Sapte*** [2010] Lloyd's Law Rep (Prof Neg) 139).

42. I asked Ms Dohmann several times in the course of her submissions whether she was saying that, if the case had been heard by an English Commercial Court, a case as to *taint* would have been sufficient to lead such English Court to conclude that the contract was unenforceable. She did not in the event give me an answer to that question, but simply reiterated that such a court would not have reached the conclusion that the Arbitrators did, that the GSPC was not procured by corruption, but without any explanation of why that should have been the case and what evidence they had ignored, misinterpreted or misapplied. Ms Dohmann relied upon ***Nayyar***, in which Hamblen J addressed an attempted bribe (paragraph 92) as an "*act which is more than preparatory which is done with the intent to bribe*", but this was still in the context of a finding that "*proof of a payment which is intended to be a civil law bribe is sufficient to engage the ex turpi causa principle. It is not necessary to establish the illegal purpose as being effectively carried out."* The action was still one for recovery of that payment, so that *ex turpi causa* applied, and not a case where, as on the findings of the Arbitrators, the potentially corrupt activities came to nothing and the action is to enforce a contract (being the *causa*) which was unaffected by any such acts, even if they were preparatory acts.

43. The only authorities where the English Court has been faced with alleged procurement by corruption when the contract itself was not illegal, to which my attention was drawn by either counsel, were ***Hurstanger Ltd v. Wilson*** [2007] 1 WLR 2351, where there was discussion of voidability at the election of a principal where there has been a secret commission (paragraph 38 per Tuckey LJ), and, in particular, ***Honeywell International Middle East Ltd v. Meydan Group LLC*** [2014] 2 Lloyd's Law Rep 133. In ***Honeywell*** an application by a party, who had failed in an arbitration, to challenge enforcement of the award as contrary to English public policy under s.103 of the 1996 Act failed. It failed on the grounds of the absence of any fresh evidence (to which I shall return below), but it also failed because Ramsey J accepted the submissions of the party seeking to enforce the award and resist the section 103 application that (at 178):-

> *"even if Meydan's allegations of bribery were established, they would not, as a matter of English law, result in enforcement being contrary to public policy. It submits there is no principle*

> *of English law to the effect that it is contrary to English public policy to enforce a contract which has been procured by bribery. It submits that the distinction must be drawn between the enforcement of contracts to commit fraud or bribery and contracts which are procured by bribery. It says that whilst contracts to commit bribery are contrary to public policy and will not be enforced, contracts which have been procured by bribery would be rendered voidable by English law, provided that counter-restitution can be made. Honeywell relies on the decision in the decision in* ***Wilson v. Hurstanger****… thus, as a matter of English law public policy, the courts will enforce a contract procured by bribery subject to the innocent party having, in the appropriate circumstances, a right to avoid the contract."*

44. Ramsey J considers the authorities at some length and concludes:-

> *"185. It follows that, 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."*

45. Mr Pollock submits that (i) taint is insufficient (ii) even in the event of a finding of procurement of a contract by corruption, there is no English case in which such contract has been found to be unenforceable. At worst it can only be enforced at the instance of one party, and even then if the contract is voidable, as Ramsey J found in ***Honeywell***, which Mr Pollock submits to be correct, there would come a time when a contract could no longer be voidable, which certainly would, Mr Pollock submits, apply in this case. He submits that this must apply a *fortiori* in a case where the bribery was only attempted and/or of no effect.

46. In any event Mr Pollock submits that the English Court should not interfere with the decision of Arbitrators under s.68 where the Arbitrators have fully considered the position, and reached a decision that the contract was not unenforceable and not procured, whether by fraud (also within s.68)(2)(g)), or, in this case, by corruption. He distinguishes a case such as ***Soleimany*** where, on the face of the arbitrators' own award, the contract which they enforced was an illegal one. Absent such a case, and particularly where, as here, after full consideration of the evidence the Tribunal has found that there was no procurement of the contract by corruption, even if (contrary to his contentions) the concept of English public policy extended to such a case, this Court cannot and should not interfere. He refers to ***Soleimany v. Soleimany,*** where the Beth Din had enforced a contract in respect of the apportionment of the profits of a plainly illegal venture, and Waller LJ, giving the judgment of the Court, concluded (at 794F and 800D) that it could be seen from the award itself that the underlying contract was illegal. He said that there was 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*". He therefore concluded (at 800F) that "*an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent. Is there evidence on the other side to the contrary? 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 enquiry? May there have been collusion or bad faith, so as to procure an award despite illegality ?… The judge has to decide whether it is proper to give full faith and credit to the arbitrators' award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate enquiry into the issue of illegality".

Mr Pollock submits that there is nothing whatever here to cause the Court to go behind the detailed reasoning and conclusions of these Arbitrators.

47. Mr Pollock also drew my attention to the subsequent Court of Appeal decision in ***Westacre Investments Inc*** (on appeal from the judgment of Colman J referred to in paragraph 39 above, which was upheld). In that case the majority of the Court of Appeal (Mantell LJ and Sir David Hirst) disagreed with Waller LJ, and in particular disagreed with what were described as the obiter passages cited by Waller LJ from his own judgment in ***Soleimany.*** I set out the relevant passage in Mantell LJ's judgment (with which Sir David Hirst agreed) at 316F-317B:-

> *"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 crucial law of the arbitration and Switzerland, like the United Kingdom, being a party of the New York Convention. From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.*
>
> *However, in the obiter passage cited by Waller LJ from the judgment in* ***Soleimany v. Soleimany*** *[1999] QB. 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 practise, but, for the moment and uncritically accepting the guidelines offered, 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. The seriousness of the alleged illegality to which Waller LJ gives weight is not, in my judgment, a factor to be considered at the stage of deciding whether or not to mount a full-scale inquiry. It is something to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the award be enforced?*

48. To my mind what is particularly important is the reference by Mantell LJ to the absence of any fresh evidence which might have been some justification for refusing to enforce the award. As I have said in paragraph 43 above, this factor was also significant to Ramsay J in ***Honeywell*** at 89. As I have said above, there is no such fresh evidence here.

49. I reach the following conclusions:-

    (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. The siren call of Ms Dohmann, referring to recent international Conventions to outlaw bribery, and the increase of legislation to criminalise it, is attractive. But to introduce a concept of *tainting* of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy. There may be many contracts which have been preceded by undesirable conduct on one side or other or both – lies, fraud, threats and worse – but the Court would not interfere with a contract entered into by such parties, even if one or more of those parties had committed criminal acts for which they could be prosecuted, unless the contract itself was illegal and unenforceable, or one or more of the acts of such parties induced the contract, in which case it might be voidable at the instance of an innocent party so induced.

    (4) In any event, in this case, the conclusion to which the Arbitrators came was that the GSPC was not procured by bribery, after full consideration and evidence. The English Court should not interfere with the Arbitrators' decision under s.68, or s.103, without fresh evidence of which there is none, or save in very exceptional circumstances, of which there are none (***Westacre*** at 316-7).

50. Accordingly I conclude that there is no prospect of success for the Claimant's s.68 application by reference to s.68(2)(g) and it should be struck out as unarguable.

51. I therefore resolve issues 1, 2, 5 and 7 in favour of the Defendants, and the other issues in those circumstances do not arise.