Case No: CL-2017-000212

Neutral Citation Number: [2018] EWHC 835 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2018

Before :
THE HONOURABLE MR JUSTICE BUTCHER

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Between :

(1) JSC BTA BANK	**Claimants**
(2) BTA SECURITIES JSC	
- and -	
TÜRKIYE VAKIFLAR BANKASI T.A.O.	**Defendant**

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DOMINIC CHAMBERS Q.C. and EDWARD GRANGER
(instructed by **REED SMITH LLP**) for the **Claimants**

MARK HOWARD Q.C. and CONALL PATTON
(instructed by **FRESHFIELDS BRUCKHAUS DERINGER LLP**) for the **Defendant**

Hearing dates: 14, 15 March 2018

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Judgment

Mr Justice Butcher:

1. This is an application by the Defendant, Türkiye Vakiflar Bankasi T.A.O. ('Vakifbank'), issued on 29 September 2017 for an order declaring that the English Court has no jurisdiction, setting aside permission to serve the Claim Form outside the jurisdiction, and setting aside the Claim Form and Particulars of Claim.

2. The First Claimant ('BTA') is a bank incorporated in the Republic of Kazakhstan. The Second Claimant ('BTAS') is a brokerage company incorporated in the Republic of Kazakhstan, and was, until June 2015, a wholly owned subsidiary of BTA. Vakifbank is a bank incorporated in the Republic of Turkey.

3. The present action was commenced by a Claim Form issued on 6 April 2017. Permission to serve that Claim Form out of the jurisdiction was granted by an order of Teare J dated 5 April 2017. The Claim Form claims 'damages, consequential and associated relief … by reason of and as a result of [Vakifbank's] breaches of a written Deed of Release dated 27 August 2010, which was expressly governed by English law'.

4. The application for permission to serve out was supported by a Witness Statement of Simon Greer, a solicitor with Reed Smith LLP ('Greer 1') and a Skeleton Argument of Mr Chambers Q.C. ('the service out skeleton').

5. After service of the Claim Form and Particulars of Claim upon it Vakifbank, as I have said, issued an application seeking to set aside the permission to serve out granted by Teare J. This application was supported by a Witness Statement of Craig Montgomery, a partner of Freshfields Bruckhaus Deringer LLP ('Montgomery 1'). There have since been a series of further witness statements and expert reports served in relation to Vakifbank's application. A second witness statement of Mr Greer dated 8 December 2017 and a first expert report of Mr Gür on behalf of the Claimants dated 7 December 2017 were then served. An expert report of Professor Akinci dated 9 February 2018, responding to various of the matters raised by Mr Gür, was served on behalf of Vakifbank. Third and fourth witness statements from Mr Greer, a second expert report of Mr Gür, and a third witness statement from Mr Montgomery have subsequently been served and all were referred to in the hearing before me.

6. I will have to refer to some of this material in more detail in due course. At present it is convenient to set out a summary of the nature of the dispute, of the action and of Vakifbank's objections to the jurisdiction of this court. This summary is intended to be of matters which were not in dispute on the witness evidence before me.

The loan and guarantee

7. By a loan agreement dated 18 December 2007 Vakifbank agreed to lend US$ 60 million to a company called ELT Lojistik ('ELT'). The loan funds were paid into an account at Sekerbank T.A. ('Sekerbank') in Ankara, Turkey. BTA guaranteed the obligations of ELT pursuant to a guarantee dated 14 December 2007, governed by Turkish law ('the guarantee'). The guarantee contained a jurisdiction clause in favour of Ankara, Turkey. ELT defaulted on the loan and Vakifbank made a request for

payment under the guarantee to BTA, in the sum of US$ 61,437,871.21 on 4 January 2010.

Restructuring of BTA

8. At that time BTA was subject to a restructuring under Kazakh law. The restructuring had been initiated by the application of BTA to the Specialised Financial Court of Almaty ('SFCA'), which application had been granted on 16 October 2009. That order of the SFCA was recognised by the English High Court by order dated 18 December 2009, which also recognised the restructuring as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006.

9. BTA sent a message to Vakifbank on 12 January 2010 stating that it had implemented a moratorium on claims against it. On 1 May 2010, pursuant to the order of the SFCA, BTA published an Information Memorandum which contained detailed information about the restructuring, as well as information on the procedures for creditors to vote on the proposed Restructuring Plan and to submit claims subject to the Restructuring Plan. The proposed Restructuring Plan was to be governed by the laws of the Republic of Kazakhstan. BTA's indebtedness to Vakifbank pursuant to the guarantee constituted Designated Financial Indebtedness within the meaning of that term in the Information Memorandum and was listed as such in Annex 1 of the Information Memorandum.

10. Under the terms of the proposed Restructuring Plan, BTA's indebtedness to Vakifbank would be cancelled and Vakifbank was to receive a mixture of cash in US dollars, US dollar Senior Notes, US dollar Subordinated 1 Notes, US dollar Recovery Units and Global Depositary Receipts relating to ordinary shares in BTA (together 'the Entitlements'). BTA's creditors were entitled to vote on the proposed Restructuring Plan at a meeting of creditors scheduled for 28 May 2010.

11. Vakifbank submitted a formal written claim in the restructuring on 19 May 2010. This claim was in the sum of US$ 68,764,583. The Proof of Claim was executed by Vakifbank's Deputy General Manager and by its Head of Treasury and Foreign Operations. The Proof of Claim contained the following matters:

(1) Box 2 identified these details of Vakifbank's claim

> "2)Principal … USD 61,437,871
>
> 3) Accrued interest … USD 7,176,712
>
> 4)Premia, Fees, Indemnities … USD 150,000
>
> 5)Total Claim … USD 68,764,583
>
> 6) Description of Claim: Letter of Guarantee Issued by BTA Bank dated 14.12.2007 with reference PG 238/07 in favor of Vakifbank as beneficiary."

(2) Box 3 identified the elections that Vakifbank made in relation to any Entitlements which it would take.

(3) In Box 4 it was stated that Vakifbank represented and undertook that:

'(1)[Vakifbank] hereby authorises [BTA] to execute and deliver on its behalf the Deed of Release substantially in the form contained in Schedule 1, Annex 3 of the Information Memorandum and agrees to be bound by the Restructuring Plan
…
(4)This Claim Form has been duly completed by [Vakifbank] and constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, subject to the general principles of equity and any applicable bankruptcy, insolvency, reorganisation or similar law in any jurisdiction affecting creditors' rights generally.
…
(6)[Vakifbank] has adequate information concerning its Claim and the business and financial condition of [BTA] to make an informed decision regarding the Restructuring Plan and the Entitlement to be received under the Restructuring Plan in exchange for cancellation or restructuring of its Claim, and no reliance has been made on any document other than the Information Memorandum.
…'

12. On the same day Vakifbank completed and signed a Form of Proxy in which it confirmed its vote in favour of the Restructuring Plan and delegated such vote to the Chairman of the intended Meeting of Creditors.

13. The restructuring was approved by BTA's creditors on 28 May 2010.

The Deed of Release

14. BTA contends that it entered into the Deed of Release envisaged by Representation/Undertaking 1 in Box 4 of the Proof of Claim on 27 August 2010. The Deed of Release provided, in part, as follows:

(1) It stated that it was between BTA, 'the Claimants', and 'the Related Parties acting by [BTA] pursuant to the authority conferred upon [BTA] by the Claimants pursuant to the Restructuring'.

(2) It provided that, unless the context otherwise required or expressly provided, capitalised terms not otherwise defined should have the meanings ascribed to them in the Information Memorandum (1.2(a)).

(3) In clause 2.1 that 'The Claimants and the Related Parties hereby irrevocably and unconditionally release and/or waive on their own behalf and on behalf of any person to whom they have or may have transferred any of their Claims, in each case to the extent permitted by law, each and every claim (actual or potential) which they may have against:
(a)[BTA]

(b) the Subsidiaries

…

arising out of or in connection with the Designated Financial Indebtedness and/or the implementation of the Restructuring with effect from the Release Date …'.

(4) It provided that a person who was not a party to the Deed should have no rights under the Contracts (Rights of Third Parties) Act 1999.

(5) In clause 5 that 'This Deed and any non-contractual obligations arising out of or in connection with this Deed shall be governed by and construed in accordance with English law.' There was no jurisdiction clause.

15. The term 'Claimant' was defined in the Information Memorandum to mean someone who had a 'Claim' against BTA arising out of 'Designated Financial Indebtedness', which included a liability of BTA in respect of 'any guarantee, surety, indemnity … or anything analogous thereto', and without limitation, the obligations set out in Annex 1 to the Restructuring Plan. As already set out, those obligations included BTA's indebtedness to Vakifbank under the guarantee. BTAS was a 'Subsidiary' within the meaning of that term as it appeared in the Information Memorandum. The term 'Related Party' was defined in the Information Memorandum as 'any Affiliate' of BTA, and 'Affiliate' was defined to include a person controlled by BTA. At least for the purposes of the Information Memorandum, BTAS was within the meaning of Affiliate.

The Entitlements

16. BTA's evidence is that on 31 August 2010 Vakifbank received the Entitlements in full under the Restructuring Plan, being (a) US$6,747,399 in cash; (b) US$16,463,166 in US$ Senior Notes: (c) US$3,730,269 in US$ Subordinated 1 Notes; (d) US$34,011,279 in US$ Recovery Units; (e) 76,671 representing 39,835,500 ordinary shares in BTA. BNY Mellon was Distribution Agent for this purpose. A letter from BNY Mellon to BTA dated 29 February 2012 confirmed Vakifbank's receipt of these Entitlements.

17. On 31 August 2010 the SFCA declared the Restructuring complete pursuant to art. 312-6 of the Kazakhstan Civil Procedure Code, and formally terminated the Restructuring.

The alleged Assignment Agreement

18. The Claimants say that on 10 October 2011 an assignment agreement was executed, with retrospective effect to 26 August 2010, assigning Vakifbank's claims against ELT to BTA. Vakifbank does not accept that the assignment agreement was ever validly executed. It is expressed to be governed by English law and disputes under it are subject to LCIA arbitration. The Claimants do not in these proceedings assert any claims arising from the assignment agreement but it has been necessary to understand it because it features in various of the arguments which were addressed in the Turkish proceedings.

The Attachment of Sekerbank shares

19. Vakifbank subsequently applied for and on 7 February 2012 obtained a preliminary injunction from the Istanbul Primary Commercial Court No. 23 preventing the transfer or assignment to third parties of a portion of BTAS's shareholding in Sekerbank shares (namely 10.17% of the issued shares of Sekerbank being 101,726,214 shares), in order for there to be an asset within Turkey which Vakifbank could enforce against in the event that it was successful in proceedings on the guarantee. For whatever reason, the application for the preliminary injunction made no reference to the Deed of Release.

The Turkish proceedings

20. Proceedings in Turkey have proceeded since the attachment was obtained as described in the preceding paragraph. What follows is a non-exhaustive description of the Turkish litigation.

21. On 16 February 2012 Vakifbank commenced a substantive claim in the Istanbul Primary Commercial Court No. 1 against BTA and BTAS under the guarantee for payment of the guaranteed sums. Vakifbank relied upon a 'piercing of the corporate veil' doctrine in order to claim against BTAS as well as BTA. In its claim, Vakifbank sought US$ 60 million from BTA and BTAS jointly and 'in solido', default interest at a rate of 22.5% from 4 January 2010 to the date of collection, and an order that the all shares in Sekerbank belonging to BTAS be converted to cash by sale and the resulting sum be given to Vakifbank.

22. BTAS filed two sets of submissions with the Istanbul Primary Commercial Court No. 23 objecting to the grant of the attachment. These submissions objected to the jurisdiction of the court on the basis that it was the courts of Kazakhstan which had jurisdiction. This was said to be the case because there was a Kazakhstan jurisdiction provision in the Restructuring Plan and also because BTAS was domiciled in Kazakhstan.

23. In addition, these submissions stated that there had been a debt restructuring arrangement, and that as part of this Vakifbank had 'expressly released [BTA] with regard to the letter of guarantee in dispute'. Although there was some debate about precisely what was exhibited it appears that BTAS probably exhibited the Deed of Release to the second of the two sets of submissions, which continued:

24. 'Vakifbank entered into a restructuring arrangement with the debtor of the claim, which is the subject matter of this case. As a result of this restructuring arrangement, it relinquished its claims and received cash, bonds/bond-like securities and stocks in return. That is, Vakifbank already recovered its claim and [BTA], which is the debtor, was released from debt under the Kazakh and English laws pursuant to the relevant restructuring arrangement.

25. (Notwithstanding the foregoing, it should be noted that here the client company [ie BTAS], which has a totally different legal personality, is not a party to this debt

relationship in any manner. Thus, it is not a party to the debt either. What is more, the principal debtor [ie BTA] itself was released by Vakifbank!!!)

26. Whereas, Vakifbank acts in bad faith and although it is a party to the debt restructuring arrangement at issue and it released [BTA] in respect of the relevant letter of guarantee, it applied to the court to obtain a precautionary attachment order. It is inexplicable. At this stage we reserve our client's right to damages of millions of dollars.

27. When this incident was shared with our client's directors, they told that they "cannot believe" what happened.'

28. A hearing of BTAS's objections to the preliminary injunction took place at the Istanbul Primary Commercial Court 23 on 14 March 2012. One of the arguments put forward on behalf of Vakifbank is recorded as being:

29. 'There is no protocol signed by [Vakifbank]; the objecting parties refer to a protocol in their statements however that is actually a structuring plan. [Vakifbank] did not sign this document, in fact we do not even have any knowledge about it. We learned that [BTA] suspended payments and declared moratorium afterwards. The debtor party forced us to participate in this plan against our receivables and that is why we attended the negotiations in this regard…'

30. The result of the hearing was that the court refused to lift the injunction on the basis that BTAS's objection had not come within Article 394 of the Turkish Code of Civil Procedure.

31. On 5 April 2012 BTAS filed an appeal with the 11th Civil Chamber of the Court of Appeals against the dismissal of BTAS's objection to the attachment. BTAS continued to contend that it was the courts of Kazakhstan which had jurisdiction, and if that was not correct, then the courts of Ankara, not the Istanbul Primary Commercial Court No. 23. On 4 May 2012, BTA also filed an appeal against the attachment. On 14 November 2012 the Turkish Court of Appeals gave its decision on these appeals against the attachment. BTA's appeal was dismissed on the basis that BTA had not objected to the attachment at first instance. BTAS's appeal succeeded to the extent that the decision of 14 March 2012 was quashed on the procedural ground that BTAS's objections to the attachment should have been heard by the Istanbul Primary Commercial Court No. 39. On 2 and 17 April 2013, respectively, BTA and BTAS filed submissions with the Istanbul Primary Commercial Court 39, but in May 2013 that court dismissed these objections and the attachment continued.

32. In the meantime, on 16 February 2012, Vakifbank had filed a substantive claim. It was initially allocated to the Istanbul Primary Commercial Court No. 39 but as a result of a reorganisation of the Turkish courts in June 2014 it thereafter continued in the Istanbul Primary Commercial Court No. 1 (which I will refer to hereafter as 'the Turkish Court'). This substantive claim was for monies said to be due under the guarantee and interest. BTA filed its Statement of Defence to the substantive claim on 8 May 2013. It relied, inter alia, on the Deed of Release. Part of the Statement of Defence read:

> "The Plaintiff [Vakifbank] released my client [BTA] from debt. (Exhibit-9 Deed of Release)"
>
> *** The Plaintiff released my client bank through the Representative (Agent) that it has authorised together with the other creditors. ***
>
> With the statement made in Article 2.1 of the Deed of Release in question which states:
>
> "The Claimants hereby irrevocably and unconditionally release and/or waive both on their own behalf and on behalf of any other person to whom they have or may have transferred any of their claims, to the extent permitted by law, each and every claim (actual or potential) which they may have against those parties specified below, arising out of or in connection with the Designated Financial Indebtedness and/or the Restructuring that will enter into force as of the Release Date and the Restructuring Date.
>
> It is beyond dispute that the Plaintiff released my client."

33. A further pleading was submitted by BTA on 11 July 2013, which argued that Vakifbank's claim for declarations was unfounded and inviting the dismissal of the action. It did not mention the attachment.

34. A considerable number of further documents were submitted in the proceedings. I was not taken to all of them. They included certain experts' reports, but it is clear that these (for either side) did not deal with English law.

35. It is necessary to mention three other documents submitted in the proceedings, which were relied upon by Mr Howard Q.C. for Vakifbank. The first is a written argument submitted by BTA and dated 1 September 2015 (5/49). At paragraph 4 it was stated that the question of whether the release agreement was valid was 'in the Honorable Court's own discretion', and that it should hold that the Deed of Release was valid and declare that BTA owed no debt to Vakifbank. This document proceeded to refer to the Restructuring and the Entitlements. It stated that Vakifbank had entered into the Deed of Release 'through the joint authorized representative they appointed', and referred to the terms of the Deed of Release which was on the court file. It then proceeded to refer to Vakifbank's arguments as to the invalidity of the Deed of Release and the separate Assignment Agreement, and in particular that it was not a party to the Deed of Release. To counter these arguments BTA referred to two decisions of the Turkish Court of Appeals as authority for the proposition that if the parties have mutually performed obligations under a putatively binding agreement, it would be contrary to good faith for one of the parties thereafter to claim that the contract was legally invalid. It was stated that 'The legal evaluation and discretion on this matter lies with your Honorable Court'. In consequence the Turkish Court was asked to lift the attachment, and to dismiss the lawsuit, as having been unjustly and unlawfully brought 'by way of abuse of right'.

36. The other two documents are the submissions filed by BTA and BTAS on 11 and 15 September 2015 respectively for the recusal of the court panel on the grounds of lack of impartiality. The basis of BTA's application, as I understood it, was that the court had shown a lack of impartiality by having referred the case back for an expert report which calculated default interest taking into account only the cash element (and no other element) of the Entitlements. This, it was argued, showed that the court had failed to give proper weight to BTA's arguments, including as to the validity of the Deed of Release; and in this context reference was again made to one of the Turkish Court of Appeals authorities on abuse of right, referred to in the previous paragraph. BTAS's submission as to recusal was essentially the same: that the court had failed to give proper attention or weight to certain of its arguments.

37. On 19 November 2015 there was a hearing before the Turkish Court at which it was noted that the applications for recusal had been received, examined and rejected, with no appeal.

The Turkish judgment

38. The final hearing took place on 3 December 2015, and at the end the Turkish Court delivered its judgment ('the Turkish judgment').

39. The Turkish judgment set out that part of the argument of BTA and BTAS had been as follows:

> "Although [BTA] acknowledges that it is liable in its capacity as the issuer of the letter of guarantee, it argues that a moratorium was announced and application for restructuring of debts was filed with the court and this request was accepted by the Financial Court of Kazakhstan and that [Vakifbank] itself was also involved in the restructuring process and according to this, its debt was settled through some cash payments and stocks and bonds, that [Vakifbank] assigned its loan claims and released [BTA] and therefore the debt does not exist anymore and [BTAS] reiterates the same defence however it also argues that it is not a party to the guarantee agreement…"

40. Thereafter the Turkish judgment contained the following passage:

> "According to the letter of guarantee in dispute between the parties, it is set forth that Turkish laws shall apply in the event of a dispute. In contracts with a foreign element, parties are free to agree on the law applicable in the event of a dispute. In fact, in the present case, it was agreed that Turkish law shall be applicable. Therefore Turkish laws must be applied to the matters of whether the assignment and release acts are valid or not."

41. This was followed by the Turkish Court's reasoning on the issue of the validity of the Deed of Release. That reasoning was as follows:

> "It was further observed that the deed of release dated 27/08/2010 submitted to the file by defendant is not valid either since this document was signed unilaterally by those acting in the name of [BTA] and it does not involve [Vakifbank's] signature and it was drafted on the basis of a restructuring agreement, which was prepared unilaterally and based on a foreign court judgment [ie that of SFCA], regarding which no recognition or enforcement orders have been rendered, and during the restructuring process, creditors of [BTA] were represented by a member of the board of directors of [BTA], which is the debtor, therefore, the event of self-contracting by representative is at issue and under these circumstances, it cannot be considered as valid and whereas it is observed that [BTA] authorized one of its board of directors members to represent the creditors, in view of the fundamental principles of law, it is also not possible for both the creditors and the debtor, who are in an absolute conflict of interest, to be represented by board of directors members of the same bank and since also gratuitous assignment of a claim such as USD 60,000,000.00 in amount is unconceivable and given that no document supporting what kind of a consideration was paid by [BTA] in order to accept assignment of the bank's claims has been submitted to the case file, and considering also that the document submitted as deed of release bears the date 27/08/2010 and the assignment is dated 10/10/2011, it is a clear fact that it is contrary to the ordinary course of events to conclude an assignment agreement after the release, therefore it is not possible to respect the defense of [BTA] that it was released by [Vakifbank] and that [Vakifbank's] claims were assigned."

42. The Turkish judgment proceeded to find that BTA and BTAS, the latter on a 'piercing the corporate veil' basis, were, in effect, jointly and severally liable to Vakifbank under the guarantee, and Vakifbank was to be paid the principal sum of US$ 60 million with default interest at an annual rate of 22.5% as of 3 September 2010. The attachment was to remain in place until the decision was final. BTA and BTAS were also to pay sums in respect of a proportional judgment fee, Vakifbank's attorneys' fees and the costs of the hearing, these sums amounting to some US$4,727,560. The sum of US$6,747,399 which had been paid to Vakifbank in cash as part of the Entitlements was to be deducted from the total amount owed to Vakifbank.

43. Vakifbank has taken steps to enforce the Turkish judgment against BTAS's shares in Sekerbank. It appears that, as a result of these steps, the sums of TRY 175 million and TRY 1,388,638.68 (or approximately US$ 60 million at prevalent rates of exchange) are to be treated as deducted from the amounts owing to Vakifbank pursuant to the Turkish judgment.

The Appeal

44. BTA and BTAS appealed the Turkish judgment on 28 June 2016. The document identifying the basis of the appeal did not reserve the position as to jurisdiction in relation to issues about the Deed of Release, as opposed to the assignment. Nor did it seek relief as to the attachment. There is an issue as to whether that appeal was commenced in time. At present, as I understand it, the appeal is with the Court of Appeals (Cassation Court) awaiting appellate review; and once it has been determined which chamber of the Court of Appeals will conduct that review decisions will be made as to (a) whether the Turkish judgment can be appealed and (b) whether the appeal was filed in time.

Kazakh proceedings

45. Before lodging the appeal against the Turkish judgment, namely in January 2016, BTA brought proceedings in the Specialised Interregional Economic Court of Almaty, Kazakhstan, seeking a declaration that the guarantee was no longer effective, that Vakifbank's claims under the guarantee had been satisfied by the Entitlements and that it had been unlawful for Vakifbank to bring the Turkish proceedings. The courts of Kazakhstan, both at first instance and (in March 2016) on appeal, without notice to Vakifbank, dismissed the claim, apparently on the basis, inter alia, that the issues raised were ones which could be raised in the Turkish proceedings.

The English claim

46. As already set out, the present action was commenced by Claim Form issued on 6 April 2017. The Particulars of Claim refer to the Restructuring; to the Deed of Release; to Vakifbank's receipt of the Entitlements; and to the commencement of the Turkish proceedings, which is alleged to have been a breach of the Deed of Release on the basis that that Release had involved an undertaking by Vakifbank not to sue BTA or BTAS in any jurisdiction under the guarantee; and to the Turkish judgment. Damages are claimed for the alleged breach of the Deed of Release in commencing the Turkish proceedings in the amounts awarded by the Turkish judgment and the costs incurred in the Turkish proceedings.

47. As I have already said, the application to serve the Claim Form out of the jurisdiction was supported by Greer 1 and the service out skeleton. Greer 1 anticipated the possible argument of Vakifbank that the Turkish judgment established *res judicata* and an issue estoppel by saying, simply, that there was neither because the Turkish Court 'did not decide the validity of the Deed of Release as a matter of English law' and that 'the judgment of the Istanbul Court was therefore not on the merits for *res judicata* and issue estoppel purposes'. As to the question of whether BTA and BTAS had submitted to the jurisdiction of the Turkish Court, Mr Greer said this (paragraphs 113-114):

> "[113] Vakifbank may allege that [BTA] and BTAS have submitted to the jurisdiction of the Istanbul Court. It may refer

> to the fact that [BTA] and BTAS defended Vakifbank's claim on the merits in the Istanbul Court and that they have appealed the Istanbul Court's judgment to the Turkish Supreme Court.
>
> [114] The Claimants' case is that this does not matter. The Claimants have not waived their claim for damages for breach of the Deed of Release, even if they have submitted to the jurisdiction of the Istanbul Court. The Turkish proceedings should never have been brought in the first place since they clearly breach the terms of the Deed of Release. The Claimants are, I respectfully submit, entitled to sue Vakifbank in England for its breaches of the Deed of Release, notwithstanding the fact that they have defended Vakifbank's claims, which were brought under the Guarantee, in Turkey."

48. The service out skeleton argued that permission to serve out should be granted under paragraph 3.1(6)(c) of PD6B on the basis that the claim was made in respect of a contract governed by English law (namely the Deed of Release). It further contended that there was a serious issue to be tried. In this context it was argued:

> " [20] Further, the Turkish Judgment does not give rise to any questions of *res judicata* or issue estoppel because the Turkish Court applied Turkish law, rather than English law, to the Release. Accordingly, the Turkish Court did not give a decision "on the merits" (under English law) for *res judicata*/issue estoppel purposes – see generally *The Sennar (No. 2)* [1985] 1 WLR 490 at 499B-C and 499 F-G per Lord Brandon of Oakbrook. The Turkish Judgment is therefore no bar to the bringing of these English proceedings.
>
> [21] The fact that [BTA] and BTAS submitted to the jurisdiction of the Turkish courts to defend the Defendant's claim under the Guarantee does not prevent them from claiming under the Release in the English court, and it does not waive their claim for damages for breach of the Release – see generally *The Eastern Trader* [1996] 2 Lloyd's Rep 585 at 600 per Rix J. and *The Alexandros T* [2014] 2 Lloyd's Rep 579 at para. 35 per Flaux J. The Turkish Proceedings should never have been brought by the Defendant, and [BTA] and BTAS are entitled to seek redress therefor relying on the provisions of the Release in England."

The Arguments of the Parties

49. Vakifbank's principal arguments in its first skeleton argument were as follows:

(1) The Court had to be satisfied that: (i) the Claimants raised a serious issue to be tried on the merits of the claim; (ii) the Claimants had a 'good arguable case' that one of the jurisdictional gateways under paragraph 3.1 of Practice Direction 6B was applicable; and (iii) that England was the proper place to bring the claim.

Vakifbank suggested that the Claimants could establish none of these because of the matters summarised in (2) to (5) below.

(2) Vakifbank referred to the Turkish judgment and contended that it established an issue estoppel, in that it established the invalidity of the Deed of Release. The only argument raised by the Claimants in the material submitted to support the application for service out to the effect that there was no issue estoppel, namely that there was no decision 'on the merits' because English law had not been applied, was demonstrably wrong, not least by reference to *The Sennar (No. 2)* itself.

(3) That it was, in any event, an abuse of process for the Claimants to seek to advance, in England, a case which could and should have been raised before the Turkish courts.

(4) The Claimants had waived any claim to damages for breach of the alleged covenant not to sue, by having submitted to the Turkish courts.

(5) England was not the proper forum, especially in view of the existence and long course of the Turkish proceedings, and the lack of connexions of the case with England.

(6) In addition there had been non-disclosure at the time of the without notice application for permission to serve out of (a) the fact that the Claimants had failed to argue for English law in the Turkish proceedings; and (b) that BTA had brought proceedings in Kazakhstan in relation to the same subject matter.

50. The Claimants' arguments, which had developed significantly from those put in the initial materials served in support of the application to serve out, involved the following stages:

(1) There was both a serious issue to be tried, and, if and so far as necessary, a 'good arguable case'.

(2) The Turkish judgment should not be recognised and gave rise to no issue estoppel.

(3) As to recognition: the Deed of Release constituted an agreement within the terms of s. 32(1)(a) Civil Jurisdiction and Judgments Act 1982 ('the CJJA'). Given that there had not been a submission to the jurisdiction of the Turkish Court, taking into account the provisions of s. 33(1)(c) of the CJJA, the English Court had not to recognise the Turkish judgment. Even if there had been submission, moreover, the English Court must make an 'evaluative judgment' as to whether the Turkish judgement should be recognised, and, for the reasons developed in relation to issue estoppel, it should conclude it should not be.

(4) As to issue estoppel: there was no issue estoppel because (a) there had been no 'full contestation' of the issue in question in the Turkish Court; and (b) the recognition of an issue estoppel in the present circumstances would work injustice not justice. One strand of this was that the Turkish court had displayed a lack of independence.

(5) There had been no waiver of the Claimants' right to claim damages for breach of the covenant not to sue contained in the Deed of Release, given that, in the Turkish proceedings, the Claimants had contended, in reliance on the Deed of Release, that the claim should be dismissed.

(6) England was the most appropriate proper forum, given the choice of English law to govern the Deed of Release, and the fact that the restructuring had been recognised as a foreign main proceeding under the Model Law by the English Court.

(7) There had been no non-disclosure because (a) it was factually incorrect to suggest that the Claimants had not contended for English law in the Turkish proceedings; and (b) the Kazakh proceedings had been unknown to the relevant personnel at the time the English proceedings were commenced and were in any event immaterial.

51. Vakifbank protested that various of these arguments were new and in a number of significant cases not open to the Claimants. The principal answers given were:

(1) The Claimants had conceded in the service out skeleton that there had been a submission to the Turkish Court. That constituted an admission, and for it to be withdrawn would require the Court's permission under CPR 14.1(5).
(2) In any event, s. 32 CJJA was of no application, because the Deed of Release did not contain a clause of the type with which it deals, namely a jurisdiction or arbitration clause. Further, even if the clause in the Deed of Release were one to which s. 32 CJJA was applicable, the exceptions in sub-ss. 32(1)(b) and (c) applied. In relation to the latter, and the Claimants' reliance on s. 33(1)(c), there had been a submission, because the Claimants had taken steps which were not for the sole purpose of lifting the attachment.
(3) There was no 'evaluative judgment' to be exercised in a case in which one party has been found to have submitted to the jurisdiction of the foreign court. In any event, as the points relied on by the Claimants for the 'evaluative judgment' were the same as they contended defeated issue estoppel, if they failed in that context, they would fail in this as well.
(4) There was no additional requirement of 'full contestation' for there to be an issue estoppel and in any event, if there was a failure of 'full contestation' that was because the Claimants had not argued the point as to English law.
(5) There was no injustice. Most of the points relied upon by the Claimants in this context were a repackaging of the arguments that the Turkish Court applied the wrong law, which was not a basis for declining to recognise the judgment. The suggestions of lack of independence on the part of the Turkish Court had no proper foundation.

52. Finally in this summary mention should be made of two points which emerged during the course of oral argument. The first is that Vakifbank contended that the decision of the Turkish Court might create a cause of action estoppel, and not only an issue estoppel. The second was that Vakifbank contended that the Claimants' reliance on the Turkish Court's not having applied English law disintegrated when the precise nature of what had been the issues in the Turkish proceedings were considered. Thus it was said that the Turkish Court had not reached any conclusion about the meaning of the words of the Deed of Release – the matter governed by English law – but instead its reasoning on the invalidity of the Deed of Release had depended on matters which were not governed by English law, or which were simple inferences of fact.

Discussion and conclusions on serious issue and 'good arguable case'

53. There is no dispute that the matters which need to be established for permission to serve out are three-fold. They are that there is: (1) a serious issue to be tried on the merits; (2) a 'good arguable case' that one of the jurisdictional gateways in PD 6B paragraph 3.1 is applicable; and (3) a showing that England is clearly or distinctly the appropriate forum for the claim to be brought (Altimo Holdings v Kyrgyz Mobil Tel

Ltd [2012] 1 WLR 1804 at [71]). The burden of establishing these matters, even on an application such as this brought by the Defendant, is on the Claimants.

54. There is a difference between 'a serious issue to be tried' and a 'good arguable case'. A 'serious issue to be tried' has been said to correspond to the test for resisting an application for summary judgment. This connotes that there must be a substantial question of fact or law or both, and that the claimant has a real, as opposed to a fanciful, prospect of success (Altimo Holdings v Kyrgyz at [71]). If the question is one of law, and the court is satisfied that it has all the evidence before it necessary to consider it, then the court may be able to take the view that it does not constitute a serious issue to be tried, just as the court may in an appropriate case decide such points of law on an application under Part 24 (ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725 at [12]).

55. A showing of a 'good arguable case' requires the demonstration of something more than an argument which would survive an application for summary judgment, but does not require that the court is satisfied on a balance of probabilities. In Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 there is some discussion of the practical application of the test. Baroness Hale of Richmond (at [33]) said that the correct test was 'good arguable case' and glosses on that phrase should be avoided. She added that she did not regard what Lord Sumption said in the same case on the issue as being a gloss. Lord Sumption had said (at [7]) that what had been said by Waller LJ in Canada Trust Co v Stolzenberg (No. 2) [1998] 1 WLR 547 at 555 was:

> "… a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

56. There was a debate in the present case as to whether there were issues which I had to resolve only by the standard of whether there was a serious issue to be tried, or whether effectively the only relevant test was the 'good arguable case' standard. The reason for this debate was that the jurisdictional gateway relied upon by the Claimants is PD 6B paragraph 3.1(6)(c), namely that the claim is made in respect of a contract (namely the Deed of Release) governed by English law. It was not disputed that it was necessary for the Claimants to show that there is a good arguable case that there

was such a contract. Vakifbank argued, however, that the nature of its case as to the effect of the Turkish judgment which had held that the Deed of Release was invalid was such as indicated that there was no such contract. Accordingly, Vakifbank argued, the Claimants needed to show a good arguable case that the Turkish judgment did not create a cause of action or issue estoppel. By contrast Mr Chambers Q.C. for the Claimants suggested at one point of his argument that the issue of whether there was an estoppel should be judged only by the test of whether there was a serious issue to be tried. I consider that Vakifbank is probably correct on this point, as these issues are two sides of a coin: if the Claimants do not have a good arguable case on whether they are estopped by the Turkish judgment from contending that the Deed of Release is valid, they will not have a good arguable case on whether there is a valid Deed of Release. I will, however, consider the question of whether there is a cause of action or issue estoppel both as to whether there is a serious issue to be tried and as to whether there is a good arguable case.

57. Vakifbank's case in relation to the effect of the Turkish judgment was primarily put on the basis that it created an issue estoppel, and I will consider that contention first. I will consider later its new argument that it created a cause of action estoppel.

58. The requirements for an issue estoppel to arise from a foreign judgment were summarised in The Sennar (No. 2) [1985] 1 WLR 490 by Lord Brandon of Oakbrook at 499B-C as follows:

> "The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

59. There was no dispute in the present case that the second and third of Lord Brandon's requirements were met in the present case. The parties to the action in which the Turkish judgment was given and to the present action are the same; and the issue of the validity or invalidity of the Deed of Release was decided in the Turkish judgment and is raised again in the present action. There was also no dispute that requirement 1(b) is met. A judgment is final and conclusive if 'its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction, although it may be subject to appeal to a court of higher jurisdiction': The Sennar (No. 2) at 494B. The evidence is that that is the status of the Turkish judgment.

60. In the material submitted by the Claimants in support of the application to serve out, as I have already said, the only point made to suggest that the Turkish judgment did not create an issue estoppel was that the Turkish court did not decide the issue of validity of the Deed of Release under English law, and therefore the decision was not one 'on the merits'. That point hardly featured in the Claimants' argument before me, though it was not formally abandoned. It is, I consider, clearly wrong. As was stated

by Lord Diplock in The Sennar (No. 2), a decision 'on the merits' means that 'the court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise' (494B). Lord Brandon said, at 499F-G:

> "Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."

61. The Turkish judgment falls within those descriptions of a decision 'on the merits'. The suggestion which was made in the Claimants' materials at the service out stage was to the effect that it was nevertheless not a judgment on the merits because it had applied the 'wrong' law. Even if that were a correct description of what the Turkish court did, it would not make the decision one reached other than 'on the merits'. In The Sennar (No. 2) Lord Diplock said, at 493G, that 'Issue estoppel operates regardless of whether or not an English court would regard the reasoning of the foreign judgment as open to criticism.' It makes no difference that the error is said to be one of English law which is apparent on the face of the judgment (Godard v Gray (1870) LR 6 QB 139), or is said to be as to what law should have been applied as to the governing law (Leibinger v Stryker Trauma [2005] EWHC 690 (Comm) at [23]). Accordingly I consider it plain that Lord Brandon's requirement 1(c) is met in the present case.

62. The remaining requirement is that the Turkish judgment should have been one of a court of competent jurisdiction. The circumstances in which a foreign court will be regarded as one of competent jurisdiction for these purposes, as a matter of common law, are set out in Rubin v Eurofinance SA [2012] UKSC 46 at [7] by reference to a long-standing statement in *Dicey*. The four cases identified include, as the third case 'if the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings'; and as the fourth case 'if the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.' Vakifbank submitted that the Turkish Court was a court of competent jurisdiction, both by reason of the agreement as to jurisdiction in the guarantee, and by reason of a subsequent voluntary submission to the Turkish Court's jurisdiction. The Claimants disputed this, and in that context relied on the provisions of the CJJA to which I have referred.

63. At this juncture it is necessary to deal with the preliminary point raised by Vakifbank, to the effect that it was not open to the Claimants to dispute that they had submitted to the jurisdiction of the Turkish Court because of what Vakifbank said was their 'admission' in the service out skeleton paragraph 21, which I have already quoted. The Claimants contended that paragraph 21 of the service out skeleton had been a reference only to submission in the Istanbul proceedings as a matter of Turkish law, and that it was not an acceptance that the Claimants had submitted to the jurisdiction of the Turkish Court as a matter of English private international law.

64. I consider that the service out skeleton was not seeking to refer simply to submission as a matter of Turkish law. It does not say that and, on the contrary, appears in a section of the skeleton dealing with issue estoppel and waiver as a matter of English law. Furthermore, if the Claimants had been advancing a case that they had not submitted as a matter of English law, that would have been an answer to any case of issue estoppel. That, however, was not the point which was being made in the service out skeleton: the only point which was made to answer any potential argument as to issue estoppel was that the Turkish judgment had not been 'on the merits'.

65. On the other hand, I do not consider that paragraph 21 of the service out skeleton was an 'admission' within CPR 14.1. An admission of the other party's case envisages that that case should have been set out or articulated and is being admitted in whole or in part. That does not apply to the present situation, where Vakifbank had not previously formulated a case as to why the Turkish judgment should be regarded, for English law purposes, as being binding and as creating res judicata.

66. In any event, even if I were wrong in relation to whether paragraph 21 constituted an admission, I would have been reluctant to have decided the present issues on the basis of that admission alone. Had I considered that it was an admission, I would have given permission for it to be withdrawn, on the basis that I considered that that course did not cause any real prejudice to Vakifbank, which has been able to argue fully as to why there was a submission.

67. I therefore turn to the two reasons why Vakifbank contends that the Turkish Court was a court of competent jurisdiction. The first is that there was an agreement by the Claimants, in advance, in the guarantee that the courts of Turkey should have jurisdiction. The provision of the guarantee relied upon was as follows:

> "This engagement is governed by Turkish law, place of jurisdiction is Ankara."

68. The Claimants contend that this was a submission to a particular court (namely the court of Ankara not the Istanbul court), and that a submission to a particular court is not of itself a submission to all the courts of that country. For this they cite *Dicey, Morris and Collins on the Conflict of Laws* (15th ed) para. 14-076. By contrast, Vakifbank cites the latter part of the same paragraph of *Dicey, Morris and Collins* which states that whether there is a submission to all the courts of a country is a question of construction. It says that the guarantee does not refer to a particular court (eg, the Ankara Commercial Court) and it relies on the fact that Mr Gür had said that the express jurisdiction clause in favour of Ankara had precluded the Claimants from challenging the jurisdiction of the Istanbul Court.

69. The only authority bearing on the point which is cited by *Dicey, Morris and Collins* or was referred to by the parties is the decision of the Court of Appeal in S.A. Consortium General Textiles v Sun and Sand Agencies Ltd [1978] 1 QB 279. That was a case in which one of the issues was the construction of s. 4(2)(a)(iii) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. Obiter, the majority of the Court of Appeal said that for the purposes of that sub-section a submission to the 'courts of the country of that court' could arise only when there was an express submission in general terms to the courts of a country rather than to an individual court.

70. I consider that, as *Dicey, Morris and Collins* says, whether there is a submission to the courts of the country or to a particular court must depend on the proper construction of the contract and of the relevant clause within it. I conceive that there may well be cases in which a reference to the 'place of jurisdiction' as being a city in a particular country, especially if it is the capital city, is properly to be regarded as a submission to the courts of the country in question. This would depend in part, as it seems to me, on the extent to which the courts in that country operated independently of each other; whether there might be transfers between courts; and whether, in view of such matters, it was plausible that parties might have wished to choose only the courts of a particular city or place within the country rather than the courts of the country. I have no material as to whether there was any factual matrix to the making and terms of the guarantee which might be relevant to this issue, and do not consider that it is one on which I can take a reliable view at this stage. For that reason I would regard this as being an issue on which the Claimants have shown a serious issue to be tried and a good arguable case.

71. I turn therefore to the second reason relied upon by Vakifbank as to why the Turkish Court was a court of competent jurisdiction, namely that the Claimants had submitted to the jurisdiction of that court in the course of the proceedings. Vakifbank relied, in particular, on the fact that, after the Claimants' opposition to the attachment had failed in May 2013, they continued to participate in the substantive claim; on the terms of the Claimants' written submissions dated 1 September 2015; and on the fact that the Claimants had sought to appeal the Turkish judgment.

72. The Claimants, on the other hand, contended that even after the challenge to the attachment had failed, the Claimants were entitled to continue to make applications to lift the attachment which they had done on 20 January 2015 and 1 and 11 September 2015, and that they could only have exercised that right if they defended on the merits. As they put it in their Skeleton Argument: 'Although Cs defended on the merits and are appealing the Turkish Judgment, this was all done in conjunction with their ongoing attempts to protect the Sekerbank Shares and release them from attachment.' It was submitted, accordingly, that the present case fell within s. 33(1)(c) of the CJJA which provides:

> 'For the purposes of determining whether a judgement given by a court of an overseas country should be recognised or enforced in England and Wales …, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely –
>
> …
>
> (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.'

73. As to the correct approach to s. 33(1)(c) of the CJJA I was referred by Mr Howard Q.C. to the decision of Cooke J in Motorola Credit Corp. v Uzan [2004] EWHC 3169 (Comm) at [52-53], where he said:

> "[52] In my judgment, it is implicit in the wording of the section, and in the common law authorities which preceded the wording, that in order to take advantage of the exceptions given by the statute, the purpose for entering an appearance or taking steps must be solely for all or any of the purposes set out in the section. That is, indeed, the force of the phrase 'the person shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared for any one of the following purposes'. It is right to say that [t]he protection afforded by Parliament would be abused if a defendant could participate in foreign proceedings, partly in order to obtain protection for property which had not already been seized by the foreign court, and partly in order to fight the case on the merits. In such circumstances, that party could deliberately allow the foreign court to determine this and to choose whether or not to accept the outcome, safe in the knowledge that he could otherwise rely upon the protection of s. 33. That cannot have been the intention of Parliament.
>
> [53] If challenges on merits are made for the sole purpose of challenging the jurisdiction of the court, or for the sole purpose of protection of property seized or threatened with seizure, then s. 33 applies. In each case it is necessary to look at the facts to ascertain the purpose for which appearance was entered and contest was raised. If there is engagement on the merits outside the ambit of jurisdictional challenges, or challenges relating to the seizure or threatened seizure of assets, then s. 33 cannot apply."

74. Cooke J's reference to common law authorities preceding the section is, as I understand it, a reference to cases including Voinet v Barrett (1885) 55 LJKB 39 at 41 ('… an appearance which would otherwise be voluntary is not treated as voluntary if it is **only** made in order to save property which is in the hands of a foreign tribunal…'), and Henry v Geoprosco International [1976] 1 QB 726 at 746-747 ('English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court **solely** to preserve those assets which have been seized by that court.') (My emphasis in both cases).

75. Further guidance is provided by *Dicey, Morris and Collins* at paragraph 14-074, where it is said:

> "The common law authorities may still be helpful in considering the extent to which the defendant may go in taking steps to preserve his property. Thus it is clear that an appearance was not involuntary at common law merely because it was motivated by the fact that the defendant had property within the jurisdiction of the foreign court on which execution might be levied in the event of judgment going against him by

> default; still less was an appearance involuntary when it was made because, although the defendant has no property within the jurisdiction of the foreign court, his business often took him there, so that the judgment might be made effective against him. Secondly, an appearance is not involuntary when it is made after execution has been levied under the judgment in order to rescue the property which is the subject-matter of the execution. Thirdly, if property is seized and the defendant appears and defends the case on the merits, the appearance is not involuntary. But there may be cases in which the defendant may appear to oppose the seizure on jurisdictional grounds, e.g. where he denies he has property within the jurisdiction or where he challenges the validity of the seizure. [footnote 289] In such cases the effect of s. 33 of the 1982 Act is that the appearance will not be voluntary."

76. Footnote 289 reads, in part:

> '… It is to be noted that although s. 33(1)(c) is not expressly limited to appearances to protect property on jurisdictional grounds, such a limitation should be read it (sic) to avoid the absurdity of the sub-section providing a shield against recognition to every defendant who asserts, truthfully, that the only reason he defended on the merits was to protect property which had been seized or which had been threatened with seizure if judgment on the merits was given against him.'

77. In my judgment footnote 289 is correct in emphasising that s. 33(1)(c) should not produce absurd results and should not extend to cases in which a party has actively defended the case on the merits notwithstanding that it has done so in order to avoid its property being effectively seized. I also consider that Cooke J's approach in paragraph [53] of Motorola is correct. In particular I consider that it is necessary to examine whether in relation to a particular step it was an engagement on the merits outside the ambit of jurisdictional challenges, or challenges relating to the seizure or threatened seizure of assets. Applying that approach I am in no doubt that the Claimants did indeed take steps in the Turkish proceedings which were outside the ambit of jurisdictional challenges or challenges relating to the seizure or threatened seizure of assets. In particular, their defence of the substantive proceedings after the challenges to the attachment had failed in May 2013 went outside that ambit. By that defence they invited the Turkish court to rule in their favour on the merits, and had their argument prevailed, they would have taken advantage of that, including by having the attachment lifted. Section 33(1)(c) does not, in my judgment, allow a party to contest the merits in this way and then choose either to accept the judgment if it is favourable, or contend that it is not to be recognised if it is unfavourable.

78. Furthermore, in the present case there is another matter which indicates that there has been a submission, namely that the Claimants have sought to appeal the Turkish judgment. In S.A. Consortium General Textiles v Sun and Sand Agencies Ltd [1978] 1 QB 279, at 299, Lord Denning said:

> "By inviting the Appeal Court to decide in its favour on the merits, it must be taken to have submitted to the jurisdiction of the original court. If the Appeal Court decided in its favour, it would have accepted the decision. So also if it decided against it, thus upholding the original court, it must accept the decision."

79. In Certain Underwriters at Lloyd's v Syrian Arab Republic [2018] EWHC 385 (Comm), Andrew Henshaw QC sitting as a High Court Judge stated that the S.A. Consortium remained good authority for the proposition that an appellate filing not reserving the appellant's position as to jurisdiction can amount to a submission to the foreign court (paragraphs [57-58]).

80. In my judgment the Claimants' filing of an appeal against the Turkish judgment and seeking the reversal of the first instance decision as to the invalidity of the Deed of Release constitutes a submission to the jurisdiction of the Turkish Court, and does not fall within s. 33(1)(c) of the CJJA.

81. Thus, although, as I have said, I do not consider that the service out skeleton contained an admission or at least one which cannot be withdrawn, nevertheless, in my view the acknowledgement in paragraph 21 that there had been a submission was a realistic one.

82. I now turn to consider the arguments which the Claimants have raised in relation to s. 32 of the CJJA. That section provides in part:

> (1) Subject to the following provisions of this section, a judgment given by a court of an overseas country shall not be recognised or enforced in the United Kingdom if –
> (a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
> (b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
> (c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

83. As will be apparent from what I have said in relation to submission and s. 33(1)(c) above, I do not consider that the case falls within s. 32 if only because s. 32(1)(c) is not here met. I should say, however, that I would in any event have found that s. 32 was not applicable, because I do not consider that the Deed of Release constituted 'an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country'. I consider that the section relates to provisions which provide for the settlement, which here means resolution not compromise, by a dispute resolution procedure other than proceedings in the court of the country where judgment has been given. As I see it, the section is directed at arbitration and jurisdiction agreements. That this is so is supported by what Burnton LJ said in AES Ust-Kamenogorsk LLP v Ust-Kamenogorsk JSC [2011] EWCA Civ 647 at [202], and by *Dicey, Morris and Collins* at paragraph 14-098.

84. What the Claimants contend is that the Deed of Release included an implicit covenant not to sue on the released obligations anywhere, and that this implied agreement is to be equated with the type of agreements referred to in s. 32. In my judgment the analogy is false. A covenant not to sue is not an agreement that the dispute should be resolved 'otherwise' than by proceedings in the court of the country of the judgment, but is an undertaking not to bring proceedings anywhere. The enforceability of a judgment in proceedings brought in breach of such a provision is to be considered by reference to the common law, not s. 32.

85. The Claimants have made two other arguments as to why this Court should not treat the Turkish judgment as creating an issue estoppel, namely that, as they contend, there was not a 'full contestation' of the relevant issue in the Turkish proceedings, and that an issue estoppel would work injustice.

86. Vakifbank's first answer to this was to say that the relevant estoppel was, on analysis, a cause of action estoppel, and that these two points were not even arguably relevant to a cause of action estoppel as opposed to an issue estoppel. In circumstances where the cause of action in Turkey was a claim under the guarantee, and the claim in England is for alleged breach of the Deed of Release, I am doubtful as to whether this is a case of cause of action estoppel. I do not, however, need to decide that issue, or even to form a view as to whether there is here a serious issue to be tried or good arguable case, because I am clearly of the view that the two further proposed answers to issue estoppel are not good ones.

87. The argument in relation to 'full contestation' is that there was no contestation in the Turkish Court about the application of English law to the Deed of Release or the validity of the Release under English law. On this basis it is said that one of the requirements of an issue estoppel recognised in The Good Challenger [2004] 1 Lloyd's Rep 67 at [54] per Clarke LJ, by reference to Lord Wilberforce's speech in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853, is absent.

88. I consider that the first answer to this suggestion is that there is no separate requirement for there to be a 'full contestation' of the issue in question for there to be an issue estoppel. Clarke LJ in The Good Challenger was not suggesting the existence of requirements which are not referred to in The Sennar (No. 2). I agree with the analysis of Hamblen J on this point in Yukos Capital Sarl v OJSC Rosneft Oil Co (No. 2) [2011] EWHC 1461 (Comm) at [55].

89. In any event, I consider that this argument proceeds on the basis of a mischaracterisation of what occurred in the Turkish proceedings and the basis of the Turkish judgment. While it might be said that there was no 'contestation' of what, under English law principles of construction, the Deed of Release meant, this appears to have been because there was no issue as to what it meant, and no suggestion that the application of any other system of law to its interpretation would have influenced this. The issue as to whether the Deed of Release was valid and binding on Vakifbank was based on anterior questions, namely whether there could have been a valid signature of the Deed of Release by BTA, purportedly on behalf of Vakifbank; and whether BTA in fact executed the Deed of Release at all. These issues were contested in the Turkish proceedings (not least in the submissions put in by BTA dated 1 September 2015 [5/49/1221-1222]).

90. The second argument is that the issue estoppel for which Vakifbank contends would work injustice rather than justice, and accordingly is not to be given effect. Reference was again made to paragraph [55] in The Good Challenger. I accept that there may be cases in which, though all the requirements of an issue estoppel set out by Lord Brandon in The Sennar (No. 2) at 499B-C are present, nevertheless it can be seen that recognition of an estoppel will plainly create injustice. Such cases will necessarily be rare, as the recognition of this exception cannot be permitted to undermine the rule, including the principle that a foreign judgment may create an issue estoppel notwithstanding that it may be regarded by the English court as wrong.

91. The various points which were relied upon by the Claimants in this context did not appear to me to be ones which indicated that the present was a case which fell within the exception. The suggestion, which was made in a number of guises, that Vakifbank was 'taking advantage of its own wrong' by having sued in alleged breach of the Deed of Release I considered to be a circular argument. The Turkish judgment found the Deed of Release to be invalid, and on that basis no issue of breach would arise. In circumstances where I consider that there was a submission to the Turkish court and where s. 32 CJJA does not apply, this did not in my view constitute an arguable case of injustice such as would prevent the recognition of an issue estoppel.

92. Other complaints were to the effect that the injustice arose from the fact that the Turkish court did not apply English law when, as it was said, it clearly should have done and that that amounted to a denial of substantial justice. This is an argument which, I consider, is contrary to the principle that an estoppel may be recognised notwithstanding that it contains what an English court would regard as an error. In any event, in my judgment, this argument depends on a mischaracterisation of what occurred in the Turkish proceedings. As far as I can see, the Turkish court did not refuse to apply English law to the construction of the Deed of Release – no one was suggesting that there was an issue as to what it meant. What the Turkish Court did was to decide the case on the basis of the matters to which I have referred in paragraph [84] above. Those were not matters which the Claimants submitted in the Turkish proceedings were governed by English law, and it is very doubtful that they would be regarded as governed by English law even if English conflicts rules were applied.

93. I should lastly mention in this context an argument which surfaced in the Claimants' skeleton argument for the hearing before me, to the effect that the Turkish court lacked independence. Where a party asserts that even-handed justice may not be done to him in a particular foreign jurisdiction, he must assert this candidly and support his allegations with positive and cogent evidence: The Abidin Daver [1984] AC 398 at 411 B-E per Lord Diplock; Altimo v Kyrgyz Mobil [2011] UKPC7 at [101] per Lord Collins. In the present case, the suggestion was made without any evidential support, and certainly not cogent evidence. It is not, in my judgment a complaint which I can take into account. In any event, I should record that the submission made to me on this point did not persuade me that there was here a serious issue.

94. I have considered all the points on which Mr Chambers Q.C. relied in support of his case that recognition of the estoppel in the present case would work injustice rather than justice. Neither individually not collectively did they persuade me that there was here an arguable case for the exception to apply.

95. For all the reasons which I have given up to this point, I have concluded that, in light of the Turkish judgment, the Claimants cannot show a serious issue to be tried on the merits, and have not shown a good arguable case as to the existence of a jurisdictional gateway.

Appropriate forum

96. Vakifbank contended that, irrespective of whether the Claimants could establish the other two requirements for permission to serve out, they could not show that England was clearly or distinctly the appropriate or the most appropriate forum for the claim to be brought.

97. I consider that it has not been shown that England is clearly or distinctly the appropriate or the most appropriate forum for the trial of this claim. In this regard I consider that the following considerations are of importance:

(1) There is a *lis alibi pendens*, namely the Turkish proceedings. The dispute can be determined there.
(2) Those Turkish proceedings have been on foot for six years. It is common ground that the Turkish court received extensive evidence and submissions, including expert evidence, and held a number of hearings.
(3) Turkey was at least a natural forum for the resolution of the dispute, given that the guarantee was expressly subject to Turkish law, and subject to the jurisdiction of the Ankara courts, and that one of the parties was domiciled there.
(4) As I have found, the Claimants submitted to the jurisdiction of the Turkish courts.
(5) Apart from the choice of English law, to which I will come, there are no other connexions with England. The parties are not English and are not domiciled here; none of the events relevant to the dispute occurred in England; and it has not been said that any witness who might be relevant is resident or located here.

98. The only matter which points in favour of England is the choice of English law to govern the Deed of Release. A choice of English law is generally a positive factor in favour of a trial in England. However, the significance of this factor will depend on what the issues are as to English law, and the extent to which there is an advantage in the English court applying English law. In the present case, however, it was not clear to me that there was any disputed issue of English law which actually arose between the parties. Certainly it did not appear to me that there was such an issue which showed that there was a significant advantage in its being determined here because of this Court's familiarity with its own law.

99. I have already set out, in paragraph 84, the actual issues on which the Turkish Court considered that the issue of validity of the Deed of Release depended. It is reasonable to assume that these would be the matters of contest in any proceedings brought here. The first strand, which may be summarised as to do with whether an agent could deal with itself when there was a conflict of interest, is one where it is, as I have said, at least very doubtful that English law would be relevant, even applying English conflicts rules. Seeking – for the purposes of argument – to apply those rules, the question might be regarded as one of capacity, in which case it would presumably be governed by Turkish law as the law of Vakifbank's country of incorporation.

Alternatively it might be regarded as a question of authority. That might indicate the applicability of the law of the pre-existing relationship between Vakifbank and BTA, which would be Turkish law as the proper law of the guarantee; or, since the source of the alleged authority is the claim form in the restructuring, the governing law might be the law of Kazakhstan as the express proper law of the restructuring plan. No argument was put to me as to how English law would be applicable to this question.

100. The second strand of the Turkish court's reasoning concerned an issue of fact. It is not apparent why any familiarity of the English court with English law would mean that this issue would be most advantageously tried in England.

101. For these reasons I do not consider that the fact that the Deed of Release was to be governed by English law is a significant pointer to England as the most appropriate forum. And in any event, I would not consider that that choice of law was sufficient to counteract the other factors which, to my mind, indicate that England has not been shown to be clearly or distinctly the most appropriate forum. It may have been because of a recognition as to England's limited connexions with the dispute, the parties or the witnesses that the Claimants sought, unsuccessfully, to bring proceedings in the courts of Kazakhstan before commencing proceedings here.

Conclusion

102. On the basis of the reasons set out above, I do not consider that the requirements to support service out of the jurisdiction are met. Accordingly Vakifbank's application succeeds. I will hear counsel on the terms of the appropriate order if it cannot be agreed.