Banco Nacional De Comercio Exterior SNC v Empresa De Telecomunicaciones De Cuba SA [2007] APP.L.R. 10/11

Judgement : Mr Justice Tomlinson: Commercial Court. 11th October 2007

1. This is an appeal from an order made ex parte by Irwin J on 29 September 2006 whereby he directed that a judgment of the First Civil Section of the Ordinary Court of Turin of 18 November 2005 be registered as a judgment of the English Court. The judgment in question is, effectively, a judgment in favour of the Claimant/Respondent Banco Nacional de Comercio Exterior SNC to whom I shall refer as "Bancomext" against Empresa de Telecomunicaciones de Cuba SA to whom I shall refer as "ETECSA" in a sum of in excess of US$160million together with interest. That order was made pursuant to Article 33 of Council Regulation (EC) 44/2001, the Judgments Regulation. Under Article 43 of the Judgments Regulation an appeal inter partes lies as of right and it is ETECSA's appeal against the order of Irwin J which I have to resolve. Only one ground of appeal is put forward, which is that Article 34.1 of the Judgments Regulation is engaged. That Article provides:

   "A judgment shall not be recognised:

   1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought…"

   In the alternative ETECSA invokes Article 46.1 of the Judgments Regulation which provides:

   "The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged."

   I should also set out Article 46.3:

   "The court may also make enforcement conditional on the provision of such security as it shall determine."

   An appeal against the judgment of 18 November 2005 is indeed pending before the Court of Appeals of Turin. Although ETECSA's Appellant's Notice seeks in the alternative a stay of enforcement of the Turin judgment, under Article 46.1, what is in fact sought is a stay of these appeal proceedings, i.e. the appeal against recognition and registration of the Turin judgment as a judgment of the English Court. Whilst the appeal is pending enforcement is precluded, although not conservatory measures – see Article 47.3. In fact Irwin J granted a domestic freezing order against ETECSA at the same time as directing registration and thus recognition of the judgment. In view of the nature of the jurisdiction conferred upon the court by Article 46.1 the application for a stay of these proceedings, i.e. of this appeal, should logically be considered first, before any consideration of the question whether the order of Irwin J as to registration should be upheld or set aside. If the appeal is first resolved, there will remain no proceedings capable of being stayed.

2. The case arises indirectly out of a Loan Agreement of 25 November 1994 pursuant to which Bancomext lent US$350million to Banco Nacional de Cuba, to whom I will refer hereafter as "BANCUBA". Bancomext is an international trade bank owned by the United Mexican States, i.e. in common parlance by Mexico. BANCUBA is, as its name suggests, the State Bank of Cuba. The Loan Agreement contains an arbitration clause conferring competence upon a tribunal to be appointed under the auspices of the Court of Arbitration of the International Chamber of Commerce (the "ICC") in Paris. The Loan Agreement is governed by the law of Mexico. It is relevant to note that on 5 March 2002 Bancomext and BANCUBA concluded a Second Loan Agreement providing for a loan of up to US$211million. This agreement contained an arbitration clause providing for ICC arbitration in Madrid.

3. Also party to the Loan Agreement are ETECSA and its majority shareholder Telefonica Antillana S.A., to which I shall refer as "TELAN". ETECSA is the official monopoly telecommunications services provider in Cuba. TELAN is a Cuban state-owned company which holds 51% of the shares in ETECSA.

4. The contractual relationship between Bancomext and ETECSA arises out of an agreement between BANCUBA and Bancomext regarding the restructuring of Cuba's defaulted sovereign debt to Mexico. The Loan Agreement contained a repayment mechanism whereby the debt would be serviced by the proportion of dividends declared by ETECSA that were to be received by TELAN. Pursuant to an Assignment Agreement of 29 November 1994, i.e. four days subsequent to the Loan Agreement, concluded between Bancomext, TELAN and ETECSA, but not BANCUBA, TELAN assigned to Bancomext its rights over its foreign currency dividends from its shares in ETECSA. There was also a cash-flow mechanism to assist in ensuring that ETECSA had funds out of which to pay declared dividends. Pursuant to the Loan Agreement ETECSA undertook to open and to maintain a "Cash Flow Account" into which certain identified international telecommunications operators who had payments due to ETECSA would make those payments pursuant to irrevocable instructions to be given by ETECSA. Each month ETECSA would deposit into an "Escrow Account" from the Cash Flow Account an amount equivalent to one sixth of the semi-annual repayment amount due pursuant to the loan repayment schedule. Following each declaration of a dividend by ETECSA, ETECSA would transfer from the Escrow 1 Account into an Escrow 2 Account an amount equivalent to the value of the dividend due to TELAN. If the funds in the Escrow 1 Account were insufficient to cover the amounts declared as dividends due to TELAN on any given payment date, ETECSA would make up the shortfall with its own funds – conversely ETECSA could dispose of any surplus on a semi-annual basis. Bancomext was enabled to draw on the Escrow 2 Account on defined terms.

5. There was a further agreement concluded on 29 November 1994 between Bancomext, ETECSA, TELAN and, on this occasion, National Bank of Canada, described therein as "Escrow Agent". This Escrow Agreement set up the Cash Flow and Escrow Accounts and provided for their administration and operation. This Escrow Agreement was governed by the law of Quebec. I think that it also contained a provision conferring exclusive jurisdiction upon the

courts of Quebec – the copy in the hearing bundles is tantalisingly incomplete. However nothing turns on this as on 11 February 2000 the 1994 Escrow Agreement was substituted by another Escrow Agreement by which National Bank of Canada was replaced as Escrow Agent by Banca Commerciale Italiana S.p.a., which later became Banca Intesa BCI and is now Banca Intesa. The 2000 Escrow Agreement is governed by the law of Italy and confers exclusive jurisdiction upon a competent court in Turin.

6. ETECSA's obligations under the 2000 Escrow Agreement were:

(i) to open and maintain with the Escrow Agent the Cash Flow Account and the Escrow 1 Account and irrevocably and unconditionally to instruct the Escrow Agent to transfer automatically the Monthly Deposits from the Cash Flow Account to the Escrow 1 Account; and

(ii) "Pursuant to the terms and conditions of the Loan Agreement, … deposit in the Escrow 2 Account" the quarterly foreign currency dividends declared in favour of TELAN "with funds obtained from the Escrow 1 Account and from other sources in accordance with the provisions of the Loan Agreement."

7. On 30 April 2002, evidently as a result of some political difference at high level between Mexico and Cuba the Council of Ministers of the Republic of Cuba by its Executive Committee issued the following decree number 273:

"WHEREAS, the recent statements made by the Secretary for Foreign Affairs of Mexico linking the loans granted by the Mexican financial institution Banco Nacional de Comercio Exterior S.N.C. (BANCOMEX) to the National Bank of Cuba to the conflictive politics that have arisen between the governments of Cuba and Mexico, implies a threat to the normal development of the Cuban companies benefiting from this loan, such as the company Empresa de Telecomunicaciones de Cuba S.A. (ETECSA) and Telefónica Antillana, S.A. (TELAN) and an inadmissible attempt to pressure and damage the reputation of our country.

WHEREAS, the malicious conduct carried out by the Secretary for Foreign Affairs of Mexico related to this transaction could cause serious harm to ETECSA and TELAN, companies that perform an essential role in the telecommunications sector in Cuba.

WHEREAS, the telecommunications sector is absolutely crucial for the integral development of the country and important resources have been invested in such sector to achieve a system that is in line with the economic and social progress of Cuba and, in the present situation, the facilities and guarantees granted by ETECSA and TELAN could seriously compromise this development.

WHEREAS, it is indispensable to protect ETECSA and TELAN in order to prevent them from being involved in this political dispute that has arisen due to the damage that this could cause to the country if the pertinent measures are not immediately adopted.

WHEREAS, by means of the Executive Committee of the Council of Ministers exercising the authority vested therein by law, the following is hereby ruled:

DECREE NUMBER 273

ONE: The facilities and guarantees provided by ETECSA and TELAN, as collateral for the obligations undertaken by the National Bank of Cuba with the Mexican financial institution Banco Nacional de Comercio Exterior S.N.C, shall be deemed legally null and void, therefore ETECSA and TELAN must immediately take all the necessary measures so that the provisions included in this decree are duly fulfilled. ETECSA and TELAN must adapt that stated in this Decree and any obligations undertaken thereby with BANCOMEX, and any provision or instruction related to such obligations, shall hereby be deemed legally null and void.

TWO: The Government of the Republic of Cuba fully accepts to undertake the guarantees that have currently been provided by ETECSA and TELAN.

FINAL PROVISION

SOLE: This Decree shall come into force on the date it is signed.

In the city of Havana, in the Palace of the Revolution, on the thirtieth day of April in the year two thousand and two."

8. It is ETECSA's case that this decree prevented it from continuing to implement the payment mechanism and, in particular, prevented it from performance of the obligations undertaken by it pursuant to the Escrow Agreement. The sanctions for non-compliance with the decree are said to be of a civil and criminal nature including possible sanctions against its directors and could it is said, extend to a loss of ETECSA's most important asset, the concession for the provision of public telecommunications services in Cuba. There are said to be other far-reaching implications of the decree such as an inability on the part of ETECSA to disclose information concerning its assets and an inability, if so required, to provide security in these appeal proceedings.

9. The subsequent history may be relatively briefly stated.

(i) In May 2002 Bancomext commenced proceedings against ETECSA in Turin under the 2000 Escrow Agreement ("the Italian court proceedings").

(ii) In November 2002 ETECSA (and TELAN) filed arbitration proceedings pursuant to the Rules of the ICC in Paris against Bancomext under the Loan Agreement ("the Paris arbitration proceedings").

(iii) In February 2004 the Court of Turin suspended the Italian court proceedings pending the conclusion of the Paris arbitration proceedings. The first instance judge, Dr Simonetta Rossi, did so in reliance on the Italian law number 218 of 31 May 1995 which conferred on her a discretion so to do "in the event of the prejudiciality of foreign proceedings… if the foreign ruling may affect Italian law" which provision she held applicable to the prejudiciality of foreign arbitration proceedings. She found also that there was a link between the Loan Agreement and the Escrow Agreement and considered as a result that the

arbitration ruling which aimed to confirm, among other things, if TELAN and ETECSA may be considered to be exempt from compliance with the obligations deriving from the Loan Agreement may be relevant to or find effect in the judgment of her own court.

(iv) In July 2004 the award was rendered in the Paris arbitration proceedings. It was held, broadly, that ETECSA had assumed pursuant to the Loan Agreement and Assignment Agreement directly and unconditionally both affirmative and negative covenants and that Decree Number 273 did not constitute a cause of force majeure nor give rise to circumstances exonerating ETECSA and TELAN from complying with those obligations. The amount required to be deposited in Escrow Account 1 by ETECSA was found and ETECSA was directed to deposit it within sixty days.

(v) In December 2004 the Turin Court resumed the Italian court proceedings.

(vi) Also in December 2004, ETECSA filed annulment proceedings in relation to the award before the Court of Appeals in Paris.

(vii) In November 2005 the Turin Court rendered the Turin Judgment.

(viii) On 6 December 2005 ETECSA appealed the Turin Judgment to the Turin Court of Appeals and on the same day obtained from the President of the Court ex parte an interim suspension of the enforceability of the judgment.

(ix) However after a full inter partes hearing on 17 January 2006 the full Court of Appeals, including the President, set aside the interim suspension order. I shall have to revert to the grounds upon which the court did so. They had nothing whatever to do with the prospects of success of the substantive appeal further than a finding that the grounds were not patently without foundation.

(x) On 29 September 2006 Bancomext applied, without notice, to Irwin J to register the Turin Judgment in this jurisdiction and for a domestic freezing order: the Turin Judgment was registered and the domestic freezing order granted.

(xi) On 26 October 2006 Bancomext applied, without notice, to David Steel J, for a worldwide freezing order: the worldwide freezing order was granted.

(xii) By a decision of 16 November 2006 the Court of Appeal in Paris annulled the arbitration award. The annulment was based on a jurisdictional point – the Court of Appeal found that the arbitrators had acted without jurisdiction in determining certain matters which arose in part under the Second Loan Agreement which provided for arbitration in Madrid. However, the court considered that this point was by itself sufficient to require annulment of the entire award, which was declared void. Bancomext's alternative argument that the award should be annulled only in part was rejected. ETECSA for its part had also raised other substantive grounds on the basis of which it argued that the award should be set aside but the Court of Appeal had no need to consider these arguments.

(xiii) On 6 December 2006 ETECSA applied again to the Turin Court of Appeals for a stay of the Turin Judgment based this time upon the annulment of the award.

(xiv) In January 2007 Bancomext issued an application to the Cour de Cassation seeking to annul the decision of the Paris Court of Appeals annulling the award. The next procedural step in this proceeding is that Bancomext is due to file the memorial in support of the application on 26 August 2007. It appears that the procedure could take two years, could result in the matter being remanded to the Court of Appeals and that at the end of the challenge, if the annulment is upheld, a new arbitration could be commenced.

(xv) On 13 February 2007 the Turin Court of Appeals rejected as "simply inadmissible" ETECSA's application for a stay of execution of the Turin Judgment. The decision already given over a year earlier on a similar request was, by virtue of Article 351(3) of the Italian Code of Civil Procedure, "non-contestable" – neither revocable nor open to amendment. As I read the judgment, the occurrence of new facts, in particular the ruling of the Paris Court of Appeal which annulled the award by which the Turin Judgment was allegedly influenced, was nothing to the point precisely because the previous application under Article 351 had been rejected for reasons which had nothing to do with the strength or otherwise of the substantive grounds of appeal, further than that they were not wholly without foundation – "unclear groundlessness." The previous application had been rejected because the court concluded that ETECSA would in consequence of a successful appeal following unconditional enforcement suffer no prejudice over and above the mere fact of execution, the Italian courts adhering to the general principle of enforceability of judgments given at first instance without awaiting the outcome of an appeal – see the decision of the European Court of Justice in ***van Dalfsen v. van Loon*** [1991] ECR 1-4743 at paragraphs 28-30 of the judgment. The Turin Court of Appeals specifically rejected ETECSA's argument that it would be "extremely difficult" to recover from Bancomext any amount which it had obtained as a result of enforcement of the judgment. The court noted that the damages were payable to a substantial bank, Bancomext, with a substantial capital of about €350million to which resort for financing had in the first instance been had by the Cuban Government. Thus not only did Italian procedure provide no mechanism for review of the decision by the Court of Appeals in January 2006 that there would be no prejudice to ETECSA arising out of execution of the judgment, over and above that inherent in the general principle of enforceability, but also the decision of the Paris Court of Appeal annulling the award was simply irrelevant to that discretionary decision, going as it did, if to anything, to the merits of the substantive appeal rather than to the question of the prejudice to be suffered by ETECSA through enforcement before exhaustion of the appeal process.

(xvi) On 5 June 2007 a procedural hearing in ETECSA's appeal in Turin took place before the Turin Court of Appeals at which the parties formally confirmed their Prayers for Relief. The parties have now to file their closing briefs. These briefs will be filed in the early Autumn. It will be in this closing brief that ETECSA will be able to rely upon the annulment of the award in support of its appeal: the position under Italian law is that before that stage ETECSA is unable to rely upon the annulment of the award because unsolicited briefs are not contemplated and would be rejected as inadmissible.

(xvii) By a judgment handed down on 4 July 2007, the English Court of Appeal have discharged the worldwide freezing order granted by David Steel J on the basis that the Court did not have jurisdiction to make a worldwide freezing order in the circumstances of this case.

10. It is against that background that I must examine ETECSA's appeal. Two principles, as I see it, must underpin and inform my consideration. The first is that of the general enforceability of judgments without awaiting the outcome of an appeal which is inherent in the permissive nature of the jurisdiction conferred by Articles 37 and 46 and was confirmed by the European Court in the *van Dalfsen* decision to which I have already referred. The second is spelled out in Articles 36 and 45.2 which, save for the substitution of a definite for an indefinite Article, identically provide: *"Under no circumstances may a [the] foreign judgment be reviewed as to its substance.*"

In his report on what was then the Brussels Convention Mr Jenard spelled out bluntly the meaning of this provision. At page C59/46 (Official Journal of the European Communities, C59, vol. 22 5 March 1979) citing in support of his second paragraph both Graulich and Batiffol he said:

"It is obviously an essential provision of enforcement conventions that foreign judgments must not be reviewed.

The court of a State in which recognition of a foreign judgment is sought is not to examine the correctness of that judgment; 'it may not substitute its own discretion for that of the foreign court nor refuse recognition' if it considers that a point of fact or of law has been wrongly decided."

As the European Court pointed out at paragraph 32 of its judgment in ***van Dalfsen*** an assessment by the recognising or enforcing court of the chances of success of an ordinary appeal lodged or to be lodged in the State in which the judgment was given amounts to a review of the foreign judgment as to its substance.

11. The clarity and weight of this legislation, jurisprudence and authority combine, in my mind, to render the arguments of ETECSA difficult to accept. It is true that no Italian court has considered the effect of the annulment of the award on the prospects of success of ETECSA's appeal on the merits against the Turin Judgment. However the prospects of success of ETECSA's appeal is expressly something of which this Court can take no account. Moreover, the Turin Court of Appeals has taken note of the annulment of the award in the context of the renewed application for a stay and has pointed out that even if it were procedurally possible for that matter to be prayed in aid of the application that the initial exercise of discretion should be reviewed, it is an analysis irrelevant to the critical issue of prejudice to ETECSA.

12. I turn first to the application for a stay of this appeal, with the consequential effect of a stay of execution. In ***Petereit v. Babcock International Holdings Limited*** [1990] 1 WLR 350, Mr Anthony Diamond QC, as he then was, sitting as a Deputy High Court Judge, was concerned with a case in which the German Court had directed the defendant to pay to the plaintiff DM40million together with interest. The German Court had further ordered that the judgment was provisionally enforceable on security amounting to DM49million being provided by the plaintiff. An appeal against the judgment was pending in Germany. The judgment was registered as an English Judgment by order of the Master. The defendant sought either (i) to set aside the registration of the judgment obtained by the plaintiff or (ii) to have proceedings for the registration of that judgment stayed pending an appeal to the relevant appellate court in Germany or (iii) to make the registration and enforcement of the judgment conditional upon the plaintiff agreeing to indemnify the defendant against any exchange loss that might be incurred by it should the judgment sum become repayable and to supply the defendant with a bank guarantee to secure payment of such loss. At page 358 Mr Diamond set out three conclusions as follows:

"… (i) That the enforcing court has a general and unfettered discretion under the Convention to stay the enforcement proceedings if an appeal is pending in the State in which the judgment was obtained;

(ii) That a judgment obtained in a contracting State is to be regarded as prima face enforceable, and accordingly the enforcing court should not adopt a general practice of depriving a successful plaintiff of the fruits of the judgment by the imposition of a more or less automatic stay, merely on the ground that there is a pending appeal;

(iii) That the purpose of Articles 30 and 38 [now Articles 37 and 46 of the Regulation] is to protect the position of the defendant in an appropriate case and to ensure that, if the appeal succeeds, then the defendant will be able to enforce the order of the Appeal Court and will not be deprived of the fruits of his success by reason of a previous unconditional enforcement of the judgment. It seems to me that the court's discretion to grant a stay should be exercised with this purpose in mind."

At page 361 he went on:

"… I do not think that merely because the court of the State in which the judgment was given has considered what security should be provided by the successful plaintiff as a condition to declaring the judgment enforceable in that State is, of itself, any reason for the enforcing court not to order a stay. It is true that there may be cases where all relevant factors relating to the question whether a stay should be ordered, and if so on what terms, may have been fully debated before and considered by the court of the State in which the judgment was given. In such a case I would expect the court of the enforcing State to respect the decision of the former court and to be reluctant to re-open

questions which have been determined by it unless perhaps circumstances have changed since the relevant decision was given. I do not, however, consider that the mere fact that the question of the security to be provided by the plaintiff has been considered by the court of the state in which the judgment was given is, of itself, any reason for the enforcing state to decide to exercise its responsibilities and powers under Article 38 [now Article 46]."

On the facts ***Petereit*** was a very different case from that which is now before the Court. I need only quote one more passage from the judgment of the Deputy Judge, at page 362:

"… I am equally clear that I ought not to be deterred from staying the enforcement proceedings because of the security which has been ordered by the Landgericht. It was not disputed at the hearing before me that this security, which is in the sum of DM49million, is wholly inadequate since at the present time the interest accrued under the judgment already amounts to over DM10million. As it so happens, the defendant's application to the Oberlandesgericht for further security has not yet been determined. Furthermore the German courts have not been invited at any stage to consider whether in all the circumstances it might not be appropriate to order a stay. I can find nothing in these facts to cause me to decline to make the order which in my view will best protect the interests of both parties, namely, a stay of the enforcement proceedings subject to the provision of appropriate security."

In the present case the Italian Court has been invited to consider whether in all the circumstances it might not be appropriate to order a stay. The Turin Court of Appeals gave full consideration to that question in its judgment of 24 January 2006. It concluded that ETECSA's application in that regard was "groundless and not worthy of acceptance." It did not even mention in its judgment that Bancomext had on 12 January 2006 by its Legal General Council given a written undertaking to the Court:

"… in the event that this Honourable Court of Appeals should allow Bancomext to enforce the judgment number 7485/05 rendered by the Tribunal of Turin in its favour on November 18, 2005, and thereby to collect any sum, to promptly repay any such sum that this Honourable Court should decide, when it adjudicates the merits of the pending appeal, should not have been paid to Bancomext, together with interest on the said sum."

13. It seems to me that in all the circumstances I should respect the fully reasoned decision of the court seised of the case. The Turin Court of Appeals has as I see it in the exercise of its discretion addressed the very same question of prejudice to the defendant in the event of a successful appeal after unconditional enforcement of the judgment as would an English court in similar circumstances regard as properly informing its exercise of discretion. The annulment of the award seems to me of no relevance whatsoever to this particular exercise of discretion, as the Turin Court of Appeals itself pointed out in its February 2007 judgment, admittedly in a manner which was inessential to its decision which was in any event compelled by procedural considerations. I might however respectfully add that I would myself reach precisely the same conclusion as did the Italian Court. In the event of the substantive appeal succeeding the Turin Court of Appeals will be in a position to direct Bancomext to repay with interest to ETECSA such sums as it has recovered. I have no reason to believe either that Bancomext would not voluntarily honour its undertaking or that enforcement against it would be problematic should it fail to do so. In reality the latter question is academic. No question is raised concerning Bancomext's ability to meet any likely obligation and Bancomext could not continue to operate in the international financial market should it fail voluntarily to make repayment in such circumstances.

14. Mr Onions QC, for ETECSA, pressed me with the spectre that the Turin Court of Appeals might, in determining the substantive appeal, make a decision which the English Court might regard as resolving issues which fall to be submitted to arbitration under the Loan Agreement. In this regard Mr Onions reminded me of the learning on the difficult and unresolved question whether a Community judgment should be recognised if it has been obtained in breach of an arbitration provision – see in particular ***Phillip Alexander Securities and Futures Limited v. Bamberger*** *and others* [1997] I.L.Pr 73 at page 101, paragraph 114 of the judgment of Waller J. There was, Mr Onions accepted, as yet no decision of the Italian Court which could be regarded as resolving issues which fell within the purview of the arbitration agreement. However the Italian Court has, by virtue of Article 6 of Law 218/95, power to examine issues outside of its competence a decision on which is necessary to adjudicate the claims which are under its competence. Such an examination is said to be carried out "incidenter tantum." The award having been annulled, the position now is, he suggested, precisely that which it was when in February 2004 the Turin Court of First Instance suspended its proceedings pending determination of the Paris arbitration. Since no Turin court has yet addressed the impact of the annulment of the award upon Bancomext's claim against ETECSA, and since in so doing the Turin court might deliver a judgment in respect of which there could be a question as to whether it should be recognised pursuant to the Judgments Regulation, the appropriate course, submitted Mr Onions, is to stay these proceedings to await developments in Turin. I reject this argument. Quite apart from being hypothetical, all these considerations are to my mind irrelevant to the exercise of discretion with which the court is concerned when considering whether to stay its appeal proceedings. They are not relevant to the prejudice which will be likely to accrue in the event of a successful appeal following unconditional enforcement. To accede to this argument would in my judgment amount to a derogation from the general principle that Community judgments are enforceable before all avenues of appeal have been exhausted.

15. I turn then to ETECSA's substantive appeal. It is suggested that I should set aside the registration of the Turin Judgment because recognition thereof is manifestly contrary to public policy in the UK. Although not greatly emphasised by Mr Onions in his submissions to me (nor mentioned in the Appellant's Notice or Grounds of Appeal) the only identifiable element of public policy upon which ETECSA relies in this regard is an alleged infringement of the right to peaceful enjoyment of possessions under Protocol 1, Article 1 of the European Convention on

Human Rights. I do not consider that this reliance advances the argument. The right in question is of course qualified and it is obviously compatible with Protocol 1, Article 1 for a State to permit execution of a lawfully obtained judgment on the assets of a judgment debtor. However the broader way in which Mr Onions put the case is that, the factual basis for the judgment i.e. the findings in the award having been removed, enforcement of the judgment in the UK is manifestly contrary to public policy.

16. It is common ground that recourse to public policy is to be had only in exceptional cases – see ***Hoffmann v. Krieg*** [1988] ECR 645 at paragraph 21 and ***Hendrikman v. Druck*** [1996] ECR 1-4943 at paragraph 23. It is for the national court to define the content of the public policy of its own State, although the European Court has the power to review the limits within which recourse may be had to that principle – see ***Krombach v. Bamberski*** [2000] ECR 1-1935 at paragraphs 22 and 23. The word "manifestly" was added into the Regulation, not having been present in either the Brussels or the Lugano Conventions. In the opinion of Professor Adrian Briggs (Civil Jurisdiction and Judgments 4th Edition Paragraph 7.13 at page 504) "*In the light of the recent case law, it is unlikely that it adds anything of discernible substance.*" Professor Briggs attempts his own encapsulation – *"The doctrine of public policy will prevent the recognition of a judgment in cases where the duty to confer recognition would require the court to contravene values which English law regards as being fundamental."* So stated, it is not immediately obvious that the somewhat arcane debate whether the Turin Judgment was dependent upon the findings in the now annulled arbitration award engages values which English law regards as being fundamental.

17. There is plainly an argument, which will be deployed by Bancomext, to the effect that the Turin Judgment should be upheld in whole or in large part notwithstanding the annulment of the award on the basis that ETECSA's obligations derived both from the Loan Agreement and from the Escrow Agreement, the former being incorporated by reference into the latter. Further, by way of example, Article 15 of the Escrow Agreement talks of obligations in relation to Escrow Accounts 1 and 2 as undertaken by ETECSA and TELAN pursuant both to the terms and conditions of the Escrow Agreement and of the Loan Agreement. Relevant findings in the Turin Judgment include:

(i) that the claim in the arbitration was "separate" from the claim before the Turin Court,

(ii) that the obligations under the Loan Agreement and the Escrow Agreement are "autonomous, albeit functionally linked" and,

(iii) that "it is clear that the subject-matter of the two proceedings is different in substance."

Indeed the second of these conclusions is one reached independently on two occasions by the Turin court, the first occasion being a judgment given on 12 August 2002 in proceedings for interim relief – see page 11 of the agreed English translation of the second judgment. It is true that in relation to damages accruing due as from 1 July 2002, although not those due on 30 June 2002, the judgment recites that the "*amounts have been set by the award.*" Mr Cran submits that this was a purely mechanical exercise, that the amounts were not disputed and that the Turin court merely "*borrowed*" these amounts from the award which was not itself essential to the conclusion that these were the amounts which were in fact due. Although he did not expressly assent to this analysis, I did not understand Mr Onions to controvert it. Indeed Bancomext adduced evidence, in the shape of Mr Birrell's 8th Witness Statement, to the effect that the relevant amounts, appearing in both the award and the Turin Judgment, are in fact derived from an Annex to the Escrow Agreement and had never been in issue in either the arbitration or the Turin proceedings. I would also note, finally, that the evidence before the court is to the effect that as a matter of both Mexican law, the law of the Loan Agreement and Italian law, the law of the Escrow Agreement, the Loan Agreement is to be treated as a valid engagement until pronounced otherwise. The ground upon which the award has been annulled does not in any way support a case that the Loan Agreements are invalid. Whilst it is obviously true that the Turin court did originally suspend its proceedings in order to await the outcome of the arbitration, the position today is in fact the same as it would have been if there had been no arbitration and no challenge to the validity of the Loan Agreements.

18. I have gone into these points in order to demonstrate that it is far from a foregone conclusion that the annulment of the award will lead inexorably to the setting aside or even a variation of the Turin Judgment. That is no doubt why ETECSA's Italian lawyers speak in terms only of the annulment of the award "*greatly increasing*" the chances of a reversal or amendment of the Turin Judgment, that being now "*a realistic prospect.*" It would be a surprising conclusion that, in such circumstances, when ETECSA has an unfettered right of appeal in the course of which it may rely upon the implications of the annulment of the award, recognition of the existing Turin Judgment should be regarded as manifestly contrary to public policy. Having regard to the general principle of enforceability of judgments before rights of appeal have been exhausted it seems to me that a more plausible conclusion might be that non-recognition would be contrary to public policy, although I do not need to go that far. I suspect however that the exercise upon which I have been engaged is in any event simply impermissible. However it is dressed up the exercise is an assessment of the chances of success of an appeal which amounts to a review of the Turin Judgment as to its substance. That is an exercise which is prohibited by Article 36 and for good measure in the context of this appeal by Article 45(2) also.

19. Finally, I agree with Mr Cran that some guidance as to the correct approach may perhaps be found in ***Interdesco S.A. v Nullifire Limited*** [1992] 1 Lloyds' Reports 180. Registration of a foreign judgment was challenged on the ground that recognition would be contrary to public policy, on the basis of an allegation that the foreign court, there a French court, had been fraudulently deceived. Phillips J (as he then was) considered the course that the Court should adopt where, in support of the case of fraud, the defendant seeks to raise a fresh case or to rely on

evidence that was not before the foreign court. Phillips J held that the English court should first consider whether a remedy lay in such a case in the foreign jurisdiction in question. If so, it would normally be appropriate to leave the defendant to pursue his remedy in that jurisdiction. Phillips J made the following comment at page 188:

"Such a course commends itself for two reasons. First it accords with the spirit of the Convention that all issues should, so far as possible, be dealt with by the State enjoying the original jurisdiction. Secondly, the Courts of that State are likely to be better able to assess whether the original judgment was procured by fraud."

So here, the effect if any of the annulment of the award should, so far as possible, be dealt with by the courts of the State enjoying the original jurisdiction, Italy. The courts of Italy, reviewing in their own language their own judgment on a question of Italian law are likely to be better able than this court to assess the effect if any of the annulment of the award.

20. For all these reasons the appeal against registration must fail. I have already in the course of this judgment dismissed the logically anterior application for a stay of the appeal. The Turin Judgment has been fully enforceable in Italy since January 2006. There is in my judgment no reason why it should not equally be enforceable in this jurisdiction.

Jeffery Onions QC (instructed by Messrs Freshfields Bruckhaus Deringer) for the Appellant
Mark Cran QC and Andrew Thomas (instructed by Messrs Travers Smith) for the Respondent