Neutral Citation Number: [2022] EWHC 1645 (Comm)

Case No: CL-2021-000621

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF THE ARBITRATION ACT 1996

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

Date: 30 June 2022

Before:

MR JUSTICE PICKEN

- -

Between:

NATIONAL IRANIAN OIL COMPANY

Claimant/Respondent

- and -

(1) CRESCENT PETROLEUM COMPANY INTERNATIONAL LIMITED
(2) CRESCENT GAS CORPORATION LIMITED

Defendants/Applicants

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- -

Mark Howard QC, Simon Rainey QC, Natalie Moore and **Emilie Gonin** (instructed by **Eversheds Sutherland (International) LLP**) for the Claimant.
Constantine Partasides QC, Ricky Diwan QC and **Tariq Baloch** (instructed by **McDermott Will & Emery UK LLP**) for the Defendants.

Hearing dates: 11 and 12 May 2022.
Judgment provided in draft: 23 June 2022.

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Approved Judgment

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

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Mr Justice Picken:

Introduction

1. This is an application by the Claimant, National Iranian Oil Company ('NIOC'), for permission to appeal against an award issued on 27 September 2021 (the 'Partial Award') under s. 69 of the Arbitration Act 1996 (the '1996 Act'). As such, it is a matter which would ordinarily be dealt with on the papers. However, owing to the complexity of the application (there were over ten bundles and the arbitral awards and submissions ran to many hundreds of pages) and a jurisdictional objection which has been made by the Defendants, Crescent Petroleum Company International Limited and Crescent Gas Corporation Limited ('Crescent Petroleum' and 'Crescent Gas' respectively and together 'Crescent'), in considering the permission application on the papers, I decided that it would be appropriate to determine that application at an oral hearing and to hear the substantive appeal on a *de bene esse* basis in the event that permission were to be granted.

The underlying arbitration proceedings

2. The dispute between the parties arises under a Gas Sales and Purchase Contract concluded by NIOC and Crescent Petroleum on 25 April 2001, as amended from time to time (the 'GSPC'). Under the GSPC, NIOC agreed to supply and sell to Crescent Petroleum and Crescent Petroleum agreed to purchase from NIOC, specified quantities of natural gas, at the price and on the terms and conditions there provided, for a period of 25 years, commencing on 1 December 2005.

3. NIOC failed to deliver gas on 1 December 2005 or at any time thereafter up until 11 September 2018, on which date Crescent terminated the GSPC.

4. Pursuant to Article 16 of the GSPC, on 26 July 2003, Crescent Petroleum assigned its rights to Crescent Gas before the first delivery of gas was due.

5. Crescent commenced arbitration on 15 July 2009. Strikingly, as will appear, although the parties' arbitration agreement provides for an expedited arbitral process lasting approximately one year from commencement of the arbitration to a final award, that arbitration has been ongoing for over 12 years.

6. Thus, on 25 February 2010, by Procedural Order No. 1, the Tribunal as then constituted ordered the bifurcation of the proceedings between a phase covering all jurisdictional issues and all issues relevant to liability (the 'Jurisdiction and Liability Phase'), and a phase covering remedies (the 'Remedies Phase') in the event that liability was established.

7. On 31 July 2014, a majority of the Tribunal (as then differently constituted) issued an award dealing with jurisdiction and liability (the 'Award on Jurisdiction and Liability'). By that award, the Tribunal confirmed that it had jurisdiction over the claims; declared that NIOC had been in breach since 1 December 2005 and remained in breach of its obligation to deliver gas under the terms of the GSPC; and dismissed NIOC's defences and counterclaims.

8. In 2016, challenges to the Award on Jurisdiction and Liability were rejected by the Commercial Court.

9. Hearings during the subsequent Remedies Phase included an evidentiary hearing in November 2016, a hearing for closing submissions in October 2017 and a final hearing before the Tribunal in August 2020. As presently constituted, the Tribunal members are: The Hon Murray Gleeson AC, the former Chief Justice of Australia; The Rt. Hon. The Lord Phillips of Worth Matravers, KG, PC, the former Lord Chief Justice; and Sir Jeremy Cooke, a former High Court Judge and judge of the Commercial Court.

10. During the Remedies Phase, NIOC advanced arguments and led evidence relating to sanctions and various other events affecting NIOC's ability to supply and/or Crescent's ability to receive, pay for and/or benefit from gas under the GSPC in order to reduce the amount of recoverable damages. NIOC's contention, in short, was that, in assessing Crescent's loss and considering the 'but for' counterfactual of what would have happened had the GSPC been performed, the Tribunal must take into account the fact that sanctions (and other external events) would have reduced the amount of gas which could have been supplied and/or received under the GSPC and/or would otherwise have affected Crescent's ability to benefit from the GSPC.

11. In response, Crescent contended that many of those arguments were precluded by the doctrines of *res judicata* and abuse of process because they were an attempt to circumvent the Tribunal's findings in the Award on Jurisdiction and Liability and/or were arguments that either were advanced or, importantly in the context of the proposed appeal, could and should have been advanced during the liability phase.

12. The Tribunal agreed with Crescent's submissions, going on at paragraph 887 of the Partial Award to determine that NIOC was liable to pay damages to Crescent Gas for NIOC's breaches of the GSPC up to 31 July 2014: US$1,344.70 million in respect of Crescent Gas's loss of profits from on-sale of gas that should have been supplied under the GSPC; and US$1,085.27 million in respect of Crescent Gas's liability to Crescent National Gas Corporation Limited ('Crescent National Gas') in respect of Crescent National Gas's loss of profits from on-sale of gas and sale of products.

Crescent's jurisdictional objection

13. Before coming on to deal with NIOC's proposed appeal, I need, first, to address a threshold objection taken by Crescent, namely that it is not open to NIOC to appeal because the parties have agreed that the right to appeal on a point of law is excluded, the parties having *"otherwise agreed"* to waive their right to appeal a point of law under s. 69 of the 1996 Act, which provides as follows:

"Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings."

14. On behalf of Crescent, Mr Partasides QC submitted that the parties *"otherwise agreed"* through their incorporation of the 1998 International Chamber of Commerce rules (the 'ICC Rules')in their contractual agreement, specifically Article 28.6, which is in these terms:

"Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

Mr Partasides QC highlighted in this connection how in this respect in ***Lesotho Highlands Development Authority v Impregilo SpA and others*** [2005] UKHL 43 the House of Lords decided that the wording of Article 28.6 of the ICC Rules is sufficient to exclude the s. 69 right of appeal.

15. Article 22.2 of the GSPC provides that any dispute, controversy or claim is to be finally settled by arbitration in accordance with the *"Procedures for Arbitration"* as contained in Annex 2, which at paragraph 9 provides that in the case of a gap in the procedural rules of arbitration *"the procedural rules of arbitration of the International Chamber of Commerce (ICC) shall apply"*.

16. Specifically, Article 22.2 is in these terms:

"Arbitration

The Parties shall use all reasonable efforts to settle amicably within 60 days, through negotiations, any dispute arising out of or in connection with this Contract or the breach, termination or invalidity thereof. Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof shall be finally settled by arbitration before three arbitrators, in accordance with a "Procedures for Arbitration" (attached hereto as Annex 2) which will survive the termination or suspension of this Contract. Any award of the arbitrators shall be final and binding upon the Parties. Either Party may seek execution of the award in any court having jurisdiction over the Party against whom execution is sought."

17. Annex 2, then, states (where relevant) as follows:

"8. The following procedural rules inter alia shall in any event be taken as agreed:

(a) the language of the arbitration shall be English;

(b) the tribunal may in its discretion hold a hearing and make an award in relation to any preliminary issue at the request in writing of either Party and shall do so at the joint request in writing of both Parties;

(c) the tribunal shall hold a hearing(s), in order to determine substantive issues unless the Parties agree otherwise in writing;

(d) all hearings shall be held in private;

(e) the tribunal shall issue its final award within 60 (sixty) days of the last hearing of the substantive issues in dispute between the Parties, unless the Parties otherwise agree in writing;

(f) any award or procedural decision of the tribunal shall be made by a majority of the arbitrators;

(g) the award shall be made in writing and shall be final and binding on the Parties;

(h) the award shall state the reasons on which the award is based, unless the Parties agree in writing that no reasons are to be given;

(i) each Party shall be responsible for his own costs of litigation. The costs of arbitration shall be equally born by both Parties, unless the arbitral tribunal otherwise decides.

9. The Parties shall decide on other procedural rules of arbitration, whenever and whatever it deems necessary, by mutual agreement. However, in case of disagreement or gap in such procedural rules of arbitration, the procedural rules of arbitration of the International Chamber of Commerce (ICC) shall apply. Nevertheless, it will not be explicitly or implicitly interpreted as submission to International Chamber of Commerce's authority."

18. Mr Partasides QC submitted that, since the arbitration agreement in Article 22.2 and Annex 2 (as incorporated into the arbitration agreement) did not contain any rules about appeals to the court on points of law, the Court should proceed on the basis that there is, as he put it, *"by definition"*, a gap which is filled by Article 28.6 of the ICC Rules and the exclusion of the right to appeal on a point of law contained within that provision.

19. I am not persuaded by Crescent's jurisdictional objection.

20. As Mr Howard QC pointed out (through his adoption of the written submissions prepared by his predecessor, Mr Simon Rainey QC), whether or not there is an agreement within the meaning of s. 69 is a question of construction. As to that, he cited ***Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd*** [2018] EWHC 163 (Comm), [2018] 1 Lloyd's Rep 654, in which Popplewell J (as he then was) had this to say, albeit in a different context at [8]:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is

entitled to prefer the construction which is consistent with business common sense and to reject the other. …"

21. Of more direct relevance in ***Shell Egypt West Manzala v Dana Gas*** [2009] EWHC 2097 (Comm), [2010] 2 All E.R. (Comm) 442, [2010] 1 Lloyd's Rep. 109, [2009] 8 WLUK 80, [2009] 2 C.L.C. 481, 127 Con. L.R. 27, [2009] C.I.L.L. 2773, and [2010] Bus. L.R. D53, Gloster LJ confirmed at [37] that, in order to amount to an agreement as envisaged by s. 69, *"sufficiently clear wording is necessary, albeit that no express reference to section 69 is required"*, whereas ***Sukuman Limited v Commonwealth Secretariat*** [2006] EWHC 304 (Comm), [2006] 2 Lloyd's Rep 53 and [2007] EWCA Civ 243 makes it clear that an agreement to exclude the right of appeal may be incorporated by reference.

22. It is with these principles in mind that I have reached the conclusion that in the present case the parties ought not to be taken to have *"otherwise agreed"* to waive their right to appeal a point of law since I agree with Mr Howard QC when he submitted that there is not the gap which Crescent's argument on this aspect requires there to be for Article 28.6 of the ICC Rules to have any application.

23. As Mr Howard QC observed, there was no general or wholesale incorporation of the ICC Rules into the GSPC since paragraph 9 of Annex 2 provides for the incorporation of the ICC Rules only in the case of disagreement or gap in the procedural rules of arbitration otherwise agreed by the parties.

24. Annex 2 is concerned with the procedures of the arbitration. It also deals with the *res judicata* effect of any award. It is not concerned with any right of appeal or, indeed, the process of an appeal. It stops, in effect, with the arbitration itself and does not stray into post-award territory. As the opening words of paragraph 8 itself makes clear, that paragraph is concerned with *"procedural rules"*. It might have been clearer if it had been spelt out that those procedural rules are the rules with which the arbitration itself is concerned but, given the types of matters covered by (a) to (i) of paragraph 8, there is no real room for doubt that it is the procedure of the arbitration which is being addressed and not any follow-on appeal.

25. The fact that paragraph 9 goes on, again, to refer to *"procedural rules"* serves to underline the point which I have just made, the more so, however, since in this paragraph the reference to *"procedural rules"* is followed by the words *"of arbitration"*, making it clear that the focus of both paragraphs 8 and 9 must be the procedural rules of the arbitration rather than also any appeal procedure. It is in this very specific context (and no other) that paragraph 9, then, refers to the ICC Rules having application *"in case of disagreement or gap in such procedural rules of arbitration"*.

26. I note that in ***Arab African Energy Corp Ltd v Olieprodukten Nederland BV*** [1983] 2 Lloyd's Rep 419, Leggatt J (as he then was) rejected a similar argument that the words *"arbitration 'according to I.C.C. rules'"* in an arbitration agreement related only to the ICC Rules which are concerned with how the arbitration is to be conducted so as to mean that the right to appeal an award on a question of law (under the predecessor to the Act) was not excluded by the incorporation of the ICC Rules. He said this at page 423:

"Arbitration 'according' I.C.C. rules must in my judgment mean 'in conformity with' them. No process is envisaged whereby the procedural rules have to be winnowed out from the remainder for the purpose of administering the conduct of the arbitration but not its effect. Such a process would itself be a fruitful source of dissension."

However, the incorporating language in paragraph 9 of Annex 2 to the GSPC is not the same since in ***Arab African*** there was no limit on the incorporation. In contrast, paragraph 9 incorporates *"the procedural rules of arbitration of the International Chamber of Commerce"* only in the event that there is "*disagreement or gap*" in the *"procedural rules of arbitration"* as agreed by the parties either in paragraph 8 of Annex 2 or by mutual agreement. I reject Mr Partasides QC's submission that paragraph 9 does not seek to narrow or winnow out particular rules from the ICC Rules which are agreed to be incorporated; on the contrary, that is precisely what it does with its reference to the *"procedural rules of arbitration"*.

27. If there were any doubt that paragraphs 8 and 9 (and Annex 2 more generally) are only concerned with the arbitration itself, this is removed once it is appreciated that the other paragraphs of Annex 2 are, similarly, concerned not with any appeal but with the arbitration itself. Accordingly, although I do not propose to set the various provisions out, paragraph 1 addresses how to commence arbitration, paragraph 2 deals with any initial response, paragraph 3 deals with the seat of the arbitration, paragraph 4 addresses the appointment of arbitrators, paragraph 5 deals with the procedure for the claimant providing a statement of case, paragraph 6 addresses the provision of a defence and paragraph 7 focuses on service of any reply. These are all aspects concerning the arbitration; they say nothing about appeal.

28. That, indeed, there is not the gap, which Mr Partasides QC acknowledged there would need to be were his submissions to prevail, is borne out by the fact that Article 22.2 uses the *"final and binding"* language which it does. Had the parties intended to agree to waive the right of appeal, it is to be expected that they would have done this in Article 22.2. Instead of doing this, however, they chose to use wording which the authorities indicate is insufficient to amount to a waiver. As Gloster LJ put it in ***Shell Egypt West*** at [39] quoting Ramsey J in *Essex County Council v Premier Recycling Ltd* [2006] EWHC 3594 (TCC), [2006] 3 WLUK 295 and [2007] B.L.R. 233 at [22]:

"… the use of the words 'final and binding', in terms of reference of the arbitration, are of themselves insufficient to amount to an exclusion of appeal. Such a phrase is just as appropriate, in my judgment, to mean final and binding subject to the provisions of the Arbitration Act 1996."

29. What Crescent's position, in effect, amounts to is the proposition that because the parties must for s. 69 purposes explicitly *waive* the right of appeal, so they must also (if that is their preference) explicitly *reserve* it since, if they do not do so, then, it should be taken that there is a gap and that gap should, in the present case, be filled by Article 28.6 of the ICC Rules. To approach matters in this way is to reverse the proper order of things since s. 69 is concerned with it otherwise being agreed that there should be an ability to appeal which (but for such an agreement) exists. The default position, in other words, is that there is a right of appeal, not the other way round; as such, it is wholly unnecessary and unrealistic to expect that the parties should have explicitly to reserve the right.

30. I would add also that nor do I agree with Mr Partasides QC that there would be considerable room for uncertainty and dispute as to which of the ICC Rules were incorporated and which were excluded were NIOC's construction to be adopted since I see no difficulty with there being a clear distinction between, on the one hand, procedural rules relating to the conduct of the arbitration and procedural rules concerned with an arbitral appeal.

31. It follows, for all of these reasons, that the parties are to be regarded as having preserved their right of appeal under s. 69, and so that Crescent's jurisdictional objection fails.

32. I should, lastly, mention in this regard that Mr Partasides QC additionally observed that counsel previously instructed by NIOC had on an earlier occasion, at a hearing in the context of a different application unrelated to the present application for permission to appeal but instead concerned with an earlier challenge (not an appeal) to the Liability Award, stated that NIOC could not rely on s. 69 because the ICC Rules preclude the right to appeal. I take no account of this, however, since, as Mr Partasides QC ultimately accepted, nothing turns on the point since he did not suggest that there is, as a result, an estoppel or such like.

The proposed appeal

33. Turning to the proposed appeal, as will appear, my conclusion is that there is no merit in what NIOC seeks to argue and so that permission to appeal ought to be refused on the basis that not all of the statutory hurdles within the 1996 Act have been met, specifically the requirement that it be shown that the Tribunal's decision was obviously wrong.

NIOC's case

34. NIOC seeks permission to appeal the following question of law:

> *"[W]here bifurcation has been ordered and liability determined, is a defendant/respondent precluded on grounds of res judicata and/or abuse of process from referring to and relying on matters in support of its separate defence to quantum merely because those matters might or could also have been raised in relation to liability?"*

Specifically, NIOC's contention is that, in considering whether the sanctions and other 'but for' defences in question were open to NIOC to run at the Remedies Phase, the Tribunal stated and applied the applicable legal test incorrectly.

35. The legal test which, according to NIOC, the Tribunal did not state and apply correctly is that described by Lord Sumption in ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*** [2013] UKSC 46 at [17], as follows:

> *"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins ... The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily*

described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages ... Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment ... Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties ... 'Issue estoppel' was the expression devised to describe this principle ... Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

36. It follows, Mr Howard QC observed, that, unless the point in question has been decided in the earlier action or stage of the proceedings, the point is only barred if it would be an abuse of process to raise it in the second action/stage.

37. As for abuse of process, Mr Howard QC referred to ***Johnson v Gore Wood & Co*** [2002] 2 AC 1, in which Lord Bingham had this to say at page 31:

"Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Mr Howard QC highlighted, in particular, Lord Bingham's rejection of *"too dogmatic an approach"* in favour of a *"broad, merits-based judgment"* which focuses on *"the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before"*.

38. The Tribunal dealt with Crescent's contentions concerning *res judicata* and abuse of process at various places in the Partial Award, with this introduction at paragraph 282:

"In the Remedies Phase ... NIOC has on occasion advanced arguments which, if correct, would or may have constituted grounds of contractual justification of or excuse for non-delivery. To the extent to which those arguments are inconsistent with declaration D [of the Award on Jurisdiction and Liability] quoted in paragraph 23 above, and the findings on which it is based, questions of issue estoppel or res judicata may arise. For example, NIOC did not, during the Jurisdiction and Liability Phase, raise arguments of frustration, or supervening impossibility of performance, to excuse non-delivery of gas. Some of the evidence in the Remedies Phase relating, for example, to sanctions, or to non-availability or failure of equipment, led in order to diminish the quantities which Crescent would have received had the Contract been performed, may need to be considered in that light."

39. The Tribunal went on to decide that it was not open to NIOC to run the defences in question at the Remedies Phase. Thus, at paragraph 619, the Tribunal had this to say:

"It is said that at the Commencement Date, Crescent was not in a position to sell and process gas. It had no agreement in place with Shalco, no tie-in of the SajGas plant had occurred and the SajGas plant had not been commissioned. On the Dubai side, no agreements had been finalised with CTI (the pipeline owner), DUGAS (the processor) or DUSUP (the purchaser). However, in the Award on Jurisdiction and Liability, the Tribunal found that 'Crescent acted prudently in refraining from any additional expenditures, effectively mitigating its damages'."

The Tribunal continued (at paragraph 624) by saying this:

"[In relation to NIOC's contention as to the impact of sanctions on Crescent's ability to perform.] There is, however, a more fundamental problem with NIOC's reliance on the suggested effect of sanctions. There is a finding, in the Award on Jurisdiction and Liability, that NIOC was in breach of its obligations to deliver gas from 1 December 2005 to 31 July 2014. If, as a result of sanctions, the GSPC had been unable, for a period, to be put into effect by either party, then that <u>would</u> have been an answer to Crescent's case on liability in respect of that period. It is not open to NIOC, at this stage of the arbitration, to rely upon sanctions as making it impossible for NIOC, or Crescent, to perform" (emphasis added).

40. At paragraph 742, the Tribunal stated as follows:

"The Respondent refers to a series of events which it says would have delayed completion of NIOC's facilities and restricted or denied its capacity to meet its supply obligations. These include events of force majeure, which <u>may</u> have been relevant at the liability phase of the arbitration. This Award is made upon the premise that NIOC was in daily breach of its delivery obligations from 1 December 2005 to 31 July 2014" (emphasis added).

41. Three paragraphs later, at paragraph 745, the Tribunal added:

"[In relation to NIOC's arguments that sanctions would have affected Crescent's ability to perform the GSPC.] As to sanctions more generally, Mr Haberman referred

to various stages at which sanctions might impede Crescent from performing its obligations (in particular its payment obligations) under the GSPC. Mr Watts explained how those impediments could have been circumvented. Moreover, if sanctions would have made it impossible for Crescent to have performed its obligations under the GSPC that is an issue that could have been raised at the liability phase of the arbitration" (emphasis added).

42. It was Mr Howard QC's submission that, in these passages when determining the *res judicata*/abuse of process issues, the Tribunal failed to apply the correct legal test. It was not enough, Mr Howard QC submitted, that the Tribunal used the language of *"may"* (see paragraph 742), *"could"* (see paragraph 745) or *"would"* (see paragraph 624) since the Tribunal ought, rather, to have considered whether the points raised by NIOC *"should"* have been raised sooner, so as to mean that it was abusive for them to be raised at a later stage.

43. Mr Howard QC submitted, specifically, that the Tribunal should have considered (but did not consider) in relation to each defence: (i) whether or not the point in question had been decided in the Jurisdiction and Liability Phase; (ii) if so, whether it was nonetheless a point which was caught by the special exception for issue estoppel which allows a previously argued point to be reargued if special circumstances exist; and (iii) if the point in question was not decided in the Jurisdiction and Liability Phase, whether it could and also should in all the circumstances have been raised before and whether it was abusive or amounted to unjust harassment of Crescent for NIOC to raise the point at the Remedies Phase for the first time. Had the Tribunal considered these further issues, Mr Howard QC suggested, then, it ought to have concluded that the defences in question were not barred on grounds of *res judicata* and/or abuse of process.

44. Mr Howard QC also submitted that, in view of the fact that the reference was bifurcated from an early stage, the defences were appropriately raised in relation to quantum rather than in relation to liability. Provided that NIOC did not seek at the quantum stage (*"by a side wind"*, as Mr Howard QC put it) to say that it was not liable or putting forward a contractual excuse for its non-performance notwithstanding the earlier finding of liability, he submitted, it was open to NIOC to advance any case which was directed to the issue of quantum without limitation.

45. It was Mr Howard QC's submission that the Tribunal failed to recognise the distinction between, first, the effect of sanctions on NIOC (something which it was not open to NIOC to raise at the Remedies Phase because the effect of sanctions on NIOC was something which went to liability, not quantum) and, secondly, the effect of sanctions on Crescent, specifically whether Crescent could not have performed its obligations to NIOC (something which went not to liability but to quantum).

46. Specifically, Mr Howard QC highlighted how in the Award on Jurisdiction and Liability, the Tribunal (or at least the majority comprising Dr Gavan Griffith QC and Dr Kamal Hossain) decided that NIOC was in continuing breach of contract from the relevant commencement date (1 December 2005) until the date of that award (31 July 2014) because it failed to deliver gas throughout that period: see paragraphs 457 and 555 of the Award on Jurisdiction and Liability. In arriving at this conclusion, the majority rejected four defences which were put forward by NIOC. The first of these defences was that no operation agreement had been entered into, something which was said to be a precondition to NIOC's obligation to deliver and something which made it

impossible to deliver gas; that defence was rejected at paragraphs 459 to 468 of the Award on Jurisdiction and Liability. The second defence was the assertion that there was no effective and operable delivery point, such that the obligation to deliver gas had not arisen. This was founded on three contentions: first, that the parties did not agree to the use of the existing Riser Platform, a matter addressed (and rejected) at paragraphs 473 to 496; secondly, that Crescent could not operate the Riser Platform because it did not have authorisations required under Iranian law, a mater addressed (and again rejected) at paragraphs 497 to 512; and thirdly, that from a technical point of view the Riser Platform could not be operated independently, a matter which the Tribunal found could have been foreseen and as to which Crescent acted reasonably in mitigating its losses by refraining from incurring additional expenditure (see paragraphs 513 to 526). A third defence put forward by NIOC at that stage was that there was no adequate payment security, such that NIOC was entitled to withhold performance. This was rejected at paragraphs 527 to 554. Lastly, NIOC alleged corruption, a defence which was rejected at paragraphs 556 to 1378.

47. These are all defences which, Mr Howard QC submitted, NIOC was not seeking to resurrect when advancing the case which it did in the Remedies Phase. At that stage, he explained, the question under consideration was what would have happened but for NIOC's breach of contract or, in other words, if NIOC had delivered gas to Crescent: in essence, whether Crescent would, in fact, have made a profit in, as Mr Howard QC put it, that *"but for world"*. That, Mr Howard QC observed, is the very point which the Tribunal itself was making in the Partial Award at paragraph 618, where the following is stated:

"NIOC contends that, even if it had performed its contractual obligations, there are major elements of uncertainty as to whether Crescent would have been able to sell and process the gas delivered."

48. It is also the point which was made by NIOC in its Reply Counter-Memorial on Remedies dated 19 August 2016 at paragraphs 512 to 515, as follows:

"512. The Respondent has shown in its Counter-Memorial that, in a 'but-for' scenario, the impact of international sanctions must be taken into account in quantifying any profits that Crescent would have earned if the gas had flowed under the GSPC. Indeed, any failure to do so would result in Crescent receiving windfall damages to compensate for profits that it would in fact not have earned in the absence of a breach by NIOC.

513. The Respondent is not trying to hidebehind the sanctions as an event of force majeure that would have excused its non-performance, as the Claimants suggest. The complaint that raising this issue is an abuse of process and/or is precluded by res judicata is thus entirely misplaced.

514. Rather, the Respondent is simply pointing out that, in any quantification of alleged future lost profits arising out of a breach, it is appropriate to take into account any events that occurred in the real world that would have had an effect on Crescent's ability to perform during the period of the claim, independent of the breach. This is quite normal in any 'but-for' scenario. To ignore this would be to rely upon an incomplete and inaccurate 'but-for' scenario.

> *515. In this context, the Respondent has shown that it would have become illegal for Crescent to comply with its contractual payment obligations under the GSPC in October 2012, and that it would have become illegal for Crescent (and also for CNGC) to purchase the gas under the GSPC as from July 2013. Further, the Respondent has shown that, essentially as a result of the increasingly stringent sanctions that were adopted and implemented by the United States, it is highly likely that, long before it became illegal, Crescent's performance under the GSPC would already have become impossible in practice, and that, in the likely event of technical issues arising, these could not have been easily and quickly remedied."*

49. It was Mr Howard QC's submission that, nonetheless, the Tribunal failed to recognise the distinction to which I have referred. This failure, Mr Howard QC submitted, is apparent from what the Tribunal had to say at paragraph 624:

> *"There is, however, a more fundamental problem with NIOC's reliance on the suggested effect of sanctions. There is a finding, in the Award on Jurisdiction and Liability, that NIOC was in breach of its obligations to deliver gas from 1 December 2005 to 31 July 2014. If, as a result of sanctions, the GSPC had been unable, for a period, to be put into effect by either party, then that would have been an answer to Crescent's case on liability in respect of that period. It is not open to NIOC, at this stage of the arbitration, to reply upon sanctions as making it impossible for NIOC, or Crescent, to perform."*

Mr Howard QC submitted that this shows the Tribunal's error: thinking that, if sanctions could have been raised at the liability stage in order to defeat Crescent's claim through establishing that NIOC was unable to perform its contractual obligations, then, it was not open to NIOC to raise them in relation to quantum either, not in relation to NIOC's ability to perform its obligations but in relation to Crescent's ability to process and sell the gas which, but for NIOC's breach of contract, Crescent would have been supplied by NIOC.

50. This confusion meant, Mr Howard QC submitted, that the Tribunal failed to answer the correct legal test of whether NIOC both could and should have raised the issue of sanctions at that earlier (liability rather quantum) stage. The same confusion explains, Mr Howard QC submitted, why at paragraph 745 the Tribunal referred to sanctions making it impossible for Crescent to perform being a matter which *"could have been raised at the liability phase of the arbitration"*. As he put it, the Tribunal *"got themselves into a muddle"* by not applying the 'could and should' test in relation to the specific points being raised in the Remedies Phase.

51. Mr Howard QC submitted that, for these reasons, the Tribunal's decision was *"obviously wrong"* for the purposes of s. 69(3)(c)(i)). He made it clear, however, that NIOC no longer sought to contend that the question which has been identified is one of *"general public importance and the decision of the Tribunal is at least open to serious doubt"* (see s. 69(3)(c)(ii)).

52. I do not agree with Mr Howard QC about this: in my view and as I shall now explain, the Tribunal applied the right test to the facts and thereby reached a decision which cannot properly be said to amount to an error of law, still less a clear or obvious such error.

s. 69(3)(b): whether the Tribunal was asked to determine the legal question

53. Before dealing with this aspect, however, I should, first, address a submission which Mr Diwan QC made to the effect that the Tribunal was not asked to determine the legal question which NIOC has raised in the context of its application for permission to appeal, and so that s. 69(3)(b) has not been satisfied in this case.

54. Mr Diwan QC submitted, specifically, that both parties relied upon the 'could and should' test specified in ***Virgin Atlantic***, neither of them seeking to water it down to 'could or might' in the manner which NIOC's application for permission to appeal assumes the Tribunal did. Indeed, as Mr Diwan QC pointed out, in its Post Hearing Brief dated 28 February 2017, Crescent itself set out the 'could and should' test in these terms at paragraphs 612-613:

"612. NIOC is precluded from running points that could and should have been raised earlier. The test is whether 'they could with reasonable diligence and should in all the circumstances have been raised': ***Gbangbola v Smith & Sheriff*** *[1998] 3 All E.R. 730; Price v Nunn [2013] EWCA Civ 1002;* ***Virgin Atlantic Airways v Zodiac Seats UK Ltd*** *[2013] UKSC 46.*

613. Many of NIOC's arguments are an abuse of process because they are inconsistent with the way in which NIOC put its case in the Liability Phase. Abuse of process applies to arbitral proceedings: ***Injazat Technology Capital Limited v Dr. Hamid Najafi*** *[2012] EWHC 4171 (Comm)".*

Accordingly, Mr Diwan QC submitted, it is not open to NIOC now to complain that the Tribunal erred by applying the wrong ('could or might') test instead of the right ('could and should') test.

55. There is, in my view, however, no merit in this objection. As Mr Howard QC pointed out, the purpose of the requirement in s. 69(3)(b) that *"the question is one which the tribunal was asked to determine"* is to prevent parties from raising wholly new points which were not in play before the arbitrators. As Lewison J (as he then was) put it in ***Safeway Stores v Legal & General Assurance Society*** [2004] EWHC 415 at [8]:

"As to subparagraph (b), the tribunal must have been asked to determine the question, but I do not think that the question needs to have been raised with the precision of a construction summons. All that is needed, in my judgment, is that the point was fairly and squarely before the arbitrator, whether or not it was actually articulated as a question of law."

What matters is that the question of law was integral to the resolution of the dispute, as explained by Cockerill J in ***CVLC Three Carrier Corp and another v Arab Maritime Petroleum Transport Company*** [2021] EWHC 551 (Comm) at [36] when she said this:

"…What is necessary is that the question of law is inherent in the issues for decision by the tribunal…."

56. In the present case, as Crescent's Post-Hearing Brief itself demonstrates, the question of law was put to the Tribunal, Crescent submitting to the Tribunal that the 'could and should' test is the test to apply when determining the *res judicata*/abuse of process

issues. That was, indeed, as NIOC also agreed, the test which it was incumbent upon the Tribunal to apply. If the Tribunal did not apply that test, then, the Tribunal made an error of law. The fact that, making that error, the Tribunal acted in the face of agreement as to the applicable test by both NIOC and Crescent does not change things: there was still an error in relation to a matter which was before the Tribunal. If the position were otherwise, then, it would be most odd because it would mean that a party would find itself barred from being able to appeal in a case where it is common ground that the Tribunal went wrong.

57. Put shortly, it was incumbent upon the Tribunal to apply the correct legal test; if this was not done in the circumstances of the present case, then, s. 69(3)(b) cannot properly amount to a bar to NIOC's ability to appeal. It cannot, in other words, be the case that there can only be an appeal if the parties were opposed on the question of law raised in the appeal when that question was before the arbitral panel. As Popplewell J (as he then was) put it in ***K v A*** [2020] 1 Lloyd's Rep 28 at [37], if, as Crescent contends, the question of law that arises out of the Partial Award and on which NIOC seeks permission to appeal was not *"one which the Arbitrators were asked to determine"* only because it was common ground between the parties, the point is still susceptible to an appeal under s. 69 of the 1996 Act if the Tribunal nonetheless got the law wrong since otherwise injustice would result.

58. The point may be tested in this way: suppose that the Tribunal had included in the Partial Award express reference to ***Virgin Atlantic*** and to the appropriate test being 'could and should' (something which was not done in this case); it would inevitably have been open to NIOC to say that, notwithstanding this, in the event, the Tribunal applied a different (and incorrect) test. That this is the position is supported by ***Finelvet AG v Vinava Shipping Co Ltd (The 'Chrysalis')*** [1983] 1 WLR 1469, a case under the Arbitration Act 1979 in which Mustill J (as he then was) at page 1475A-B identified the following three stages in an arbitrator's process of reasoning:

"(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision."

Mustill J, then, importantly, added at page 1475D-E:

"Stage (2) of the process is the proper subject matter of an appeal under the Act of 1979. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, for the court is then driven to assume that he did not properly understand the principles which he had stated."

In other words, merely stating what the law is, and doing so correctly, does not mean that there can be no error of law if, in applying the law to the facts, it can be seen that

the arbitrator has misapplied the law as he or she has stated it to be. Whether the present case is one in which it can properly be said that a correct application of the law to the facts found would lead *"inevitably to one answer"* is a matter which falls to be considered in answering the next, and critical, question: whether the Tribunal's decision was obviously wrong.

s. 69(3)(c)(i): whether the decision of the Tribunal was obviously wrong

59. Turning, then, to that question, I have reached the clear conclusion that NIOC has not shown that there was anything wrong (still less anything obviously wrong) with the Tribunal's decision, specifically that, when determining the *res judicata*/abuse of process issues, the Tribunal failed to apply the applicable legal test.

60. Despite the language used by the Tribunal in explaining why they decided as they did (*"may"* in paragraph 742, *"could"* in paragraph 745 and *"would"* in paragraph 624), there is no reason to suppose that the Tribunal did not have in mind the correct ('could and should') test. As previously mentioned, it was common ground before the Tribunal that, in accordance with ***Virgin Atlantic***, this is the applicable test. The fact that the Tribunal did not themselves refer to ***Virgin Atlantic*** or spell out the test which they were intending to apply is, in the circumstances, nothing to the point. As Popplewell J put it in ***Reliance Industries Ltd v The Union of India*** [2018] EWHC 822 (Comm), [2018] 2 All ER (Comm) 1090 at [56]:

"The restriction of appeals to errors of law must be rigorously applied in order to give effect to the principles of party autonomy and minimum court intervention enshrined in ss 1(b) and (c) of the 1996 Act: see ***Geogas SA v Trammo Gas Ltd, The Baleares*** *[1993] 1 Lloyd's Rep 215 per Steyn LJ at p. 228. … If the arbitrators have stated the correct legal principle, the court will start from the assumption that that is the principle which has been applied. If the law is not stated, or not fully stated, the court will nevertheless start from the assumption that the law has been correctly understood and applied; tribunals are not to be treated as in error if they do not spell out the law, and to require them to do so would be contrary to the desideratum of speedy finality which underpins the 1996 Act…. ."*

61. As Popplewell J (again) also put it in ***ST Shipping and Transport PTE Ltd v Space Shipping Ltd, The 'CV Stealth'*** [2016] EWHC 880 (Comm), [2016] 2 Lloyd's Rep. 17 at [36]:

"Mr Croall QC reminded me of the principles governing the approach to the reading of awards summarised by Teare J in ***Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The 'Pace')*** *[2010] 1 Lloyds' Rep 183 at para 15, including the oft cited dictum of Bingham J as he then was in* ***Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*** *[1985] 2 EGLR 14 that the courts do not approach awards 'with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration'. However, there is no need to resort in this case to any presumption in favour of the benevolent reading of awards. The arbitrator's findings of fact are clear. In truth, this is another example of a disappointed party trying to dress up an appeal against findings of fact as one which turns on questions of law. … ."*

The more so, given the eminence of the Tribunal since it is somewhat unlikely that, having been referred to ***Virgin Atlantic*** and the parties having directed submissions to the correct test, the Tribunal would, then, have sought to apply a different (and wrong) test.

62. It might have been preferable in the present case had the Tribunal referred, in terms, to ***Virgin Atlantic***. The fact that this was not done is not, however, critical. Nor, in truth, is the fact that, having not referred to ***Virgin Atlantic***, the Tribunal adopted somewhat loose language in expressing their conclusions.

63. It would certainly have been better had there been reference not merely to what 'could' have been done by NIOC at the liability stage of the arbitration but also to what NIOC 'should' have done at that stage. It does not follow, however, reading the Partial Award as a whole and bearing in mind the submissions which had been made on the *res judicata*/abuse of process point, that the Tribunal arrived at the decision which they did through a misapplication of the law. On the contrary, it is apparent from the passages in the Partial Award to which I have previously made reference that the Tribunal were not confused as to what NIOC was seeking to do at the Remedies Phase, which was to focus on Crescent's ability to accept gas in view of the applicable sanctions in the 'but for' scenario which was relevant for causation purposes. This is apparent, for example, from paragraphs 743 and 744 of the Partial Award, to which reference has not yet been made and which follow paragraph 742 of the Partial Award (as set out above) where the Tribunal referred to NIOC having referred *"to a series of events which it says would have delayed completion of NIOC's facilities and restricted or denied its capacity to meet its supply obligations"*:

> *"743. Crescent's capacity to accept gas, up to the contractually required volumes (relevantly, up to 500 MMscfd) is questioned by NIOC. There was delay in the completion of a new Emarat pipeline, but Mr Watts gave evidence, which the Tribunal accepts, that it would have been in place by November 2006 if gas flowed, and the existing gas pipeline grid in the Northern Emirates was sufficient to satisfy SEWA and FEWA.*
>
> *744. There was evidence and argument as to the willingness of Shalco to process the gas to go to the Northern Emirates. BP Sharjah was a minority shareholder and there was evidence that is had particular concerns related to sanctions about being involved in processing gas of Iranian origin. However, this was a project of major local importance involving supplies to state-owned instrumentalities. As noted in paragraph 623 above, the Tribunal accepts that, in practice, it would not be likely to have been frustrated by BP's objections."*

The same distinction is apparent from paragraph 745 of the Partial Award (again as set out above) itself, where the focus is on the effect of sanctions on Crescent's ability to perform *"its obligations"*.

64. As I read the Partial Award, the Tribunal were saying something really quite straightforward. This is that, having not advanced a defence based on sanctions to excuse the non-performance of its contractual obligations, it was no longer open to NIOC to put forward a case which required the Tribunal nonetheless to take sanctions into account as a reason why Crescent should not have the damages which it sought. That would have entailed the Tribunal having to engage in an exercise which, in

context, would have been really quite unreal, in that it would have required the Tribunal to suppose that, despite being liable to Crescent *notwithstanding* the sanctions, NIOC was not obliged to pay the damages sought by Crescent precisely *because* of those self-same sanctions.

65. Implicit in the approach adopted by the Tribunal, therefore, was a criticism of NIOC which went further than merely 'could' and which extended, by necessary implication, to 'should'. The Tribunal clearly considered and were clearly entitled to consider that, since NIOC could have raised the issue of sanctions at the liability stage, then, to seek to do so (albeit in relation to Crescent rather than itself) at the Remedies Phase amounted to an abuse of process. The Tribunal, in other words, reading the Partial Award as a whole, applied the correct ('could and should') test in arriving at the decision which they did.

66. Moreover, as to Mr Howard QC's reliance on the fact that the reference was bifurcated so as to mean that liability and quantum were dealt with separately, the one after the other, this is not a point of any real significance. I say this because I do not consider that having a split trial should permit a party to advance cases which, if not strictly speaking inconsistent with each other, are nonetheless cases which place the tribunal (whether arbitrators, as in the present case, or a court) in the position which I have described. The point may be tested by asking whether, had both liability and remedies been addressed at one hearing, it is realistic to suppose that the Tribunal in the present case would have been content to allow NIOC to advance its sanctions case only in relation to causation and not also by way of a defence to liability. It is somewhat unlikely that this would have been permitted. This is a case, after all, where, as the Tribunal explained and as NIOC appears itself to have acknowledged, if sanctions would have prevented Crescent from accepting the gas, then, those same sanctions would have prevented NIOC from performing its own contractual obligations. On that basis, for NIOC to have argued at the single (liability and quantum) trial that sanctions meant that Crescent was not entitled to the damages sought would run entirely counter to any finding of liability against NIOC which did not also take account of those sanctions.

67. It follows that this is not so much a case of NIOC seeking at the quantum stage *"by a side wind"* to say that it was not liable or putting forward a contractual excuse for its non-performance notwithstanding the earlier finding of liability made by the Tribunal, as NIOC inviting the Tribunal to reach decisions, on liability and remedies respectively, which, if not strictly inconsistent, nonetheless sit most unhappily with each other and, in doing so, to arrive at a result which tends to ignore reality.

68. I consider, for these reasons, that the Tribunal were right in the decision which they made. It is unnecessary, however, for me to go as far as that for two reasons.

69. First, I bear in mind that, as Mustill J put it in ***The 'Chrysalis'***, where the Court is, in effect, being asked to infer an error of law, what a party applying for permission to appeal must do is demonstrate that *"a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another"*. It is quite impossible in the present case to reach such a conclusion since there is simply not the inevitability which is required.

70. Secondly and again in any event, it is equally impossible to conclude that, even if the Tribunal were wrong to have decided as they did, then, they were *"obviously wrong"* to do so for the purposes of s. 69(3)(c)(i).

71. In the circumstances, permission to appeal must be refused: on the basis that it has not been demonstrated that the Tribunal's decision on the legal question which NIOC has identified for the purposes of its proposed appeal was obviously wrong. That is the case even though, as I have explained, I am satisfied that the s. 69(3)(b) requirement has been satisfied.

s. 69(3)(a) and (d): whether determination of the question will substantially affect the rights of one or more of the parties and whether it is just and proper to determine the question

72. Although unnecessary given the conclusion which I have reached on the 'obviously wrong' issue, for the sake of completeness, I will now deal briefly with the other s. 69 requirements, namely that the determination of the question identified by NIOC will substantially affect the rights of one or more of the parties (see s. 69(3)(a)) and that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question (see s. 69(3)(d)).

73. As to the former, Crescent's position is that applying the 'could and should' test would not change the result because the quantum defences could and should have been raised in the liability phase. Mr Diwan QC acknowledged, however, when pressed, that this is not a point which would warrant the refusal of permission if the Court were otherwise in favour of NIOC on its permission application. In short, had my decision in relation to the 'obviously wrong' issue been different, Mr Diwan QC accepted that s. 69(3)(a) would not amount to a freestanding reason to refuse NIOC permission to appeal. That must be right given that it must plainly be assumed at this stage that the Court has taken the view that the Tribunal failed to apply the right ('could and should') test. I need not, therefore, take up time addressing this submission in more detail.

74. Nor, in the circumstances, need I take up time dealing with Mr Diwan QC's alternative submission to the effect that the Tribunal articulated alternative grounds for the dismissal of a number of the defences, in any event, since, in making this submission, Mr Diwan QC rightly recognised that only some other such defences were relied upon by the Tribunal and that in other respects the Tribunal rejected the defences raised on *res judicata*/abuse of process grounds. Given this, it must obviously be the case that, if the Tribunal adopted and applied the wrong legal test, then, this would have made a difference to the outcome of the arbitration at least in relation to those other respects and so that the determination of the question identified by NIOC will substantially affect the rights of the parties.

75. As to s. 69(3)(d) and whether, in all the circumstances, it is just and proper to determine the question of law, if I had had to consider this having otherwise decided that all the other s. 69 criteria are met, I am clear that I would have concluded that this requirement is also satisfied. It is difficult, indeed, to see on what basis it could legitimately be concluded that it was not. The fact that the arbitrators in the present case are very experienced and eminent, a matter highlighted by Mr Diwan QC (at least in his written submissions), is not a reason to conclude that it would not be just and proper to give permission. The eminence and experience of a tribunal may bear on the Court's assessment of its reasoning at the error stage (hence my earlier reference to these

considerations), but, once the error threshold is crossed, it should not *per se* justify the refusal of permission to appeal.

Conclusion

76. For the reasons which I have sought to give in this judgment, although Crescent's jurisdictional objection is rejected, permission to appeal must nonetheless be refused.