EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0005

BETWEEN:

CUKUROVA HOLDINGS A.S.

Appellant

and

SONERA HOLDINGS B.V.

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Kenneth MacLean, QC, with him, Ms. Arabello di Iorio, Mr. James Nadin and Mr. David Caplan for the Appellant
Mr. Ben Valentin, QC, with him, Ms. Lynette Ramoutar for the Respondent
Mr. Ewan McQuarter, QC, with him, Mr. Adam Hinks for Ziraat Bankasi A.S. (Interested Party)

2016: November 23;
2017: June 14.

Commercial appeal – Arbitral award – Enforcement of Final Award – Enforcement judgment definitively determined by courts at all levels – Partial Award by subsequent arbitral tribunal – Whether the decisions to enforce the Final Award issued by the first arbitral tribunal are capable of being re-opened or qualified by the DSPA Partial Award issued by the second arbitral tribunal – Whether the learned judge failed to recognise that the issue of the DSPA Partial Award was live – Whether the learned judge failed to give any (or any proper) effect to the DSPA Partial Award – Whether the learned judge failed to deal with the appellant's case that there had been a material change of circumstances – Whether the learned judge's approach to the exercise of discretion was manifestly flawed

This is an appeal by Cukurova Holding A.S. ("Cukurova") against the judgment of the learned Mr. Justice Gerard Farara, QC [Ag.], which, based on enforcement judgments of the High Court, Court of Appeal and Privy Council, allowed the application of Sonera

Holding B.V. ("Sonera") for an order of sale in respect of Cukurova's 100% shareholding in Cukurova Finance International Limited ("CFI"). The relevant facts are outlined below.

On 1st September 2011, Sonera obtained a Final Award in International Chamber of Commerce ("ICC") arbitration proceedings ("the First Arbitral Tribunal" or "the LA Arbitral Tribunal") against Cukurova. By order of the High Court made on 24th October 2011 ("the Enforcement Judgment"), Sonera was granted permission to enforce the Final Award in the LA Arbitral Tribunal proceedings for the principal sum plus interest as a High Court judgment in the British Virgin Islands. Cukurova applied to set aside the Enforcement Judgment. Their application was brought on various grounds, one of these being that the LA Arbitral Tribunal had acted in excess of jurisdiction in making the Final Award and awarding damages because it had been constituted under an arbitration clause contained in a letter agreement ("the Letter Agreement") but the LA Arbitral Tribunal had granted remedies for breach of a different agreement - a share purchase agreement ("SPA") – which it determined had been concluded between the parties and which SPA contained its own arbitration clause. This application was rejected by Bannister J [Ag.], the Court of Appeal and the Privy Council, all of which held that the Final Award was not issued in excess of jurisdiction. Accordingly, the Final Award remains in full force.

Cukurova then brought revision proceedings before the Swiss Federal Supreme Court, aimed at reopening the LA Arbitral Tribunal proceedings, but these were dismissed on 30th April 2012. By that time Cukurova had commenced a second ICC arbitration under the arbitration clause in the SPA before a second arbitration tribunal ("the DSPA Arbitral Tribunal") seeking the following: (i) a declaration that Cukurova had never entered into the SPA in any form; and (ii) compensation against Sonera in equal amount as the Final Award in favour made against Cukurova (plus interest and costs). Sonera raised preliminary objections before the DSPA Arbitral Tribunal, arguing that Cukurova's claims should be dismissed on the grounds of abuse of process and res judicata as all of the issues had already been determined by the LA Arbitral Tribunal and that a proper application of the kompetenz-kompetenz principle meant that the DSPA Arbitral Tribunal had no jurisdiction to review the decision of the LA Arbitral Tribunal as to its own jurisdiction, as this could only be done by the Swiss Federal Supreme Court or a court asked to enforce the LA Arbitral Tribunal's awards under the New York Convention.

On 12th May 2014, the DSPA Arbitral Tribunal issued a partial award ("the DSPA Partial Award"), holding that the LA Arbitral Tribunal had exceeded its jurisdiction in issuing the Final Award which consequently was not entitled to have a res judicata effect. The DSPA Arbitral Tribunal also opined that the Letter Agreement and the draft SPA were separate and distinct agreements; their respective arbitration clauses did not overlap; and Cukurova's obligation to transfer the shares or to pay damages to Sonera fell under the SPA Arbitration clause.

Sonera, having prevailed before the Board, applied for and was granted a final charging order by Bannister J [Ag.] over and in respect of Cukurova's beneficial interest in the CFI shares. The final charging order was expressly made subject to specific undertakings by Sonera. On 9th January 2015 Sonera applied to enforce its charging order by way of an order for sale. Cukurova resisted the application on a number of grounds, all of which

were rejected by Farara J [Ag.]. The learned judge held in his judgment that Sonera was seeking to enforce an unimpeachable judgment; that the existence of the DSPA Arbitration was not a matter which ought to lead the British Virgin Islands High Court to decline to make an order for sale; and finally, that the DSPA Partial Award was only confined to the conduct of the arbitration in which it was issued.

Dissatisfied with the decision of the learned judge Cukurova appealed on the basis of: (1) the learned judge's failure to recognise that the issue of whether to recognise the DSPA Partial Award was live; (2) the learned judge's failure to give effect to the DSPA Partial Award; (3) the learned judge's failure to recognise the contractual consequences of the DSPA Partial Award; (4) the learned judge's incorrect approach to the unimpeachability of the underlying judgment; (5) the learned judge's failure to deal with Cukurova's case that there had been a material change of circumstance; (6) the learned judge's approach to the exercise of his discretion in granting the order of sale was manifestly flawed; and (7) the DSPA Final Award amounts to a material change of circumstance which would justify the Enforcement Order being revisited, or at the very least not further enforced and had the learned judge known this before he handed down his judgment this would (or should) have provided further grounds for dismissing Sonera's application. Sonera vigorously resisted the appeal.

Held: dismissing the appeal and awarding costs of two-thirds of the costs below to be assessed if not agreed within 21 days from the date of this judgment, that:

1. The learned judge's approach to unimpeachability cannot be impugned as he quite comprehensively and correctly examined the factual matrix and determined the application that was put before him having given deliberate consideration to the contesting views. A close reading of the judgment as a whole indicates that the learned judge was at all times seized of all the factors, including the fact that the DSPA Partial Award was a live matter based on Cukurova's case irrespective of how he may have expressed himself in passing on the issue of the DSPA Partial Award in the judgment. The fact that the DSPA Partial Award was a live issue is immaterial and cannot assist Cukurova's case and any alleged omission on the part of the learned judge to expressly refer to this issue does not take Cukurova's case any further. It is clear that this fact was not the basis for the learned judge's disposition of the case and that he reasoned that the DSPA Partial Award was of no moment and could not and did not detract from the court's judgment. The DSPA Partial Award could not supersede the Final Award neither could it in any way undermine the correctness of the decision of this Court and the Privy Council. Therefore, the unimpeachability of the court's judgment prevailed. Accordingly, the learned judge did not err and this ground of appeal fails.

2. Judicial certainty is a pre-requisite of any civilised system of justice. There is great public interest in the stability, coherence and certainty of the law. Decisions on points of law from higher courts have to be accepted by lower courts. The Final Award rendered by the LA Arbitral Tribunal has been held to be valid and enforceable by the High Court, this Court and the Privy Council. It is trite that this Court is not in a position to review the decision by the Board, which is binding on

it; neither was the judge at first instance in any better position. The learned judge was therefore correct in holding that the Enforcement Judgments of all our courts were uninmpeachable. Moreover, the learned judge quite properly examined the nature of the DSPA Partial Award in the context in which our courts have definitively pronounced on the validity of the LA Arbitral Tribunal and its jurisdiction to give the Final Award. The learned judge comprehensively dealt with the issues that were raised and more importantly examined whether there was any scope for him to disregard the decision of not only this Court but also that of the Privy Council on the jurisdiction of the LA Arbitral Tribunal. The Enforcement Judgment on the Final Award remains in full force and it was not open to the learned judge to seek to review, revise, revisit or undermine the authoritative pronouncements of our hierarchy of courts. Therefore, the learned judge did not err in his treatment of the DSPA Partial Award.

Willers v Joyce et al [2016] UKSC 44 applied; **Attorney General of Saint Christopher and Nevis and Anguilla v Reynolds** [1997] 43 WLR 108 applied.

3. Even in the face of a contractual obligation of Sonera to abide by the decision of the DSPA Partial Award, insofar as the learned judge correctly held that the Enforcement Judgment was unimpeachable, that contractual obligation cannot enable a lower court to ignore decisions of the Court of Appeal and the Privy Council. This is not a case where the parties have contracted out of a decision but rather one in which it is alleged by one party that due to a subsequent decision of the DSPA Arbitral Tribunal one party is free or obliged to ignore the decisions of the Court of Appeal and Privy Council. It would be making a mockery of this justice system for a High Court judge to accept that higher courts namely the Court of Appeal and the Privy Council erred in rejecting the contention that the LA Arbitral Tribunal exceeded its jurisdiction in making the Final Award and to hold that the DSPA Arbitral Tribunal was correct in allegedly holding any contrary view. Accordingly, the ground of appeal that the learned trial judge did not recognise the contractual consequences of the DSPA Partial Award fails.

   Kimberley Construction Ltd v Mermaid Holdings Ltd. [2004] 1 NZLR 386 distinguished.

4. Section 84 of the **Arbitration Act** of the British Virgin Islands cannot apply to the circumstances of the case in order to derail the decisions of this Court and the Privy Council. This section does not provide a facility for a judge at first instance to ignore judgments of higher courts which are binding on that court. Insofar as the Privy Council's decision of May 2014 held that the Final Award of the LA Arbitral Tribunal was made by that Tribunal with jurisdiction and therefore the award was enforceable within this jurisdiction, there is nothing in section 84 of the **Arbitration Act** that can have the effect of derogating from that decision.

   Section 84 **Arbitration Act, 2013**, Act No. 13 of 2013, Laws of the Virgin Islands considered.

5. It is self-evident that neither the DSPA Partial Award nor the DSPA Final Award can rise to the threshold to amount to a material change of circumstance, more so to one which would warrant any court revisiting its earlier order. Therefore, the learned judge was correct in not giving any weight to Cukurova's alleged material change of circumstance based on the DSPA Partial and Final Awards.

6. The learned judge's decision was undoubtedly a matter that was within the exercise of his discretion. It is trite that an appellate court will only interfere with the exercise of discretion by a lower court in very limited circumstances, none of which are present in this case. The learned judge took into account all the relevant factors in relation to the LA Arbitral Tribunal's Final Award, the Enforcement Judgment and the DSPA Partial Award and in a closely reasoned judgment concluded that Sonera is entitled to enforce the Enforcement Judgment. As the learned judge carefully considered the relevant matters and reached a conclusion that was open to him, this ground of appeal fails.

JUDGMENT

[1] **BLENMAN JA**: This appeal brings into sharp focus the highly unusual relationship between a Final Award of the First Arbitral Tribunal ("the LA Arbitral Tribunal") and the enforcement judgments of our Courts, at all levels including the Privy Council and that of a subsequent Partial Award of the DSPA Arbitral Tribunal, the DSPA Partial Award. The latter award is alleged to have addressed the same matters that have been definitively determined by our Courts and the Privy Council and has in effect given rise to the issues that are engaging our attention in this appeal. It is an appeal by Cukurova Holdings A.S. ("Cukurova") against the judgment of the learned Mr. Justice Gerard Farara, QC [Ag.], which, based on enforcement judgments of our Courts allowed in principle the application of Sonera Holdings B.V. ("Sonera") for an order for sale in respect of Cukurova's 100% shareholding in Cukurova Finance International Limited ("CFI").

[2] The learned judge directed that the shares be sold by way of public auction or private treaty and that the parties should agree the terms of a "comprehensive order" within 21 days, failing which the terms of the order would be settled by the court. The learned judge also recognised that the order would be subject in all respects to the rights and interests of TC Ziraat Bankasi A.S. ("Ziraat"); whose prior working security includes Cukurova's shares in CFI. Those directions were

the basis of an application by Cukurova to this Court for a stay which this Court granted pending the hearing and determination of this appeal. I will now briefly examine the factual background.

Background

[3] This appeal is yet another event in a very long running dispute between the parties. For the sake of convenience, I will utilise the factual history as helpfully stated by Farara J [Ag.], in the court below in some detail, with the requisite modifications. On 1st September 2011, Sonera obtained a Final Award in International Chamber of Commerce ("ICC") arbitration proceedings against Cukurova for the sum of US$932 million in damages plus interest and costs. Those arbitration proceedings, which is also referred to as the First Arbitral Tribunal proceedings or the LA Arbitral Tribunal proceedings were brought pursuant to an arbitration clause in a Letter Agreement between Sonera and Cukurova for the sum of US$932 million in damages plus interest and costs.

[4] By order of the High Court made on 24th October 2011 ("the Enforcement Order"), Sonera was granted permission to enforce the Final Award in the LA Arbitral Tribunal proceedings for the said principal sum plus interest as a judgment of the High Court of Justice in the Virgin Islands. At that time, the award had grown with interest to US$1,033,809,033 and judgment was entered for that sum plus interest.

[5] Cukurova's attempt to set aside the Final Award on the ground that it was issued in excess of jurisdiction before the Swiss Federal Supreme Court failed in May 2012. Cukurova's main argument was that the LA Arbitral Tribunal could not properly make the determination which it did based on the arbitration clause in the Letter Agreement. Cukurova further argued that the jurisdiction to grant the relief that Sonera was seeking was provided in the arbitration clause in the Share Purchase Agreement ("SPA"), which agreement had not been executed. Between 2011 and 2014, Cukurova applied to set aside the Enforcement Order principally on the ground that the LA Arbitral Tribunal lacked jurisdiction to make the award. This application was rejected by Bannister J [Ag.], the Court of Appeal and the

Privy Council ("the Enforcement Judgments"), all of which held that the Final Award was not issued in excess of jurisdiction. The decision of the Privy Council dismissing Cukurova's appeal was handed down on 13th May 2014.

[6] It is appropriate to now treat with the decision of the Board in some detail, since in my view it conclusively determined the issues that Cukurova had raised in relation to the issue of the jurisdiction.

The Privy Council's decision on jurisdiction

[7] The Privy Council in **Cukurova AS v Sonera Holding BV**[1] upheld the decisions of both Bannister J [Ag.] and our Court of Appeal on the issue of the jurisdiction of the LA Arbitral Tribunal to make the Final Award, on the salutary basis that it made 'good commercial sense' to treat the Letter Agreement and the draft SPA as part of the same transaction. The main issue was Cukurova's application to set aside the Enforcement Order on the basis, inter alia, that the LA Arbitral Tribunal lacked jurisdiction to make the Final Award. The Privy Council found explicitly that the component parts of the transaction between Sonera and Curukova amounted to a single, seamless transaction. The Board held that it could not be assumed that the parties to the Letter Agreement and the SPA intended to divide the transaction into several component parts, as this would be too costly, inefficient and not make good commercial sense. Specifically on the issue of jurisdiction, Lord Clarke, giving the opinion of the Board, concluded at paragraph 27:

> "This is an unusual case and the Board sees no reason to interfere with the conclusions reached by the judge and the Court of Appeal. On the contrary, their conclusions seem to the Board to make good sense. As already stated, the clauses in the two contracts were very similar indeed. There is no dispute that, in the circumstances prevailing in May 2005, Sonera was entitled to commence arbitration proceedings under the Letter Agreement. As it is put on behalf of Sonera, the issue is whether the parties intended that, if the Tribunal found, as it did, that the Letter Agreement had been breached, the Tribunal was obliged to draw stumps, requiring Sonera to commence a fresh arbitration under the Final SPA. The Board agrees that there is nothing to suggest that the parties intended such a result. It would make no commercial sense. Contrary to

[1] [2014] UKPC 15.

> submissions made on behalf of Cukurova, like the judge and the Court of Appeal, the Board takes the view that, by way of contrast with the position in *The Football Case*, the agreements here were component parts of a single transaction."

Lord Clarke concluded further:

> "In all the circumstances, the Board is of the opinion that the judge was correct to hold that the Tribunal had jurisdiction to make the award it did in this case and the Court of Appeal was right to dismiss Cukurova's appeal on this ground. It follows that the Board answers the first question posed in para 3 above, namely whether the Tribunal had jurisdiction to grant the relief in the Final Award, in the affirmative. It follows that Cukurova's appeal on jurisdiction should be dismissed."[2]

[8] Sonera, having prevailed before the Board, applied for a charging order against Cukurova's shares. On 31st July 2014, Bannister J [Ag.] made a provisional charging order in respect of:

(a) Cukurova's beneficial interests in shares held:

(i.) by Cukurova in CFI;

(ii.) by CFI in Cukurova Telecom Holdings Limited ("CTH").

(b) Cukurova's beneficial interest in any and all amounts received by or due to CFI and CTH, including any amounts derived from the undistributed profits of Turkcell.

[9] A final order and stop notice ("the Final Charging Order") was made by Bannister J [Ag.] on 4th November 2014 over and in respect of Cukurova's beneficial interest in the CFI shares and the provisional charging order was discharged. The Final Charging Order was expressly made subject to the undertaking by Sonera that it will not contend that (a) the Final Charging Order 'affect [sic] in any way the mortgaging or charging of the legal and beneficial interest in the stock of Cukurova Telecom Holdings Limited (CTH) and related rights under the CTH Share Mortgage to the full extent provided in that security'; and (b) CFI was unable to or

[2] At para. 29.

did not validly mortgage or charge the beneficial interest in the stock of CTH and related rights under the CTH Share Mortgage. Paragraph 4 of the Final Charging Order expressly provided that it shall not prejudice in any way the rights and interest of the Third party, Ziraat (or any other person) in its capacity as Lender and/or Agent and/or Security Agent as defined in, and pursuant to a Facility Agreement dated 25th July 2014, an equitable first fixed charge ("the CFI share charge") and a legal mortgage ("the CTH Share Mortgage").

[10] It is noteworthy that on 10th April 2012 and a few months after the Final Award had been issued and before Bannister J [Ag.] had given judgment on Cukurova's challenge on the Enforcement Order, Cukurova commenced a second ICC arbitration in Geneva, Switzerland before the DSPA Arbitral Tribunal against Sonera. In the DSPA Arbitration, Cukurova, among other things, sought a declaration that it never entered into the SPA pertaining to the B shares in Turkcell Holdings S.A., and for an order that Sonera pays to it 'damages in an amount to be established but not less than any amount paid by Cukurova to Sonera pursuant to the Final Award … or further to any 'decision enforcing this award up to USD932 million plus interest'.

[11] Sonera responded to the DSPA Arbitral Tribunal that the arbitration should be dismissed on the grounds of res judicata and abuse of process, as all of the issues had already been determined by the LA Arbitral Tribunal. Sonera's response was taken by the DSPA Arbitral Tribunal as preliminary issues and resulted in the DSPA Partial Award. In the DSPA Partial Award, the DSPA Arbitral Tribunal dismissed Sonera's objections on the ground that the LA Arbitral Tribunal had exceeded its jurisdiction in issuing the Final Award which accordingly was not entitled to have a res judicata effect. The DSPA Arbitral Tribunal also opined that the Letter Agreement and the draft SPA were separate and distinct agreements, their respective arbitration clauses did not overlap, and Cukurova's obligation to transfer the shares or to pay damages to Sonera fell under the SPA Arbitration clause.

[12] Following the decision of the Privy Council, Bannister J [Ag.], in an ex tempore ruling on 6th June 2014 dismissing Sonera's application for a court appointed receiver, stated obiter:

> "The validity of the award was upheld by the Privy Council, although an insurgent group of arbitrators has recently risen up to declare that the original award is a nullity – the tribunal having been without the jurisdiction to make it. The expression of that opinion does not, of course, affect the validity of Sonera's judgment, which cannot be impeached in this jurisdiction."

[13] On 9th January 2015, Sonera applied to enforce its charging order by way of an order for sale. Cukurova resisted the application on a number of grounds. However, Sonera persisted in the application before the Farara J [Ag.] in rejecting Cukurova's submissions. The learned judge held that the judgment that Sonera was seeking to enforce was an unimpeachable judgment; that the existence of the DSPA Arbitration was not a matter which ought to lead the British Virgin Islands High Court to decline to make an order for sale; and finally that the DSPA Partial Award was only confined to the conduct of the arbitration in which it was issued. It is noteworthy however that the DSPA Arbitral Tribunal in its Partial Award at paragraph 129 made this finding:

> "129. Accordingly, as a consequence of the LA Tribunal's excess of jurisdiction, the LA Awards cannot be recognized or given effect by this Arbitral Tribunal in the present proceedings by reference to article V(1)(c) of the New York Convention; and their res judicata effects are denied … "

At paragraph 136 it stated as follows:

> "136. In other words, the LA Tribunal, rather than addressing the issue of damages for breach of the [Letter Agreement], which presently is not at stake in this arbitration, awarded damages on the basis of a breach of the SPA by [Cukurova], an issue which, on the face of it and so far pleaded, falls within the exclusive scope of the DSPA Arbitration Clause. In doing so this Tribunal considers that the LA Tribunal crossed the line between the arbitration clause in the LA and the DSPA, as alleged by [the Respondent]."

[14] It is of significance that when the DSPA Tribunal made the above ruling it was fully aware of the decisions of our courts including that of the Board which held a

different view. For the sake of completeness, it is noteworthy that after the judgment of Farara J [Ag.] was issued, a final award from the DSPA Tribunal was rendered which would be addressed only insofar as it relates to the arguments that were advanced before this Court on ground 7. For present purposes, however, it is sufficient to say that the DSPA Arbitral Tribunal in its final award dismissed Cukurova's claims for relief while others were ruled inadmissible. In other words, the relief that Cukurova sought in the DSPA Final Award were refused.[3]

Grounds of Appeal

[15] Cukurova has filed seven grounds of appeal and complains about alleged errors of the learned trial judge. The challenges are as follows: (1) the judge's failure to recognise that the issue of whether to recognise the DSPA Partial Award was live; (2) the judge's failure to give any (or any proper) effect to the DSPA Partial Award; (3) the judge's failure to recognise the contractual consequences of the DSPA Partial Award; (4) the judge's approach to the unimpeachability of the underlying judgment was wrong; (5) the judge's failure to deal with Cukurova's case that there had been a material change of circumstance; (6) the judge's approach to the exercise of discretion was manifestly flawed; (7) the DSPA Final Award – amounts to a material change of circumstances which would (a) justify the Enforcement Order being revisited, or at the very least not further enforced; and (b) had this been known by the judge before he handed down his judgment would (or should) have provided further grounds for dismissing Sonera's application. It is noteworthy that the above grounds of appeal were accompanied by in excess of forty (40) paragraphs in support.

[16] Insofar as the interested party seems to have taken a neutral position in this appeal, it is convenient, in my view, to now indicate that position.

[3] The DSPA Arbitral Tribunal in its Final Award has dismissed Cukurova's claim for declarations that it had not breached the SPA and it dismissed Cukurova's claims for orders preventing Sonera from enforcing the Final Award in the Virgin Islands.

Submissions on behalf of interested party

[17] Mr. McQuarter, QC on behalf of Ziraat reminded this Court that Ziraat's interest in this appeal arises from its first ranking security over the CFI Shares to the CFI Shares Charge. Ziraat additionally enjoys first-ranking security over CFI's shares in CTH, created pursuant to the CTH Share Mortgage. The CFI Share Charge and the CTH Share Mortgage secure CFI's indebtedness to Ziraat under the Facility Agreement pursuant to which Ziraat advanced approximately US$1.6 billion to enable the shares in issue in this application and CFI's shares in CTH to be redeemed from Alfa Telecom Turkey Limited ("ATT").

[18] Mr. McQuarter, QC advised this Court that at the hearing before Farara J [Ag.] the terms of any order for sale and the inclusion of appropriate safeguards for Ziraat remained in dispute and Ziraat accordingly appeared before Farara [Ag.] below in order to ensure that any order for sale made in respect of the CFI Shares would not interfere with Ziraat's priority entitlement to said shares and more broadly, would not prejudice any of Ziraat's rights and interests. The learned judge commented that "the position taken by Ziraat with regard to the application is a commendable one", summarising Ziraat's position as follows:

> "Ziraat does not in principle oppose an order for sale. Its main concern is the full protection of its rights and interests as set out in the security documents (the CFI Share Charge and the CTH Share Mortgage), and as recognized by the terms of the Final Charging Order."

[19] Mr. McQuarter, QC reminded this Court that the detailed terms of the order were subsequently agreed between Ziraat, CTH, and the judgment creditor, Sonera, and are set out in the order for sale entered on 20th May 2016. Mr. McQuarter, QC pointed out that Farara J [Ag.] further recorded that that he agreed entirely with the submissions of Ziraat's counsel as follows:

> "[Counsel for Ziraat] submitted that any order for sale (i) must protect Ziraat's rights and state expressly that it is without prejudice to its rights' (ii) preserve Ziraat's rights under its security documents to proceed to realise its secutity or any other rights granted to it in an event of default; (iii) must provide unconditionally and unreservedly that Ziraat will be paid in full and first and before completion of the sale; and (iv) the sales

> process must be such that it does not prejudice Ziraat's interest – it must ensure there will be no deterioration in the value of the CFI shares in the market, as these shares are a complex and unique asset. With these factors, I am entirely in agreement."

[20] Mr. McQuarter, QC said in the event, following the judgment, the detailed terms of the order for sale were agreed between Ziraat, Cukurova and Sonera. Ziraat's interests are protected in the order for sale and Ziraat is content with those terms and does not pursue any appeal. Mr. McQuarter, QC stated that Ziraat does not understand either Cukurova or Sonera to be challenging the terms of the order for sale. Rather, Ziraat understands CTH to be asserting only that no order for sale should have been made at all. Ziraat takes no position on the merits of Cukurova's appeal. Ziraat's only concern is to ensure that the terms of that order for sale (if it survives the appeal) are not changed in any way which adversely affects the protections currently afforded to Ziraat. Mr. McQuarter, QC opined that those protections are fully justified as Farara J [Ag.] recognised and any derogation from them would be wrong in principle.

[21] Mr. McQuarter, QC said in summary, in light of (a) the very substantial sum at stake for Ziraat; (b) Ziraat's obvious interest in ensuring that the protections embodied in the terms of the order for sale are not eroded; and (c) Ziraat's participation at the hearing below, Ziraat is plainly justified in appearing at the hearing of this appeal. Ziraat's participation in the hearing may in the event be limited, since if no point is taken on the terms of the order for sale.

[22] I will now address in turn the arguments that were advanced on behalf of the two antagonists on each of the grounds of appeal.

Appellant Submissions
Ground 1: Failure to recognise that the issue of whether to recognise the DSPA Partial Award was live

[23] Learned Queen's Counsel Mr. MacLean submitted that the issue of whether to recognise the DSPA Partial Award was before the judge and to that end Cukurova had produced to the Court duly certified copies of the documents it was required to

produce pursuant to section 85 of the **Arbitration Act**[4] of the British Virgin Islands. He posited that the judge, however, appears to have considered that the issue of whether to recognise the DSPA Partial Award was not before him. This he said was a fundamental error. Mr. MacLean, QC opined that it is difficult to know how much this error impacted on the other conclusions reached by the judge, but it appears to have had at least some effect.

Ground 2: Failure to give any (or any proper) effect to the DSPA Partial Award

[24] Next, Mr. MacLean, QC stated that when it came to considering the effect of the DSPA Partial Award, the judge held that "the [DSPA Partial Award] is confined to the question of whether the [LA Tribunal Final Award] gave rise to a res judicata, so as to disentitle the DSPA Arbitral Tribunal from considering and determining the dispute between them". Mr. MacLean, QC said that the judge stated that "… the [DSPA Partial Award] relates to a preliminary objection to jurisdiction based on principles of res judicata and nothing more…" and the DSPA Arbitral Tribunal "recognised the 'continuing efficacy' of the LA Tribunal Final Award and the Enforcement Order in paragraphs 26 and 94 of the DSPA Partial Award". That reasoning, Mr. MacLean, QC argued however, is clearly and demonstrably wrong, and fails to give any (or any proper) effect to the DSPA Partial Award, let alone treat it as binding for all purposes as the Court was obliged to do. Mr. MacLean, QC posited that it is clear that the judge fundamentally misunderstood what the DSPA Partial Award was about. It was not (or was not exclusively or primarily) about the DSPA Arbitral Tribunal's own jurisdiction. Its jurisdiction had not been challenged. It was about certain preliminary challenges raised by Sonera. Furthermore, the judge's characterisation of the DSPA Partial Award in paragraph 28 of the judgment is unduly narrow. He said that it is true that Sonera had raised preliminary objections based on res judicata (and abuse of right as well). However, as the DSPA Arbitral Tribunal explained, those objections squarely and necessarily raised the issue of whether the LA Arbitral Tribunal had exceeded its

[4] Act No. 13 of 2013.

jurisdiction. Mr. MacLean, QC said that was the central issue in dispute and was the key issue determined in the DSPA Partial Award.

[25] Mr. MacLean, QC also submitted that the judge's characterisation of paragraphs 26 and 94 of the DSPA Partial Award was incorrect. He pointed out that paragraph 94 of the DSPA Partial Award provides as follows:

> "94. The Parties agree that this Arbitral Tribunal is not an enforcement court and has no powers to this effect. Such is indeed indisputable. This Tribunal is not a state court at all; and it has no powers whatsoever to enforce the LA Awards. The issue triggered by Sonera's preliminary objections do not, therefore, relate to the enforcement of the LA Awards or its judicial recognition in the sense given to the term under the New York Convention…but rather to the effects to be given in these proceedings to the LA Awards, which were issued by a different arbitral tribunal under a different arbitration agreement in a different arbitration, in permitting this Tribunal to decide whether the LA Awards are res judicata on claims falling within the scope of the DSPA Arbitration."

[26] Learned Queen's Counsel Mr. MacLean opined that the learned judge, however, appears to have taken the above-mentioned paragraph completely out of context. Mr. MacLean, QC said that one of Sonera's arguments before the DSPA Arbitral Tribunal was that, as a matter of Swiss law, only supervisory and enforcing courts had the power to review an arbitral tribunal's jurisdiction, and that since the DSPA Arbitral Tribunal was neither, it simply had to accept the LA Arbitral Tribunal's awards without asking itself whether they were rendered in excess of jurisdiction. However, Cukurova disagreed with that position, submitting that: (i) the res judicata effect of the LA Arbitral Tribunal's awards was dependent on whether they would be recognised in their country of origin (i.e. Switzerland); and (ii) since Sonera was seeking to rely on the LA Arbitral Tribunal's awards as a complete answer to the proceedings before the DSPA Arbitral Tribunal, the DSPA Arbitral Tribunal had no choice, and was required as a matter of Swiss law, to review the LA Arbitral Tribunal's jurisdiction by applying the New York Convention by analogy, even though it was not a supervisory or enforcement court.

[27] Mr. MacLean, QC pointed out that the DSPA Arbitral Tribunal considered the rival submissions at paragraphs 93-108 of the DSPA Partial Award. He said that paragraph 94 of the DSPA Partial Award falls within the introductory section of that consideration. He opined that all it does is record its acceptance of Sonera's position – which to this extent was not disputed – that the DSPA Arbitral Tribunal was not an enforcement court, and that the issues raised by Sonera's preliminary objections could not therefore relate to the enforcement or judicial recognition of the LA Arbitral Tribunal's awards. Rather, they related to whether the LA Arbitral Tribunal's awards were entitled to res judicata effect. He pointed out however that the DSPA Arbitral Tribunal immediately went on to say this:

> "95. Such a review [of whether the LA Tribunal's awards are entitled to res judicata effects] necessarily entails … a determination of the delineation and respective limits between (i) the scope of the LA arbitration clause … and … (ii) the scope of the SPA Arbitration Clause … Such a determination not only requires this Tribunal to verify if the LA Awards are recognized in Switzerland, being their country of origin, and in the negative whether the LA Awards could be recognized under the requirements set out under Article 192(2) [of the Swiss Federal Statute on Private International Law]. This means that this Tribunal is entitled to make the latter decision, one way or the other. To do so, the Arbitral Tribunal must assess the scope of … the LA Tribunal's jurisdiction … over the issues in relation to which Sonera raises its res judicata objection in order to decide whether the decisions of the LA Tribunal on such claims have any res judicata effects in the present arbitration …".

[28] Mr. MacLean, QC stated that the DSPA Arbitral Tribunal agreed with Cukurova that it had to address the issue of the LA Arbitral Tribunal's jurisdiction in order to determine Sonera's preliminary objections – not least because the res judicata effect of the LA Arbitral Tribunal's awards depended on whether they would be recognised in Switzerland, being their country of origin. Learned Queen's Counsel Mr. MacLean stated that the DSPA Arbitral Tribunal was not saying that whatever it decided would have no effect outside of the DSPA Arbitral proceedings. It was simply not addressing that issue. He said that it was addressing its role in the light of Sonera's arguments, and specifically whether that role permitted it to review the LA Arbitral Tribunal's jurisdiction. It decided that it did, and went on to hold that the LA Arbitral Tribunal did exceed its jurisdiction. Mr. MacLean, QC said that in

any event, whatever the DSPA Arbitral Tribunal's reasons for deciding that the LA Arbitral Tribunal exceeded its jurisdiction, the simple fact is, that is what it decided, and that decision is binding on Sonera and must be recognised by this Court. He said that similarly, the fact that the DSPA Partial Award did not 'set aside' the LA Arbitral Tribunal's Final Award is nothing to the point. It is the DSPA Arbitral Tribunal's decision that the LA Arbitral Tribunal exceeded its jurisdiction that is critical here, because that determination (a) is binding on Sonera as a matter of contract; (b) must be recognised by this Court as binding for all purposes as a matter of both domestic and international law; and (c) goes directly to Sonera's ability to continue its attempts to enforce the Final Award or its fruits here or anywhere else.

[29] Accordingly, Mr. MacLean, QC submitted that it is clear that the judge failed to give any (or any proper) effect to the DSPA Partial Award. He treated it as binding only for very limited purposes, rather than for all purposes as he was required to do pursuant to section 82(2) of the **Arbitration Act**. Had he treated it as binding for all purposes, Mr. MacLean, QC argued the judge could not have made an order for sale.

Ground 3: Failure to recognise the contractual consequences of the DSPA Partial Award

[30] Mr. MacLean, QC pointed out that the judge dealt with the contractual effect of the DSPA Partial Award in paragraph 33 of the judgment. He said that the judge held that since the DSPA Partial Award related to "a preliminary objection to jurisdiction based on principles of res judicata and nothing more …" and that "[Sonera] would, … [only] be estopped from denying, on principles of res judicata, that the DSPA Tribunal has the jurisdiction to determine the dispute between the parties …".

[31] Mr. MacLean, QC argued that the learned judge's premise is simply wrong. He said that Sonera's preliminary objections squarely raised the issue of whether the LA Arbitral Tribunal had exceeded its jurisdiction, and that was the key issue determined in the DSPA Partial Award. He maintained that Sonera is bound by

that determination as a matter of contract. Mr. MacLean, QC in seeking to impugn the judgment, argued that the judge incorrectly held that the DPSA Partial Award was based on a wrong premise - he would (or should) have held that Sonera was precluded as a matter of contract from further pursuing the enforcement of the Final Award or any of its fruits, and would (or should) have dismissed its application for an order for sale for that reason as well.

Ground 4: The judge's approach to 'unimpeachability' was wrong

[32] Mr. MacLean, QC posited that a theme running through the judgment is that the Court was dealing with the enforcement of an 'unimpeachable' judgment. He said that the judge's view is perhaps best encapsulated in paragraph 31 of the judgment:

> "I am entirely in agreement with the view of Bannister J expressed in a ruling subsequent to the decision of the Privy Council, that the judgment of this court is unimpeachable in this jurisdiction. The decision of the DSPA Tribunal on the question of res judicata does not and cannot affect the enforceability of the judgment of this court (based on [the LA Tribunal Final Award]), in circumstances where recognition of the [the LA Tribunal Final Award] has not been set aside, and all previous challenges based on jurisdiction have been swept aside up to the level of the Privy Council. In my judgment, [Sonera] is not prevented from proceeding with enforcement of the judgment of this court on the ground that a second arbitral tribunal has, in determining whether the dispute before it is res judicata, expressed a different opinion or come to a different conclusion on the jurisdiction of the first arbitral tribunal …".

[33] Mr. MacLean, QC argued that the above reasoning is however erroneous for a number of reasons. He submitted that the judge's treatment of what it meant for a judgment or order to be 'unimpeachable' was fundamentally flawed. He said that is self-evident that a judgment or order against which all avenues of appeal have been exhausted, or not pursued, cannot be appealed. But the effect of such a judgment or order is not to stop time in its tracks. It is always possible for supervening events to impact upon a party's right to enforce the judgment or order. Mr. MacLean, QC said that it is trite law that a party can obtain an award or judgment and then enter into an enforceable contractual agreement which affects

its ability or entitlement to enforce that award or judgment. In support of this contention he placed reliance on **Kimberley Construction Ltd. v Mermaid Holdings Ltd**[5] which he said is authority for the proposition that "enforcing an arbitral award, even one that is otherwise entitled to recognition, when the parties have entered into a supervening settlement would violate public policy". He said that by parity of reasoning, so a party can obtain an award or judgment and then enter into an arbitration – a procedure which is rooted in contract – the outcome of which affects its ability or entitlement to enforce that award or judgment.

[34] Mr. MacLean, QC said that in this case, Sonera not only submitted to the jurisdiction of a second arbitral tribunal (the DSPA Arbitral Tribunal) but participated in its deliberations. The DSPA Tribunal has issued an award (the DSPA Partial Award) which, just like a settlement agreement, supersedes Sonera's right to enforce the LA Arbitral Tribunal Final Award. He submitted that that is so irrespective of whether the LA Arbitral Tribunal Final Award was previously enforceable here or anywhere else. He said that none of this involves any conceptual difficulty. He opined that it simply involves the application of basic and well-settled principles to an admittedly unusual situation. In his view, the simple point is that an arbitration award creates superseding rights and obligations just like a contract, and the DSPA Partial Award has done so in this case. He argued that far from there being any difficulty in recognising that fact, as the **Kimberley Construction Ltd** case demonstrates, it would, in fact, be contrary to public policy not to recognise it and to enforce the LA Tribunal Final Award as if the DSPA Partial Award did not exist. Mr. MacLean, QC posited that insofar as the judge refused to recognise and treat the DSPA Partial Award as binding for all purposes (as he was required to pursuant to section 82(2) of the **Arbitration Act**) because of his view that the Enforcement Order was 'unimpeachable', he was wrong to do so. Accordingly, Mr. MacLean, QC submitted that had the judge not made this error, he would (or should) have dismissed Sonera's application.

[5] [2004] 1 NZLR 386, paras. 24-25.

Ground 5: Failure to deal with Cukurova's case that there had been a material change of circumstance

[35] Mr. MacLean, QC complained that the judge failed to deal at all with Cukurova's submission that the DSPA Partial Award constituted a material change of circumstance that would justify the Enforcement Order being revisited, or at the very least not further enforced. He said that this was a particularly significant error given that the judge positively relied on the fact that 'recognition of the [LA Tribunal Final Award] has not been set aside …'. He opined that the error may have been the result of the judge's apparent (but incorrect) view that the issue of whether to recognise the DSPA Partial Award was not before him. Mr. MacLean, QC maintained that in any event, Cukurova's submission on material change of circumstance was well-founded. He submitted that had the judge dealt with it, he would (or should) have concluded that it provided a further ground for dismissing Sonera's application.

Ground 6: The learned judge's approach to the exercise of his discretion was manifestly flawed

[36] Mr. MacLean, QC said that when it came to dealing with Cukurova's alternative argument that no order for sale should be made as a matter of discretion, given the advanced stage of the proceedings before the DSPA Arbitral Tribunal, the possible outcomes, and Sonera's participation in it, the judge simply said:

> "39. For the reasons already stated, I do not regard the existence of the DSPA Arbitration or [the DSPA Partial Award] to be a matter which ought to lead this Court to decline to make an order for sale. [Sonera] is the beneficiary of a judgment of this Court, and all issues concerning setting aside the Final Charging Order have been disposed of in its favour up to the Privy Council. Accordingly, [Sonera] is prima facie entitled to an order for sale of the CFI shares, which apparently are the only asset of [Cukurova]."

[37] Mr. MacLean, QC acknowledged that this Court will only interfere with a judge's exercise of discretion if it can be shown that the judge: (1) made an error of principle; (2) took into account irrelevant considerations or failed to take into account relevant ones; or (3) made a decision that was plainly wrong. Mr.

MacLean, QC argued that each of those conditions is met. He said that the learned judge's conclusion on discretion in this respect was based on his prior reasoning and conclusions, which were wrong for all of the reasons given above. He submitted therefore that the judge's exercise of discretion was therefore based on errors of principle.

[38] Learned Queen's Counsel Mr. MacLean, also pointed out that the judge does not appear to have actually taken into account the key relevant considerations, namely that: (1) the DSPA Arbitral proceedings had been running for many years; (2) Sonera had participated in it throughout; (3) it was at a very advanced stage, with the final hearing on the merits having taken place; and (4) it could have resulted in an award deciding that: (a) there was never a concluded SPA; (b) Cukurova was entitled to an order preventing Sonera from taking any further steps to enforce the LA Arbitral Tribunal Final Award; and/or (c) Sonera was obliged to reimburse Cukurova for any recovery made as a result of enforcing the LA Arbitral Tribunal Final Award.

[39] Accordingly, Mr. MacLean, QC submitted that the above matters were all plainly material considerations that should have been taken into account. However instead of considering them, the judge appears simply to have proceeded on the basis that, as he had concluded that the DSPA Partial Award did not preclude him from making an order for sale, the existence of the DSPA Arbitral proceedings was immaterial when it came to the exercise of his discretion. He said that the judge's approach was fundamentally misconceived.

[40] Mr. MacLean, QC argued that in the circumstances the decision made by the judge was plainly wrong. He submitted that to order the sale of an irreplaceable US$2.8 billion asset in circumstances where, in addition to the matters identified above, Sonera's position was secured via its charging order, was a decision that was outside the range of reasonable decisions available to the judge. Mr. MacLean, QC posited that if one gets there at all, the judge's exercise of discretion falls to be revisited, and a proper application of the relevant principles, and a

proper consideration of all the relevant circumstances, should lead to the conclusion that an order for sale should not be made.

Ground 7: The DSPA Final Award amounts to a material change of circumstances

[41] Mr. MacLean, QC asserted that there has been a material change in circumstances since the date of the judgment in that the DSPA Final Award has been issued. He indicated that the DSPA Final Award reaffirmed its prior determination that the LA Arbitral Tribunal Final Award had been made in excess of jurisdiction and that it assessed Sonera's loss as less than the sum that was awarded to it (in excess of jurisdiction) by the LA Arbitral Tribunal. Mr. MacLean, QC posited that these developments constitute a material change of circumstances which required the enforcement order being revisited, or at the very least not further enforced. He further argued that had this been known by the learned judge before he handed down judgment, this would (or should) have provided further grounds for dismissing Sonera's application.

[42] In conclusion, Mr. MacLean, QC submitted that the appeal be allowed, the judgment and order be set aside, and Sonera's application for an order for sale be dismissed, and Sonera pay Cukurova's costs of this appeal and the costs below, to be assessed if not agreed.

Respondent's Submissions

[43] Learned Queen's Counsel Mr. Valentin indicated that the outcome of this appeal is dependent on an issue on which this Court has already expressed clear views in its most recent judgment in the action, which was handed down on 23rd June 2016. That issue is whether the decision (upheld by the Privy Council in May 2014) to enforce the Final Award of 1st September 2011 issued by the First Arbitral Tribunal is capable of being re-opened or qualified by the Partial Award of 12th May 2014 issued by the DSPA Arbitral Tribunal. Mr. Valentin, QC said that since the answer to this issue is already clear from the Privy Council's decision, and this

Court has itself recently answered it in the negative, the appeal should be dismissed.

[44] Mr. Valentin, QC said that it is important to note at the outset that Cukurova's appeal is not concerned with any challenge to the terms of the order for sale, which was the product of careful negotiation and detailed agreement between the parties and with Cukurova's current lender, Ziraat. He said that neither is there any appeal by Cukurova in relation to the approach taken by the court when making the order for sale pursuant to the relevant procedural provision, **Civil Procedure Rules 2000** ("CPR") 48.11. Nor (save in relation to the various arguments relied on in relation to the DSPA Partial Award and the DSPA Arbitral Tribunal) is there any appeal in relation to the issue of whether the court correctly exercised its discretion to make the order for sale. Mr. Valentin, QC said that Cukurova's appeal is effectively confined to a single contention (albeit one that is said by Cukurova to give rise to five separate "errors") namely that the judge should not have made the order for sale because he should have held that the DSPA Partial Award had prevented Sonera from taking any further steps in this jurisdiction to enforce the Enforcement Judgment. Mr. Valentin, QC argued that this contention is hopeless because: (i) the DSPA Partial Award does not even purport to alter or affect in any way the enforceability of the Final Award or the Enforcement Judgment, still less their enforceability in this jurisdiction; and (ii) the DSPA Partial Award could not have done so, because the Final Award and the Enforcement Judgment are, as the judge correctly held and this Court has confirmed in the June 2016 judgment, no longer open to challenge in this jurisdiction. I am in total agreement with Mr. Valentin, QC's argument in this regard for reasons which will become apparent shortly.

[45] Mr. Valentin, QC submitted that this Court should dismiss the appeal, with costs.

[46] Mr. Valentin, QC argued that the judge correctly held that the DSPA Partial Award was confined to the question of whether the Final Award issued by the First Tribunal gave rise to a res judicata, so as to disentitle the DSPA Arbitral Tribunal

from considering and determining the dispute before it. He said that the DSPA Arbitral Tribunal did not, and could not, set aside the Final Award; nor does the DSPA Partial Award contain any order preventing or restraining Sonera from enforcing the Final Award in this jurisdiction or elsewhere. He said that on the contrary, the DSPA Arbitral Tribunal expressly recognised (at paragraphs 26 and 94 of the DSPA Partial Award) the continuing efficacy of the Final Award and its enforceability by judgment in this jurisdiction. Mr. Valentin, QC said to similar effect, this Court indicated in its June 2016 judgment that "The Second Tribunal does not say that the Final Award is a nullity, nor could it, having regard to the Kompetenz-Kompetenz principle"[6] and that "… it is worth being reminded that the Second Tribunal has no power of review of the First Tribunal's ruling as to the extent of its jurisdiction. They are tribunals on similar footing. This much is accepted by Queen's Counsel MacLean on behalf of [Cukurova]".[7]

[47] Mr. Valentin, QC stated that the above conclusions as to the limits of the DSPA Partial Award are fully supported by the DSPA Partial Award itself, and in particular, by: (i) the DSPA Arbitral Tribunal's reasoning in paragraphs 26 and 94 of the DSPA Partial Award; and (ii) the Operative Part in paragraph 140 of the DSPA Partial Award.

[48] In relation to the status of the Final Award and the Enforcement Judgment, Mr. Valentin, QC submitted that the learned judge correctly held that the Court was not concerned with whether to recognise the LA Arbitral Tribunal's Final Award, but with the enforcement of an unimpeachable judgment of the Court. He referred to paragraph 27 of the judgment where the judge there noted:

> "The issues concerning and objections to recognition of the Final Award, have already been fully aired and dealt with by this Court, the Court of Appeal and the Privy Council, and have been dismissed. Furthermore, CPR 48.11 is concerned with enforcement of a judgment of this court by sale of stock or property. It is not concerned with objections to recognition of an arbitral award on grounds of lack of jurisdiction in the arbitral tribunal."

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[6] Sonera Holding B.V. v Cukurova Holdings A.S. BVIHCMAP2015/0005 (delivered 23rd June 2016, unreported), para. 2(h).
[7] At para. 67.

[49] Mr. Valentin, QC submitted that accordingly, as the judge also held, since the Enforcement Judgment is unimpeachable in this jurisdiction, the decision of the DSPA Arbitral Tribunal on the question of res judicata does not and cannot affect the enforceability of the Enforcement Judgment (based on the Final Award):

> "in circumstances where the Final Award has not been set aside, and all previous challenges based on jurisdiction have been swept aside up to the level of the Privy Council. In my judgment, [Sonera] is not prevented from proceeding with enforcement of the judgment of this court on the ground that the second tribunal has, in determining the dispute before it is res judicata, expressed a different opinion or came to a different conclusion on the jurisdiction of the first arbitral tribunal, sometime after the ruling on jurisdiction by this court, the Court of Appeal and the Privy Council."

[50] Mr. Valentin, QC reminded this Court that to similar effect, this Court has recently held in the June 2016 judgment that:

> "The argument that the First Tribunal acted in excess of jurisdiction making the Final Award "has been run before the First Tribunal, the High Court of the Virgin Islands, the Court of Appeal and finally the Privy Council and rejected by all. The Enforcement Judgment on the Final Award accordingly remains in full force".[8]

He further pointed out that this Court also held that:

> "The Final Award in Sonera's favour is final and binding on [Cukurova] and is unimpeachable. Sonera came to this jurisdiction and sought enforcement of the Final Award as a New York Convention Award. All of the New York Convention defences put forward by [Cukurova] against enforcement failed in the courts up to the highest level in this jurisdiction. The Enforcement Judgment of this Court is therefore final and unimpeachable by [Cukurova]".

[51] Mr. Valentin, QC maintained that the above conclusions are not controversial and are unquestionably correct. He submitted that they are fatal to Cukurova's various challenges to the judgment.

[52] Moving along and responding specifically to Cukurova's challenges to the judgment, Mr. Valentin, QC said that the DSPA Partial Award was made by a tribunal whose jurisdiction was and is unchallenged by either Sonera or Cukurova.

[8] At para. 67.

He said that it is of course correct that the DSPA Arbitral Tribunal had jurisdiction under the SPA arbitration clause to determine any issues that fell within the scope of that clause. He submitted however that the DSPA Arbitral Tribunal plainly did not have jurisdiction to vary, rescind, revise, set aside or annul the Final Award or to determine (save for the limited purpose of considering whether Final Award had res judicata effect in the DSPA Arbitral proceedings) that the LA Arbitral Tribunal had no jurisdiction to make the Final Award, because its jurisdiction was a matter to be determined by itself (subject to the views of any enforcing court). The DSPA Arbitral Tribunal's task was limited to consideration of whether it should give res judicata effect to the LA Arbitral Final Award in the LA Arbitral proceedings. He maintained that the DSPA Partial Award was therefore confined to deciding that issue. Mr. Valentin, QC maintained that nothing said to the DSPA Arbitral Tribunal on behalf of Sonera suggested that it had jurisdiction to decide anything which would affect the integrity or enforceability of the Final Award beyond the narrow question with which the DSPA Partial Award was concerned. Mr. Valentin, QC accepted that the DSPA Partial Award was a decision on the merits which Sonera had raised by way of preliminary objections. He however said that it takes matters no further, because it has no impact on the only point that matters: that the issue for the DSPA Arbitral Tribunal was confined to whether to give res judicata effect to the Final Award in the DSPA Arbitral proceedings.

[53] Mr. Valentin, QC reiterated that nothing in the DSPA Partial Award affects (or purports to affect) the wider enforceability of the Final Award, and, given its limited scope, there is nothing in the DSPA Partial Award (including the declaration in the dispositive part of the award) which requires Sonera - as a matter of contract or otherwise - to do anything at all in response to it.

[54] Mr. Valentin, QC accepted that the general proposition is that declaratory awards may be recognised or enforced in appropriate circumstances. However, he stated that this is immaterial in the present case since, so far as the British Virgin Islands enforcement proceedings are concerned, there is nothing in the DSPA Partial Award that requires either recognition or enforcement in this jurisdiction. He

submitted that to the extent that the DSPA Partial Award contains a declaration it is simply that, in the view of the DSPA Arbitral Tribunal, it had exclusive jurisdiction over all disputes arising out of the SPA and falling within the scope of the SPA arbitration clause, and that the arbitration should accordingly proceed on merits. He said plainly the LA Arbitral Tribunal had also taken the view (upheld by the Privy Council on enforcement of the Final Award) that it had had jurisdiction to determine the dispute before it and to make the Final Award. He pointed out that the DSPA Partial Award does not contain any declaration (for example): (i) that the Final Award is unenforceable in the Virgin Islands or (ii) that the LA Arbitral Tribunal's decision that it had jurisdiction to issue the Final Award, or the Final Award itself, should be set aside. Mr. Valentin, QC said that these omissions are hardly surprising because they were not matters put in issue by Sonera's preliminary objections. He submitted that in short, neither party had sought such declarations and the DSPA Arbitral Tribunal would have had no power to grant them.

[55] Mr. Valentin, QC acknowledged that Sonera's res judicata argument before the DSPA Arbitral Tribunal was indeed limited to the res judicata effect of the Final Award on the claims before the DSPA Arbitral Tribunal, and this was therefore the only argument which the DSPA Arbitral Tribunal addressed in the DSPA Partial Award. However, the point of significance being made in the extract cited from the Partial Award, at paragraph 26, was that the DSPA Arbitral Tribunal accepted that the Enforcement Judgment was "final" in this jurisdiction. Mr. Valentin, QC indicated that Cukurova itself makes the same point in the final sentence of paragraph 46 of its skeleton argument. He submitted that given this, it is highly unlikely that the DSPA Arbitral Tribunal would, in the same award, have said or done anything which it considered would (or even might) have any impact on the finality or enforceability of the Enforcement Judgment in this jurisdiction, and it did not do so.

[56] Next, Mr. Valentin, QC specifically addressed each of the grounds of appeal.

Ground 1: Failure to recognise that the issue of the DSPA Award was live

[57] Mr. Valentin, QC said that first, Cukurova contends that the learned judge made a fundamental error in failing to see that the issue of whether to recognise the DSPA Partial Award "was live". Mr. Valentin, QC opined that this contention is made by reference to a single sentence at paragraph 33 of the judgment:

> "Furthermore, to date no steps have been taken by [Cukurova] to have the Partial Award in the [[DSPA] Arbitration] formally recognised in the BVI."

Mr. Valentin, QC argued that it is plain from the judgment read as a whole that the learned judge did not reject Cukurova's objections to the order for sale because of any technical failing on its part to produce the documents required for enforcement of a Convention award by section 85 of the **Arbitration Act, 2013**. He said that it is true that during the course of oral argument, Cukurova produced various documents in certified form to meet any objection that it had not complied with the requirements of section 85. Mr. Valentin, QC pointed out however that as was made clear at the time, no such technical objection was being taken by Sonera. He argued that the learned judge relied on the point of substance: that there was no conclusion, finding or order in the DSPA Partial Award (concerned as it was only with Sonera's preliminary res judicata objections) which required or justified recognition or enforcement of the DSPA Partial Award in this jurisdiction, or which could (in any event) have affected in any way the final and unimpeachable quality of the Enforcement Judgment (which provided the foundation for the order for sale).

[58] Mr. Valentin, QC reminded this Court that even Cukurova accepts that it is "difficult to know how much this [alleged] error impacted on the other conclusions reached by the Judge" and he indicated that in Sonera's submission, it had no impact at all. He argued that the suggestion that it may in some way have been the reason why the judge did not deal with a separate submission that the DSPA Partial Award constituted a material change of circumstance is a speculative one, which is unsupported by anything in the judgment and is inherently unlikely to be correct. Mr. Valentin, QC submitted that it is much more likely that the learned judge

considered it unnecessary to address Cukurova's "material change of circumstance" submission on the basis that it added nothing to Cukurova's other arguments (which the judge had firmly rejected) as to why the DSPA Partial Award precluded further enforcement by Sonera of the Enforcement Judgment.

Ground 2: Failure to give any (or any proper) effect to the DSPA Partial Award

[59] Mr. Valentin, QC submitted that the contention that the judge erred in his interpretation of the DSPA Partial Award and therefore failed to give any effect to it should be rejected for the reasons already indicated above. In short, Mr. Valentin, QC submitted that the judge correctly interpreted the DSPA Partial Award and correctly concluded that it had no effect on the enforceability in this jurisdiction of the Final Award or the Enforcement Judgment, and therefore no effect on the Court's power to grant the order for sale. Further Mr. Valentin, QC submitted that the judge correctly identified the scope of the issue determined by the DSPA Partial Award and in this regard, he referred to paragraphs 5, 28 and 29 of the judgment in support. He said that the sentence relied on by Cukurova from the judgment, at paragraph 33, "the Partial Award … relates to a preliminary objection to jurisdiction based on principles of res judicata and nothing more" is simply a summary of the more detailed description of Sonera's preliminary objections given earlier in the judgment, at paragraphs 5, 28 and 29.

[60] Mr. Valentin, QC said that there is nothing unduly narrow about the characterisation of the DSPA Partial Award given in the judgment. He said that paragraph accurately reflects the true position: although the res judicata challenge depended, in part, on whether the DSPA Arbitral Tribunal considered that the LA Arbitral Tribunal had the jurisdiction to determine the issues it had determined, that was all that was before the DSPA Arbitral Tribunal, and its conclusion that the LA Arbitral Tribunal had exceeded its jurisdiction was made in the narrow context of the res judicata issue, which was the only issue it had to determine.

[61] Mr. Valentin, QC said that paragraphs 26 and 94 of the DSPA Partial Award speak for themselves, but their clear meaning is further reinforced when they are seen in the context of the DSPA Partial Award as a whole. He said that paragraph 26 contains the DSPA Arbitral Tribunal's express acknowledgement that the Enforcement Judgment had become "final" following the dismissal of Cukurova's appeal to the Privy Council. He pointed out that paragraph 30 identifies the limited declaration sought by Cukurova from the DSPA Arbitral Tribunal. Paragraph 78 records that it was Cukurova's position that the principle of Kompetenz-Kompetenz meant that "each arbitral tribunal may decide on its own jurisdiction, regardless of the finding of another tribunal". Mr. Valentin, QC submitted that Cukurova must necessarily therefore accept that the LA Arbitral Tribunal was also entitled to decide its own jurisdiction (as the courts in this jurisdiction have conclusively held it correctly did). Paragraph 84 identified the single issue before the DSPA Arbitral Tribunal as "the res judicata effects of the [LA Arbitral Tribunal's] Awards" and the common ground that the DSPA Arbitral Tribunal should act in accordance with the principle of Kompetenz-Kompetenz. Mr. Valentin, QC indicated that paragraph 92 records the limited scope of what Cukurova was asking the Second Tribunal to do:

> "…Cukurova asserts that the [Second Tribunal] must now examine whether the [First Tribunal] had jurisdiction to rule on the claims raised by Sonera in the [First Arbitration] in order to make its preliminary decision on res judicata, such a decision necessarily implying a decision whether or not to recognise or give legal effect to the [First Tribunal's] Awards."

[62] Mr. Valentin, QC pointed out that paragraph 94 of the DSPA Arbitral award then recorded the parties' agreement that the DSPA Arbitral Tribunal was not an enforcement court and had no power to enforce the First Tribunal's awards. Rather:

> "The issue triggered by Sonera's preliminary objections do not, therefore relate to the enforcement of the [First Tribunal's] Awards or its judicial recognition in the sense given to them under the New York Convention … but rather to the effects to be given in these proceedings to the [First Tribunal's] Awards which were issued by a different arbitral tribunal under a different arbitration agreement in a different arbitration, in permitting this Tribunal to decide whether the [First Tribunal's] Awards are res judicata on claims falling within the scope of the [SPA] Arbitration."

[63] Mr. Valentin, QC posited that the above paragraph again emphasises that the DSPA Partial Award was concerned only with the effect of the Final Award on the dispute before the DSPA Arbitral Tribunal, not with its enforceability elsewhere. Mr. Valentin, QC said that it is in this limited context that paragraph 95 of the award set out the task for the DSPA Arbitral Tribunal – it was to assess for itself whether the LA Arbitral Tribunal's awards should be given res judicata effect by the DSPA Arbitral Tribunal, a limited task, but one which (as already noted) required the DSPA Tribunal to assess for itself whether the LA Arbitral Tribunal had jurisdiction to issue its awards. He said that since the DSPA Arbitral Tribunal's decision that the LA Arbitral Tribunal had exceeded its jurisdiction was confined to the issue of whether to give res judicata effect to the LA Arbitral Tribunal's awards, it therefore had none of the additional consequences contended for by Cukurova.

[64] Mr. Valentin, QC maintained that the learned judge correctly interpreted the effect of the DSPA Partial Award and did not make the error contended for by Cukurova. He said that the judge was correct to find that the DSPA Arbitral Tribunal did not reach any general conclusion that the LA Arbitral Final Award should for all purposes be treated as having been made without jurisdiction. The DSPA Arbitral Tribunal was not asked by either party so to find, and it could not, and did not, do so.

Ground 3: Failure to recognise the contractual consequences of the Partial Award

[65] Mr. Valentin, QC posited that the judge rejected Cukurova's submission that Sonera was precluded from further pursuing enforcement of the Final Award and the Enforcement Judgment by its contractual obligation to act in accordance with the DSPA Partial Award. He posited that for the reasons given in the judgment, at paragraph 33, which were essentially based on the judge's (correct) conclusion that the DSPA Partial Award was limited in its scope to the res judicata issue, the judge was correct to reject Cukurova's contention. Mr. Valentin, QC argued that, further, by virtue of the previous decisions of the British Virgin Islands Court

rejecting the contention that the LA Arbitral Tribunal had exceeded its jurisdiction in making the Final Award, Cukurova is now estopped from contending that the LA Tribunal had no jurisdiction to issue the Final Award.[9] He said that in any event, on the issue of whether (for enforcement purposes) the First Tribunal actually had jurisdiction to issue the Final Award, it is the British Virgin Islands Court, not the LA Arbitral Tribunal or the DSPA Arbitral Tribunal, that has the last word.[10] He said that there is nothing in Article 46(3) of the ICC Rules, or the relevant contracts, which prevents Sonera from continuing to enforce the Enforcement Judgment in this jurisdiction.

Ground 4: The judge's approach to "unimpeachability" was wrong

[66] Mr. Valentin, QC argued that the contention that the judge's approach to unimpeachability was wrong should be rejected for the reasons already given. Further, in relation to the three specific submissions made by Cukurova in support of this contention he said that whilst it may be possible for the parties to agree not to enforce an award or judgment or, by agreeing to re-litigate or re-arbitrate the same dispute, thereby to waive any right to enforce an earlier award or judgment, neither scenario remotely reflects what has happened in the present case. Mr. Valentin, QC maintained that the DSPA Partial Award has not superseded the Final Award; nor has Sonera, by submitting to the jurisdiction of the DSPA Arbitral Tribunal, agreed that it should. He submitted that in this regard Cukurova's contention is wrong in law and lacking in any conceptual or commercial reality.

[67] Mr. Valentin, QC said that the view expressed by Bannister J [Ag.] in his 6th June 2014 ruling, although obiter, was correct and Farara J [Ag.] in his judgment was fully entitled to express his agreement with it. He said that Cukurova does not suggest that Farara J [Ag.] placed excessive weight on Bannister J [Ag.]'s view, or that the order for sale was granted on the (on this hypothesis, erroneous) basis

[9] He referred this Court to the cases of Ingaseous Industria de Gaseosas v McDonald BVIHCV2009/0439 (delivered 29th July 2010, unreported) at para. 11 and Diag Human SE v Czech Republic [2014] EWHC 1639 (Comm), per Eder J.

[10] AEGIS v European Reinsurance Co, of Zurich [2003] 1 WLR 1041; Dallah v Ministry of Religious Affairs of Pakistan [2011] 1 AC 763 per Lord Collins at paras. 86 and 96-98.

that Farara J [Ag.] considered that he was bound in any way to follow it. He said that Farara J [Ag.] simply expressed his agreement with it and was fully entitled to do so.

[68] Finally, Mr. Valentin, QC said that Farara J [Ag.] did not treat the DSPA Arbitral Tribunal's conclusions as a mere "expression of opinion". He correctly identified what the DSPA Arbitral Tribunal had decided and concluded in that light that the DSPA Partial Award had had no impact on the Enforcement Judgment or the court's power to grant the order for sale.

Ground 5 – Failure to deal with Cukurova's case that there had been a material change of circumstances

[69] Mr. Valentin, QC said that the material change of circumstances point is advanced by Cukurova as it was in the court below, by reference to a decision of the British Virgin Islands High Court judgment of **Caribbean Sailing (BVI) Limited v Owners of Kelliste 11**.[11] He said that the **Caribbean Sailing** case is concerned with the circumstances in which the court may revisit one of its earlier orders following a material change. However, Mr. Valentin, QC was adamant that the principle has no application in the present case because: (i) the DSPA Partial Award has changed nothing; and (ii) if the point was a good one, Cukurova might have applied (variously) to the Swiss Court to revise the LA Tribunal Final Award, and/or to the DSPA Arbitral Tribunal for an interim anti-suit injunction, and/or to the British Virgin Islands Court for a stay of the Enforcement Judgment and/or to the Privy Council to set aside the Enforcement Judgment. He pointed out that Cukurova has taken none of these steps, because in his opinion the point has no merit. He opined that in the circumstances, it is hardly surprising that the judge did not feel it necessary to lengthen his judgment to address a point that he had already effectively rejected by finding that the DSPA Partial Award had had no impact on the Enforcement Judgment. He submitted that had the judge addressed it expressly, he would have been bound to reject it.

[11] BVIHAD2011/0005 (delivered 30th October 2015, unreported).

Ground 6: The learned judge's approach to the exercise of discretion was manifestly flawed

[70] Mr. Valentin, QC was adamant that the judge made none of the errors of principle identified in Cukurova's arguments and therefore the exercise of his discretion was not based on errors of "principle". Mr. Valentin, QC said that it is apparent from paragraph 38 of the judgment, that the judge took into account the various features of the DSPA Arbitral proceedings which Cukurova said he failed to take into account. He submitted that the learned judge correctly concluded at paragraph 39 of the judgment that Sonera is entitled to enforce the Enforcement Judgment and there was nothing in the DSPA Partial Award or the fact that the DSPA Arbitral proceedings was ongoing to alter that entitlement.

[71] Mr. Valentin, QC argued that the fact that Sonera's position is already "secured" by the existence of the Final Charging Order provides no reason to exercise the court's discretion against granting the order for sale. He submitted that the judge's decision to make the order for sale was well within the generous ambit of his discretion given the continuing and persistent failure of Cukurova even to make proposals to satisfy the Enforcement Judgment. In Mr. Valentin, QC's opinion, the learned judge rightly took this into account in paragraph 44 of his judgment:

> "… there is no other asset or property of [Cukurova] which is available to satisfy the judgment debt, and no payment has been made towards satisfaction of the judgment debt by [Cukurova]. Accordingly, the only means of obtaining payment of the judgment debt, short of [Cukurova] paying it, is by the sale of the CFI shares."

[72] Mr. Valentin, QC posited that it will come as no surprise to the Court that Cukurova does not challenge the accuracy of this latter observation. He argued further that there can be no dispute that the only reasons Sonera has been compelled to pursue these extensive enforcement proceedings and to do so in this jurisdiction (with which it has no other connection) are due to: (i) Cukurova's decision to breach its contract with Sonera in 2005 (as the LA Arbitral Tribunal has conclusively held); and (ii) Cukurova's decision to create the BVI corporate structure through which its valuable interest in Turkcell is now held deliberately in

order to defeat Sonera's rights. He submitted that these are matters of fact which have long been a matter of record.

[73] Finally, Mr. Valentin, QC posited that this is all behaviour on the part of a recalcitrant judgment debtor which makes clear that, absent the order for sale correctly granted by the judge, Cukurova will never satisfy the Enforcement Judgment. According to him, it provides further reasons why the judge was fully entitled to exercise his discretion in favour of making the order for sale.

Ground 7 - The DSPA Final Award amounts to a material change of circumstances

[74] In relation to ground 7, Mr. Valentin, QC canvassed much of the same arguments that he had made in relation to the earlier grounds of appeal. I will refrain from repeating them since, in my respectful opinion nothing would be gained from doing so. Suffice it to say that Mr. Valentin, QC submitted that the judge's reasoning in his judgment applies every bit as much to the Final DSPA Award that was rendered by the DSPA Arbitral Tribunal as it applied to the Partial Award that was available at the time when the judge rendered his judgment. He therefore urged this Court to dismiss the appeal.

Discussion
General Observations

[75] It is trite law that ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system. Judges may give force to an arbitral award by a number of means including the enforcement of the arbitral awards. This is exactly what has occurred in this case and at all levels, the courts, have made judicial determination that it is appropriate to enter judgment in terms of the Final Award of the LA Arbitral Tribunal. Indeed, and in so doing our courts have definitively concluded that the interest of justice favoured the order being made enforcing the Final Award based on the LA Arbitral Agreement. As alluded to earlier, this is an appeal against the judgment of Farara J [Ag.] in relation to the order for sale. It raises an important question on the relationship between the

enforcement of a judgment which was based on recognition and enforcement of an international arbitration award based on British Virgin Islands **Arbitration Act 2013** which incorporates the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards** ("**New York Convention**") and the decisions of this Court and the Privy Council and subsequent DSPA Partial Arbitral Tribunal Award. This appeal raises questions in highly unusual circumstances, of considerable practical importance: what, if any, is the significance of a subsequent partial award on the enforcement judgment in which our courts have definitely determined that the LA Arbitral Tribunal did not act in excess of jurisdiction in giving the Final Award?

[76] In my view, the appeal must be approached against the backdrop of the binding decision of this Court and that of the Privy Council which impacts this appeal. It is simply not a matter of an arbitral award which is yet to be recognised and enforced in this jurisdiction. The process had long passed that stage and had reached the stage of enforcement of the judgment of this Court as the learned judge correctly held. Indeed, this is also consistent with the June 2016 decision of this Court in which the learned Chief Justice stated that the Enforcement Judgment is final and unimpeachable.

[77] It is settled that the Court does not do justice to the other party to the proceedings in question if it allows its process to be abused by refusing to permit one party to enforce its judgment. This is exactly what this Court and the Privy Council ensured is prevented by their respective decisions in relation to the Enforcement Judgments.

[78] It is important to indicate that section 84 of the **Arbitration Act** which provides for enforcement of Convention Awards states:

> "(1) A Convention Award is, subject to this Division, enforceable in the Virgin Islands either
>
> (a) by instituting action in the Court; or
>
> (b) in the manner provided in section 85.

(2) Any Convention award which is enforceable as mentioned in subsection (1) is to be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in legal proceedings in the Virgin Islands."

[79] The question which arises for us to determine is whether the learned judge erred in his reasoning and conclusion when he made the order for sale.

[80] In my view, the unusual features of this appeal in effect interrogates the ability of the court of first instance to refuse to follow decisions which are binding on that court and emanate from courts that are its superior. Indeed, it also seeks to challenge the ability of this Court to give effect to its previous decisions and those of the Privy Council which have affirmed our decision. At the outset, let me state that in my view the grounds of appeal are all interrelated. However, out of deference to Queen's Counsel Mr. MacLean, I will seek to address each ground of appeal in turn as if each was a discrete ground.

I will now address each ground of appeal seriatim.

Ground 1: Failure to recognise that the issue of whether to recognise the DSPA Award was live

[81] In my view this is a very short point. I have no doubt that the learned judge was at all times alive to the fact that the DSPA Partial Award was a live matter based on Cukurova's case. Irrespective of how the judge may have expressed himself on the DSPA Partial Award in a few lines of the judgment, based on a close reading of the judgment as a whole it is clear to me that this was not the basis for his disposition of the case. Indeed, the learned judge was at all times alive to the nature of the order for sale application with which he was concerned. Mr. Valentin, QC's submission on this point correctly reflects the nature of the judgment, and the judge's appreciation of the DSPA Partial Award. The learned judge was careful to indicate that the proceedings had reached the stage at which all of our courts had held that the Enforcement Judgment was valid and that the LA Arbitral Tribunal had jurisdiction to make the decision it did.

[82] Furthermore, the learned judge in my view correctly indicated that what he was addressing was the order for sale application based on an unimpeachable enforcement judgment and not whether to recognise an arbitral award. The judge, I am confident, was well aware of all of the submissions that were placed before him I am sure with some force. Stripped of all of its niceties, the effect of Cukurova's contention was to request that the High Court and now by extension this Court of Appeal, overrule the decisions of Court of Appeal and the Privy Council in the Enforcement Judgments. For reasons that will become clearer shortly, I have no difficulty in accepting the very persuasive and attractive arguments that were advanced by Mr. Valentin, QC in relation to this ground of appeal. Insofar as the Privy Council's decision of May 2014 held that the Final Award of the LA Arbitral Tribunal was made by that Tribunal with jurisdiction and therefore the award was enforceable within the jurisdiction, there is nothing in section 84 of the **Arbitration Act** that can have the effect of derogating from that decision. In my judgment, Mr. Valentin, QC is correct that the DSPA Partial Award could not and did not detract from the judgment of the Court. The fact that the Partial Award was a live issue is of no moment and cannot assist Cukurova's case and any failure of the judge to expressly refer to the issue of whether the DSPA Partial Award was a live issue takes Cukurova's case no further.

[83] In my view, to the extent that the learned judge held that the Enforcement Judgments of the High Court, the Court of Appeal and the Privy Council are unimpeachable, I am in total agreement with him. I have no doubt that section 84 of the **Arbitration Act** cannot apply to the circumstances of the case in order to derail the decisions of this Court of Appeal and the Privy Council. I reiterate that I am far from persuaded that the judge was unaware that the DSPA Partial Award was a live issue. To the contrary, a close reading of the entire judgment indicated that the learned judge was seized of all of the factors but reasoned that the unimpeachability of the Enforcement Judgment prevailed. I am not of the view that the alleged failure of the judge, such as it was, had any effect on the judgment. In my view, this appeal amounts to an impermissible collateral attack

on the judgment of this Court and that of the Privy Council. Accordingly, this ground of appeal fails.

Ground 2: Failure to give any (or any proper) effect to the DSPA Partial Award

[84] I am in total agreement with Mr. Valentin, QC that the High Court, this Court and the Board have definitively ruled that the Final Award of the LA Arbitral Tribunal is enforceable. Further, based on the clear pronouncements of this Court in June 2016 this issue of the LA Arbitral Tribunal having failed in excess of jurisdiction is impatient of debate. In addition, based on the decision of this Court and that of the Board on appeal from this Court, it is definitely not open to this Court to seek to revisit those decisions even if it were to do so based on collateral proceedings as in the present case. It is trite that this Court is not placed in a position to review the decision of the Board which is binding on this Court, and which is conclusive that the LA Arbitral Tribunal is valid and enforceable. I have no doubt that the learned judge was correct in holding that the Enforcement Judgments of the Board, the High Court and the Court of Appeal are unimpeachable. There is great public interest in the stability, coherence and certainty of the law. Mr. Valentin, QC in my view is correct that the DSPA Partial Award did not and could not impact those decisions.

[85] In spite of whatever pronouncements were made by the DSPA Arbitral Tribunal, Cukurova cannot properly contend that the LA Arbitral Tribunal had no jurisdiction to make its award, which is exactly contrary to the decisions of our court including the highest court – the Privy Council. Judicial certainty is a pre-requisite of any civilised system of justice. Decisions on points of law from more senior courts have to be accepted by lower courts. In this regard, I refer to and accept the helpful pronouncements of Lord Neuberger in **Willers v Joyce et al**[12] on the

[12] [2016] UKSC 44, paras. 4-5. See also: Attorney General of Saint Christopher and Nevis and Anguilla v Reynolds [1997] 43 WLR 108 at 123 where His Lordship Lord Salmon said that so long as there is an appeal from a Court of Appeal to their Lordships, Board or to the House of the Lords, the Court of Appeal should follow its own decisions on a point of law.

highly centralised nature of the hierarchy of courts and the fact that the doctrine of precedent is a natural ingredient of that hierarchy.

[86] It would be in breach of public policy for this Court to now hold that the decisions of this Court at all levels in which this Court held that the Enforcement Proceedings can be enforced, is no longer good law based on any purported pronouncements of the DSPA Arbitral Tribunal to the contrary and in so doing not follow its own decision and that of the Privy Council. There must be certainty in the law and lower courts should take the requisite steps to enforce their own orders rather than seek to undermine them. In any event, this Court has no such powers to disregard the conclusive and binding decision of the Privy Council.

[87] I note with interest that the new position taken by Cukurova before the judge and this Court is wholly incongruous with that taken by Cukurova and accepted in June 2016 in which this Court stated:

> "The Second Tribunal does not say that the Final Award is a nullity, nor could it say so having regard to the principle of Komptenz-Kompetenz."[13]

Indeed, the learned Chief Justice speaking on behalf of the Court expressed herself in the June 2016 judgment as follows:

> "It is worth being reminded that the Second Tribunal has no power of review of the First Tribunal's ruling as to the extent of its jurisdiction. They are tribunals on similar footing. This much is accepted by Queen's Counsel Mr. MacLean on behalf of Cukurova."[14]

[88] I reiterate that in the June 2016 judgment, this Court pointed out that the argument that the LA Arbitral Tribunal acted in excess of jurisdiction in making the Final Award was indeed rejected by the High Court of the Virgin Islands, the Court of Appeal and finally, the Privy Council. The Enforcement Judgment on the Final Award accordingly remains in full force. It simply is not open to this Court to seek

[13] Sonera Holding B.V. v Cukurova Holdings A.S. BVIHCMAP2015/0005 (delivered 23rd June 2016, unreported), para. 2(h).
[14] At para. 67.

to review, revise, revisit or undermine the authoritative pronouncements of this Court and the Privy Council.[15]

[89] Further, it is settled law that the Court of Appeal is bound by its own previous decisions on questions of law save for the three exceptions specified in **Young v Bristol Aeroplane Co Ltd.**[16] which are not present in this case. The learned judge considered the DSPA Partial Award and rejected its applicability. Indeed, the argument is that the judge failed to give effect to the merits of the DSPA Partial Award, insofar as Farara J [Ag.] was clear that the court was not concerned with whether to recognise the Final Award but with the enforcement of an unimpeachable judgment of the court. In my view, at paragraph 27 of the judgment Farara J [Ag.] correctly stated that:

> "The issues concerning and objections to recognition of the Final Award have already been fully aired and dealt with by this Court, the Court of Appeal and the Privy Council, and have been dismissed. Furthermore, CPR 48.11 is concerned with enforcement of a judgment of this Court by sale of stock or property."

[90] Also, it is unfair to say that the judge misapprehended the DSPA Partial Award of the DSPA Arbitral Tribunal. The judge held that since the Enforcement Judgment is unimpeachable in this jurisdiction, the decision of the DSPA Arbitral Tribunal cannot affect the enforceability of the Enforcement Judgment. He was correct in not giving any effect to it. Indeed, the learned Farara J [Ag.] stated as follows:

> "In circumstances where the Final Award has not been set aside, and all previous challenges based on jurisdiction have been swept aside up to the level of the Privy Council. In my judgment, Sonera is not prevented from proceeding with enforcement of the judgment of this Court on the ground that the Second Tribunal has, in determining the dispute before it is res judicata expressed a different opinion or came to a different conclusion on the jurisdiction of the First Arbitral Tribunal sometime after the ruling on jurisdiction by this Court of Appeal and the Privy Council."

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[15] In Attorney General of Saint Christopher and Nevis and Anguilla v Reynolds [1979] 43 WLR 108 at 123 Lord Salmon made some very helpful pronouncements on the binding nature of higher courts.
[16] [1944] KB 718.

[91] This is the basis of the judge's decision and it cannot be assailed. The learned judge, in my view, appreciated the full nature of the DSPA Partial Award and in the particular nature of this case, and correctly held that prominence must be given to the enforcement of the unimpeachable judgment. In so doing he held that the DSPA Partial Award had no effect on the enforceability of the LA Arbitral Tribunal's Final Award in this jurisdiction.

[92] It is evident that in addressing this ground of appeal, the comments and pronouncements that I made in relation to ground 1 are of relevance.

[93] I am not satisfied that the judge mischaracterised the nature of the DSPA Partial Award and therefore failed to give any proper effect to it. The judge was correct in his determination that the DSPA Partial Award was not at the heart of the order for sale application. I am far from persuaded that the learned judge erred in his interpretation of the DSPA Partial Award. To the contrary he considered it but concluded that it had no effect on the enforceability in British Virgin Islands of the Final Award or the Enforcement Judgment and therefore no effect on the Court's power to grant the order for sale. The judge considered the submissions that were advanced by Sonera and rejected those given by Cukurova. The uncontroversial starting point in my view, was correctly identified by the judge as the Enforcement Judgment. In my view and by way of emphasis, the learned judge quite properly examined the nature of the DSPA Partial Award in the context in which our courts have definitively pronounced on the validity of the LA Arbitral Tribunal and its jurisdiction to give the Final Award.

[94] I am unable to accept learned Queen's Counsel Mr. MacLean's submission that the judge should have treated the DSPA Partial Award as binding for all purposes as the effect of doing so would have resulted in the High Court improperly undermining the decisions of our courts, at all levels by a side wind. The learned judge comprehensively dealt with the issues that were raised and more importantly he examined whether there was any scope for him to disregard the decision of not

only this Court but also that of the Privy Council on the jurisdiction of the LA Arbitral Tribunal.

[95] In my view, there is nothing in section 82(2) of the **Arbitration Act** which countenances a High Court disregarding decisions of the Court of Appeal and the Privy Council which have recognised a Final Arbitral Award. Also, there is nothing in the DSPA Partial Award which could have the effect on our courts disregarding its own decisions and that of the Privy Council. In my judgment, Mr. Valentin QC's submissions, that the judgment of the DSPA Partial Award is limited in scope on the issue of jurisdiction in the context of res judicata and could not be seen as overruling the Court of Appeal or the Privy Council on the issue of jurisdiction, have merit.

[96] It was plainly sufficient, in view of the unusual circumstances of this case, for the learned judge to have treated the issues in the manner in which he did. In my opinion, the learned judge was correct to examine the award of the DSPA Arbitral Tribunal in the face of the decisions of the court including the highest court. The learned judge was correct to conclude that the Enforcement Judgment was unimpeachable. I am fortified in my view and agree with Mr. Valentin, QC's argument that the Enforcement Judgment was expressly recognised by the DSPA Arbitral Tribunal as final following the dismissal of Cukurova's appeal to the Privy Council. This much is not in doubt.

[97] I am not of the considered opinion that the judge should not have made the order for sale because he should have held that the DSPA Arbitral Tribunal prevented Sonera from taking further steps in this jurisdiction to enforce the Enforcement Judgment. There is no basis upon which I can properly arrive at that conclusion. In fact, with respect, I fail to see how Cukurova could even contemplate to advocate that it was open to the judge not to entertain the application for the order for sale in circumstances in which the Privy Council, this Court in its June 2016 judgment and the Court of Appeal have clearly indicated that the Final Award of the LA Arbitral Tribunal is valid and enforceable in the British Virgin Islands.

[98] It is also noteworthy as pointed out by Mr. Valentin, QC that the DSPA Arbitral Tribunal in its Final Award has expressly confirmed that it had no power to prevent Sonera from enforcing the LA Arbitral Tribunal's Final Award and that, even if it has such a power, it could not (and therefore would not) have exercised it. Indeed, at page 76 paragraph 145 of the DSPA Partial Award the DSPA Arbitral Tribunal expressed itself this way:

> "What matters for this Tribunal is whether the granting of any such relief in this arbitration could wrongly interfere with the powers of State Courts which have exclusive jurisdiction to decide whether or not the [First] Tribunal's Final Award should be recognized and enforced within their Territory under the 1858 New York Convention or otherwise. Those issues of enforcement and recognition cannot be determined by this Tribunal, directly or indirectly. It not only lacks the power to do so but even if it had such an indirect power to do so, it could not be exercised so as to preempt the exclusive jurisdiction of those State Courts."

[99] For what it is worth I have no difficulty in accepting Mr. Valentin, QC's argument that the DSPA Arbitral Tribunal's decision above is consistent with the learned judge's conclusion that the DSPA Partial Award was confined to the narrow issue of whether the Final Award should be given res judicata effect in the DSPA Arbitral Tribunal's award. It would be very much against public policy for this Court to hold that an arbitral tribunal has the power to determine that the decisions of the High Court, Court of Appeal and the LA Arbitral Tribunal's jurisdiction was erroneous. This ground of appeal also fails.

[100] I now turn to grounds 3, 4 and 5.

[101] I am of the view that grounds 3, 4 and 5 can be taken together. I have already indicated my view on the issue of correctness of the judge's conclusion on the unimpeachability of the Enforcement Judgment which in my view is entirely dispositive of grounds 3, 4 and 5 of the appeal. I am of the respectful opinion that the reasoning and conclusions to which I have arrived are determinative of them and it may well be unnecessary to consider the three above grounds. However, out of sheer deference to learned Queen's Counsel Mr. MacLean I will briefly treat with grounds 3, 4 and 5.

Ground 3: Failure to recognise the contractual consequences of the DSPA Partial Award

[102] With respect, it should be stated immediately that the arguments advanced by Cukurova on the above ground are unmeritorious, for the reasons that I have already provided. I have already indicated that the learned judge was correct to reject Cukurova's submission that Sonera was precluded from further pursuing enforcement of the LA Tribunal's Final Award and Enforcement Judgment and that nothing in the DSPA Partial Award could have undermined or derogated from the conclusive rulings of our courts. In my respectful view, Cukurova's arguments on the judge's treatment of unimpeachability of the judgment and the failure to recognise contractual consequences of the DSPA Partial Award are assailable. The learned judge correctly held that the DSPA Partial Award had no effect on the enforceability of the Final Award in this jurisdiction, as I have already concluded.

[103] Even in the face of a contractual obligation of Sonera to abide by the decision of the DSPA Partial Award insofar as the judge correctly held that the Enforcement Judgment was unimpeachable, I fail to see how the contractual obligation can enable a lower court to ignore decisions of the Court of Appeal and the Privy Council. I agree with Mr. Valentin, QC that **Kimberley Construction Ltd** is clearly distinguishable from the case at bar. In my judgment, even though it was elegantly relied on by learned Queen's Counsel I am afraid that it does not assist Cukurova's case. This is not a situation in which the parties have contracted out of a decision but rather a situation in which it is alleged by one party that due to a subsequent decision of the DSPA Arbitral Tribunal a party is free or obliged to ignore the decisions of the Court of Appeal and Privy Council. Quite unremarkably, the other party does not share this view. This is quite apart from my considered opinion that the DSPA Partial Award could not and did not impact the Enforcement Judgments, the latter which I have no doubt are unimpeachable.

[104] In my view, at the very least it would be making a mockery of this justice system for a High Court judge to accept that a higher court namely, the Court of Appeal and the Privy Council, erred in rejecting the contention that the LA Arbitral Tribunal

exceeded its jurisdiction in making the Final Award and to hold that any "lesser" tribunal (and I say this with respect) was correct in allegedly holding any contrary view. This ground of appeal also fails.

Ground 4: The judge's approach to 'unimpeachability' was wrong

[105] In my view, this is also a very short point. For the reasons that I have given at length, I have no doubt that the judge's approach to unimpeachability cannot be impugned. The learned judge quite comprehensively and correctly examined the factual matrix and determined the application that was put before him having given deliberate consideration to the contesting views. With all respect, to Mr. MacLean, QC I find attractive and persuasive the arguments that were advanced by Mr. Valentin, QC on this point and I accept them.

[106] I have not the slightest of doubt that the DSPA Partial Award could not supersede the Final Award neither could it in any way undermine the correctness of the decision of this Court and the Privy Council. To this extent I totally agree with the judge that the decisions are unimpeachable and I am of the view that the criticism of the learned judge's treatment of unimpeachability is unjustified. Accordingly, this ground of appeal fails.

Ground 5: Failure to deal with Cukurova's case that there had been a material change of circumstance

[107] With deference to the argument of Mr. MacLean, QC on this ground, in view of all that I have said earlier, the learned judge was correct in not giving any weight to Cukurova's alleged material change of circumstance based on the DSPA Partial Award. In my view, it is self-evident that the DSPA Partial Award cannot rise to the threshold to amount to a material change of circumstance, more so to one which would warrant any court revisiting its earlier order. In the case at bar, it would be rather astonishing if a lower court were at liberty to hold that there was a material change of circumstance that allowed it to ignore a decision of the highest court in the Enforcement Judgment. To state such a proposition is sufficient to reject it.

[108] In a word, I accept in its entirety the arguments advanced by Mr. Valentin, QC that the DSPA Arbitral Tribunal's Partial Award had changed nothing insofar as the Enforcement Judgments are concerned.

Ground 6: The judge's approach to the exercise of discretion was manifestly flawed

[109] For the sake of completeness, from all I have said it must be evident that I am not of the view that in the exercise of his discretion the learned judge committed any error in principle as argued by Cukurova. The judge's decision was undoubtedly a matter that was within the exercise of his discretion. It is pellucid that the judge took into account all of the relevant factors in relation to the LA Arbitral Tribunal's Final Award, the Enforcement Judgments and the DSPA Partial Award and in a closely reasoned judgment reached the inescapable conclusion that Sonera is entitled to enforce the Enforcement Judgments. The judge also did not err in concluding that the DSPA Arbitral proceedings could in no way undermine the unimpeachability of the judgment and militate against its enforcement.

[110] I am of the view that the judge was entitled to exercise his discretion in the manner he did. As indicated by Mr. MacLean, QC it is trite that an appellate court will only interfere with the exercise of discretion by a lower court in very limited circumstances which are not present here. Bearing in mind that I have already foreshadowed my reasons and conclusions on the judge's approach to the issues it is unnecessary to repeat them here.

[111] By way of emphasis, Cukurova's submissions on this issue do not disclose that the judge made any error of law or principle in the exercise of his discretion. In my judgment, the judge carefully considered the relevant matters and reached a conclusion that was open to him. This ground of appeal also fails.

Ground 7: The DSPA Final Award amounts to a material change of circumstances

[112] In my view, the DSPA Final Award cannot take Cukurova's case any further and that award simply could not and did not detract from the Enforcement Judgment. It is apparent from everything that I have said that I agree with the learned judge that the judgment is unimpeachable. The consequence of this is self-evident. Therefore, in my considered opinion it is unnecessary to proceed to consider the wider arguments advanced by Cukurova that relate to ground 7 since it cannot take Cukurova any further and is unsustainable. I reiterate that section 84 of the **Arbitration Act** does not provide a facility for a judge at first instance to ignore judgments of a higher court which are binding on that court. It would be astonishing if that were the case. The Final Award of the DSPA Arbitral Tribunal which affirmed the Partial Award insofar as it held that the LA Arbitral Tribunal acted in excess of jurisdiction can fare no better than the DSPA Partial Award. To put the matter beyond any doubt, in my judgment that does not amount to a material change of circumstance.

Conclusion

[113] Having considered each of the several grounds raised by Cukurova in their endeavour to challenge the decision of Farara J [Ag.], it is my clear view that each of those points is devoid of any merit. The learned judge was fully entitled to arrive at the conclusion he did and was right in his treatment of the elegant arguments most of which were repeated before this Court. For the above reasons, the appeal in its entirety is therefore dismissed.

Costs

[114] Having prevailed against Cukurova Holdings A.S. in this appeal, Sonera Holdings B.V. is awarded two-thirds of the costs in the court below, to be assessed, if not agreed within 21 days from the date of this judgment.

[115] I gratefully acknowledge the assistance of learned counsel.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar