JUDGMENT : Mr Justice GROSS: Commercial Court. 18th October 2002

INTRODUCTION

1. There is before the Court an application by The Republic of Ukraine ("Ukraine"), to set aside:
   (1) The order made (without notice) by Morison, J. on the 29th April, 2002 ("the Morison order") and the judgment entered pursuant thereto;
   (2) The interim third party debt order made (without notice) by Andrew Smith, J., on the 13th September, 2002 ("the Smith order").

2. For present purposes, the background can be shortly and neutrally summarised. Contracts were entered into for the development of the Hydro TIS Yuzhny Terminal, in the Ukraine ("the terminal"). The relationship between the various owners of the terminal was governed by the Owners' Agreement dated 19th April, 1996 ("the OA"). Disputes arose and, it was said, in effect, by the Claimant ("NH"), that it had been wrongly expelled from the venture; in short, its interest in the terminal had been expropriated. Pursuant to cl. 20 of the OA (to which I shall come), NH commenced arbitration proceedings. The nature of NH's complaint appears from paragraph 1 of its Request for Arbitration ("the Request for arbitration"):

   "On 19 April 1996 Hydro and the Respondents, as well as the European Bank for Reconstruction and Development, signed the Owner's Agreement (the "Agreement") regulating the relationship between the owners of Transinvestservice, a company with limited liability incorporated under the laws of Ukraine ….. The purpose of the Agreement is to regulate Hydro's role in Transinvestservice and the operation of Transinvestservice. For example, in Article 4 of the Agreement the owners of Transinvestservice recognise and acknowledge the leading role to be played by Hydro in Transinvestservice. Article 3 of the Agreement sets forth certain undertakings made by the owners of Transinvestservice with respect inter alia to licences, permits and approvals required for the operation of the Yuzhny II terminal near Odessa, Ukraine.

   The Respondents have in various ways breached their obligations under the Agreement, inter alia by attempting to oust Hydro as an owner of Transinvestservice and has thereby caused damage to Hydro. In this arbitration, initiated pursuant to Article of 20 of the Agreement, Hydro will seek compensation for such damage."

3. The OA provided, so far as material, as follows:

   " This Owners' Agreement … is made on 19 April 1996, between

   1. Norsk Hydro a.s, a company with limited liability incorporated under the laws of Norway and having its principal offices in Oslo, Norway (hereinafter referred to as "Hydro"); 2. The State Property Fund of Ukraine, being an agency of the Government of Ukraine and having its principal offices in Kiev, Ukraine (hereinafter referred to as the "State Property Fund"); 3. Concern Primorsky, a concern organised and incorporated under the laws of Ukraine and having its principal office in Odessa, Ukraine (hereinafter referred to as "Primorsky"); and 4. Alpex, an joint venture company organized and incorporated under the laws of Ukraine and having its principal office in Odessa, Ukraine (hereinafter referred to as "Alpex") 5. Colorado Financial Incorporated, a company organised and existing under the laws of the State of Nevada, United States of America, with its principal offices in Odessa, Ukraine (hereinafter referred to as "Colorado"). 6. European Bank for Reconstruction and Development, (hereinafter referred to as "EBRD")

   ….

   "Owners" shall mean Hydro, EBRD, the State Property Fund, Colorado, Primorsky and Alpex, individually or together, and any other party holding Shares in the Company, and "Owner" shall mean any one of them;

   …..

   2. CERTAIN REPRESENTATIONS, WARRANTIES AND COVENANTS

   Each Owner hereby represents, warrants and covenants to the other Owners that:

   (i) it is a separate legal entity and has all requisite corporate and other power and authority to enter into this Agreement and to carry out the transactions contemplated by this Agreement, and that it is duly established, organised and validly existing under the laws of its jurisdiction of incorporation or, in the case of the EBRD, under international law;

   (ii) All proceedings required to be taken by it to authorize the execution, delivery and performance of this Agreement by it have been properly taken, and this Agreement constitutes its valid and binding obligations, enforceable against it in accordance with it terms…..

   ….

   18. WAIVER OF IMMUNITY

   To the extent that any Owner other than the EBRD enjoys sovereign and/or diplomatic immunity, such Owner hereby irrevocably and unconditionally waives all such immunity, including, but not limited to, immunity from the jurisdiction of any court of law in respect of any injunction, arrest or attachment of any property, whether before or after the rendering of any award, and with respect to the execution of any award."

   Interposing here, the EBRD did not waive immunity, as was further made clear by cl. 19 of the OA.

   "20. APPLICABLE LAW AND DISPUTES

   This Agreement shall be governed by and construed in accordance with the substantive laws of Sweden.

Any dispute, controversy or claim arising out of or in connection with this Agreement or the breach, termination or invalidity thereof which cannot be amicably resolved, shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules, with the Stockholm Chamber of Commerce as appointing authority. The arbitral tribunal shall be composed of three arbitrators, it being agreed that all three arbitrators shall be appointed by the Stockholm Chamber of Commerce. The place of arbitration shall be Stockholm, Sweden."

4. I have already referred to paragraph 1 of the Request for Arbitration. In the Request, the Respondents were described as follows:

"<u>Respondents:</u> 1. The Republic of Ukraine, represented through the State

Property Fund of Ukraine (the "Republic") 18/9 Kutuzov St. 252001, Kiev, Ukraine

. 2. Concern Primorsky ("Primorsky")

49 Suvorova Str., 270026 Odessa, Ukraine

3. Alpex joint venture company ("Alpex")

9 Kateryninska Str., 270026 Odessa, Ukraine

4. Colorado Financial Incorporated ("Colorado")

25 Risheljevskaja Str., 270026 Odessa, Ukraine"

Paragraphs 2 and 3 were in the following terms:

"*2. <u>Preliminary Statement of Relief claimed by Hydro</u>*

Hydro will ask the arbitral tribunal – to be appointed – to <u>confirm</u> that Respondents have breached their obligations under the Agreement and will ask the tribunal to <u>order</u> the Respondents to pay compensation for damages caused by Respondents. Hydro's prayers for relief will be set forth in detail in the Statement of Claim to be submitted pursuant to Article 18 of the UNCITRAL Arbitration Rules.

3. <u>Appointment of arbitrators</u>

Pursuant to Article of 20 of the Agreement all three arbitrators are to be appointed by the Stockholm Chamber of Commerce. Hydro has today requested the Stockholm Chamber of Commerce to make such appointments …"

5. I come next to the Arbitral Award, dated Stockholm, 20th March, 2000 ("the award"). The award recites the parties as follows:

"<u>Claimant:</u>

Norsk Hydro ASA….

<u>Respondents:</u>

1. *The Republic of Ukraine, through the State Property Fund of Ukraine, 18/9 Kutuzov Street, 252001 KIEV, Ukraine*
2. *Concern Primorsky, 49 Suvorova Street, 270026 ODESSA, Ukraine*
3. *Alpex Joint Venture Company*
4. *Colorado Financial Incorporated"*

The proceedings were characterised by participation on the part of NH but non-participation by the Respondents. So far as concerns the first Respondent to the arbitration, "*The Republic of Ukraine, through the State Property Fund of Ukraine*", all communications were addressed to the address of the State Property Fund ("the SPF"). The SPF did not participate in the arbitration, save to contest jurisdiction on the ground of a signature point (which does not require elaboration on this occasion). No other jurisdictional issue was raised. Save insofar as these communications to the SPF and this participation on the part of the SPF count as communication to and participation of Ukraine, it was not involved at all in the arbitration. The tribunal recorded the position of the parties as follows:

"1. Claims

<u>Hydro</u> requested the Arbitral Tribunal

(a) to confirm that the Respondents are in breach of the Owners' Agreement, through the breach of their contractual duty of good faith under that Agreement;

(b) to confirm that the Respondents are in breach of Section 4 of the Owners' Agreement;

(c) if the Tribunal were to find that the Owners' Agreement had been improperly executed by the Respondents, to confirm that the Respondents are in breach of Sections 2 (i) and2 (ii) of the Owners' Agreement;

(d) to order the Respondents to pay, jointly and severally, USD 21,260,000 plus interest pursuant to the provisions of the Swedish Interest Act (rantelagen) from the date of the Award; and

(e) to order the Respondents to pay, jointly and severally, Hydro's costs incurred in connection with these proceedings, including legal fees and compensation to the arbitrators, plus interest on such amount.

At the main hearing, Hydro reduced its claim under (d) above, from USD 21,260,000 to USD 20,000,000 plus interest.

<u>The Respondents</u> did not participate in the proceedings before the Arbitral Tribunal. However, the State Property Fund and Alpex demanded before the Stockholm Chamber of Commerce that the request for arbitration be rejected for lack of jurisdiction according to Article 21of the UNCITRAL Arbitration Rules."

6. In summary, the tribunal's conclusions were these:
   (1) The OA was a valid agreement; pursuant to cl. 20 of the OA, the tribunal had jurisdiction to determine the dispute and Swedish Law was to be applied.
   (2) The tribunal did not proceed with the claims against Alpex and Colorado, essentially because they could not be located.
   (3) As to the substance of the matter, the tribunal put it this way:
   "(b) declares that the Republic of Ukraine, through the State Property Fund, and the Concern Primorsky are in breach of Section 4 of the Owners' Agreement and of their general duty of loyalty and consideration for the interests of Norsk Hydro ASA under the Owners' Agreement;
   (c) decides that the Republic of Ukraine, through the State Property Fund, and the Concern Primorsky, jointly and severally, shall pay to Norsk Hydro ASA the amount of sixteen million two thousand seven hundred nine US dollars (USD 16,002,709) plus interest on that amount according to Section 6 of the Swedish Interest Act ("... interest shall be calculated per annum according to a rate of interest equivalent to the discount rate established by the Central Bank of Sweden from time to time plus eight percentage points") from the date of this Award until payment is made;"
   (4) The tribunal then proceeded to deal with costs and arbitrators' fees in the same manner.

7. The award remained unsatisfied and NH remained unpaid. Various negotiations ensued, some apparently at inter-governmental level but the matter was not resolved. Ultimately, in 2002, NH applied to the English Court and obtained the Morison order. The Respondents to the application were described as follows: *" The State Property Fund of Ukraine (1) The Republic of Ukraine (2) Concern Primorsky (3)"*

   The Morison order itself provided as follows:
   "1. The Claimant has permission to enforce the Award rendered in Stockholm on 20 March 2000 in the Arbitration between the Claimant and (1) The Republic of Ukraine, through the State Property Fund of Ukraine; (2) Concern Primorsky, (3) Alpex Joint Venture Company; (4) Colorado Financial Incorporated (the "Award") against the First, Second and Third Respondents;
   2. That judgment be entered for the Claimant as against the First, Second and Third Respondents as follows:
   a) US$16,002709 for damages (as set out in the Award)..."

   It was further ordered that judgment be entered for various other sums in respect of interest and costs. Additionally, the Morison order included the following paragraph: *"To the Respondents: Within 21 days of service of this order, you may apply to set aside this Order and the Award shall not be enforced until after the expiration of that period, or, if you apply to set aside this Order within the 21 days, until after the application has been finally disposed of."*

   The Morison order and associated judgment were served through diplomatic channels on Ukraine on the 24th July, 2002.

8. What remained was the matter of practical enforcement. In this regard, in the course of 2000, the Ukraine had re-scheduled its overall debt commitments through certain bond issues. Instalments of principal and interest were to be repaid or paid as the case may be by Deutsche Bank AG ("Deutsche") in London, in its capacity as Principal Paying Agent. To enable Deutsche to fulfil such payment obligations, it was of course likely that Deutsche would be funded by Ukraine in London. On the basis of that likelihood and on the basis that sums standing to the credit of the Ukraine account with Deutsche would constitute a debt capable of being attached for the purposes of CPR Part 72, NH sought an interim third party debt order, without notice, in the event from Andrew Smith, J. The Smith order was granted in the following terms:
   "a) there is an amount owing by the [defendant] ('the judgment debtor') under the judgment or order given on 29 April 2002 [by the Honourable Mr Justice Morison in claim no. 2002 FOLIO 441] and
   there is a debt due or accruing due by the third party to the judgment debtor
   ***and the court orders** that*
   1. The application will be heard at 10.30 [am] on Friday 1 Nov ember 2002 at E121 Royal Courts of Justice when a Master will decide whether a final third party debt order should be made.
   2. Until that hearing the third party must not, unless the court orders otherwise, pay to the judgment debtor, or to any other person, any sum of money due or accruing due by the third party to the judgment debtor, except for any part of that sum which exceeds the total shown below."

9. The concern to which the Smith order gave rise has been explained by Mr. Clark, the principal external legal adviser to the Ministry of Finance of Ukraine with regard to all external debt and debt related matters, in the following terms in his witness statement:
   "21...Accordingly absent payment of the interest on the Dollar Notes which was due to be paid on 16 September 2002, the major portion of which is now frozen in the hands of Deutsche Bank, an Event of Default will occur on 26 September 2002. The consequences of such Default would be catastrophic for Ukraine, both politically and economically. Accordingly Ukraine is taking steps to put itself in a position by alternative means to fund Deutsche Bank with the amount required to make the interest payment on the Dollar Notes, whilst retaining the amount the subject of the Third Party Debt Order, before an Event of Default occurs. However the difficulty, inconvenience and cost of its having to do so should not be underestimated. The freezing of the funds has created major

financing problems for the Ministry of Finance of Ukraine. In order to ensure that an Event of Default does not occur it will be required to reallocate State resources at extremely short notice. For a developing State with limited resources facing enormous budgetary pressures this is a very real political and administrative problem which is deeply troubling to the Government of Ukraine. Since I became aware of the Third Party Order on 16 September 2002 I have spoken on numerous occasions to several officials at the Ministry of Finance including Volodymyr Visotsky, Head of Debt Department of the Ministry of Finance and Oleg Bilinsky, Head of Capital Markets Division in the Debt Department of the Ministry of Finance, who have expressed to me their great concern about the consequences to Ukraine of these events.

22. The non payment of the interest due on 16 September 2002 has of course already come to the attention of the Note holders entitled to receive such payments. The matter is also becoming apparent to the wider financial community. Rumours as to Ukraine's ability and willingness to comply with its foreign debt obligations are extremely damaging to Ukraine, impacting not only its current position but its future ability to raise finance in the international capital markets. Ukraine has today been forced to issue a statement through Euroclear and Clearstream, in an attempt to reassure investors."

10. Five days after the grant of the Smith order, on the 18th September, 2002, Ukraine launched its present application to set aside the Morison and the Smith orders on the following grounds:

"1. The Owners' Agreement giving rise to the proceedings and containing the arbitration agreement was (purportedly) entered into by the State Property Fund only, as principal, and not as agent for the Republic of Ukraine.

2. As a matter of Ukraine law, the State Property Fund is a separate legal entity with capacity to contract and to sue and be sued in its own name. See Article 15 of the Temporary Regulations on the State Property Fund of Ukraine approved by Resolution of the Verkhovna Rada of Ukraine of 7 June 1992; Informational Letter #01-8/1432 of the Higher Arbitration Court of Ukraine (1 December 1992). 3. Therefore, the Republic of Ukraine was not a party to the arbitration agreement. 4. Not being a party to the arbitration agreement, the Republic of Ukraine is immune from the jurisdiction of the English court as respects proceedings which relate to the arbitration: see s. 1(1) and 9(1) of the State Immunity Act 1978. 5. Further or alternatively, the Republic of Ukraine was not a party to an arbitration agreement in writing, and the court has no jurisdiction to enter judgment against it in respect of the purported arbitration award (see Part II of the Arbitration Act 1996, especially s.100). 6. The statements in paragraph 11 of the witness statement of Paul Fallon dated 11 September 2002 that the Republic of Ukraine (i) nominated arbitrators and (ii) entered an appearance in the arbitration proceedings are untrue. In accordance with the Owners' Agreement (and the Claimant's request for arbitration), the arbitrators were appointed by the Stockholm Chamber of Commerce. The Republic of Ukraine (as opposed to the State Property Fund) did not "enter an appearance" or play any part in the arbitration proceedings; and there is no suggestion in the award or elsewhere that it did. 7. Therefore the order of 29 April 2002 must be set aside as against the Republic of Ukraine. 8. Further or alternatively, the order of 29 April 2002 should be set aside as having been applied for without full and frank disclosure in relation to the facts and matters set out above. 9. If the order of 29 April 2002 is set aside as against the Republic of Ukraine, then the interim third party debt order must also be set aside. 10. Alternatively, the interim third party debt order must be set aside as having been applied for and made contrary to CPR 62.18(9)(b)(i).

10.1 The order of 29 April 2002 was served on 24 July 2002.

10.2 The Republic of Ukraine had two months and 21 days to enter an appearance (s. 12(2) and 22(2) of the State Immunity Act 1978), and thus two months and 21 days to apply to set aside the order.

10.3 The award must not be enforced within that period; CPR 62.18(9)(b).

10.4 The interim third party debt order, being an order purporting to enforce the award, was made on 13 September 2002, within that period."

11. The matter came before me on the 25th September and was adjourned for the reasons and on the terms set out in a short ruling on that day. It was restored before the Court on Friday, 11th October. However, very late in the day, NH sought to adduce further evidence of Swedish and Ukrainian Law. While the lateness of this evidence was unfortunate, its emergence perhaps simply reflects that in the somewhat murky world of post-Soviet era privatisation, issues of some complexity arise as to the honouring of commercial bargains, state immunity and the enforcement of international arbitration awards. At all events, in the circumstances it would not have been either sensible or just to exclude this evidence and, realistically, Mr. Philipps QC for Ukraine did not seek to have me do so. Moreover, should such evidence matter, then plainly Ukraine would need time to answer it. Accordingly, it was not possible on the 11th October to hear, let alone resolve, all the issues between the parties.

12. Mr. Philipps however submitted and, likewise realistically, Mr. Walker QC for NH did not resist the submission, that certain issues could be isolated and argued on the 11th October. If I resolved those Issues or any one of them in favour of Ukraine, then it would obtain some or all of the relief it was seeking. It was therefore submitted that I should deal with those Issues and thereafter consider what, if anything, remained. I proceeded accordingly.

13. The three Issues were these:

(I) Could the Morison order stand where (so far as relevant) the award was against a party, described as "The Republic of Ukraine, through the State Property Fund of Ukraine" but the Morison order provided for enforcement against two parties (1) The State Property Fund of Ukraine and (2) The Republic of Ukraine ? While this Issue went primarily at least to the Court's jurisdiction, it also encompassed allegations of non-disclosure. ("Issue (I) – the Morison order")

(II) Should the Smith order be set aside on the ground of prematurity, having been granted less than two months after the service of the Morison order on Ukraine ? This Issue went solely to the Court's jurisdiction, in the light of the provisions of The State Immunity Act 1978, esp. ss. 12 and 22, read together with CPR 62.18. ("Issue (II) – the Smith order")

(III) Should the Smith order be set aside as a matter of discretion, given the existence of a challenge to the Morison order, admittedly arguable (hence the need for NH's further evidence) but, ex hypothesi, made late ? This Issue only arose if Ukraine had failed on Issues (I) and (II) and therefore necessarily proceeded on the assumption that the Ukraine's application to set aside the Morison order had been made outside of the time provided under the CPR for such challenges. ("Issue (III) – discretion").

14. At the conclusion of the hearing on Friday 11th October, I indicated to the parties that judgment would be reserved but that I would very shortly inform them of my decision, with reasons to follow. By Note on Monday 14th October, I informed the parties' legal representatives, on a confidential basis, that: (1) Ukraine succeeded on Issues (I) and (II); (2) Had it arisen, NH would have succeeded on Issue (III). In consequence, both the Morison and Smith orders were to be set aside. I now give the reasons for my decision.

ISSUE (I) – THE MORISON ORDER

15. So far as concerns the jurisdiction of the Court, with which I propose to deal first, Issue (I) raises a very short point. In essence, Mr. Philipps submits that the Morison order cannot stand; as already observed, the relevant Respondent to the award was "The Republic of Ukraine, through the State Property Fund of Ukraine"; the Morison order, however, purported to enforce the award against (1) The State Property Fund of Ukraine and (2) The Republic of Ukraine; the Court had no jurisdiction to make such an order. For NH, Mr. Walker accepted that it had been wrong to proceed as NH had done; nonetheless, the Morison order could and should survive against Ukraine. The arbitration tribunal had regarded the SPF and Ukraine as a single entity; the Morison order should stand against Ukraine, whom the tribunal and NH regarded as the true respondent; the reference to the SPF in the Morison order could simply be struck out; the question was one of the true identity of the party against whom enforcement was sought; as that was Ukraine, the addition of another party did not make the order bad. Finally, it was neither here nor there that (when the matter came to be fully argued), NH would seek to uphold the Morison order on the additional ground that the SPF had acted as agent for Ukraine; that, therefore, there were two relevant entities; and that Ukraine was liable under the award as principal.

16. I have reached the clear conclusion that Mr. Philipps' argument is to be preferred and that the Morison order cannot stand.

17. Ss. 100 and following of the Arbitration Act 1996 ("the 1996 Act") provide for the recognition and enforcement of New York Convention Awards. There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (ss. 102 -103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that Issue (I) falls to be considered.

18. Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt, true "slips" and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions, is sought in terms other than those of the award. Still further, though I do not rest my decision on it, such an approach raises the spectre of unintended consequences should a false step be taken – for example, English domestic law rules as to election and the enforcement of judgments against principals and agents would need to be considered: see, for example, ***Morel v Westmoreland*** [1904] AC 11; ***Moore v Flanagan and Wife*** [1920] 1 KB 919. In my judgment, this is all inappropriate territory for the enforcing court. The right approach is to seek enforcement of an award in the terms of that award.

19. Such considerations are reinforced and put beyond argument when regard is had to s.101 of the 1996 Act, which provides as follows:

"(2) A New York Convention award may, by leave of the court, be enforced in the same manner a judgment or order of the court to the same effect….

(3) Where leave is so given, judgment may be entered in terms of the award."

As it seems to me, the Morison order was not an order "in terms of the award"; it was an order in different terms. For the reasons already given, in the present context, that difference matters. There was no jurisdiction to enforce the award in the terms of the Morison order and that order must be set aside.

20. For completeness:

(1) The decision on Issue (I) rests on the question of the court's jurisdiction. Had I not reached the view to which I have come as to the court's jurisdiction, I would not have set aside the Morison order on the various points of non-disclosure alleged. In short, I am not persuaded that there was non-disclosure; it was made clear in Ms.

Mulcahy's Witness Statement of 26th April, 2002 that the application for enforcement was departing from the style of the award. If that is too generous a view, I am nonetheless satisfied that any non-disclosure here was the product of innocent mistake or confusion so that in my discretion I would have viewed setting aside the order as a disproportionate sanction.

(2) I am not without sympathy for the efforts of NH's solicitors and, in particular, Mr. Fallon in seeking to grapple with the ambiguity (not, I suspect, of Mr. Fallon's making) in the naming of the relevant Respondent to the award. That said, the Court had no jurisdiction to "iron out" the ambiguity by purporting to enforce the award in different terms. This case accordingly underlines the importance of addressing such issues before the stage of the award is reached; if, however, an ambiguity of this nature remains in an award then (so far as the enforcing court is concerned) it has to be addressed in the course of any argument as to enforcement. What cannot be sought is enforcement other than in terms of the award.

ISSUE (II) – THE SMITH ORDER

21. It was common ground that if the Morison order must be set aside then the Smith order could not stand. Nonetheless, Issue (II) was fully argued and it is right that I should decide it. Like Issue (I), this Issue raises a short point albeit that it is first necessary to set out the relevant terms of ss. 12 and 22 of the State Immunity Act 1978 ("the 1978 Act") and CPR 62.18.

22. S.12 of the 1978 Act, which appears under the rubric "Procedure" provides as follows:

"12 ***Service of process and judgments in default of appearance***

(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid."

S.22 of the 1978 Act is entitled "General Interpretation". S.22(2) provides as follows: *"In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures."*

23. CPR 62.18 deals with the enforcement of awards. So far as here relevant, it provides as follows:

" (1) An application for *permission under –*

… (b) section 101 of the 1996 Act; …

to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.

…..

(3) The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this part.

(4) With the permission of the court the arbitration claim form may be served out of the jurisdiction irrespective of where the award is, or is treated as, made.

(8) An order giving permission may be served out of the jurisdiction –

(a) without permission; and

(b) in accordance with rules 6.24 to 6.29 as if the order were an arbitration claim form.

(9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set –

(a) the defendant may apply to set aside the order; and

(b) the award must not be enforced until after –

(i) the end of that period; or

(ii) any application made by the defendant within the period has been finally disposed of."

24. As already noted, the argument on Issue (II) turned solely on the Court's jurisdiction. Mr. Philipps submitted that the Smith order could not stand and must be set aside on the ground of prematurity; pursuant to s.12(2) of the 1978 Act, a two month period had to be added to the 21 day period expressly provided in the Morison order; however, the award had been sought to be enforced by way of the Smith order before the expiry of that period (on or about the 15th October, 2002); such purported enforcement was premature under CPR 62.18(9)(b)(i). Mr. Walker's response was equally succinct; s.12(2) was concerned with the court's "*adjudicative jurisdiction*" not its "*enforcement jurisdiction*": ***Alcom Ltd. v Republic of Colombia*** [1984] 1 AC 580, at p. 600, per Lord Diplock; it was accordingly inapplicable; the Smith order had been obtained after the expiry of the 21 day period provided for in the Morison order; the Smith order was accordingly unobjectionable.

25. In my judgment, the Smith order was premature, cannot stand and must be set aside. My reasons are these:

(1) CPR 62.18 contemplates that an applicant seeking enforcement may proceed by way of an arbitration claim form or may simply seek an order granting the relevant permission. Were Mr. Walker's argument well-founded, it would be necessary either (i) to read s.12(2) of the 1978 Act as not applying to such arbitration claim forms or (ii) to conclude that s.12(2) applied where the applicant proceeded by way of arbitration claim form but not otherwise. Conclusion (ii) was described by Mr. Philipps as "bizarre" and, it is sufficient to observe, Mr. Walker did not contend for it. It follows that Mr. Walker's argument must and does proceed on the basis that s.12(2) is inapplicable to all enforcement procedures under CPR 62.18.

(2) As foreshadowed, Mr. Walker contends for such a result by seeking to confine the operation of s.12(2) to the court's "adjudicative jurisdiction". However, s.12(2) is not in terms so confined. Instead, s.12 is found under the heading "Procedure". It is therefore necessary for Mr. Walker to read words into the section.

(3) The rationale for doing so, Mr. Walker submits, is that the "generous" time period furnished by s.12(2), is appropriate in the case of the service of claims on states; of these, the state may know nothing until service is effected. By contrast, in the case of enforcement, ex hypothesi, the state affected will or should be aware of the matter giving rise to the judgment or award; there is accordingly no warrant for the application of the two month period in this context. I am, with respect, unable to accept this argument and do not think that the discussion in ***Alcom*** *(supra)* is of assistance here.

(4) As it seems to me, s.12 means what it says. It deals with procedure. It is not to be confined to the court's "adjudicative jurisdiction". The two month period is an acknowledgement of the reality that states do take time to react to legal proceedings. It is understandable that states should have such a period of time to respond to enforcement proceedings under ss. 100 and following of the 1996 Act; not untypically, an award will be made in one country but enforcement may be sought elsewhere, perhaps in a number of jurisdictions, where assets are or are thought to be located. I therefore decline to read words into s.12 so as to preclude its application to the enforcement of awards under CPR 62.18.

(5) Insofar as it remains in dispute, I am satisfied that the wording in s.12(2) of the 1978 Act, "Any time for entering an appearance (whether prescribed by rules of court or otherwise)" applies to the time period to be set by the court as available to a defendant to seek to set aside an order for enforcement under CPR 62.18(9). If need be, s.22(2) of the 1978 Act (".. references to entry of appearance …include references to any corresponding procedures"), though, I suspect, primarily designed for other purposes, is capable of supporting such a construction; for my part, however, I would be inclined to arrive at my conclusion on the wording of s.12(2) standing alone but read in context.

(6) In the result, the Smith order cannot stand. The Morison order was served on Ukraine on the 24th July, 2002. That order gave Ukraine a 21 day period within which to apply to set it aside. To that 21 day period must be added the two months provided for in s.12(2) of the 1978 Act. The total period therefore expired on or about the 15th October, 2002. The Smith order was made on the 13th September. It was accordingly premature; it was, it must be stressed, granted by way of enforcement; it was not a freezing order; there was, however, no jurisdiction to enforce the award until the 15th October.

26. In argument there was some discussion as to the position of a Judge or Master in the position of Andrew Smith,J., faced with an application for enforcement, without notice. It will be recalled that, on its face, the Morison order had provided a 21 day period for Ukraine to apply to set it aside and that, by the time NH applied to Andrew Smith,J., the 21 day period had elapsed. While as a matter of jurisdiction, it cannot matter that the Morison order said nothing about the two month period contained in s.12(2) of the 1978 Act and indeed provided for a lesser period, it does strike me as undesirable that a Judge or Master in the position of Andrew Smith,J. should have to read anything into the order on which the application for enforcement is based. At least provisionally (there has not been full argument on this point), it would seem preferable for applicants for enforcement of arbitration awards against states to insert expressly into the relevant order (the Morison order here) the two month time period, provided for by s.12(2) of the 1978 Act (plus any additional period, if thought appropriate).

ISSUE (III) – DISCRETION

27. Ukraine has succeeded on Issues (I) and (II). Given that success on either of Issues (I) or (II) would have been sufficient to render Issue (III) academic, I shall deal with it summarily.

28. Essentially here, Mr. Philipps argued that the Smith order had caused great difficulty to Ukraine: see, Mr. Clark's Witness Statement, referred to above. There was now an application to set aside the Morison order and Ukraine must be treated as having at least a good arguable case in this regard; were it otherwise, there could have been no good reason for NH seeking to adduce further evidence. By analogy with CPR 62.18(9)(b)(ii) and as a matter of the Court's discretion, the Smith order should not be allowed to stand until Ukraine's challenge to the Morison order had been finally disposed of.

29. I cannot accept this submission. CPR 62.18(9)(b)(ii) is premised on an application to set aside the relevant order being made within the permitted time period. If Issue (III) is reached it follows that Ukraine's application to set aside the Morison order is made outside the 21 day time period allowed. In these circumstances, it seems to me (i) that CPR 62.18(9)(b)(ii) is of no assistance even by analogy; instead, the predominant policy interest lies in the enforcement of international arbitration awards without unnecessary delay; (ii) that the inconvenience to the Ukraine has resulted from its failure (on this hypothesis) to challenge the Morison order within the time period allowed; and (iii) that any residual discretion ought to be exercised to retain the funds caught by the Smith order, to ensure that if the (belated) challenge to the Morison order failed, effective enforcement could follow. Accordingly, had it arisen, I would have decided Issue (III) in favour of NH and against Ukraine.

CONCLUSIONS AND POSTSCRIPT

30. Both the Morison and Smith orders must be set aside in consequence of my decision on Issues (I) and (II) respectively. For the avoidance of any doubt, NH is not precluded by this decision from renewing its attempts to enforce the award – but, if so advised, it must do so in accordance with the terms of the award and not prematurely.

31. I was grateful to both Mr. Philipps QC and Mr. Walker QC for their considerable assistance. I shall of course seek their further assistance on the terms of the order and on any questions as to costs.

32. In the course of the hearing, Mr. Philipps asked me to record the following reservation which I do, without comment, in the precise terms supplied to me:

    " The State does not for the purposes of this application in this jurisdiction contend that, as a matter of fact and/or Ukrainian law, the Fund, by Mr. Kulichenko and Ms Gonchar, did not sign the Owners' Agreement.

    However, the State does reserve the right so to argue in any other proceedings in this or any other jurisdiction, and the fact that the State is not so arguing here today is not a concession or admission that the Fund did sign the Owners' Agreement.

    A fortiori, it is not a concession or admission, in this jurisdiction or any other, on the part of the Fund, which I do not represent and which does not appear here."

Paul Walker QC & Alan Maclean (instructed by Reed Smith Warner Cranston) for the Claimant
Guy Philipps QC (instructed by White & Case) for the Second Defendant