Neutral Citation Number: [2023] EWCA Civ 1518

Case No: CA-2023-001486

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
Mr Justice Bright
[2023] EWHC 1691 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2023

Before:

LORD JUSTICE MALES
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between:

THE CZECH REPUBLIC	**Respondent/ Claimant**
- and -	
1) DIAG HUMAN SE **2) JOSEF STAVA**	**Appellants/ Defendants**

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- -

Patrick Green KC & Ognjen Miletic (instructed by **Mishcon de Reya LLP**) for the **Appellants**
Lucas Bastin KC, Peter Webster & Katherine Ratcliffe (instructed by **Arnold & Porter Kaye Scholer (UK) LLP**) for the **Respondent**

Hearing date: 7 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Males:

1. Section 70(7) of the Arbitration Act 1996, which applies when the losing party seeks to challenge an arbitration award in the court, provides that:

> "The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with."

2. The applicants, Diag Human SE and Mr Josef Stava, sought an order that money payable to them under an arbitration award dated 18th May 2022 by the respondent, the Czech Republic ("the Republic"), be secured pending the determination of the Republic's challenges to the award under sections 67 (substantive jurisdiction) and 68 (serious irregularity), and that if such security was not provided, the Republic's challenges to the award should be dismissed. By his order of 12th July 2023, Mr Justice Bright dismissed the application for security and refused permission to appeal.

3. The applicants now apply to this court for permission to appeal. Their application raises the preliminary question whether this court has jurisdiction to grant permission to appeal. That depends on whether the dismissal of an application for security made pursuant to section 70(7) is a "decision under" section 67 or 68. If this court does have such jurisdiction, the further questions arise whether permission to appeal should be granted and, if so, whether the judge was wrong to dismiss the application for security.

4. These issues were considered at a rolled-up hearing on 7th December 2023. The application was expedited because the substantive challenge under sections 67 and 68 is due to be heard at an eight day hearing (including one reading day) in the Commercial Court commencing on 29th January 2024.

Background

5. The award which the Republic seeks to challenge was made pursuant to the Bilateral Investment Treaty on the Promotion and Reciprocal Protection of Investments dated 5th October 1990 made between the Czech and Slovak Federal Republic and the Swiss Confederation ("the 1990 BIT"). The arbitration was commenced on 22nd December 2017. Its seat was in London. The arbitral tribunal awarded some CZK 4 billion (about £140 million at current rates) to the applicants for what were found to be breaches of the requirement for fair and equitable treatment contained in the 1990 BIT.

6. The background to the arbitration was somewhat convoluted, but the following brief summary will suffice for present purposes.

7. The underlying disputes date back to 1992. Conneco, a Czech company to which the first claimant, Diag Human SE, a Liechtenstein company, is the successor, carried on business in the blood/plasma market in what was then Czechoslovakia. The applicants' case is that its business was unlawfully destroyed as a result of a letter written by the then Czech Minister of Health, Dr Martin Bojar, on 9th March 1992 ("the Bojar letter"). That led to an *ad hoc* arbitration agreement, subject to Czech law, between Conneco and the Czech Ministry of Health.

8. An arbitral tribunal appointed pursuant to this agreement issued a partial award on 25th June 2002, awarding some CZK 326 million in favour of Diag Human. This has been paid. A final award of CZK 8.3 billion in further damages and interest was issued on 4th August 2008 ("the 2008 award"), but has not been paid.

9. The arbitration agreement provided for an award to be challenged by way of Review proceedings. The Ministry of Health applied for a Review, which resulted in a Resolution by the Review Tribunal dated 23rd July 2014 ("the 2014 Resolution") declaring that the arbitral proceedings were discontinued.

10. The applicants' case is that the Review proceedings were corrupted. They say that the Republic unlawfully used its intelligence services, its police force and a Parliamentary Enquiry Commission to obtain information and pressure the members of the Review tribunal. They also say that the Republic improperly ensured that those appointed to the Review tribunal lacked independence and were pressurised and/or bribed.

11. The "high point" of this case, as the judge described it, is a manuscript note ("the Note") made by Mr Michal Švorc, then the Director of the Legal Department of the Czech Ministry of Finance, which appears to have been made at a meeting in the Prime Minister's office on or about 8th December 2009, in relation to the Review proceedings. The manuscript appears to record that the Czech police and intelligence services held one member of the Review tribunal "by the balls" and that another member wanted "subsidies" in order to ensure a decision that nothing more would be payable by the Republic.

12. There have been proceedings in Luxembourg, the Netherlands, the United States, Austria, Belgium and England in which Diag Human has sought to enforce the 2008 award. With the exception of Luxembourg, where it transpired that the Republic held no assets available for enforcement, the courts in those jurisdictions have held that the 2008 award was not enforceable as a result of the pending Review proceedings and/or the 2014 Resolution.

13. In the meantime, on 22nd December 2017, the applicants commenced fresh arbitration proceedings against the Republic, under the 1990 BIT, contending that the Republic had breached the requirement of fair and equitable treatment as a result of (1) the Bojar letter, (2) interference with the Czech arbitration and (3) interference with the Review proceeding which led to the 2014 Resolution, as shown by the Note and other matters. The BIT arbitral tribunal upheld those complaints. It held that the 2014 Resolution was not entitled to recognition in international law; in consequence the 2008 award was to be recognised as valid and binding, which would compensate the applicants for damage suffered as a result of sending the Bojar letter and interference in the Review process; and it ordered the Republic to pay the applicants the amount of the 2008 award, with interest.

The challenge to the BIT award

14. Again in brief summary, the Republic contends that the BIT award is seriously flawed. Its case is that the applicants did not have a qualifying investment in the Czech Republic at the time of the alleged breaches and are not "investors of the Contracting Party" within the meeting of Article 1(1) of the 1990 BIT. Among other things, it says that Mr Stava parted with his shares in Diag Human in June 2011 by placing them into a

Liechtenstein discretionary trust, as a result of which he had no investment capable of giving rise to a claim under the 1990 BIT; and that Diag Human cannot claim to be an investor either, because its claim depends on it being controlled by a Swiss person, and from the moment that Mr Stava parted with his shares, he was no longer in control of the company. As a result, it submits that the BIT arbitral tribunal did not have substantive jurisdiction to determine the dispute.

15. As to section 68 of the 1996 Act, the Republic contends that the BIT tribunal decided the case on a basis that had not been argued, in breach of section 33; and that it failed to decide some of the issues which were put to it.

16. I observe that these grounds of challenge do not appear to involve any challenge to the BIT arbitral tribunal's factual finding that the Republic exerted pressure on and/or corrupted members of the Review proceedings tribunal. The Republic's case is simply that the tribunal had no jurisdiction to make that finding. Moreover, although the Republic has suggested, in my view somewhat implausibly, that the reference in the Note to an arbitrator wanting "subsidies" has to do with an issue about the level of the tribunal's legitimate fees, it has not advanced any case that there is a lawful or proper explanation for the reference to another of the arbitrators being held "by the balls". If the Note is to be interpreted as the applicants suggest, it demonstrates a serious interference with the integrity of the arbitral process to which the Czech Ministry of Health had agreed.

17. At one time the applicants sought to have the sections 67 and 68 applications dismissed summarily on the ground that they have no real prospect of success. It did so in accordance with the procedure set out in paragraphs O8.6 and O8.7 of the Commercial Court Guide (11th Edition, 2022). These provide:

> "**O8.6** The Court has power under rule 3.3(4) and/or rule 23.8I to dismiss any claim without a hearing. It is astute to do so in the case of challenges to awards under section 67 or 68 of the Act where the nature of the challenge or the evidence filed in support of it leads the Court to consider that the claim has no real prospect of success. If a respondent to such a challenge considers that the case is one in which the Court should dismiss the claim on that basis: (a) the respondent should file a respondent's notice to that effect, together with a skeleton argument (not exceeding 15 pages) and any evidence relied upon, within 21 days of service of the proceedings on it; (b) the applicant may file a skeleton and or evidence in reply within 7 days of service of the respondent's notice.
>
> **O8.7** Where the Court makes an order dismissing a section 67 or section 68 claim without a hearing pursuant to O8.6, whether of its own motion or upon a respondent's notice inviting it to do so, the applicant will have the right to apply to the Court to set aside the order and to seek directions for the hearing of the application. If such application is made and dismissed after a hearing the Court may consider whether it is appropriate to award costs on an indemnity basis."

18. However, that application has not been pursued as a separate application and the substantive challenge to the award is due to be heard at an eight-day hearing beginning on 29th January 2024. Instead, the applicants sought orders pursuant to section 70 of the 1996 Act that the Republic provide security for the applicants' costs of the section 67 and section 68 proceedings and that it provide security for the amount of the BIT award, failing which the applications under section 67 and section 68 would be dismissed.

19. Mr Justice Bright refused to order security for costs in the light of an undertaking given to the court by the Republic to comply with any order to pay costs made in favour of the applicants. It is his refusal to order security for the amount of the award with which we are now concerned.

The judgment

20. In a judgment produced with commendable promptness, Mr Justice Bright summarised the principles applicable to an application for security under section 70(7) as follows:

> "59. It is well-established that, in the context of a s. 67 challenge, there are generally two requirements to be satisfied: *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm) at [37]; *Progas v Pakistan* [2018] EWHC 209 (Comm) at [50].
>
> 60. First, the applicant must persuade the Court that the challenge appears weak on the merits, specifically that it is 'flimsy or otherwise lacks substance' (this formulation having emerged in *A v B* [2011] 1 Lloyd's Rep 363, per Flaux J at [32]). This is because the award is not presumed to be valid, in the context of a s. 67 challenge, i.e. the Court proceeds on the basis that the challenge may succeed, unless the applicant can show that its prospects are flimsy.
>
> 61. Second, the applicant must show that the challenge in some way prejudices his ability to enforce the award (or diminishes the other party's ability to honour the award). This is generally done by showing a risk of dissipation, as required for a freezing injunction: *A v B* at [47].
>
> 62. The first limb does not apply to a s. 68 challenge: *Progas* at [51]. The reason for this is that, in this context, the award is presumed to be valid, unless and until the challenge succeeds. In a s. 68 challenge, therefore, there is no need for the applicant for security to demonstrate flimsiness."

21. The judge found himself unable "to form any real view as to the substance or flimsiness of the [Republic's] case". That was because almost all of the time at the hearing had been taken up with a different application, for security for costs pursuant to section 70(6) of the 1996 Act, and the judge had been asked to read far more than he possibly could in the time estimated as appropriate for pre-reading. As a result he did not have the benefit of oral submissions and had not had an opportunity to read enough of the evidence to form a view. However, he concluded that this did not matter because there

was no real evidence that the Republic was likely to dissipate its assets so as to put them beyond the applicants' reach. The applicants relied on the Republic's interference in the Review proceedings as demonstrating that the Republic would do whatever it could to avoid paying the award, but the judge did not regard that alleged misconduct as analogous to the peril which the applicants claimed to face, i.e. that in the period until determination of the sections 67 and 68 challenges in January 2024, the Republic might put its non-sovereign assets beyond the applicants' reach.

22. Finally, the judge addressed a submission on behalf of the applicants that in a case where the award debtor had acted egregiously, that should itself be enough to justify an order for security under section 70(7). After referring to the decision of Mr Justice Eder in *Konkola*, he rejected that submission, concluding that:

> "80. … my own view is that the explanation of the Departmental Advisory Committee Report [i.e. that the purpose of an order for security is to avoid the risk that while the appeal is pending, the ability of the losing party to honour the award may be diminished] strongly indicates that security may be ordered if this risk is identified, but not otherwise.
>
> 81. It follows from this that s.70(7) is indeed related to prejudice that may arise from the s.67 or s.68 or s.69 challenge; specifically, the risk the award may become more difficult to enforce during the period while the challenge is pending. This calls for a comparison between the enforceability of the award before the challenge was issued, and the enforceability by the end of the challenge proceedings.
>
> 82. It further follows that misconduct or alleged misconduct alleged to have occurred long before the s.67 or s.68 or s.69 challenge is not of obvious relevance. Mr Green KC's submissions only concerned allegations of historic misconduct."

The proposed grounds of appeal

23. The applicants seek permission to appeal, contending that the judge erred in his approach to the power to order security contained in section 70(7). They submit that he ought to have concluded that the Note provided compelling *prima facie* evidence of the Republic's corruption of an arbitral tribunal; and that although the principles summarised by the judge are appropriate for the general run of cases, this was an interference with the integrity of the arbitral process, contrary to fundamental requirements of due process, the rule of law and public policy, which ought to have led to an order for security under section 70(7). The applicants contend that section 70(7) should be approached in the light of the rule of interpretation in section 1 of the 1996 Act that "the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".

Does this court have jurisdiction to grant permission to appeal?

24. Because the judge refused permission to appeal, the applicants can only pursue their appeal if they can obtain permission from this court. But the preliminary question arises

whether this court has jurisdiction to grant such permission. In *National Iranian Oil Company v Crescent Petroleum Company International Limited* [2023] EWCA Civ 826 this court held that the Court of Appeal has no jurisdiction to grant permission to appeal from a decision, pursuant to section 73 of the 1996 Act, that a party has not lost the right to raise an objection to arbitrators' substantive jurisdiction when bringing a challenge to an award under section 67. Mr Lucas Bastin KC for the Republic submits that the present case is materially indistinguishable, or is if anything *a fortiori*, and that accordingly this court has no jurisdiction to grant the necessary permission.

Relevant provisions of the Arbitration Act 1996

25. Sections 66 to 71 of the 1996 Act are a group of sections contained within Part 1 of the Act under the heading "Powers of the court in relation to award". They include the three grounds on which an award may be challenged, set out in sections 67 to 69 of the Act. These are (1) a challenge to the arbitral tribunal's substantive jurisdiction under section 67, (2) that there has been a serious irregularity (section 68), and (3) an appeal on a question of law arising out of the award (section 69). Each of these sections allows for the possibility of an appeal to the Court of Appeal, but provides that such an appeal may only be brought with the leave of the first instance court. For example, section 67(4) provides that:

> "The leave of the court is required for any appeal from a decision of the court under this section."

26. Section 68(4) is in the same terms, while section 69(8) is to the same effect, with the additional requirement that leave shall not be given unless the court considers that the question of law is one of general importance or should for some other special reason be considered by the Court of Appeal.

27. The reference in these provisions to "the court" is a reference to the first instance court which determines the challenge to the award (*Athletic Union of Constantinople v National Basketball Association (No. 2)* [2002] EWCA Civ 830, [2002] 1 WLR 2863; *NIOC v Crescent* at [37]). Section 105 provides that "the court" in relation to England and Wales means the High Court or the county court.

28. Section 70 has the heading "Challenge or appeal: supplementary provisions". I have already set out subsection (7), but the section as a whole reads as follows:

> "(1) The following provisions apply to an application or appeal under section 67, 68 or 69.
>
> (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted–
>
> (a) any available arbitral process of appeal or review, and
>
> (b) any available recourse under section 57 (correction of award or additional award).
>
> (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of

appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award–

(a) does not contain the tribunal´s reasons, or

(b) does not set out the tribunal´s reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is–

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions."

29. The Departmental Advisory Committee Report on the Arbitration Bill commented on what became section 70(7) of the 1996 Act in these terms:

"380. … This is a tool of great value, since it helps to avoid the risk that while the appeal is pending, the ability of the losing

> party to honour the award may (by design or otherwise) be diminished."

30. By way of comparison, section 73, which was the provision considered in *NIOC v Crescent*, provides as follows:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection–
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.
>
> (2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling–
>
> (a) by any available arbitral process of appeal or review, or
>
> (b) by challenging the award,
>
> does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal´s substantive jurisdiction on any ground which was the subject of that ruling."

31. It can be seen that neither section 70 nor section 73 contains any express equivalent to section 67(4) or the corresponding provisions in sections 68 and 69.

NIOC v Crescent

32. My judgment in *NIOC v Crescent*, with which Lord Justice Nugee and Lady Justice Falk agreed, drew together a number of points from the previous case law:

> "60. First, the policy underlying section 67(4) and other equivalent provisions has consistently been stated as being to avoid delay and expense. Obviously this is not achieved by excluding appeals altogether, but by making the first instance

court the sole gatekeeper to control whether permission to appeal should be given. Paragraph 74(iii) of the DAC Report, commenting on the equivalent provision in what became section 12(6) of the Act, demonstrates that it was intended that appeals should generally be limited to 'some important question of principle':

> 'Thirdly, we have made any appeal from a decision of the court under this Clause subject to the leave of that court. It seems to us that there should be this limitation, and that in the absence of some important question of principle, leave should not generally be granted. We take the same view in respect of the other cases in the Bill where we propose that an appeal requires leave of the court.'

61. It is worth noting that the policy set out in section 1 of the Act also includes, in addition to the avoidance of unnecessary delay and expense, a policy of non-intervention by the court in the arbitral process except as expressly provided in Part I of the Act.

62. Second, there are statements which suggest that a decision which is 'part of the process' of reaching a final decision on a challenge to an award is a decision 'under' section 67 or section 68, as the case may be. More specifically, it was at least assumed in *Sumukan* [*Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] Bus LR 1075] that a decision under section 73 was 'within the compass' of section 67 or section 68, and that the restrictions on appeal contained in section 67(4) and section 68(4) would therefore apply.

63. Third, there is no support in these cases for the view that only a decision finally disposing of a challenge to an award is capable of being a decision under section 67 or section 68. Nor is any distinction drawn between a decision that a party has lost the right to object and a decision that it has not done so."

33. I stated my conclusion as follows:

"64. Whether a decision that a party has not lost the right to challenge an award under section 73 is a decision under section 67 or section 68 for the purpose of section 67(4) and section 68(4) is a question of statutory interpretation. It must therefore be approached having regard to the object of the 1996 Act. The principles by which the Act must be interpreted are set out in section 1. They include the avoidance of unnecessary delay and expense and the limitation of court intervention in the arbitral process except where expressly provided.

65. In my judgment it is clear that section 73 is entirely ancillary to sections 67 and 68. It has no relevance or application

independent of a challenge to an award under one or both of those sections. A decision whether a party has lost the right to challenge an award is undoubtedly 'part of the process' for determining a challenge under section 67 or section 68 and is 'within the compass' of those sections. It is a preliminary question, but not a question going to the court's jurisdiction, the answer to which determines whether the court needs to consider the merits of the section 67 or section 68 challenge. 'Decision' is a broad term and the determination of a section 73 issue is naturally to be regarded as a decision under section 67 or section 68 as a matter of language, whichever way it goes. There is no justification for saying that it is a decision under section 67 or section 68 if the section 73 issue is decided in favour of the award creditor (*ASM Shipping* [*ASM Shipping Ltd v TTMI Ltd* [2006] EWCA Civ 1341, [2007] 1 Lloyd's Rep 136]), but not if it goes against the award creditor.

66. Moreover, it is in accordance with the policy of the Act, as consistently described in the case law, to interpret section 67(4) and section 68(4) as encompassing such a decision. It would be paradoxical to interpret those provisions to mean that only the first instance court can grant permission on the final decision to uphold or dismiss the challenge to an award, but that the Court of Appeal can give permission on preliminary or case management decisions when the first instance court has refused such permission. Although it may be said that the Court of Appeal could be trusted not to give permission in unmeritorious cases, and would be unlikely to do so on case management decisions, even the process of applying for such permission would cause delay and expense, while leaving the status of the award in limbo until the application had been determined. The fact that there are other provisions of the Act, such as section 9 and sections 66 and 103, which may raise broadly similar issues as to the scope of an arbitration clause as arise under section 67, but which contain no equivalent restriction on the grant of permission to appeal, is nothing to the point.

67. The reference to 'recalcitrant parties' in the DAC Report does not warrant any different conclusion. It describes what sometimes happens and provides an explanation of the need for section 73, but does not provide any justification for limiting the scope of the natural language of section 67(4).

68. As Lord Justice Gross said in *Blumenthal* [*Johann MK Blumenthal Gmbh & Co KG v Itochu Corporation* [2012] EWCA Civ 996, [2013] 1 All ER (Comm) 504], there can be no justification for straining to avoid the operation of the restriction on appeals contained in section 67(4). On the contrary, that restriction is in accordance with the statutory policy of non-intervention by the court except as expressly provided.

> 69. For these reasons I would hold that this court has no jurisdiction to grant permission to Crescent on the cross-appeal.
> …"

The applicants' submissions

34. Mr Patrick Green KC for the applicants submitted that the decision in *NIOC v Crescent* is distinguishable and that different considerations apply to an application for security under section 70(7). He submitted that the starting point must be that clear statutory words are required if a right of appeal is to be excluded, and that in order to qualify as a "decision under" section 67 or section 68, a decision had to be one which substantively determined the challenges under those sections, or formed a necessary step in order to do so.

35. Applying that principle, Mr Green submitted that *NIOC v Crescent* was correctly decided because a necessary step in determining the section 67 challenge was to decide whether the award debtor's right to object that the tribunal lacked substantive jurisdiction had been lost as a result of failing to raise the objection at an earlier time. Similarly, Mr Green accepted, or as he said asserted, that a decision under section 70(2) whether an applicant had exhausted any available arbitral process of appeal or review, or recourse under section 57, would also be a necessary step in determining a challenge under section 67 or section 68, and would therefore qualify as a decision under one or other of those sections, so that only the first instance court could give leave to appeal; and that the same analysis applies to a decision under section 70(3) whether a challenge to an award had been brought within 28 days. In contrast to these provisions, however, a decision whether to order security under section 70(7) was not a necessary step in determining a challenge under section 67 or section 68, but was an ancillary matter which did not form part of the critical pathway of decisions leading to the substantive determination of the challenge to the award.

Decision

36. In my judgment only the first instance court can give leave to appeal from a decision either to order or not to order security under section 70(7). I reach this conclusion substantially for the reasons advanced by Mr Bastin.

37. I accept that the starting point, as a matter of statutory interpretation, is that in the absence of clear words or necessary implication there should be no restriction on whatever right of appeal a party has under the general law (see *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 590E-F, although the issue in that case was whether a right of appeal had been excluded altogether; that is different from the present issue, as there is no doubt that the first instance court has jurisdiction to grant leave to appeal to this court). However, in my view the position is clear.

38. I consider that the reasoning in *NIOC v Crescent* applies here. Section 70 is ancillary or supplementary to an application under sections 67, 68 or 69, and has no application independent of those sections. That is spelled out by subsection (1), which states that the provisions of the section apply to an application or appeal under section 67, 68 or 69. It is also made clear by the heading of the section ("Challenge or appeal: supplementary provisions"). The terms of the section fully justify that heading.

39. Deciding whether to order security is part of the process of determining a challenge under section 67, 68 or 69. Such a decision only needs to be made if the award creditor makes an application for security, but it is equally true that a decision under section 73 whether a right of challenge to an award has been lost will only need to be made if the award creditor argues that it has been.

40. Indeed, the terms of section 70(7) provide expressly that one outcome of an application for security is an order that if security is not provided, the challenge under section 67 or section 68, or the appeal under section 69, will be dismissed. That will be the typical sanction when security is ordered. It is the order which the applicant sought in this case. A decision dismissing the challenge to the award, albeit contingent on security not being provided as ordered, is a paradigm case of a decision under section 67, 68 or 69.

41. This view is confirmed by the structure of the Act, with section 70 located in the group of sections which deal with the powers of the court in relation to an award, and by the policy considerations which I described in *NIOC v Crescent*.

42. For these reasons, this court does not have jurisdiction to grant permission to appeal and the decision of the judge must stand.

Should permission to appeal be granted?

43. If (contrary to my view) this court does have jurisdiction to grant permission to appeal, I would grant permission. The circumstances in which the court should exercise its power under section 70(7) of the Arbitration Act 1996 to order security for money payable under an award which is subject to challenge under sections 67, 68 or 69 have not been considered at appellate level, and the question whether or to what extent it is relevant to form any view as to the merits of a section 67/68 challenge warrants consideration by this court.

44. As I shall explain, a series of first instance cases has arrived at what seems to be a firm position that it is a “threshold requirement” for the ordering of security when the challenge is to the arbitrators’ substantive jurisdiction under section 67 that the challenge is “flimsy”, but that this threshold requirement does not apply when the challenge is made under section 68 (or, presumably, under section 69). I would not criticise the judge for having followed this approach, but in my view it is at least questionable, and could usefully be reconsidered at appellate level. I should explain why.

The cases

45. The first case to notice is *Peterson Farms v C&M Farming Ltd* [2003] EWHC 2298 (Comm), [2004] 1 Lloyd’s Rep 614. In an *extempore* judgment which he described at [2] as containing his “necessarily undigested reasons” for declining to order security for an ICC award which was being challenged under section 67, and in which he expressed reluctance at [29] to lay down any general principles or guidance, Mr Justice Tomlinson said at [30] that “one circumstance which is likely always to weigh very heavily with the Court in determining whether it is appropriate to exercise a power under s.70(7) will be the question whether the challenge appears to have any substance”. In that context he rejected a submission by the award creditor that the challenge under section 67 was “flimsy”. On the contrary, although Mr Justice

Tomlinson was careful not to express any final view, it is apparent that he thought the challenge was a strong one (as he put it at [34], it was "far from flimsy"). That later proved to be correct (see [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603, where Mr Justice Langley described the arbitrators' approach as "seriously flawed"). Mr Justice Tomlinson went on to say:

> "35. It seems to me that, in most cases, it is likely that demonstration by the party against whom the jurisdictional challenge is made that the challenge is flimsy or otherwise lacks substance is likely to be regarded as a threshold requirement for the court's consideration whether in all the circumstances it is appropriate to require, as a condition of proceeding under s.67, that money payable under the award shall be brought into Court or otherwise secured pending the determination of the application."

46. This reference to a "threshold requirement" was picked up in *A v B* [2010] EWHC 3302 (Comm), [2011] 2 All ER (Comm) 935, which also involved a challenge to the arbitrators' substantive jurisdiction under section 67:

> "32. … in most cases, there will be a threshold requirement that the party making the s 70(7) application demonstrates that the challenge to the jurisdiction is flimsy or otherwise lacks substance."

47. On the facts that threshold requirement was not satisfied which meant, on that ground alone, that the application should fail (see at [43]). However, Mr Justice Flaux went on to consider what other criteria might apply in determining whether to order security under section 70(7). His conclusion was as follows:

> "50. Thus, whilst it would not be advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under s 70(7), it seems to me that as a general principle the court should not order security unless the applicant can demonstrate that the challenge to the award (whether under s 67 or, indeed, either of the other sections) will prejudice its ability to enforce the award. Often this will entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced."

48. The application for security in *A v B* failed on that ground also.

49. This approach, consisting of a threshold requirement of flimsiness, combined with the need for an applicant for security to show that the challenge to the award would prejudice its ability to enforce the award, has been followed in later cases (*X v Y* [2013] EWHC 1104 (Comm), [2013] 1 Lloyd's Rep 230; *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm), [2014] 2 Lloyd's Rep 507; *Y v S* [2015] EWHC 612 (Comm), [2015] 2 All ER (Comm) 85; *Erdenet Mining Corporation LLC v ICBC Standard Bank Plc* [2017] EWHC 1090 (Comm), [2018] 1 All ER (Comm) 691; and *Progas Energy Ltd v Islamic Republic of Pakistan* [2018] EWHC 209

(Comm), [2018] 2 All ER (Comm) 287) as well as by Mr Justice Bright in the present case.

50. *X v Y* introduced a further refinement to the flimsiness requirement, which has also been followed in later cases. This is that it applies only when the challenge is made under section 67 and not when it is made under section 68 or section 69. The justification for that distinction, picking up *dicta* in the earlier cases, is said to be that in the case of a challenge under section 68 or section 69 the award is presumed to be valid unless and until the court rules otherwise, but that this presumptive validity does not apply in the case of an application under section 67. As to the circumstances in which an order should be made when the threshold requirement (when applicable) has been satisfied, Mr Justice Teare summarised the position in these terms in *X v Y*:

> "32. I accept that the jurisdiction conferred on the court by section 70 should not be used as a means of assisting a party to enforce an award which has been made in its favour. Ordering payment in by X would certainly assist Y to enforce the fourth award. Such an order can only be justified (following the guidance in the authorities to which I have referred) if the existence of the sections 67 and 68 challenges to the award in some way prejudices the ability of Y to enforce the award or diminishes X's ability to honour the award. If such prejudice or diminution is shown then an order for payment in may be an appropriate means of removing the prejudice to Y's ability to enforce the award or of restoring X's ability to honour the award".

Relevance of the merits

51. For my part, I can see no basis in the terms of section 70(7) for drawing a distinction with the effect that in the case of a challenge under section 67 there is a threshold requirement before security can be ordered that the challenge be shown to be "flimsy", but that this requirement does not apply in the case of a challenge under section 68 or section 69. Presumptive validity may be a valid ground for distinguishing between challenges under section 67 and section 68 for some purposes, but in my view it has no bearing on the exercise of the court's discretion under section 70(7). On the contrary, section 70 treats these different grounds of challenge or appeal equally, with no suggestion that different considerations apply according to the nature of the challenge. Indeed, because an appeal under section 69 can only be brought with the agreement of the parties or the leave of the court (section 69(2)), and because the leave of the court will only be given if the decision of the arbitrators is either obviously wrong or at least open to serious doubt (section 69(3)), section 70 plainly contemplates at least the possibility that an order for security may be appropriate even where there is a strong case that the award is wrong – although I would accept that this is likely to be a rare case.

52. This strongly suggests that, in general at any rate, the merits of the challenge are likely to be irrelevant to the question whether security for the award should be ordered and that, again in general, the primary and usually the only question is whether the making of the challenge is likely to prejudice the ability of the award creditor to enforce the award or the ability of the award debtor to honour it. That is, as the DAC Report

explained, the mischief at which section 70(7) is directed. It strikes a fair balance. The losing party has a right to challenge an award under section 67 or section 68, and (with the agreement of the other party or the leave of the court) to appeal on a question of law under section 69, but if doing so is likely to prejudice the award creditor, the price of exercising that right may be the provision of security.

53. Moreover, there is no need to introduce a threshold requirement of "flimsiness", and it is undesirable to do so. It is unnecessary because, if a challenge to an award has no real prospect of success, the appropriate course is for the challenge to be summarily dismissed, if necessary without a hearing in accordance with the procedure set out in paragraphs O8.6 and O8.7 of the Commercial Court Guide.

54. It is true that the "flimsiness" requirement has the formidable support of Lord Mance in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2017] UKSC 16, [2017] 1 WLR 970:

> "43. … there is first instance authority, which in my opinion accurately reflects what would be expected as a matter of principle in relation to the provision of security for the amount of an award in issue, that the power under section 70(7) will only be exercised if the challenge appears 'flimsy or otherwise lacks substance': *A v B (Arbitration: Security)* [2010 EWHC 3302 (Comm); [2011] 1 Lloyd's Rep 363; [2011] Bus LR 1020, para 32 per Flaux J; *Y v S* [2015] EWHC 612 (Comm); [2015] 1 Lloyd's Rep 703, para 33 per Eder J. …"

55. However, this approval of the first instance cases was plainly *obiter* and is not binding. More fundamentally, neither Lord Mance nor (with one exception) the judges who decided those cases took any account of the fact that, if a challenge to an award is flimsy in the sense that it has no real prospect of success, it should be summarily dismissed, so that no question of security arises. The only exception is the judgment of Sir Jeremy Cooke in *Erdenet Mining*. He recognised at [11] that if an application has no real prospect of success it can be summarily struck out or dismissed, and suggested that "flimsy" in this context means something like "unlikely to succeed" or "shadowy". That seems to me, with respect, not to have been what the other judges who used the term had in mind, and is likely to create uncertainty. While the concept of a case having no real prospect of success is familiar and established, a threshold test that a case has a real prospect of success but is nevertheless "unlikely to succeed" or "shadowy" would not be easy to apply.

56. It is in my view undesirable to adopt a criterion that an application be shown to be "flimsy", "unlikely to succeed" or "shadowy" before security can be ordered, because that will lead to precisely the kind of "minitrial" which the courts have deprecated in other procedural contexts. The merits of a challenge ought not to have to be examined twice, once in order to see whether they are "flimsy" for the purpose of an application for security, and then again on the hearing of the substantive application. Such an approach could only add to the delay and expense which section 1 of the 1996 Act tells us it is the object of arbitration to avoid. This view is supported by the practice of the Commercial Court that applications for security under section 70(7) should in general be marked with a time estimate of one hour or less (see paragraph O8.11 of the Guide – although the hearing below, including the application for security for costs, was listed

for a full day). That practice plainly envisages that it will not be necessary or appropriate to investigate the merits of the substantive challenge in any detail. While listing practice cannot dictate the way in which the discretion under section 70(7) should be exercised, there is in my view good sense in the thinking which underpins this practice.

57. I would also suggest that there is considerable wisdom in the approach of Lord Justice Staughton in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208. Dealing with the question whether security should be ordered on an adjournment of proceedings to enforce a New York Convention award pursuant to Article 5(5) of the Convention (see now section 103(5) of the Arbitration Act 1996), which is in some respects an analogous situation, Lord Justice Staughton emphasised the need to avoid going into the merits in too much detail on such an application (emphasis added):

> "In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived *on a brief consideration* by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is *manifestly* invalid, there should be an adjournment and no order for security; if it is *manifestly* valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point."

58. To go beyond a brief consideration of the award and the challenge in order to see whether the challenge is manifestly valid or invalid is unlikely to be helpful on an application of this nature. It is, moreover, only too easy for a picture of complexity to be painted. Take the present case. The award alone runs to 336 pages. The documents and evidence which it would be necessary to consider in order to form any view about the prospects of success of the Republic's challenges are voluminous. In order to decide whether those challenges are well-founded an eight day hearing in the Commercial Court will be required. At the end of that hearing, the challenges may or may not turn out to be without substance. At this stage, neither Mr Justice Bright nor this court could hope to form any sensible view, even provisionally, about the Republic's prospects (as I have said, they appear to have nothing to do with the conduct revealed by the Note) without undertaking an exercise which would be thoroughly disproportionate, and which cannot have been contemplated by Parliament as necessary in order to decide whether security should be ordered in accordance with section 70(7) of the 1996 Act.

59. The irrelevance in general of the merits of the challenge to an award is also in accordance with principle. If an award creditor can show that it is prejudiced by the challenge, for example because the debtor is actively taking steps to make enforcement more difficult, that is a powerful reason for ordering security as a condition of proceeding with the challenge, regardless of whether the challenge can be characterised as "flimsy". That is equally so regardless of whether the challenge is made under section 67 or section 68 or, as is commonly the case and is so in the present case, both.

Relevance of the Republic's alleged misconduct

60. Another issue which would have merited permission to appeal being given is the applicants' submission, not considered in previous cases, that the misconduct of the Republic as revealed by the Note provides an independent ground for making an order for security under section 70(7) in the present case.

61. I would accept that, on appropriate facts, an award debtor's misconduct may be evidence that the debtor is likely to take steps to render enforcement of the award more difficult while a challenge is pending. If so, that is capable of supporting an application for security in accordance with the conventional approach described in the cases. However, the judge was not persuaded that the applicants' allegations of misconduct (which in the court below were not confined to the Note but extended much more widely) constituted such evidence. He described those allegations as being concerned with "historic misconduct", which did not suggest that the Republic would be likely now to take steps to render enforcement more difficult than it already is. That is the kind of assessment which is quintessentially for a judge in the Commercial Court to make.

62. Mr Green went further, however, submitting that the misconduct revealed by the Note demonstrated an interference with the integrity of the arbitral process, contrary to fundamental principles of the rule of law, which was so serious that it ought to have led to an order for security under section 70(7). He submitted that the BIT award was itself the remedy for the Republic's misconduct, such that public policy rendered it desirable to order security in order to assist the applicants to enforce the award in the event that the Republic's challenges to the award under sections 67 and 68 fail.

63. While I would accept that the statutory discretion under section 70(7) is not fettered by express words, and that the principles which I have so far discussed are not rigid rules, I have considerable reservations about this approach. In general, as the cases rightly explain, it is not the purpose of an order under section 70(7) to assist in the enforcement process (e.g. *X v Y* at [32], cited at [50] above). Although Mr Green described the facts of this case as "bizarre and unusual and hopefully never to be repeated", experience suggests that allegations of gravely improper conduct in relation to litigation or arbitration, whether or not well-founded, are not as unusual as might be wished. I am concerned that to recognise misconduct in the course of an arbitration as a sufficient ground in itself for ordering security under section 70(7), whether or not accompanied by adjectives such as "bizarre", "unusual" or "egregious", would open up a significant volume of such applications, the overall effect of which would be to add expense to the challenge process and to delay the resolution of the substantive challenge.

Disposal

64. For these reasons I would have been prepared to grant permission to appeal if this court had jurisdiction to do so, although that is not to say that I would have allowed the appeal. As it is, however, I conclude that there is no such jurisdiction.

Lord Justice Snowden

65. I agree.

Lady Justice Falk

66. I also agree.