Neutral Citation Number: 2015 EWHC 2542 (Comm)

Case No: CL-2014-000070

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 1st September 2015

Before :

The Honourable Mr Justice Popplewell

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Between :

(1) ANATOLIE STATI	**Claimants**
(2) GABRIEL STATI	
(3) ASCOM GROUP S.A.	
(4) TERRA RAF TRANS TRAIDING LTD.	
- and -	
THE REPUBLIC OF KAZAKHSTAN	**Defendant**

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Mr Thomas K Sprange QC and Ms Ruth Byrne (instructed by **King & Spalding International LLP**) for the Claimants
Mr Ali Malek QC, Mr Christopher Harris, Mr Paul Choon Kiat Wee (instructed by **Norton Rose Fulbright LLP**) for the Defendant

Hearing date: 1st September 2015

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APPROVED RULINGS

Mr Justice Popplewell Tuesday, 1st September 2015

Ruling 1 by MR JUSTICE POPPLEWELL

1. I have formed a clear view that the court ought, of its own motion, to adjourn this matter. I will give my reasons briefly.
2. First, if the Swedish court were to vary or set aside the award then it seems to me there is a substantial likelihood, although not an inevitability, that that will have rendered the hearing of this application unnecessary in whole or in part, and result in considerable wasted time and costs. Having read the material which I have indicated that I have read, and doing the best I can at the moment on the basis of that material, I cannot regard the challenge in Sweden as being made in bad faith or one which has a fanciful, as opposed to real, prospects of success.
3. Secondly, there is a high degree of overlap between the issues which arise on this application and those which are to be considered by the Svea Court of Appeal. This court may very well be assisted by what the Swedish court has to say on those issues, particularly in relation to the SCC Rules and the appointment of Professor Lebedev, and may treat what is said as of persuasive effect. It is clear that an adjournment in this case will reduce the risk of inconsistent judgments and is in the interests of comity.
4. Third, there is a risk that this application cannot in any event be finally disposed of in this hearing window if the hearing goes ahead. The defendant has raised a further ground for resisting enforcement, namely, that the award was procured by fraud so far as concerns the LPG plant, and it is by no means clear that that issue can be finally determined in this hearing. Moreover, this is the vacation, and the number of Commercial Court judges available is limited, so it may be that in the course of the week priority would have to be given to other urgent applications if they arose.
5. Fourth I have to take into account not only the interests of the parties but the interests of other court users and the efficient use of court resources. This case will take, on present estimates,

three days of hearing time, possibly longer, and further judicial time in the preparation of a judgment, in circumstances where that may turn out to be unnecessary or may be the subject matter of future duplication. As I have indicated, the court resources are more limited than usual in the vacation and, in my view, are better used to service the needs of other court users.

6. Fifth, there does not appear to me to be a compelling urgency in having this application determined now. The claimants are understandably keen to be able to enforce the award as soon as possible against any assets they may be able to find here, and the underlying policy behind the New York Convention and its implementation in the 1996 Act is that double exequatur is not required, nevertheless there can be no finality in the claimant's favour until after resolution of the challenge in Sweden. The delay which is being contemplated by an adjournment is something of the order of four to six months, and any prejudice to the claimant in an ability to enforce the award arising out of the adjournment can be addressed by considering whether to order security, on which I will invite further argument on the limited question which Mr Sprange reserved as to where we are on the sliding scale on the merits.

7. I recognise of course that the parties have prepared for this hearing and that an adjournment will involve some additional cost being wasted because of the inevitability of repreparation, but the sums involved are relatively modest compared with the sums at stake and the importance of the issues to the parties. The more important factors, in my view, are the proper administration of justice and the interests of other court users, as well as the interests of the parties.

8. For those reasons I propose to adjourn the application for it to be refixed at a time when it is anticipated that judgment at first instance has been given by the Svea Court of Appeal. I would envisage that steps could be taken to refix it now, so that a date could be found in the early part of next year for the adjourned hearing to take place.

Mr Justice Popplewell Tuesday, 1st September 2015

Ruling 2 by MR JUSTICE POPPLEWELL

1. MR JUSTICE POPPLEWELL: I have to decide whether I should order security to be provided by the defendant for an amount which represents some or all of the amount awarded.

2. As to the applicable principles, I was referred to a number of authorities. Those that I have found most helpful in giving guidance are the decision of the Court of Appeal in *Soleh Boneh International v Government of the Republic of Uganda* [1993] 2 Lloyd's Reports 208, the decision of the Court of Appeal in *Dardana Limited v Yukos Oil Limited* [2002] EWCA Civ 543, the decision of Mr Justice Gross, as he then was, in *IPCO (Nigeria) Limited v Nigeria National Petroleum* [2005] 2 Lloyd's Reports 326.

3. In the last case, Mr Justice Gross said at paragraph 15:

> "…the Act does not furnish a threshold test in respect of the grant of an adjournment and a power to order the provision of security in the exercise of the court's discretion under section 103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, article (vi) of the New York Convention). Ordinarily a number of considerations are likely to be relevant: (i) Whether the application before the court in the country of origin is brought *bona fide* and not simply by way of delaying tactics; (ii) Whether the application before the court in the country of origin has at least a real, (i.e. realistic) prospect of success, the test in this jurisdiction for resisting summary judgment; (iii) The extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters it is probably unwise to generalise. All must depend on the circumstances of the individual case. As it seems to me the right approach is that of a sliding scale, in any event, embodied in the decision of the Court of Appeal in *Soleh Boneh International Limited v The Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 in the context of the question of security:
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> > "…two important factors must be considered on such an application although I do not mean to say 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.
> > The second point is that the court must consider the ease or difficulty of enforcement of the award and whether it will be rendered more difficult … if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened."

4. That was a quotation from the passage in Lord Justice Staughton's judgment in the *Soleh Boneh* case at page 212.

5. The *IPCO* case and the *Soleh Boneh* case were each cases which are typical of a situation in which this issue arises, where an application is being made for an adjournment by the party which is seeking to resist enforcement of the award. In such cases, an order for the provision of security is commonly seen to be the price which may have to be paid by the applicant in return for the delay which that party is seeking as part of its resistance to the enforcement of the award.

6. In this case, the adjournment has not been sought by the defendant. It is clear from the decision in *Dardana v Yukos* that that is a circumstance which may militate against an order for security. In that case the Court of Appeal refused to order security in circumstances where it was the party in whose favour the award had been made which sought the adjournment, and where the party resisting the award had resisted the adjournment and was asking the court not to delay, but rather to proceed immediately to determine the merits of its challenge to enforcement. Paragraph 52 of the judgment of Lord Justice Mance, as he then was, giving the judgment of the court, makes clear that it was an important factor, in the court exercising its discretion to refuse an order for security, that the party in whose favour the award had been made had, until the end of the two-day hearing, sought to press its application for enforcement and had itself then been the party seeking an adjournment because it recognised that it faced very considerable problems if it persisted in asking the court to determine the application.

7. That was not a case where the court determined of its own motion that there should be an adjournment against the wishes of both parties. Nevertheless in such a case it is important to bear in mind that security under section 103(5) can only be granted where there is an adjournment. The procedure in relation to the enforcement of an award under the New York Convention is that the application to enforce is made in the first instance ex parte; a provisional

order is made permitting enforcement but providing that the award is not to be enforced until the other party has had an opportunity to make an application to set aside the enforcement order; if such an application is made, no security can be ordered in the first instance pending the determination of that application. Accordingly, in the absence of any adjournment, there is simply no jurisdiction in the court to order a party against whom an award has been made to provide security pending the hearing of his application to set aside the provisional order that the award is to be enforced.

8. That suggests that it should be a very important factor militating against an order for security, that there has been no application for an adjournment on the part of the defendant, and where an adjournment has only come about because the court has determined that the interests of comity and of case management, and the public interest in the administration of justice and the interests of other court users, require that the matter be deferred.

9. Applying those principles to the facts of this case. First, so far as the merits are concerned, based on the materials which I have read and the skeleton arguments, my conclusion is that the challenge to the award in the Swedish proceedings has a real chance of success. Beyond that, I do not feel able to place the merits at any particular point on a sliding scale between arguable and manifestly valid.

10. Mr Sprange QC, on behalf of the claimants, sought to persuade me that the case advanced for challenging the award was at best weak and should be put at that end of the scale. Moreover, he drew attention to the fact that under section 103(2), paragraph (f), this court retains a discretion, even where the curial court has set aside an award, to grant recognition and enforcement of the award because the rubric of the section talks in terms of "may".

11. The circumstances in which such a discretion will be exercised must inevitably be rare, as is suggested in passages in the judgments of Lord Mance and Lord Collins in *Dallah v Ministry of Religious Affairs of Pakistan* [2011] 1 AC 763.

12. But despite Mr Sprange's able submissions, I am not persuaded by anything he had to say that I can make a further assessment of the merits of the challenge to the award, than I have indicated, or that the merits are any weaker taking into account this Court's discretion under s.103(2)(f).

13. It follows that I also conclude that the application to challenge the award has been brought in Sweden in good faith and not merely as a delaying tactic. There is no suggestion in this case that there has been any delay by the defendant in pursuing that challenge before the Swedish court.

14. The next factor is that, as I have said, the adjournment has been the consequence of the decision of this court, not of an application by the defendant, which has urged me to hear the New York Convention challenge to enforceability of the award on its application. Mr Malek QC urged upon me that that was a conclusive factor against an order for security. I do not regard it as conclusive but I do regard it, as I have said, as a very powerful factor which militates against an order for security. Had there been no adjournment but merely the fixing of this hearing after the Swedish proceedings had been determined, there would have been no power to order security under the 1996 Act. The claimants could have waited until after those proceedings to have this matter heard but chose not to do so. It is no fault of the defendant that the application is not being determined now.

15. As to the risk of prejudice in relation to enforcement of the award arising out of the adjournment, there is some limited information in paragraph 29 of Mr McCoy's witness statement as to the prospects of enforcing the award against assets in England if the claimants were free to do so now. Essentially what is said is that there are reasons to think that the government has interests in some trading which is conducted by or under the umbrella of English companies. There is no detail as to the nature of those interests or as to the nature or value of the assets themselves or how the claimants would go about enforcement. Mr Sprange says that that is not a matter which is very surprising because at this stage of enforcement it is

difficult for the claimants to have very much information about those assets. Nevertheless, what appears from what Mr McCoy says is that the only assets which have been identified by the claimants at the moment which might be susceptible to enforcement appear to be normal trading interests. There is no basis for inferring that during the period of the adjournment, the defendant would seek to dissipate those assets or remove them from the jurisdiction in order to seek to defeat enforcement or would otherwise deal with the assets other than by way of normal trading. Indeed, were the defendant to be minded to deal with assets so as to avoid execution pursuant to an English Judgment, it has had ample opportunity to do so prior to this hearing, which it envisaged would proceed to a resolution of its application, and the possibility of that application being dismissed.

16. I also bear in mind that the delay which is contemplated by the adjournment in this case is something of the order of four to six months. That is not, of course, to say that there is no risk of prejudice in a delay of six months. It may be that, if the claimants were free to enforce the award now, they might be able to enforce against assets which are to be found within England and Wales, or, on the basis of an enforceable English judgment against assets within Europe. That risk is unquantified in amount or extent. That risk, and the fact that the prospect of enforcement will be delayed by six months, although it is the consequence of the adjournment, is not the consequence of anything which the defendant has brought about. It is not, in my view, sufficient to outweigh the other factors, all of which lead me to the conclusion that in exercising my discretion I ought not to order security to be provided.