Case No: 2014 Folio 1479

Neutral Citation Number: [2015] EWHC 612 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 13 March 2015

Before :

MR JUSTICE EDER

- -

Between :

Y

Respondent/ Claimant

- and -

S

Applicant/ Defendant

- -
- -

MR RICKY DIWAN QC and MR JEREMY BRIER (instructed by **Gibson Dunn & Crutcher LLP**) for the **Respondent/Claimant**
MR ALAN MACLEAN QC and MR ANDREW SCOTT (instructed by **Baker & McKenzie**) for the **Applicant/Defendant**

Hearing dates: 6 March 2015

- -

Judgment

Mr Justice Eder:

1. These are applications by the defendant ("S") (i) to discharge paragraph 2 of the Order of Flaux J dated 12 December 2014 (the "Flaux J Order") as varied by the Order of Andrews J dated 22 December 2014 (the "Andrews J Order") (the "Discharge Application"); and (ii) for leave under s66 of the Arbitration Act 1996 (the "1996 Act") to enforce a LCIA award dated 11 November 2014 (the "Award") (the "s66 Application").

2. The applications arise in somewhat unusual circumstances which I would summarise briefly as follows.

3. S is a Russian national, based in Russia, and in business in the real-estate sector. It is S's case (inter alia) that on 3 March 2008, he entered into an agreement with Y (the alleged "March 2008 Agreement"), a Russian national, and that disputes thereafter arose under the March 2008 Agreement. Those disputes were referred to arbitration pursuant to the alleged arbitration agreement contained in the March 2008 Agreement. In the arbitration, Y asserted, in effect that the March 2008 Agreement (including the arbitration agreement) was not binding and that in any event it did not contain an arbitration agreement; and that therefore the Tribunal had no jurisdiction. In the event, the Tribunal rejected that assertion and numerous other defences advanced on their behalf; and by its Award, the Tribunal substantially upheld S's case in the sum of approximately US$72m. Together with interest, it is S's case that a total of approximately US$84.2 million is due under the Award.

4. On 9 December 2014, Y issued an Arbitration Claim purporting to challenge the Tribunal's jurisdiction under s67(1)(a) of the 1996 Act on various grounds relating to the SHA. S's case is that such challenge is baseless. The Arbitration Claim also included an application for "… *a <u>stay</u> of any enforcement of the Award prior to its determination of this challenge under section 67(1)(a) of the Arbitration Act 1996*" (emphasis added). On 10 December 2014, that application was made on behalf of Y to Flaux J without notice to S. In the event, Flaux J made an order on paper *inter alia* in the following terms:

> "*2. No steps to be taken by [S] to enforce the Award prior to the determination of [Y's] challenge to the Award in these proceedings under section 67 of the Arbitration Act 1996.*
>
> *"3. [S] may apply to set aside or vary this Order within 7 days of service of the same.*"

The Order was served on S on the evening of 15 December 2014, with the result that the set aside date fell in the Court vacation.

5. On 22 December 2014, an oral application was made to the Court without notice on behalf of S to vary the Flaux J Order by discharging paragraph 2 in its entirety. That application came before Andrews J as the vacation Judge. The application was made on grounds that there was no legal basis for paragraph 2 of the Flaux J Order; that it was improperly obtained on a without notice basis; and that it was liable seriously to prejudice S unless discharged. As appears from a note of that hearing, Andrews J

expressed concern that what appeared to be an injunction, restraining enforcement steps anywhere in the world, including against K, had been obtained on a without notice application, without a hearing, and without Y having proffered any cross-undertaking in damages to the Court; and apparently stated that she recognised S's legitimate concern that, unless discharged or varied, paragraph 2 of the Flaux J Order might prevent the foreign protective proceedings under consideration.

6. Notwithstanding these concerns, Andrews J was not prepared to *discharge* paragraph 2 of the Flaux Order at a without notice hearing but instead varied it as follows:

> "*1. Paragraph 2 of the Order of the Honourable Mr Justice Flaux dated 12 December 2014 (the "Order") shall be varied such that:*
>
> *(1) In respect of the Claimant, the Defendant shall have permission to take steps in jurisdictions other than England and Wales (including without limitation Cyprus) for the purposes of enforcing the Award to the extent of commencing enforcement proceedings and taking steps to preserve assets for enforcement.*
>
> (2) *It shall not apply to any step to enforce the Award against K.*
>
> *2. The Application, the evidence filed in support of it, ancillary material such as a note of the hearing, and this Order (the "Application Materials"), shall be served on the Claimant by 4pm on 31 December 2014.*
>
> *3. Paragraph 2 of the Order as varied shall be discharged unless the Claimant within 7 days of being served with the Application Materials sends to the Defendant's solicitors a letter stating that the Claimant will provide to the Court a cross-undertaking in damages in respect of that paragraph, secured by payment into Court or provision of alternative security in a form and amount which is acceptable to the Defendant or the Court. Any dispute as to the form and/or amount of such security shall be a matter to be determined by a Commercial Court Judge. If the parties are agreed that the cross-undertaking is in appropriate terms as to form and amount of security, then the cross-undertaking may be incorporated into the Order by consent.*
>
> *4. The Claimant may apply to set aside or vary this Order within 7 days of service of the same.*
>
> *5. Costs reserved.*
>
> *6. Liberty to apply.*"

7. On 31 December 2014, S served Y with the Andrews J Order and associated materials. Thereafter, the parties' solicitors corresponded regarding S's position that paragraph 2 of the Flaux J Order ought never to have been made; and (without prejudice to that position) the fortification required to satisfy the cross-undertaking that Andrews J envisaged. Meanwhile, S has pursued (and continues to pursue) protective proceedings seeking to preserve assets for the purpose of enforcing the Award in California and Cyprus.

8. Before turning to consider the two main applications before the court, it is convenient to make certain initial observations about the scheme of the 1996 Act and the procedural rules relating to the enforcement of an arbitration award.

9. First, I would refer to s1 of the 1996 Act which provides in material part as follows:

> "*The provisions of this Part are founded on the following principles, and shall be construed accordingly-*
>
> *(a) ...*
>
> *(b) …*
>
> *(c) in matters governed by this Part the court should not intervene except as provided by this Part.*"

In this context, as submitted by Mr Diwan QC, it is important to note what was said by Lord Mance in *Ust-Kamenogorsk Hydropower v AES Ust-Kamenogorsk Hydropower* [2013] 2 Lloyd's Rep 281 at p289 lhc:

> "*The use of the word "should" in section 1(c) was also a deliberate departure from the more prescriptive "shall" appearing in article 5 of the UNCITRAL Model Law. Article 5 reads that "In matters governed by this Law, no court shall intervene except where so provided in this Law". Article 5 had been the subject of forceful critique in A New Arbitration Act?, the 1989 report on the UNCITRAL Model Law by the DAC at a time when its chair was Lord Justice Mustill, who had also represented the United Kingdom at UNCITRAL. Even in matters which might be regarded as falling within Part 1, it is clear that section 1(c) implies a need for caution, rather than an absolute prohibition, before any court intervention.*"

10. S66 of the 1996 provides in material part as follows:

> "*66. Enforcement of the award*
>
> *(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.*

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

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the [1950 c. 27.] Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

As appears from sub-section (1) above and implicit in the words "may" and "by leave of the court", it is plain that the court has a discretion whether or not to grant leave to enforce an award in the same manner as a judgment or order of the court.

11. In general, the procedural rules relating to the enforcement of arbitration awards are governed by CPR 62.17 and 18 which provide in material part as follows:

"*62.17*

This Section of this Part applies to all arbitration enforcement proceedings other than by a claim on the award.

Enforcement of awards

62.18

(1) An application for permission under –

(a) section 66 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.

…

(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 that period has been finally disposed of.

(10) The order must contain a statement of –

(a) the right to make an application to set the order aside; and

(b) the restrictions on enforcement under rule 62.18(9)(b)."

12. As to these procedural rules, Mr Diwan made a number of submissions which I would summarise as follows:

    i) CPR 62.18 is the exclusive and mandatory regime or mechanism for seeking to enforce an arbitral award pursuant to s66 (and s101) of the 1996 Act which requires that: (1) this should be done by way of arbitration claim form (CPR 62.18(1)); and (2) the party seeking permission is precluded from enforcing the arbitral award until the time for making a challenge to the award has expired or the challenge, if made, has been finally disposed of: CPR 62.18(9) and (10).

    ii) In other words, pursuant to this mechanism, the enforcing party, with the permission of the Court, obtains an *interim* order of enforcement or an order '*nisi'* only, pending the final disposal of any challenge: see *Continental Transfert Technique Ltd v The Federal Government of Nigeria and others* [2010] EWHC 780 (Comm) at paragraphs 3-5; *MTS v Nomihold Securities* [2012] 1 Lloyd's Rep 6 (CA) at paragraph 10.

    iii) These provisions fulfil this jurisdiction's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") not to permit enforcement of awards until the final disposal of any challenge to the Award. These provisions thus constitute an automatic case management order to be made in relation to such orders for permission to enforce.

    So far as necessary, I consider these submissions further below.

13. Finally, at this stage, I would refer to s70 of the 1996 Act which provides in material part as follows:

    "*Challenge or appeal: supplementary provisions*

    (1) The following provisions apply to an application or appeal under section 67, 68 or 69.

    …

    (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."

14. Against this background, I turn to consider the two main applications before the court as referred to above. In that context, Mr Diwan submitted that I should consider the s66 application first because (i) this raised a short question of law on the mandatory nature of the restriction on obtaining a final order on enforcement at this stage; and (ii) if Y is correct on the construction of CPR 62.18, the Discharge Application is necessarily subsumed within and superseded by the s66 application. I see some force in that submission. However, the Discharge Application relates to events first in time and, whilst recognising that there is a potential interrelationship between the two applications, it seems to me preferable to deal first with the Discharge Application.

The Discharge Application

15. There was some dispute as to the true nature of paragraph 2 of the Flaux J Order. Mr Maclean QC submitted that, in truth, it was in the nature of an injunction. Mr Diwan QC submitted that this was not so; that it was a "normal order" involving no "worldwide restriction" in the absence of express words to that effect; that it was, in effect, no more than a "case management restriction" precluding S from taking steps to obtain a final order enforcing the Award in the same manner as a judgment of the court prior to the court determining the s67 challenge; that the language of the order tracked the language of an order that would ordinarily have been made if S had applied under s66 of the 1996 Act for leave to enforce the Award and an order had been made under CPR 62.18(9); and that S had wrongly interpreted the Flaux J Order as a worldwide anti-enforcement injunction (which it is not) rather than a "case management stay" on obtaining a final order on enforcement pending the s67 challenge to ensure that the established regime for the enforcement of awards is respected.

16. As to these submissions, Mr Diwan would seem to be right in saying that the language of paragraph 2 of the Flaux J Order tracks the language of CPR 62.18(9); and I am prepared to assume that in that context (i.e. an application made pursuant to CPR 62.18(9)), the effect of such language would ordinarily not extend and not be intended to extend to enforcement proceedings which might be taken outside of this jurisdiction. However, in the present circumstances i.e. where the Flaux J Order was obtained otherwise than in the context of an application pursuant to CPR 62.18, it seems to me that, on its face, Mr Maclean QC is right i.e. the language would appear to be unrestricted. In that context, it is perhaps noteworthy that that is how Andrews J appears to have understood its effect. At the very least, it seems to me that the wording is ambiguous and requires clarification if it is not – and not intended - to extend to enforcement proceedings abroad; and in my view, it is important that there should be no ambiguity at all. To a certain extent, the wording as modified by Andrews J provides some clarification. However, as submitted by Mr Maclean and as I understood Mr Diwan to accept, the wording should, in any event, be modified to make plain that the restriction on enforcement does not apply to any steps that might be taken to enforce the Award outside this jurisdiction. Thankfully, this served to narrow considerably the scope of the disputes between the parties.

17. That leaves the more fundamental question i.e. should the original orders of both Flaux J and Andrews J have been granted at all? In summary, Mr Diwan submitted that the grant of such an order made sense as a matter of "sensible case management" and that it was supported by the decision of HH Judge Raymond Jack QC in *Apis AS v Fantazia Kereskedelmi KFT* [2001] All ER 348 where absent any application for leave to enforce the award in that case under s66 (see p353b-c) it appears at p356b that an order was made prohibiting steps being taken to enforce such award in England. The underlying reasoning which persuaded the learned Judge to make that order appears at p353a-j viz.

> "*An arbitration award is not a judgment. Section 66 of the 1996 Act provides that an award may be enforced in the same manner as a judgment if the leave of the court is obtained. Until that occurs the usual processes of enforcement or execution appropriate to a judgment cannot be employed. So until leave is given, no question of staying execution can arise. Once leave has been given, a stay of execution under RSC Ord 45, r 11 is unlikely to be appropriate. I refer to Far Eastern Shipping Co v AKP Soveonflot [1995] 1 Lloyd's Rep 520. No leave here has been sought under s 66 of the 1996 Act. Nor is it likely to be. For I am told that the buyers have no assets in England.*
>
> *There is no provision in the Arbitration Acts which provides for the court to make an order preventing steps being taken to enforce an award. Counsel have not found any case in which the court has been asked to make such an order. There is, however, some assistance in s 103 of the 1996 Act. This provides:*
>
> *'(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.*
>
> *(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves ...'*
>
> *I can omit (a) and (b):*
>
> *'(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case ...'*
>
> *I can then go to (f):*
>
> *'that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.'*
>
> *This reflects art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958; UN TS 330 (1959); Cmnd 6419) of 10 June 1958, called the New York Convention. The United Kingdom and Slovakia*

> *are parties to the convention, though it is unclear on the information provided to me whether Slovakia is a party because of the accedence of the former Czechoslovakia or because Slovakia itself has acceded.*
>
> *Article V and s 103.2(f) presuppose that an award may be suspended by a competent authority in the country in which it is made, which authority--I may presume--will normally be the appropriate court. It is but a small step further to hypothesise that such a suspension may be ordered pending an application to set the award aside, perhaps on grounds referred to earlier in the subsection. If an award is suspended, it will be deprived of immediate effect. The article and the section thus pre-suppose that one court has power to order that an award shall not have effect depending on the determination of an application to set it aside and this may be relied on to resist enforcement by a court in another country. In the case of the section, the two countries are a foreign country and England respectively. <u>It is a short further step to ascribe the same power to suspend to the English court in respect of awards made in England, to the enforcement of which art V of the convention will apply abroad. The parties are right to accept that under its inherent jurisdiction the English court has the power in question here</u>.*" (emphasis added)

18. As appears from this passage, the learned Judge considered that the court had a general power to "suspend" enforcement of an award made in England. It also appears that the parties in that case accepted that such power derived from the inherent jurisdiction of the court.

19. Without deciding the point and for present purposes only, I am prepared to assume in favour of Mr Diwan that the court has an inherent jurisdiction to make an order suspending enforcement of the award in England as the court did in *Apis.* However, it is plain from the terms of s1(c) of the 1996 Act that the Court "*should not intervene except as provided by this Part of the Act*"; and although, as stated by Lord Mance in *AES* (see above), this is not an absolute prohibition, the wording implies the need, at the very least, for "*caution*" before any court intervention.

20. Here, it seems to me that it was both unnecessary and inappropriate for the court to grant the original order as appears in paragraph 2 of the Flaux J Order or as subsequently varied by Andrews J for the following reasons. First, as Mr Diwan accepts (and indeed asserts) it was not intended to – and did not - apply to any enforcement proceedings that might be taken abroad. Second, so far as any possible enforcement steps in England are concerned, there is no evidence that Y has any assets within this jurisdiction and no suggestion (at least at the moment) of S intending to seek enforcement within this jurisdiction. In any event, any enforcement of the Award in the same manner as a judgment or order within this jurisdiction requires the leave of the court and although, as noted above, CPR 62.18 in effect permits an application for leave to enforce being made without notice and the grant of an order *nisi*, the effect of

CPR 62.18(9) is to prohibit any enforcement in fact for a period pending any application by the respondent to set aside such order and, if such application be made, until determination of such application. In other words, there was no real risk of S seeking to take steps to enforce the Award because if S did make an application for an order pursuant to s66 of the 1996 Act, the only order that S would have obtained is an order *nisi* which would have been subject to the automatic and mandatory restrictions in CPR 62.18(9) and which would have protected Y's position. In these circumstances, I see no or no sufficient practical need for paragraph 2 of the Flaux J Order either in its original form or as varied by Andrews J.

21. For these reasons, I would accede to the Discharge Application i.e. I would discharge paragraph 2 of the Flaux J Order as varied by the Andrews J Order.

22. I should mention that Mr Maclean submitted in the alternative that the Flaux J Order should be set aside on the basis that Y's application failed properly to draw the Judge's attention to the highly unusual nature of the order sought, in serious breach of his duties of full and frank disclosure and fair presentation on a without notice application. Given my conclusion as stated above, it is unnecessary to consider this alternative submission.

The s66 Application

23. It is important to understand that the application made by Mr Maclean under this head on behalf of S is that the court should now make an unrestricted final order granting leave to enforce the Award in the same manner as a judgment or order of the court i.e. before the disposal of Y's pending s67 challenge which, following a recent directions hearing by Flaux J, is now fixed for a 4-day hearing in June 2015.

24. In essence, Mr Diwan submitted that such application should be rejected in particular because (i) it is contrary to the mandatory and exclusive regime for the enforcement of arbitration awards under CPR 62.18; and (ii) such an order would be in breach of this country's treaty obligations under the New York Convention and would deprive S of his New York Convention defences. As to the former, he referred, in particular, to *Russell on Arbitration* (23rd edition), paras 8-219 and 8-224; and *Merkin, Arbitration Law* at paras 19.18 and 19.19.

25. In the course of the argument in relation to this application, there was much debate as to (a) whether CPR 62.18 provides an exclusive code for the enforcement of arbitration awards; (b) if an application is made for leave to enforce an award pursuant thereto, whether the court is in effect inevitably bound to make an order as stipulated in CPR 62.18(9) i.e. prohibiting enforcement *pro tem;* (c) whether the court might be able to vary or "suspend" the terms of such order so as to require, for example, the respondent to put up security for the amount of the award as part of its general discretion which arises under s66 of the 1996 Act whether or not to grant leave to enforce an award; and (d) in that context what is the proper approach of the court in determining whether any security should be ordered and, in particular, whether the test in *Soleh Boneh International v Government of Republic of Uganda* [1993] 2 Lloyd's Rep 208 applied. In this context, I was also referred to the decision of Mackay J in *Socadec S.A. v Pan Afric Impex Company Limited* [2003] EWHC 2086.

26. Interesting as the debate in respect of these matters may be, I do not consider that it is necessary to deal with them – at least in any detail. I accept that the present procedural position is unusual i.e. whereas normally, the original application for leave to enforce is made without notice pursuant to CPR 62.18, the fact is that this application comes on with notice. However, of itself, I do not consider that this should mean that I should reject the application for that reason. Any such suggestion would, in my view, not only be contrary to the overriding objective but also absurd – and I did not understand Mr Diwan to suggest otherwise. However, I do not consider that the mere fact that this application comes on with notice should put S in any better position that he would otherwise have been in if the application had come on without notice in the usual way. On this basis alone, it is my conclusion that Mr Maclean is not entitled to a final order now in the terms he seeks; or, at the very least, I would decline to make such final order in the exercise of my discretion.

27. Initially, it appeared that Y's position was that the application by S for leave to enforce was inevitably doomed because (i) CPR 62.18 is mandatory i.e. in effect, it requires any such application to be made by a separate Arbitration Claim; and (ii) here, S had not issued a separate Arbitration Claim but had instead issued an application notice. However, in the event, Mr Diwan was prepared to accept that this was not necessarily fatal. To this extent, there was some narrowing of the ground between the parties and Mr Diwan suggested in his skeleton argument that the appropriate order in this context should be:

> "*1. Permission be given to [S] to enter judgment in the terms of the Award pursuant to s66(2) of the 1996 Act.*
>
> *2. No steps be taken to enforce the Award prior to final disposal of the s67 challenge*."

This formulation follows the broad structure of the kind of order that would normally be made without notice under CPR 62.18.

28. In light of the above and subject to three points, I agree that that this seems the appropriate order to make.

29. The first point concerns the scope of paragraph 2 of this suggested draft order. Mr Diwan accepted that the prohibition in that paragraph relates only to steps that might otherwise be taken within this jurisdiction; and in my view, this should be made plain by incorporating these words i.e. "*within this jurisdiction*" after the word "Award" in that paragraph 2.

30. The second point also concerns the formulation of paragraph 2 of this suggested draft order. Following the structure of CPR 62.18(9), the prohibition against taking steps to enforce is normally linked to a potential future application to set aside the order for leave to enforce. Here, I recognise that an application under s67 of the 1996 Act has already been issued; and this explains the wording suggested by Mr Diwan. However, in my view and subject to any further submissions from Counsel, the appropriate wording should be as follows:

> "*1. Subject to paragraph 2, permission be given to [S] to enter judgment in the terms of the Award pursuant to s66(2) of the 1996 Act.*
>
> *2. By [date], Y may apply to set aside this order.*
>
> *3. No steps be taken to enforce the Award within this jurisdiction prior to [date] or any application made by Y within that period has been finally disposed of.*"

No doubt, the application to set aside may refer to the existing s67 application and/or the same grounds. But it seems to me that this wording is more appropriate because it follows the structure of CPR 62.18.

31. The third point is more fundamental. It concerns the question of a possible order requiring Y to put up security for the amount in dispute. I have already referred to this in part. Here, Mr Maclean submitted that any order restricting enforcement of the Award pending determination of Y's s67 challenge should be conditional upon Y providing adequate security i.e. the full amount due under the Award. In support of that submission he relied upon *Apis AS v Fantazia Kereskedelmi KFT* and *Socadec S.A. v Pan Afric Impex Company Limited*. Although the former was a case where there was no existing s66 application, I accept that these decisions appear to support an argument that the court may, in an appropriate case, make any order restricting enforcement of an award conditional upon the respondent putting up security. Mr Maclean forcefully submitted that such an argument is also consistent with the discretion under s66 of the 1996 Act as to whether or not to grant leave to enforce i.e. if the court has a discretion to refuse enforcement, presumably it can grant leave to enforce on terms.

32. In principle, I see much force in this argument. However, it is not clear to me how such an argument fits in with the overall scheme of CPR 62.18 including, in particular, CPR 62.18(9); nor how the approach of the court to the question of the provision of security in *Apis* and *Socadec* fits in with the approach of the court under s70(7) of the 1996 Act: see *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm) at [37]-[44]. Further, contrary to Mr Maclean's submissions, I was not persuaded that he derived any assistance from Article VI of the New York Convention.

33. Sadly, the time allowed for the present hearing (2 hours including Judgment) was insufficient to permit proper consideration of this argument. This is unfortunate because it raises a point of some considerable practical importance. My tentative view is that CPR 62.18(9) speaks for itself i.e. in principle, a successful party is *prima facie* entitled to an order *nisi* granting leave to enforce an arbitration award as prescribed by CPR 62.18(9) but if an application to set aside such order is issued then (subject possibly to a counter strike-out application) the award must not be enforced until such application is disposed of. There is nothing in CPR 62.18 which contemplates that such temporary prohibition against enforcement may be made subject to an order for the provision of security. As it seems to me, this is also consistent with (i) the decision of this court in *Ipco (Nigeria) v Nigerian National Petroleum* [2005] 2 Lloyd's Rep. 326 at [20] where an enforcement order was held to be defective because the restriction on enforcement was not inserted into the order obtained; and (ii) s70(7) of the 1996 Act only applies to

ss67, 68 and 69 of the 1996 Act i.e. it does not apply to any application for leave to enforce under s66 of the 1996 Act. Consistent with s70(7), it seems to me that any application for an order requiring provision of security for the amount of dispute must be made in the context of a discrete application under ss67, 68 or 69 supported by adequate evidence pursuant to that statutory provision.

34. Even if that is wrong, it seems to me that the approach of the court to that question i.e. whether or not to order the provision of security for the amount in dispute, should in principle be similar under s66 as it is under s70(7). As to the latter, I would refer to my recent judgment in *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm) at [37]-[44] where I considered, and followed, the earlier authorities in the context of s70(7). Here, I should emphasise that Mr Diwan submitted that there had been insufficient time to put in further evidence to deal with Mr Maclean's argument in this context. Be that as it may, it is, in my view, quite impossible for me to say that the s67 challenge is "flimsy"; nor am I persuaded that there is any relevant prejudice of the kind referred to in the authorities given in particular the matters already stated above. On this basis, I would, in the exercise of my discretion, reject Mr Maclean's submission that I should make the order restricting enforcement conditional on the provision of security.

35. For the avoidance of doubt, I should emphasise that there is no present application before me under s70(7) of the 1996 Act; and that nothing that I say should preclude any such application in the future or otherwise affect the court's consideration of such application if and when it is ever made.

Conclusion

36. For these reasons, I would grant the Discharge Application and the s66 application in the terms stated above subject to any further submissions as to the precise form of wording; but I would, in effect, reject Mr Maclean's submission that the latter should be conditional on the provision of security by Y. The order should also include liberty to apply both generally and, in particular, to permit S to make an application (if so advised) pursuant to s70(7) of the 1996 Act. Accordingly, Counsel are requested to seek to agree a draft order (including consequential matters). Failing agreement, I will deal with any outstanding issues.