Neutral Citation Number: [2014] EWCA Civ 356

Case No: A3/2013/0447

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
Mr Justice Cooke
[2013] EWHC 213 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 27th March 2014

Before :

LORD JUSTICE TOMLINSON

LORD JUSTICE RYDER
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

(1) Anthony Lombard-Knight **(2) Jakob Kinde**	**Appellants**
- and -	
Rainstorm Pictures Inc	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

David Berkley QC (instructed by **Richard Slade and Company**) for the **Appellants**
David Chivers QC (instructed by **Howard Kennedy FSI LLP**) for the **Respondent**

Hearing dates : 3/4 December 2013

- -

Judgment

Lord Justice Tomlinson :

1. Sections 100-103 of the Arbitration Act 1996 give effect in the United Kingdom to the 1958 New York Convention on the Recognition of Foreign Arbitral Awards. That Convention was first given domestic effect by the Arbitration Act 1975. Section 102 of the 1996 Act provides:-

> "(1) A party seeking the recognition or enforcement of a New York Convention award must produce –
>
> (a) the duly authenticated original award or a duly certified copy of it, and
>
> (b) the original arbitration agreement or a duly certified copy of it.
>
> (2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent."

This almost exactly reproduces Article IV of the Convention. It is immediately apparent that the statutory language embraces two concepts, authentication and certification. The question in this appeal concerns the manner in which a copy of an original arbitration agreement may be duly certified.

2. Lord Mustill and Steward Boyd QC, in their work The Law and Practice of Commercial Arbitration in England, 2nd Ed, 1989, remark, at page 425 that:-

> "The references to documents being "duly authenticated" or "duly certified" are unfamiliar in an English context, but probably add nothing to the ordinary rules of evidence concerning proof of documents: the most convenient method of proof will generally be by exhibiting the document to an affidavit deposing to its authenticity, accuracy as a copy, or truth as a translation, as the case may be."

3. Bearing in mind that the statute directly enacts the Convention, the statutory language must of course be given an autonomous meaning, which may be informed by the *travaux preparatoires*, the decisions on it of foreign courts and the views on it of foreign jurists – *la jurisprudence* and *la doctrine* – see Bennion on Statutory Interpretation, 5th Ed, 2008 at page 682.

4. Applications for enforcement are dealt with in the Commercial Court in the first instance on paper. CPR 62.18(1)(b) provides that an application for permission under s.101 of the 1996 Act to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form. CPR 62.18(6) provides that an application for permission must be supported by written evidence exhibiting, where the application is under s.101 of the 1996 Act, the documents required to be produced by s.102 of that Act. So here on 4 September 2012 Eder J on the paper application granted leave to the Claimant, Rainstorm Pictures Inc, to enter judgment

against the Defendants in the same terms of [sic, scilicet as] the Award made by JAMS [Judicial Arbitration and Mediation Service, Los Angeles, California] on the 26 March 2012. The Order made by Eder J recited:-

> "1. Anthony Lombard-Knight shall pay to Rainstorm Pictures Inc the sum of US$ 13,273,000 as compensatory damages for breach of the December 3, 2010 Agreement.
>
> 2. Knight and Jakob Kinde shall jointly and severally pay to Rainstorm the sum of US$ 13,511,000 as compensatory damages for breach of the December 23, 2010 Agreement.
>
> 3. Knight and Kinde shall jointly and severally pay to Rainstorm the sum of US$ 28,048.87 for its fees and costs of this proceeding."

5. As required by CPR 62.18(9) and (10) the Order also recited:-

> "The Defendants may apply to have this order set aside within fourteen 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.
>
> The order may not be enforced until after the end of that period or any application by the Defendant(s) to set it aside has been finally disposed of."

6. The Agreements of 3 and 23 December 2010, to which reference is made in the Order, were Investment Agreements concluded between Fortnom and Co SA as capital investor and Rainstorm Pictures Inc, the first of which was signed for and on behalf of Fortnom by the First Defendant/Appellant, Anthony Lombard-Knight, as Director of Fortnom, and the second of which was signed for and on behalf of Fortnom by both Lombard-Knight and the Second Defendant/Appellant, Jakob Kinde, as Directors of Fortnom.

7. The Investment Agreements provided:-

> "10. **Arbitration**
>
> If any controversy, dispute of claim arising out of or relating to this Agreement cannot be settled by the parties through good faith discussion and negotiation, it shall be settled by binding mediation and/or arbitration on an expedited basis in Los Angeles, California under the rules of the JAMS (Judicial Arbitration and Mediation Service). There shall be a single arbitrator mutually selected by the parties (or if the parties cannot agree, then the arbitrator shall be final and binding on the parties, and judgment on the award rendered by be entered in any court having jurisdiction. The losing party in such arbitration shall pay for all costs of the arbitration, including the winning party's reasonable legal fees and costs.

> 11. **Governing Law and Jurisdiction**
>
> This Agreement shall be governed by, interpreted and enforced in accordance with the internal laws of the State of California and the Federal laws of the United States applicable therein which are applicable to contracts made and to be fully performed within such state without reference to its conflict of laws provisions. Except as provided in paragraph 9 above, the parties hereby submit to the exclusive jurisdiction and venue of the State and Federal courts located in Los Angeles, California with respect to all matters concerning this Agreement, including, without limitation, the enforcement of any arbitration award. Any process in such proceeding may be served by, among other methods, delivering it or mailing it, by registered or certified mail, directed to, as applicable, the Investor's or Rainstorm's address as designated in this Agreement. Any such delivery of mail service shall have the same effect as personal service within the State of California."

8. A sole arbitrator was designated in accordance with the Investment Agreements. The arbitrator found, and as far as I know it is in any event common ground, that at the time the Agreements were executed Fortnom and Co SA did not exist. Indeed, so far as I know, it is not suggested that Fortnom has ever existed. The arbitrator determined that, in accordance with the governing law, the signatories to the agreements on behalf of the non-existent entity were bound personally on the contracts.

9. Section 101(2) of the 1996 Act provides:-

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

10. The without notice application to enforce the award in the same manner as a judgment was made by Claim Form issued on 29 August 2012. The Claim Form included the following statements:-

> "Agreements were signed by the respective parties on the 3 and 23 December 2010. These agreements (see attached) expressly stated (Clause 10) that in the event of disputes between the parties binding arbitration would take place at the Judicial Arbitration and Mediation Service ("JAMS") in Los Angeles, California.
>
> A Final Award ("the Award") was made by JAMS on the 26 march 2012 against the Defendants herein (see attached)."

11. Photocopies of the Agreements were attached to the Claim Form. It is common ground that the photocopies were true copies of the Agreements. A photocopy of the Award was attached to the Claim Form, along with a separate document, entitled "Certification of Award", signed by Karen Beutler, Business Manager of the Los

Angeles Resolution Center of JAMS, certifying that this was a true and correct copy of the Award.

12. The Claim Form was supported by a Statement of Truth, which recited:-

> "I believe that the facts stated in these Particulars of Claim are true.
>
> I am duly authorised by the Claimant to sign this statement."

The standard form wording of the Claim Form requires the maker of the Statement of Truth, if he is not the Claimant's solicitor, to state the position or office held (if signing on behalf of a firm or company). The maker of the Statement of Truth was Mr Granville Hodge, who described himself as "Senior Executive".

13. On 25 September 2012 the Defendants issued an application seeking to set aside the enforcement order made by Eder J. The sole ground relied upon was that enforcement of the award would be "against public policy". This was a reference to s.103(3) of the 1996 Act. For ease of reference I set out the whole of s.103 as it is useful to have in mind the ambit of what is usually the second stage of the enforcement process:-

> "Refusal of recognition or enforcement.
>
> (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—
>
> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> (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;
>
> (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
>
> (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

> (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.
>
> (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
>
> (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
>
> (5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.
>
> It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."

This section essentially reproduces Articles V and VI of the Convention.

14. The hearing was directed to be heard on Friday 1 February 2013, with, so far as I can gather, the morning set aside. The Defendants had indicated that a hearing of two hours duration would be required.

15. On 23 January 2013 the Defendants served a draft amended application notice setting out five further grounds upon which, under s.103(2) of the 1996 Act, enforcement of the Award should be refused. It suffices to say that each of the heads under s.103(2) was now sought to be relied upon, with the exception of s.103(2)(e) which relates to the composition of the arbitral tribunal.

16. On the morning of the hearing itself, indeed as I understand it as the parties' counsel were sitting in court waiting for the judge to take his place on the bench, the Defendants for the first time indicated their intention to argue that the Enforcement Order was in any event irregular because Rainstorm had failed to comply with s.102(1)(b) in that the two arbitration agreements had not been produced to the court in the form of either the originals or certified copies thereof.

17. The judge, Cooke J, was referred to no authority. He plainly regarded the new and unforeshadowed argument as of little consequence since he anticipated, rightly, that if he acceded to it the only consequence would be that a further application would be made that same day, in a manner thought to be compliant. He did accede to the argument, delivering an extempore judgment in which he indicated that the initial

Order should indeed be set aside, but at the same time dealing substantively with all the other objections to enforcement. Thus the relevant parts of his judgment read:-

> "4. In my judgment, there was an irregularity inasmuch as the terms of section 102(1) were not complied with. When the section refers to production of the original Arbitration Agreement or a duly certified copy of it, it is not sufficient merely to produce a copy of the award with an accompanying Statement of Truth in a Claim Form. Certification means what it says. There must be some independent certification of the copy of the Agreement which is produced to the court. The importance of that provision appears from the reference to the need for production either of an original Arbitration Agreement or a duly certified copy of it. This, of course, is important in the context of the New York Convention and the international dimension which is involved in enforcement of it. A court must be astute to ensure that the appropriate formalities are complied with so that there can be no doubt whatsoever about the validity of an award or the validity of the Arbitration Agreements which underlie it. Along with the Arbitration Agreement there must be independent certification of the authenticity of the copy produced as compared with an original.
>
> 5. In consequence, it is, therefore, right, in my judgment, to say that the initial order was irregular. It is agreed between the parties that I can make a fresh order today for enforcement, but it would be of the kind that was originally made, namely allowing time for any objection to be raised and staying enforcement in the meantime.
>
> 6. In my view, the best use of the parties' time in these circumstances, and given the expense already incurred, would be to decide as many issues as I could possibly decide today, dealing with the substantive objections that were taken to enforcement of the Award. It will, of course, be open to the Defendants to raise further objections in the future, but inasmuch as I decide issues today, it seems to me, though I have heard no argument on the subject, that issue estoppel is likely to arise in relation to all those issues which I do decide, those matters being fully argued and the subject of evidence produced to the court.
>
> 7. The application to set aside, which was originally made in September 2012, was made on the basis of section 103(3) of the Arbitration Act, namely that it would be contrary to public policy to recognise or enforce the award. On 23rd January 2013, a draft Application Notice set out five further grounds upon which the Defendants wished to rely and permission was sought today to rely upon those grounds.

> 8. The Claimants object to this application for a late amendment. They say that the evidence which is adduced now in support of these new grounds could have been obtained at any time during the currency of the proceedings and that the evidence which is produced is, in any event, highly unsatisfactory. It is said that there has been no satisfactory explanation as to the lateness of the application or why the court should exercise any indulgence to the Defendants to allow these new grounds to be argued.
>
> 9. In essence, I accept what is said about the absence of any proper explanation for not taking such points earlier. As to the evidence which is relied on in support of it, I will come to that in a moment.
>
> 10. Notwithstanding the lateness and absence of any explanation, if justice requires that the points which are raised should be dealt with, then the court must grapple with them. . . .
>
> . . . .
>
> 42. In the result, therefore, none of the grounds which are put forward by the Defendants for objecting to the enforcement of the award are sustainable. I have dealt with each of those grounds as a matter of substance, but I record also that I see no basis whatsoever for the application for leave to amend because quite insufficient reasons were adduced for allowing such amendment to occur. Way back in September of last year, within the 14 day limit, the Defendants were able to produce evidence on what they regarded as the public policy ground which should prevent enforcement of the award. This other material has come forward without excuse at a very late stage indeed. I have dealt with it as a matter of justice, but there is no reason why the court should in fact grant any such indulgence save perhaps, of course, the point that arose this morning and which I have held to be a good point, namely the irregularity in the obtaining of the order in the first place.
>
> 43. In consequence, the position must be that I must set aside the order, but, having decided that there are no grounds upon which enforcement can be refused, it is right that I should now make a fresh order giving leave to the Claimant to enforce the award as a judgment, but, in accordance with the terms of Order 62, set the appropriate period of time during which the judgment cannot be enforced and in which it is open to the Defendants to raise any objections they feel they properly can."

18. In consequence an Order was made which recited that the court had determined that the earlier order of Eder J was irregular by reason of the Claimant's failure to comply with the requirements of s.102 of the Arbitration Act 1996, and continued:-

> "2. AND UPON the court notwithstanding such determination having proceeded and considered the substantive merits of the Application and the draft Amended Application
>
> AND the court having determined each of the grounds stated in the Application and the draft Amended Application in favour of the Claimant
>
> IT IS ORDERED THAT:-
>
> 1. The Claimant's [sic, scilicet Defendants'] application to amend the Application in accordance with the draft Amended Application is refused.
>
> 2. The Order is set aside solely on the ground of its irregularity.
>
> 3. The Defendants shall within fourteen days of the date of this Order pay the Claimant's costs of the Application, which said costs are summarily assessed in the sum of £14,000.
>
> 4. Permission to appeal against this Order is refused."

19. What next occurred is described in a witness statement dated 29 November 2013 of Timothy John Bignell, a solicitor and Partner in the firm of Messrs Howard Kennedy Fsi LLP, who had conduct of the action on the part of Rainstorm. At paragraph 5 he says:-

> "Immediately following the hearing therefore, Mr Justice Cooke's clerk provided me with the two arbitration agreements which were upon the file, I endorsed each of these agreements in manuscript as certified copies of the originals, and signed and dated the endorsements. I then handed the (now certified) arbitration agreements back to the clerk, who placed them in the file. I can only assume that he then put them before Mr Justice Cooke, who felt he was able to make the Order that he then did."

Thus it was that on 1 February 2013 Cooke J also made a second Order, in substantially the same terms as the initial Order made by Eder J on 4 September 2012.

20. The court is not concerned with the status of the Order made by Cooke J on 1 February 2013.

21. The Defendants appeal against that part of Cooke J's first Order which determined, adversely to them, all of the grounds of opposition to enforcement stated in their original application notice and in their amended application notice. Beatson LJ granted permission to appeal on the following grounds:-

> "1. The Learned Judge having correctly determined that the Order dated the 4th September 2012 ("the Order"), whereby the Claimant was granted leave to enter judgment against the Defendant in the same terms as the Award made by JAMS on

> the 2nd March 2012 ("the Enforcement Order"), was irregular by reason of the Claimant's failure to comply with the mandatory provisions of section 102 of the Arbitration Act 1996 ought not then to have proceeded and considered the substantive merits of the Defendant's Application and thereby decide the theoretical issues which would have properly arisen had the Enforcement Order been regular.
>
> 2. The Learned Judge erred in refusing the Defendant's Application to amend the Application in accordance with the draft Amended Application, having regard to:
>
> > 2.1 The arguability and substantial merits of the further grounds therein stated;
> >
> > 2.2 The absence of any or any substantial prejudice to the Claimant of allowing the Amendment;
> >
> > 2.3 The apparent eagerness of the learned Judge to consider and dispose of the substantive issues raised in the draft Amended Application.
> >
> > . . .
> >
> > 6. The Learned Judge erred in determining that the Defendants each had notice of the arbitral proceedings, when there were serious questions raised by them as to whether or not they had been served and in particular whether or not they had notice that it was being alleged that they were personally liable which could not be decided on a summary basis.
> >
> > 7. The Learned Judge was not bound by the arbitral tribunal's own decision and should have directed a trial of the issue of jurisdiction and notice in accordance with the principles enunciated by the Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763; [2010] UKSC 46."

22. Beatson LJ refused permission to appeal on eleven other grounds, including an argument to the effect that the Defendants were not parties to any arbitration agreement. It follows that the permission granted on Ground 7 relates only to the argument concerning lack of notice of the arbitral proceedings, and I did not understand Mr David Berkley QC for the Defendants to contend otherwise.

23. By a cross-appeal brought with leave of Aikens LJ, Rainstorm contends that the judge should not have set aside the Order made by Eder J. Rainstorm contends that the copies of the arbitration agreements produced to Eder J for the purposes of the application were indeed duly certified. The arbitration agreements were said to be "attached" to the Claim Form. Attached thereto were photocopies of the agreements.

It is obvious that what was being put forward were copies which were said to be true copies of the original arbitration agreements. The Statement of Truth attested to the truth of the facts stated in the Claim Form.

24. Alternatively, contends Rainstorm, Cooke J should not in any event have set aside the enforcement order made by Eder J because it was not in contention before him that the copies attached to the Claim Form were true copies of the arbitration agreements. Both Defendants independently attached identical copies of the arbitration agreements to their Witness Statements dated 24 September 2012 and 22 October 2012, made in support of their application to set aside the enforcement order. In paragraph 13 of his Witness Statement Mr Lombard-Knight asserted that he had signed two contracts, identifying them by reference to the photocopies attached to his Witness Statement. In paragraph 12 of his Witness Statement Mr Kinde explained that Mr Lombard-Knight alone had signed the first agreement because he, Mr Kinde, could not be present at the signing due to unforeseen weather conditions, and he asserted that both of them had signed the second agreement. Again, both agreements were identified by reference to the documents attached to the Witness Statement. It follows, submits Rainstorm, that in circumstances where there was no doubt that the copies of the arbitration agreements were identical to the originals and this was not in dispute, the judge should have waived the apparently strict formal requirements of s.102(1)(b). In the further alternative Rainstorm suggests that the judge should not in such circumstances have exercised his discretion to set aside the enforcement order.

Discussion

25. I preface my remarks by observing, as is implicit in what I have already said, that neither the judge nor Rainstorm's counsel had any idea in advance of the hearing that a point on certification would arise. The judge was referred to no authority. Such argument as was proffered to the judge was improvised and unprepared. The judge therefore received no assistance, whereas we have had the benefit of carefully considered argument informed by copious citation of authority and relevant learning derived from the international context.

26. The reasoning of the judge at paragraph 4 of his judgment is in my respectful view open to question in three respects. First, there is no requirement in the Act for "independent" certification and Mr Berkley did not contend for certification of the arbitration agreements by an independent person. The reason why the Claim Form did not here work as certification of the copies was, submitted Mr Berkley, because Mr Hodge did not say that he had compared the copies with the originals. Mr Berkley referred to definitions of "certified copy" in both Black's Law Dictionary, 9th Ed, and Jowitt's Dictionary of English Law, 3rd Ed, which speak of a duplicate or copy of an original document certified as an exact reproduction [usually] by the officer responsible for issuing or keeping the original or by the officer to whose custody the original is entrusted. Mr Berkley did not suggest that the class of those capable of certifying a copy of an original is for present purposes so circumscribed, but he did suggest that inherent in the process of "due certification" was a comparison of the copy with the original. I will revert to that point, but the judge was I think wrong to look for "independent" certification and I am not quite sure what in any event he meant by it, bearing in mind that he later accepted certification by Rainstorm's solicitor, Mr Bignell. Although there is and was criticism of the role played by Mr

Hodge, I do not think that the judge was suggesting that the certification was defective simply because of his involvement in it.

27. Secondly, the judge was also I think wrong to focus on the validity of the arbitration agreements. The certification of the copy of the arbitration agreement does not I think go to the validity of the arbitration agreement itself. In *Dardana Limited v Yukos Oil Company* [2002] 1 All ER Comm 819 Mance LJ described the scheme of the 1996 Act as encompassing a two-stage process. In paragraphs 10 and 11 of his judgment he said this:-

> "10. I consider that the scheme of the Act is reasonably clear. A successful party to a New York Convention award, as defined in s.100(1) has a prima facie right to recognition and enforcement. At the first stage, a party seeking recognition or enforcement must, under s.102(1), produce the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy. The arbitration agreement means an arbitration agreement in writing, as defined in s.5. Once such documents have been produced, recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads set out in s.103(2). The issue before us concerns the content of and relationship between the first and second stages. The first stage must involve the production of an award which has actually been made by arbitrators. Mr de Garr Robinson accepted that it would not, for example, be sufficient to produce an award which had been forged. However, it must be irrelevant at that stage that the award is as a matter of law invalid, on any of the grounds set out in s.103(2), since otherwise there would have been no point in including s.103(2). The award so produced must also have been made by arbitrators purporting to act under whatever is the document which is at the same time produced as the arbitration agreement in writing. That, it seems to me, is probably sufficient to satisfy the requirement deriving from the combination of s.100(1) and s.102(1) to produce "an award made, in pursuance of an arbitration agreement". The words "in pursuance of an arbitration agreement" could in other contexts require the actual existence of an arbitration agreement. But they can also mean "purporting to be made under". Construed in the latter sense the overlap and inconsistency to which I have referred are avoided. Any challenge to the existence or validity of any arbitration agreement on the terms of the document on which the arbitrators have acted falls to be pursued simply and solely under s.103(2)(b).
>
> 11. Sections 100 - 104 of the 1996 Act give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958. Articles I to V of that Convention are not perhaps as clearly in favour of the

> conclusion that I have indicated as Mr de Garr Robinson would suggest. Articles I and II refer to two separate documents, namely an award and an agreement, and Article III requires the production of each as necessary to obtain recognition or enforcement. Once again, however, Article V(1)(a) makes clear that, at all events where an agreement apparently complies with the requirements of Article II, any challenge to its validity is a matter for the party resisting recognition and enforcement to raise and prove. Distinguished commentators on the Convention also take this view: see in particular van den Berg, *The New York Convention of 1958* (Kluwer), pages 250, 284 and 312 and *The New York Convention of 1958, A Collection of Reports and Materials delivered at the ASA Conference held in Zurich on 2 February 1996*, paragraph 106."

28. Thus the validity of the arbitration agreement is dealt with at s.103(2)(a) and (b) and a challenge to validity is a matter for the party resisting recognition and enforcement to raise and prove. It is I think instructive that Mance LJ regarded s.102(1) as being concerned with the apparent compliance of the arbitration agreement with the requirements of Article II of the Convention, which is prescriptive as to form. Article II provides:-

> "1. Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

29. Finally, although it may not take the argument much further, the judge was also I think wrong in the final sentence of paragraph 4 of his judgment to introduce the concept of authenticity. Authentication is mentioned in s.102(1)(a) but not in s.102(1)(b). Albert Jan Van den Berg in The New York Arbitration Convention of 1958, (Kluwer 1981), comments at page 251:-

> "The first question is the distinction between an authenticated original of the award, on the one hand, and a certified copy of the award and the agreement, on the other. The authentication of a document is the formality by which the signature thereon is attested to be genuine. The certification of a copy is the

> formality by which the copy is attested to be a true copy of the original. The authentication therefore concerns the signature, whilst the certification concerns the document as a whole."

The same learned commentator also observes, at page 255 that courts "appear to be quite liberal in accepting that an original award is authenticated or a copy of an award or agreement is certified".

30. Burrell J in the Hong Kong court was confronted in *Medison Co Limited v Victor (Far East) Limited* HCCT 4/2000 with circumstances virtually identical with those which confronted Cooke J in the present case. An affirmation filed in support of an application for enforcement stated:-

> "The facts and matters deposed to herein are derived from documents supplied to my firm by the plaintiff and are true to the best of my knowledge, information and belief . . . A copy of the contract is now produced . . ."

The contract contained the arbitration agreement. Burrell J said this:-

> "The court therefore has a copy of the contract, the truth of which has been deposed to by the plaintiff's solicitor, an officer of the court. Out of an excess of caution, should this be regarded as insufficient, the plaintiff, through their counsel, has undertaken to provide formal certification, if considered necessary.
>
> In my judgment, bearing in mine the comments in Mustill and Boyd [the passage which I have set out above] the affirmation evidence together with the offer of an undertaking is sufficient for this court to be satisfied that s.43(b) has been complied with. The undertaking is not strictly necessary in the circumstances of this case where the defendant has never challenged the existence of the agreement, only its application, and where the argument that s.43 has not been complied with has only been raised for the first time in this inter partes hearing without notice to the plaintiff."

Section 43(b) of the Hong Kong Arbitration Ordinance is the equivalent of s.102(1)(b) of the 1996 Act.

31. It is interesting to note that in that case there was at the stage of the without notice application for the enforcement order an admitted non-compliance with s.43(a), the equivalent of s.102(1)(a). Neither the duly authenticated original award nor, it would seem, a certified copy of it was produced to the court on the ex parte hearing. The original award was however produced at the inter partes hearing. Burrell J said this:-

> "Its authenticity was not challenged. However, Mr Chan maintained the argument that because it was not produced at the ex parte stage, the application was fundamentally flawed and could not be cured by the production of the original at this

> stage. In my judgment, its production in this hearing in which the plaintiff is still seeking to enforce the award, albeit now opposed, is sufficient. The purpose of s.43 is for the court to be satisfied that it is dealing with a proper and genuine award. Provided that it is so satisfied before the final adjudication, then s.43 will have been complied with."

32. It is true that the Claim Form in the present case did not say in terms that what was attached were copies of the agreements. However it was obvious that that was what they were. The case is therefore to all intents and purposes indistinguishable from that considered by Burrell J. Burrell J did talk of the affirmation being sufficient together with the offer of an undertaking. He regarded the undertaking as unnecessary in circumstances which are again virtually indistinguishable from those here, i.e. where the existence and identity of the agreement as an instrument were not in doubt. I would follow Burrell J's lead, but it is in my view important to distinguish what constitutes compliance with the statutory requirement from circumstances in which strict compliance may be waived. It might be said that Burrell J has elided the two.

33. In my judgment by the Claim Form and its identified attachments Rainstorm produced duly certified copies of the original arbitration agreements. It was inherent in Mr Hodge's Statement of Truth that they were true copies of the originals. By production of the Claim Form it was made sufficiently clear that it was contended by Rainstorm and verified by a statement of truth that these documents were what they purported to be and apparently were, viz, copies of the original arbitration agreements. No doubt it is better practice for the Statement of Truth, Affirmation or Witness Statement to speak expressly to the accuracy of the copy, as envisaged by Mustill and Boyd, but it would I think introduce an unnecessary element of formalism to require the deponent to be able to say that he has compared the copy with the original. It is I think sufficient to say that on the basis of the maker of the statement's information and belief it is a true copy. I note that Ms Beutler does not suggest that she has compared the copy award with the original award, although as Business Manager of the Los Angeles Resolution Center of JAMS she presumably had an opportunity of so doing. It is not suggested that her certificate is insufficient.

34. I would also point out that in modern business conditions an arbitration agreement will very often be found in an exchange of emails, just as in earlier times it will have been found in an exchange of fax messages or an exchange of telexes. The Convention itself speaks of an exchange of telegrams. As it happens there are here traditional signed agreements. However it would be absurd to suggest that the certifier must have actually seen the written record of an electronic transmission as it was first perceived by either the sender or the receiver. The process is intended to promote enforcement, not to put meaningless and purposeless hurdles in the way of enforcement. As Mance LJ pointed out in *Dardana*, any substantive challenge to the validity of the agreement comes at the second stage. The first stage is concerned only with the appearance of there being a valid award based upon a compliant arbitration agreement.

35. I find support for this approach in the admissible material. The International Council for Commercial Arbitration (ICCA) has produced a Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (May 2012 edition) ("ICCA

Guide") which sets out the questions to be answered and the steps to be followed by the courts when applying the Convention. The Guide summarises the overall object and purpose of the New York Convention as follows:

> "The Convention is based on a pro-enforcement bias. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards and in doing so it serves international trade and commerce. It provides an additional measure of commercial security for parties entering into cross-border transactions."

36. The pro-enforcement basis of the New York Convention is also supported by Van den Berg in his work to which I have already referred above, as did Mance LJ in Dardana, at page 4:

> "As far as the object and purpose of the New York Convention are concerned, they are to facilitate the enforcement of arbitration agreements within its purview and of foreign arbitral awards. This object and purpose must, in the first place, be seen in the light of enhancing the effectiveness of the legal regime governing international commercial arbitration."

37. The ICCA Guide provides the following guidance on the interpretation of Article IV(1)(b):-

> "**II.3 Original Arbitration Agreement or Certified Copy (Article IV(1)(b))**
>
> This provision merely requires that the party seeking enforcement supply a document that is prima facie a valid arbitration agreement. At this stage the court need not consider whether the agreement is "in writing" as provided by Article KK(2) (see Chapter II at IV.2) or is valid under the applicable law.
>
> The substantive examination of the validity of the arbitration agreement and its compliance with Article II(2) of the Convention takes place during phase II of the recognition or enforcement proceedings (see this Chapter below at IV.1, Article V(1)(a)).
>
> Courts in countries where the national law does not require the petitioner to supply the original arbitration agreement or a certified copy may dispense with this requirement altogether in application of the more-favourable-right principle in Article VII of the Convention (see Chapter I at V.1). This is the case of German courts, which consistently hold that petitioners seeking enforcement of a foreign award in Germany under the Convention need only supply the authenticated original arbitral award or a certified copy."

Article VII of the Convention provides:-

> "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

38. In relation to the interpretation of Article IV in light of its preparatory work, Van den Berg states at pp 246-247:-

> "Article IV is set up to facilitate the request for enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement. In comparison with the Geneva Convention of 1927 it constitutes a great improvement.
>
> . . . The final result of the drafting history of Article IV is that the party seeking enforcement of an award no longer has to prove compliance with various conditions, but has only to supply the duly authenticated original award or duly certified copy thereof; . . . In fulfilling these conditions, the party seeking enforcement produces prima facie evidence entitling him to obtain enforcement of the award. It is then up to the other party to prove that enforcement should not be granted on the grounds enumerated exhaustively in the following Article V(1). The transformation of most of the "positive" conditions [in the Draft Convention] into "negative" conditions was prompted by the desire to ease the conditions to be fulfilled by the party seeking enforcement as much as possible. Article IV is to be interpreted accordingly."

39. I have already referred, at paragraph 29 above to Van den Berg's observation that courts appear in practice to have been quite liberal in interpreting the formal requirements of Article IV of the Convention. Mr David Chivers QC for Rainstorm submits that that approach is and should be pragmatic. Thus in *R SA v A Ltd* (2001) XXVI Ybk Comm Arb 863 the Geneva Court of Appeal recognised the combination of an uncertified copy of the contract of sale (in English); an unauthenticated original of the arbitral award in Chinese; and a translation of the award (into French) which had only been certified on the first and last pages. The court held at [6] – [7]:

> "[6] The text of the Convention does not further describe the contents and nature of the formal obligations it creates, not does it indicate how their violation is sanctioned. This Court deems that Art. IV must be interpreted in accordance with the spirit of the Convention as described above. The Contracting States wished to reduce the obligations for the party seeking recognition and enforcement of a foreign arbitral award as much as possible.

> [7] As to the documents which must be submitted, we agree with Van den Berg that the applicant must supply at least the arbitral clause and the arbitral award. If these are lacking, the court must dismiss the request for enforcement. The court must however show some flexibility when evaluating the manner in which these documents are supplied, that is, as authenticated originals or certified copies.
>
> [8] . . . In 1997, this Court of Appeal also recognised and enforced a foreign arbitral award although one of the contracts between the parties and the arbitral clause it contained had not been supplied. The Court held that it would show excessive formalism if it granted defendant's objection considering that defendant had not objected to the arbitration. Last, the Supreme Court affirmed, in 1995, an unpublished decision of the Court of Appeal of 17 March 1994, by which the Court of Appeal recognised and enforced an arbitral award. The Supreme Court found that the party seeking enforcement violated Article IV(1)(b) by supplying a simple photocopy of a fax [containing] the arbitral clause and held that, since the appellant did not dispute the authenticity of the arbitral clause, this violation was irrelevant."

The court concluded that the appellant's objection was "purely formal" as it did not dispute the authenticity of the award. The objection was "rightly dismissed" so as to avoid "excessive formalism".

40. In *Continental Grain Company, et al v Foremost Farms Incorporated, et al* (1998) Civ 0848 (DC) reported in Ybk Comm Arb 2000 XXV 641 as *US no 294*, the United States District Court of Southern District of New York held at [4] that a copy of an arbitration agreement certified by the petitioner's attorney was sufficient to satisfy the requirements of the New York Convention:

> "The purpose for requiring the original or a certified copy of an agreement is to prove the existence of the Agreement, *Al Haddad Bros. Enters., Inc. v M/S AGAPI* 635 F. Supp. 205, 20-9 (D.Del. 1986), aff'd 813 F.2d. 396 (3d Cir. 1987), and no one disputes the existence of this Agreement. In furtherance of the Convention's purpose of encouraging recognition and enforcement of international awards, see *Scherk v Alberto-Culver Co* 417 US 506, 520, n. 15, 41 L.Ed.2d 270, 94 S.Ct. 2449 (1974), the copy of the Agreement certified by petitioner's attorney is sufficient to satisfy the requirements of the Convention."

41. In *Investor v Republic of Poland,* Bundesgerichtshof 2000 reported as *Germany No. 52* in Ybk Comm Arb 2001 XXVI 771, the Bundesgerichtshof was concerned with an uncertified copy an arbitral award which had been enforced by the lower court. There was no challenge to the correspondence of the copy with the original, only as to the lack of certification. The Bundesgerichtshof said this:-

> "It can remain open whether the documents, as alleged, are not duly certified. Art. IV Convention is a provision merely concerning evidence (Stein / Jonas / Schlosser, ZPO, 21st Ed. (1994) Sect. 1044 note no 48, 52 and Bredow in Bulow / Vockstiegel / Geimer / Schutze, Der international Rechtsverkehr in Zivil – und Handelssachen, Art. IV(1) Convention). The requirement in Art. IV(1)(a) Convention applies when the authenticity of the arbitral award is disputed, in which case proof thereof can only be given through the documents further defined in Art. IV(1)(a) Convention. In the present case, defendant does not question that the copy of the arbitral award supplied by claimant corresponds with the original. It would be a hollow formality to require that claimant prove the – undisputed – existence and authenticity of the arbitral award, whose copy is supplied, by also supplying the documents in Art. IV(1)(a). A certified copy [of the award], though unaccompanied by the authenticated original arbitral award, complies with the requirements in Art. IV(1)(a) convention."

42. Mr Berkley referred us to paragraph 11.54 of Redfern and Hunter on International Arbitration and footnote 57 thereto which, he suggested, shows a lack of international uniformity. Paragraph 11.54 reads:-

> "The formalities required for obtaining recognition and enforcement of awards to which the New York Convention applies are simple. [57]
>
> [57] Nevertheless, cases are from time to time reported in the Ybk Comm Arb in which the application for enforcement fails, because a party has failed to comply with these 'simple' requirements: see, e.g. the decisions of the Italian Court of cassation in *Lampart Vegypary Gepgyar (Hungary) v srl Campomarzio Impianti (Italy)* reported in (1999) XXIVa Ybk Comm Arb 699; and Bulgarian Supreme Court's decision in *National Electricity Company AD (Bulgaria) v ECONBERG Ltd (Croatia)* in (2000) XXV Ybk Comm Arb 678. Equally, some jurisdictions take a liberal and pragmatic approach to the fulfilment of formal requirements. By way of example, a Geneva court recognised a Chinese award that had not been translated into French, noting that the spirit of the Convention was to reduce the obligations for the party seeking recognition and enforcement, and that the burden of proof in respect of any questions relating to the authenticity of the arbitration agreement or the award lay on the party opposing recognition. See *RSA v A Ltd* (2001) SSVI Ybk Comm Arb 863."

43. I am not sure that the Italian and Bulgarian cases are of great assistance. The point at issue in the Corte di Cassazione was whether an earlier decision that a request for enforcement was non-compliant barred a later, compliant request. It was held that it did not. The Bulgarian case turned on provisions of Swiss law as the curial law and

the requirements of Bulgarian Code of Civil Procedure as well as Article IV(1)(d) of the Convention. In any event a second and conclusive reason for not enforcing the award in that case was that the Convention does not provide for the enforcement of partial awards, which this was.

44. It may well be that there is not absolute uniformity of approach to the Convention requirements. It would perhaps be surprising if there were. Nonetheless, the broad trend of the learning is unmistakeable. In my view it supports the conclusion which I have expressed in paragraph 33 above. The learning also in my view gives very strong support to Mr Chivers' alternative submission, which is that since the identification of the arbitration agreements from which the arbitration award derived was not in issue before Cooke J, there was in any event no need for him to set aside the enforcement order. It was hollow formalism, unrelated to the points actually in issue. Mr Berkley submits that production by the Defendants of copies of the arbitration agreements in identical form to those attached to the Claim Form should be ignored, as the obligation to produce a certified copy is on the party seeking to enforce, and what is at issue is Rainstorm's compliance with the statutory requirements at stage one of the exercise. The judge on the inter partes application, he suggests, cannot waive the statutory requirement or, if this is different, has no discretion to waive or dispense with compliance. In my judgment this argument proceeds upon the basis of a mischaracterisation. My conclusion on Mr Chivers' alternative submission in no way derogates from the need for an applicant for an enforcement order to comply with the requirements of s.102(1). It is simply a conclusion that, faced with a challenge to the enforcement order which accepted and relied upon copy arbitration agreements in the same form as those copies produced by Rainstorm on the without notice application in aid of enforcement, it was inappropriate for the judge to set aside the enforcement order on the ground alone of failure to comply with s.102(1)(b). That does not involve a waiver of or dispensation with the requirement. It involves simply a recognition that since the Defendants accept that the photocopy agreements produced by Rainstorm on the first application are true copies of the original arbitration agreements, any failure properly to certify the copies as such is or has become irrelevant to the question whether the award should be enforced.

45. Accordingly I would set aside that part of Cooke J's first Order, which set aside the earlier Order of Eder J on the ground of its irregularity.

46. That renders academic grounds 1, 2 and 3 of the Grounds of Appeal.

47. There is left only the objection in terms of s.103(2)(c) that the Defendants were not given proper notice either of the arbitration proceedings or that it was being alleged that they were personally liable.

48. The judge dealt with this point at paragraph 28 and 29 of his judgment as follows:-

> "28. The evidence establishes to my satisfaction that both the Defendants were joined into the arbitration and served in accordance with the rules of JAMS. They were notified of the proceedings and of the evidentiary hearing. Reference can be made to Mr Meehan's evidence, to the award itself and the various emails referred to in it and also to the emails which I

> have seen which emanated from the JAMS Administrator. It is clear from Mr Meehan's evidence that the amended Statement of Complaint was sent to both the Defendants by email as well as to the Luxembourg address which is in the Agreement. That amended Statement of Complaint made it plain that each of them was being held personally liable on the two agreements which they had signed, albeit signed as directors for a non-existent company. The basis upon which they were said to be liable was indeed that they had signed for a non-existent company and thereby become personally liable on the contract that individually they had signed.
>
> 29. The evidence of each of the Defendants also establishes their full awareness as to what was going on, and indeed the documents show the letters or emails that were sent by them, or on their behalf by Mr Diaz, in which they set out their objections to the arbitration going ahead, essentially upon the basis that they said that they were not parties to the agreements. As I say, it is quite plain that they were given proper notice and could present their case and, therefore, this argument, whether based upon *dicta* in Kanoria & Ors v Guinness & Anr [2006] All ER (D) 290 and paragraphs 22 or 32 or otherwise, cannot avail the Defendants here."

49. In order to demonstrate the utter hopelessness of this point it is worth reproducing what the Defendants say about it in their Witness Statements. They do not say that they had no notice of the arbitration or of the circumstance that they were sought to be made personally liable – quite the contrary. Thus Mr Lombard-Knight in his witness statement of 24 September 2012 says this:-

> "18. Some time later, I received a demand for Arbitration before JAMS. I did not consider that there was any proper basis for the claim and I regret that in the light of subsequent events, I did not take it sufficiently seriously. As far as I was concerned the project had not ever got off the ground and I did not believe that the Performance Bond was achievable.
>
> 19. I did inquire into the possibility of Californian lawyers representing my interests but the costs were considerable and I felt the entire claim was a nuisance. In any event in December 2011, Tim Murray of Libertas Capital Corporate Finance Limited, informed me that he had contacted Catalana and it had been confirmed to him that all the Performance Bond papers were forgeries and I then was convinced, and remain so, that I had been set up as part of an attempted fraud.
>
> 20. Mr Murray told me that contrary to what I had been led to understand from my initial meetings, Catalana had never heard of the Claimant or Mr Kaplan. Mr Hodge, who was then I believe my lawyer and was going to protect my interests, told me that he had passed this information on to Mr Kaplan who

> indicated that he was nevertheless going to continue with the Arbitration.
>
> 21. I then engaged a friend of mine, Hector Diaz, a Spanish Lawyer resident in London, who wrote to JAMS making representations on my behalf and identifying the fraudulent nature of the Claim. Although under JAMS rules it was open for the Arbitrator to receive written representations, it does not appear from his award that he has addressed the issue of the forgeries or the compelling evidence submitted to JAMS by Mr Diaz that I have been the victim of an attempted fraud."

Mr Kinde is to similar effect at paragraphs 18 and 19 of his witness statement of 20 October 2012

> "10. The Claimant issued proceedings in an arbitration court in California called JAMS. Despite not considering JAMS as appropriate court, Mr Lombard-Knight had instructed a Spanish lawyer which I also later instructed to respond to the legal arbitration proceedings.
>
> 19. it was clear from the documentation provided by JAMS that no physical attendance was required and that we would be able to respond to the proceedings by way of written representations. I am now shown as exhibit "JK12" an extract of some of those representations made on our behalf by Hector Diaz clearly spelling out and evidencing that the documents relied upon by the Claimant in these proceedings were forgeries.
>
> 20. We were later shocked and horrified to then find that JAMS had not only found in favour of the Claimant but that despite having confirmed receiving all of our evidence, they had completely disregarded it in reaching their decision. The only point which they had considered in reaching their decision was that because the Luxembourg company was never incorporated that Mr Lombard-Knight and I should be made to be personally liable under the Agreement we signed on behalf of the company. This is clearly expressed in the award. I attach copies of correspondence to JAMS by Mr Diaz to this witness statement at "JK13".

50. The Defendants have challenged the Award in proceedings in the Los Angeles County Supreme Court. On 19 November 2013 that Court dismissed the challenge and confirmed the Award. On 2 December 2013, i.e. the day before the hearing before us, the Defendants lodged an appeal against that decision with the Superior Court of California, County of Los Angeles, which, as I understand it, will be considered by the Court of Appeal. Formal grounds of appeal have not yet been set out. A declaration dated 2 December 2013 by the Defendants' California lawyer, Mr Birdt, indicates his belief that the lower court erred in failing to hold that the Defendants had not been duly served in accordance with the provisions of the Hague Convention. He

also cites an authority in California which, he suggests, indicates that the arbitrator's conclusion that the Defendants were responsible for their putative but non-existent principal was wrong.

51. Under s.103(5) of the 1996 Act we may, if we consider it proper, in these circumstances adjourn the decision on the enforcement of the award. I do not consider it proper so to do. The relevant point under the Convention and under the Act is notice, not service. Insofar as it is open to the Defendants to take a point in this court about their personal liability, Mr Birdt simply fails to grapple with the point that they signed the agreements on behalf of a non-existent company. The case in California to which Mr Birdt refers, *Ikerd v Warren T Merrill & Sons* [1992] 9 CAL App 4th 1833, is not concerned with a signatory on behalf of a non-existent principal.

52. Accordingly, I would dismiss the Appellants' appeal but allow the Respondent's cross-appeal. Subject to hearing Counsel on the form of order appropriate to give effect to my decision, I would set aside that part of Cooke J's first Order of 1 February 2013, which in turn set aside the Order of Eder J made on 4 September 2012.

Lord Justice Ryder :

53. I agree.

Lord Justice Christopher Clarke :

54. I also agree.