

Case No: CL-2015-000613

Neutral Citation Number: [2017] EWHC 797 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

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

Date: 11/04/2017

Before :

MR JUSTICE ANDREW BAKER

Between :

EASTERN EUROPEAN ENGINEERING LTD

Claimant

- and -

VIJAY CONSTRUCTION (PROPRIETARY) LTD

Defendant

Khawar Qureshi QC (instructed by **Signature Litigation LLP**) for the **Claimant**

David Brynmor Thomas (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 7 April 2017

Judgment

Mr Justice Andrew Baker:

1. This judgment has been prepared in limited time following a hearing on 7 April 2017, because it is important the parties know where they stand straight away. It therefore does not provide as much detail in the reasoning as might have been the case with a little more time.
2. The hearing was of two applications by the claimant, which by these proceedings seeks to enforce under the New York Convention and s.101 of the Arbitration Act 1996 an arbitration award dated 14 November 2014 in an ICC arbitration seated in Paris. Leave to enforce the award, and judgment in terms of the award, was granted *ex parte* by Cooke J on 18 August 2015. By CPR 62.18(9): (i) the defendant had 14 days from service of that order to apply to set it aside (Cooke J did not specify any different time period); and (ii) the award may not be enforced until an application to set aside made within that period has been finally disposed of. In accordance with CPR 62.18(10), Cooke J's order included a statement of that right to apply to set aside and its consequence.
3. The defendant made a timely application to set aside Cooke J's order, by Application Notice dated 23 October 2015. That application has not yet been finally disposed of. The claimant is frustrated at its inability to proceed with enforcement and believes that the defendant's application to set aside was and is a delaying tactic. To overcome that frustration, the claimant now applies to have the defendant's application dismissed summarily.
4. By order dated 8 June 2016, Flaux J (a) adjourned the defendant's set aside application pending the final determination in the French courts of an application brought by the defendant there to challenge the award and (b) ordered the defendant to provide security for the award in the sum of €7,500,000 by 4.00 pm on 20 July 2016. The award is for c.€17,000,000, so the order was not for security of the full amount. The defendant has not complied with the order to put up security and, I infer although this has not been stated in terms, it has no intention of doing so. Flaux J's order gave a general liberty to apply to both sides. The defendant's challenge to the award in France has failed. (There is a little more to that, but that will suffice for this introduction.)

The Applications

5. The claimant's first application, by Application Notice dated 26 August 2016, sought an order that the defendant provide the security ordered by Flaux J by a date (to be specified) in September 2016. The reason why that has only now come on for hearing does not matter. In my judgment, that application was misguided and I shall dismiss it. Flaux J's order stands, it has not been complied with (and the defendant has failed in its French claim), and the question is what (if any) consequence that should have. No purpose is served by reiterating the order for security with a new deadline.
6. It may be noted, though, that in that initial, prompt response to the defendant's failure to put up security as ordered, the claimant did not apply for the most obvious order. That would have been for the adjournment of the defendant's application to be ended, to bring on the day when steps could be taken to enforce the award (so the claimant would say, believing as it does that it will prevail on the defendant's application).

7. The claimant's second Application Notice, dated 3 April 2017, makes two applications: for an order setting aside and/or dismissing the defendant's application; and for an order setting aside what is said to be the "*adjournment granted by Mr Justice Flaux ... of the leave to enforce [the award] granted by Mr Justice Cooke ...*". The second application is also misguided and I shall dismiss it. Flaux J did not adjourn the leave to enforce granted by Cooke J; he adjourned the determination of the defendant's application to set aside Cooke J's order. There is a stay upon taking any steps to enforce the award so long as the defendant's application remains to be determined, but that is by operation of CPR 62.18(9), albeit it is stated in Cooke J's order as required by CPR 62.18(10). On no view was the stay ordered by Flaux J (although by adjourning the defendant's application, his order prolonged the period of the stay). If the defendant's application is dismissed, the stay on enforcement will come to an end without requiring any further order.
8. Thus, the effective application is for the dismissal of the defendant's set aside application, because of the defendant's failure to comply with the order for security and the failure of its challenge to the award in the French courts. If it could be proper to consider dismissal of the defendant's application in these circumstances, the lesser alternative of an 'unless' order, providing for dismissal if the ordered security is not now provided by a new, final deadline, would arise naturally for consideration, and in the opening summary to his skeleton argument and by way of the main focus of his oral argument, Mr Qureshi QC made the contention that there should now be such an 'unless' order the claimant's primary submission, albeit without abandoning the submission that the court would be entitled to move here and now to dismissal.

Discussion

9. I mentioned that there was more to say to explain the simple statement that the defendant's French claim has failed. It was dismissed by the *Cour d'Appel de Paris* as long ago as 28 June 2016, just a few weeks after Flaux J's order here. The defendant lodged an appeal with the *Cour de Cassation*, so the *Cour d'Appel* decision did not represent the final determination of the defendant's French claim required to end the adjournment. However, the defendant failed to file any submissions in support of its appeal to the *Cour de Cassation*. Nor did it attend hearings there of the claimant's consequent application to dismiss that appeal. It is difficult not to draw the inference that the lodging of papers with the *Cour de Cassation* may have been a delaying tactic, whatever view the defendant may have taken of the merits of its French claim prior to its dismissal by the *Cour d'Appel*.
10. It was common ground before me that as things now stand, the defendant's French claim will be dismissed in a few weeks and that, all things being equal, the adjournment of the defendant's set aside application here should be terminated now rather than only then.
11. The set aside application claims that under s.103(2)/(3) of the 1996 Act, the award should not be enforced here because, according to the defendant:
 - i) the arbitrator lacked jurisdiction as conditions precedent under the arbitration agreement had not been satisfied;
 - ii) the defendant was unable properly to present its case to the arbitrator;

- iii) enforcement would be contrary to public policy because of interference with a material witness of fact, or with his evidence.
12. Those grounds of challenge are vigorously denied by the claimant. They appear to have been the basis of the defendant's French claim and so have been rejected by the French courts. It is natural to envisage that the defendant will have its work cut out to make them good here. In particular, whilst the claimant does not say that the *Cour d'Appel* decision creates an issue estoppel as to whether the award can or should be enforced in this jurisdiction, it may be the court here will regard it as having "persuasive effect" given the high degree of overlap (*per* Popplewell J in *Stat et al. v Kazakhstan* [2015] EWHC 2542 (Comm), at [2]-[3]).
13. There are also real reasons, in my judgment, for the claimant's concern that the defendant is engaged in nothing more than delaying tactics. In that regard, I have already made my observation about the unprosecuted appeal to the *Cour de Cassation* in France. There has also been conduct in, and in relation to, proceedings to enforce the award brought by the claimant in the Seychelles (where the defendant is thought to have very substantial assets) to fuel that concern. But on the evidence as it stands, and taking all of those matters into account, I am not prepared to say that the defendant's set aside challenge is not made in good faith, or that it has no arguable basis.
14. That brings me to the key point. On 1 March 2017, the Supreme Court handed down judgment in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] UKSC 16. Mr Brynmor Thomas for the defendant says it is authority for each of the following propositions:
- i) nothing in s.103 of the 1996 Act (or in the provisions of Article V of the New York Convention that underlie it) provides that an enforcing court may make the decision of an issue raised under s.103(2)/(3) conditional upon the provision of security for the award;
 - ii) the only circumstance in which the New York Convention allows for the party challenging the award to be required to provide security for sums awarded against it, is where the challenge in the enforcing court is adjourned pending a challenge in the courts of the seat of the arbitration (and s.103(5) of the 1996 Act is to be interpreted as limited accordingly);
 - iii) CPR 3.1(3) does not authorise the making of an unless order the effect of which would be to require the provision of security for an award as a condition of pursuing a properly arguable challenge under s.103 of the 1996 Act, since that would contravene the first proposition.
15. In oral argument, Mr Brynmor Thomas developed his second submission further. He contended that *IPCO v NNPC* (at [27]-[30], confirming and explaining *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 2 Lloyd's Rep 326) holds that security for an award may only be ordered under s.103(5) where the party resisting enforcement requests the adjournment of its challenge in the enforcing court pending determination of challenge proceedings in the courts of the seat. Thus, e.g., "Security pending the outcome of foreign proceedings is, in effect, the price of an adjournment which an award debtor is seeking, not to be imposed on an award debtor who is

resisting enforcement on properly arguable grounds” (per Lord Mance at [28], my emphasis).

16. If that further submission is correct, then on the face of things Flaux J was wrong to order security in the first place, in the present case. For he did so on the basis that “*The only conditions that are imposed upon the granting of security under Section 103(5) are that (i) there is a challenge before the competent authority so that ... Section 103(2)(f) would be engaged ... and (ii) ... the Court considers it proper and appropriate to grant an adjournment of the enforcement proceedings or any application to set aside the enforcement proceedings, until such time as the competent authority has ruled*” ([2016] EWHC 1450 (Comm) at [16]).
17. But in my judgment, that is a matter for the Court of Appeal, not for me. In that regard, an application by the defendant for permission to appeal against Flaux J’s order is pending in the Court of Appeal, the defendant having been refused on paper but having renewed, with an oral hearing due on 18 May. The function of this court now is to take the order for security as made but not complied with and consider what, if any, sanction it is possible and proper to impose.
18. For that purpose, what matters is Mr Brynmor Thomas’ third proposition. In response to it, Mr Qureshi QC for the claimant submits, very simply, that the order requiring security, like any other court order, was made with the intention that it be obeyed. When not obeyed, he submits, there is no special restriction upon the means by which the court may consider enforcing it or upon the sanctions that may be imposed. He says in particular that I should assess the appropriateness of making an unless order by reference to the principles in, e.g., *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864, with due regard to the principle that “*Maintaining public confidence in the Court’s ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself*”, per Popplewell J in *Orb arl v Ruhan* [2016] EWHC 850 (Comm) at [178], citing *JSC BTA Bank v Ablyazov (No.8)* [2013] 1 WLR 1331 at [188].
19. This difference between the parties seems to me an important one of principle; and I prefer Mr Brynmor Thomas’ submission upon it. In the specific context of a challenge to the enforcement of a New York Convention award, an order requiring the party challenging the award to provide security for it is permissible (if at all) only where the enforcing court has judged that a challenge in the courts of the seat is to delay the enforcing court’s determination of the challenge but that should in fairness be on the basis that security be provided. However, where that adjournment is not sought by the party resisting enforcement, there is no sense in which the security ordered can properly be regarded as the “*price of relief sought as a matter of discretion or concession*”, as Lord Mance put it in *IPCO v NNPC* at [44], approving *Huscroft v P&O Ferries Ltd (Practice Note)* [2010] EWCA Civ 1483, [2011] 1 WLR 939 at [18]-[19].
20. Mr Qureshi QC drew attention to the fact that until shortly before the hearing before Flaux J, it had been the defendant’s position that its set aside application should be adjourned pending its French claim. His submission was that the defendant changed its stance upon appreciating that it might be faced with a requirement to secure the award as the price for such an adjournment if it persisted in the request. That seems to me a fair inference. But the fact remains that before Flaux J, the defendant resisted

any adjournment, submitting that the appropriate course was “*for the Court to order that the matter should come on as quickly as possible, irrespective of what determination there may or may not be by the Cour d’Appel de Paris and irrespective of whether or not the Defendant seeks to appeal any decision by the Cour d’Appel de Paris if it is against the Defendant*”, *per* Flaux J at [8]. The adjournment was nonetheless granted, but at the claimant’s urging, and the order confirms expressly that it was granted upon the claimant’s application.

21. In that circumstance, even assuming that security was properly ordered (contrary to the defendant’s submission, now supported, it will say, by *IPCO v NNPC* in the Supreme Court), in my judgment it would be wrong in principle, and directly contrary to the Supreme Court’s decision, to impose ‘unless’ terms upon the order for security. To do so in respect of security justified (if at all) only by the claimant’s insistence upon an adjournment, objected to by the defendant, would be to require the provision of security as a condition of pursuing a challenge under s.103 of the 1996 Act otherwise than because of any procedural default by the defendant in that challenge. (Nothing in Mr Brynmor Thomas’ submissions, or my acceptance of them on the point at issue, touches the use of ‘unless’ orders, with a sanction of dismissal, for procedural default, e.g. a refusal to comply with an order for disclosure of documents in the s.103 proceedings.)
22. Contrary to Mr Qureshi QC’s submission, the final point in *IPCO v NNPC*, *per* Lord Mance at [46], does not contradict the foregoing conclusions. There, Lord Mance noted that the decision, that the Court of Appeal had been wrong to impose the provision of further security as a condition of NNPC’s pursuit here of its s.103 challenge, did not affect the security previously provided. I do not agree with Mr Brynmor Thomas that Lord Mance there founded himself upon the fact that the prior security had been provided under an undertaking by NNPC in a consent order as opposed to an order made upon a contested application. In my judgment the same result, *viz.* that the prior security was to remain in place, would have obtained either way. Further, I agree with Mr Qureshi QC that had that prior security been allowed to lapse (it took the form of bank guarantees), it would have been proper to require its renewal and, potentially, to move to ‘unless’ terms if there were a failure to comply.
23. The point of distinction, though, is (again) that the prior security ordered to be provided by NNPC had been the ordered price of an adjournment sought by NNPC of its s.103 challenge here, pending its challenge in Nigeria. It was therefore the price (as it happens, on the facts, an agreed price) of the grant of relief sought by NNPC as a matter of discretion on the part of the court (or of a concession on the part of IPCO). It was apt accordingly to become subject to ‘unless’ terms under CPR 3.1(3) if not complied with. But that is not this case.
24. That does not mean that non-compliance with Flaux J’s order that security be provided was to have no consequence at all. That order represented the view of the court that if there was to be an adjournment, fairness to the claimant *prima facie* required that there be security and that was so even though it was the claimant that sought the adjournment. (Even if it be possible to order security at all in such a case (contrary to the defendant’s submission), it is on any view “*a very important factor militating against an order for security*” that the defendant is not seeking the adjournment (*per* Popplewell J in *Stati v Kazakhstan*, *supra*, at [6]-[8]).) It follows that when the ordered security was not provided, it was *prima facie* the court’s view

that there ought to be no adjournment after all. Flaux J did not order that the adjournment was conditional upon the provision of the security ordered, nor that the adjournment would terminate upon its not being provided as ordered. Rather, he gave the parties liberty to apply.

25. So had the claimant wished to enforce the court's view that if there was to be an adjournment there should be security, its proper course was to make prompt application, pursuant to that liberty, for the adjournment to be terminated. Had it done so, unless it then became apparent that the defendant wanted the adjournment to continue after all, even if that would require putting up the security that had been ordered, then:
- i) the court might have adhered to the view that there should be an adjournment, but revised its view that that should be so only if security were provided, in which case the proper order would have been to continue the adjournment but discharge the order for security; or
 - ii) the court might have adhered to the view that there should only be an adjournment, if at all, *ex hypothesi* an adjournment resisted by the defendant, if security were provided, in which case the proper order would have been to terminate the adjournment and (again) to discharge the order for security; or
 - iii) (perhaps) the court might have revised its view generally as to the desirability of an adjournment resisted by the defendant and simply terminated it, but then (again) it seems to me the order for security would properly have fallen to be discharged.
26. I am in no position to say why the claimant did not make that application, but in my judgment it would be wrong in principle now to make it a condition of the defendant's pursuit of its set aside application that it comply with Flaux J's order to provide security. Rather, in my judgment the proper order to make in the circumstances is that the adjournment be now terminated, the order for the provision of security be discharged, and there be directions for the prosecution of the defendant's set aside application, towards as expeditious a determination as is fairly possible.

Conclusion

27. For those reasons, the claimant's applications will be dismissed.

Coda

28. For completeness, I shall mention how I would have dealt with two aspects of the matter had I regarded it as proper in principle to consider dismissal of the defendant's set aside application, or an 'unless' order as a lesser alternative.
29. Firstly, applying the ordinary principles relied on by Mr Qureshi QC (see paragraph 18 above), I would then have concluded that it was not appropriate to dismiss the application now, but that it was appropriate to grant the claimant an 'unless' order. I would not have been deterred by Mr Brynmor Thomas' submission that it would be wrong to do so because the defendant's assets in the Seychelles are currently subject to relief in the nature of freezing orders granted on the claimant's application in its

enforcement proceedings there. The orders in question do not permit of transfers of assets with the claimant's consent; but the defendant offered no evidence of the law or practice of the Seychelles to suggest that the court would not sanction a transfer to comply with an 'unless' order made here, to which Mr Qureshi QC made it clear that the claimant would undertake to consent.

30. Secondly, come what may I would not have acceded to a further suggestion by the claimant that I should order the use of penal notices in respect of either Flaux J's original order for security or a further order made now. I find it difficult to envisage circumstances in which it would be appropriate to contemplate dealing with a failure to 'purchase' the survival of a claim in court by providing security as ordered by way of contempt. But certainly, I would not have regarded that as appropriate in the present case.