Neutral Citation Number: [2013] EWHC 3190 (Comm)

Case No: Folio 2011/684

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

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

Date: 25/10/2013

Before :

MR JUSTICE BURTON

- -

Between :

Diag Human SE	**Claimant**
- and -	
The Czech Republic	**Defendant**

- -
- -

Raymond Cox QC, Philip Riches, Liisa Lahti (instructed by **Goodman Derrick**) for the **Claimant**
Charles Joseph (instructed by **DWFM Beckman**) for the **Defendant**

Hearing dates: 2 and 3 October 2013

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Judgment

Mr Justice Burton :

1. The Claimant is Diag Human SE and the Defendant, is the Czech Republic. Diag Human SE is a company incorporated in Lichtenstein, which until 1996 was trading in the Czech Republic in the pharmaceutical field, particularly in relation to the supply of blood plasma. The Claimant brought proceedings in the Czech Republic, arising out of a letter written by the then Minister of Health of the Czech Republic on 9 March 1992 to A/S Novo Nordisk Copenhagen, its major supplier and the company which carried out the fractionation of the plasma, which led to Novo Nordisk terminating its relationship with the Claimant. On 18 September 1996 the Claimant and Defendant agreed to submit the dispute in respect of compensation for the loss caused in connection with that letter to arbitration. A number of awards by arbitrators have followed, in particular a partial award (after a review) by which the arbitrators awarded damages or compensation to the Claimant on account by way of interim damages in the sum of CZK 326,608,334 (approximately £10 million), which sum the Defendant paid on 15 January 2003. There has now been a final award issued in Prague on 4 August 2008 by which the arbitrators awarded further sums by way of damages and interest which was not included in the partial award. The arbitrators awarded CZK 4,089,716,666 in damages, interest from the period from 1 July 1992 to 30 June 2007 in the sum of CZK 4,244,879,686 and interest since 1 July 2007 of CZK

58,130,213 and continuing, an amount equivalent to some £135 million in damages and £140 million in interest.

2. The Claimant has been trying to enforce the award in Austria, France, Luxembourg, Switzerland and the United States, and pursuant to an ex parte application to this court dated 21 July 2011 now in this country. The Defendant's resistance to enforcement is not upon the basis that the award is not valid, but that it is not (yet) binding because there is an outstanding application for review, and that such an application for review has been made. Article V of the Arbitration Agreement reads as follows:

> "The parties have also agreed that the arbitral award will be submitted to a review by other arbitrators whom the parties appoint in the same manner if an application for review has been submitted by the other party within 30 days from the date on which the applicant party received the arbitral award. Articles II-IV of this agreement apply similarly to the review of the arbitral award. If the review application of the other party has not been submitted within the deadline, the award will enter into effect and the parties voluntarily undertake to implement it within the deadline to be determined by the arbitrators, in default of which it may be implemented by the competent court."

3. The Claimant challenges the validity and timeousness of that application for review, but accepts that if there has been a valid such application then the award is not binding.

4. Upon the ex parte application above referred to, as it happens I was the Commercial Court Judge dealing with it on paper, and I made an ex parte order for enforcement as sought.

5. It is common ground that this is a New York Convention Award. By CPR 62.18, where an application for permission is made in respect of such an award under s.101 of the Arbitration Act 1996 ("the 1996 Act"), it follows the same course as an application for permission to enforce a domestic award under s.66 of the 1996 Act, namely that such application for permission to enforce is made without notice in an arbitration claim form. Such a claim form was issued and served and, as is always provided for in relation to an ex parte application under CPR 62.18, an application to set aside the permission has been issued by the Defendant, which is to be heard at a hearing fixed for 2 days in May 2014. There is very substantial evidence to be adduced by both sides, namely as to:

   (i) whether, at Czech law or otherwise, any of the various documents relied upon by the Defendant (I am told four in all) amount to a valid and timeous application for a review. The Claimant asserts that the question of validity and thus of whether there is a binding award must be decided by the English Court on this application, relying on my decision in **Dowans Holdings SA and Anr v Tanzania Electric Supply Co Ltd** [2011] 2 Lloyd's Rep 475. In the Austrian Courts (three hearings up to the Supreme Court) and the French Courts (two hearings so far and only to the Court of Appeal) those courts have concluded that the issue of the validity of the applications for review must be decided by the appointed arbitrators in

connection with the putative review, who have, after some considerable litigation in the Czech Republic, now been appointed, although the Claimant has expressed considerable reservations about those arbitrators and the manner of their appointment (and in some cases removal).

(ii) whether there is any issue estoppel arising out of any of the various foreign proceedings.

6. The Defendant has issued an application for security of the costs of that application. It claims the sum of £258,405 (in three tranches).

7. I deal first with the Defendant's case as to non-disclosure by the Claimant on the ex parte application. The Claimant did not disclose to me that there was a dispute as to whether there was a binding award, because the Defendant was going to rely upon the assertions that (i) it had made a valid application for review within Article V (ii) the Claimant had itself made an application for review, albeit that it had subsequently withdrawn it. There was of course nothing improper about bringing an application for enforcement on the basis that the award was binding when that is indeed the Claimant's case, for it is thoroughly sceptical as to the strength of the Defendant's arguments (which I cannot possibly resolve nor am asked to do so). However the issue is that the Claimant did not disclose the existence of the dispute. There is a note in the White Book under 2E-39 which refers to the "*importance of full and frank disclosure in any affidavit and by like token in any witness statement in support of* [an] *application which in the first instance is made without notice*", referring to **Curacao Trading Co BV v Harkisandas & Co** [1992] 21 Lloyd's Rep 186. Neither I nor the Claimant would have required such a note in order to be conscious of the importance of full and frank disclosure in any ex parte application. No explanation was given by the Claimant as to why the existence of the dispute about the review (which, if valid, would be conceded to render the award not binding, as discussed above), save that Mr Raymond Cox QC who, together with Mr Philip Riches and Ms Liisa Lahti appears for the Claimant, describes it (I am told on instructions) in paragraph 109 of his skeleton as "*the result of oversight*". In an inappropriately argumentative witness statement Ms Janine Alexander of the Claimant's former solicitors suggests that "*the duty of disclosure depends on the type of application . . . and in the present case it is* [her] *view that even if there was a failure to disclose all material facts that does not have the consequence that the order of Burton J should now be set aside. Perhaps this is why Mr Bridson does not explicitly say that it does. It must be clear to him that there would have been no defence in any event.*"

8. It is very likely that I would have made the same order that I did, albeit with the knowledge of the inevitability that there would be an application to set aside the order I made once the claim form was issued. However there must have been at least a risk that I would not have made the order, but directed the Claimant to issue a claim form without making the order, and this is a risk which the Claimant's oversight avoided. In a witness statement served subsequent to the hearing before me, the appropriate apology has been given by the Claimant, and it seems clear that the omission was not deliberate.

9. However I am satisfied that the Claimant should be deprived of any advantage it may have gained by having the ex parte order made in its favour. There may be no such advantage, but one of the debates that took place at the hearing before me was

whether the Defendant was, because it was making an application to set aside and had the onus of proof of establishing its case by way of challenge to the award, not really in the position of a defendant such as to be an applicant for security for costs. Of course the main argument, so far as it was material to the outcome, concentrated on the fact that the Defendant bears the onus of proof, but if there is any additional strength to the Claimant's case by virtue of this application being one to set aside an order, rather than one by the Claimant to enforce inter partes ab initio, the non-disclosure on the ex parte application must deprive the Claimant of that argument. Mr Cox did not resist that proposition once I formulated it.

10. I turn now to the issues on this application for security of costs:

(1) Jurisdiction

Is there jurisdiction to grant an order for security of the costs in favour of a Defendant who is resisting the enforcement of a New York Convention Award? There are three matters for debate:

(a)Does the New York Convention prevent the making of an order for security for costs against a party seeking to enforce a Convention Award (consideration of Articles III, V and VI)?

(b)Given that the New York Convention does not permit (Article III) any order to be made against a party seeking to enforce a Convention Award which cannot be imposed in respect of the recognition or enforcement of domestic awards, can security for costs be awarded in relation to a domestic award? If not, then (the concept of 'discrimination') there can be no such order in respect of a New York Convention Award either.

(c)In any event is a defendant resisting the enforcement of a New York Convention (or other) award not in fact in the position of a defendant but in the position of, or analogous to, a claimant?

(2) Discretion

If there is jurisdiction, should an award for security costs be made in the sum claimed or at all? As to this:

(i)The Claimant asserts that the same arguments which militate against the existence of the jurisdiction with regard to New York Convention awards (if they have not achieved their desired end) should militate in favour of there being a 'higher' discretion, or a discretion only exceptionally exercised. This arises primarily out of the judgment of Rix LJ in a Court of Appeal decision which vigorously exercised the minds of the parties and the Court during the hearing, and to which I shall return, namely **Gater Assets Ltd v Nak Naftogaz Ukrainiy** [2007] 2 Lloyd's Law Rep 588. As will be seen, Rix LJ set out powerful reasons why, in his judgment, there was no jurisdiction to award security for costs, but in the event he did not so decide, and was prepared to '*assume*' jurisdiction, but he then adopted (inter alia) the same grounds in declining security as a matter of

discretion. Although Moses LJ agreed with the result, he concluded (at paragraph 90) that "*I do not think that if the arguments which tell against jurisdiction fail, they should be re-deployed in favour of some higher order of discretion, which requires the court to refuse an application as a matter of principle, save in wholly exceptional circumstances*", he would have found that there was no jurisdiction. Buxton LJ found that there was jurisdiction (thus in the majority, albeit on the basis of Rix LJ's '*assumption*'), and he would have exercised his discretion to order security for costs (in which he was in the minority).

(ii)Alternatively if there be jurisdiction, and subject to the *higher order of discretion* discussed above, there were issues as to the usual questions of discretion which arise with regard to an application for security for costs by an impecunious claimant. There was no issue raised by the Claimant with regard to the risk of its claim being stifled, because it accepts that there is a third party backer, a Mr Stava, who has put in a witness statement. Nor was there consideration of the merits: it was common ground that I should conclude that the issues which I have set out in paragraph 5 above as to the validity of the award should not be, indeed cannot be, assessed at this stage on a short security for costs application, and although in the Defendants' written submissions something was made as to the issue of estoppel by virtue of the decisions in the other foreign courts, it did not feature in the hearing as it was so obviously a matter of serious contention The issues which remained for debate were :

(a) whether there is a need for security, given that in fact the third party is backing the company and paying the substantial costs occasioned by the worldwide enforcement process,

(b) whether, by reference to **Sir Lindsay Parkinson and Co Ltd v Triplan Ltd** [1973] 1 QB 609 at 626H, it can be said that the Claimant's impecuniosity has been brought about by the Defendant's conduct,

(c) alleged delay by the Defendant and

(d) (by an argument raised for the first time only during the hearing) whether as a result of the fact that the partial award was only for a payment of damages on account, (i.e. the very minimum due), and made no award of interest, it can be said that even if the review application is valid and is successful, and even if the award as reviewed is for very considerably less than the amount presently awarded, there must be something (if only interest) against which any order for costs in favour of the Defendant can be off-set, rendering security for costs inappropriate.

Jurisdiction

11. The first sub-issue arises out of the terms of the New York Convention at Articles III and V, which read in material part:

> "*Article III*
>
> *Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.*
>
> *. . .*
>
> *Article V*
>
> *1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
>
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
>
> *(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
>
> *(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
>
> *(e) 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, that award was made.*
>
> *2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"

12. The submission by Mr Cox is that this means that there can be no condition imposed upon a party seeking to enforce a Convention Award, because if he fails to comply with such a condition then a sanction will follow by way of dismissal of his enforcement proceedings, which is not permissible within the terms of Article V, which sets out the *only* ground upon which recognition and enforcement of an award may be refused (and there is similar provision in s.103(1) of the 1996 Act, providing that enforcement *shall not be refused except* on those grounds). This is a point made by Rix LJ in his discussion in **Gater** at paragraph 81 (under Discretion), with which Moses LJ agreed at paragraph 95. As to this, Mr Charles Joseph, who appears for the Defendant and Applicant for security of costs, submits that this would wholly depend on what occurred thereafter. In the event of non-compliance, which might not - indeed, if Mr Stava be right, would not – arise, then the court has the option, instead of dismissal, to impose a stay, which is a very frequent result of non-compliance with security for costs in a domestic case, rather than a dismissal, and that would not amount to a *refusal* of enforcement within Article V.

13. But Mr Cox further submits that the fact (also relied upon by Rix LJ in paragraph 81) that the first sentence of Article III refers to the "*conditions laid down in the following Articles*" entails that no conditions can be imposed which are not laid down in those Articles, and security (though not expressly for costs) is expressly provided for, but only against the party opposing enforcement, by virtue of Article VI:

> "*Article VI*
>
> *If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.*"

Hence such cases as **Soleh Boneh International Ltd v Government of the Republic of Uganda** [1993] 2 Lloyd's Rep 208 and indeed **Dowans**.

14. The answer is in my judgment contained in the very authority, the learned and indeed seminal academic work, in fact produced by Mr Cox, namely **Albert Jan Van den Berg: New York Arbitration Convention of 1958**, at pages 239-240. The answer

lies in the second sentence of Article III, which qualifies the first sentence by permitting the imposition of conditions by the local court, provided that they are not *more onerous* i.e. 'discriminatory', in the respect discussed in paragraph 9(1)(b) above. The passage in **Van den Berg** reads as follows:

> "*In this connection it may be observed that the use of the wording "shall not impose substantially more onerous conditions" in the second sentence of Article III is somewhat confusing. The word "conditions" as used in the second sentence must be deemed to relate to the conditions of the procedure, in other words, the rules of procedure. It does not refer to the conditions under which the enforcement of a Convention award is to take place, in which sense the word is employed in the first sentence of Article III.*
>
> *Article III can also be considered as the basis for the application of the law of procedure of the forum to those aspects incidental to the enforcement which are not regulated by the Convention. Attachment in connection with the enforcement of the award is one such example; others are discovery of evidence, set-off of a claim against the award which is sought to be enforced, and bankruptcy of a party. The question of estoppel of the right to invoke a provision of the Convention could similarly be considered as pertaining to the law of the forum, although it is also arguable that this question is implicitly regulated by the Convention itself. Furthermore, the procedural law of the forum may impose time limits within which the enforcement of a Convention award must be requested.*"

15. It is quite clear that the local court is free to impose its own procedural conditions, such as orders for disclosure, indeed time limits for evidence, and, in respect of compliance with those conditions, to make final or unless orders, and, in the event of failure to comply with such final or unless orders, to impose sanctions including dismissal. It is plain to me that this must also include security for costs, if otherwise appropriate, and so long as non-discriminatory; and the fact that there is an express remedy given by Article VI, whereby a defendant may be liable for security in respect of the award and/or for costs, does not in my judgment take away the effect of the second sentence of Article III, which permits the imposition of conditions, and hence inevitably of sanctions for non-compliance with them, including a dismissal, which would thus not be offensive to Article V. I am satisfied that there is no need to take the cautious approach suggested by Mr Joseph of the imposition of a stay.

16. Non-discriminatory conditions can be imposed, as a result of the second sentence of Article III, and the sanctions for non-compliance must include dismissal. This argument was not addressed by Rix LJ, who, in referring to the very passage of **Van den Berg** in paragraph 81 of his judgment, referred only to the non-discriminatory aspect, and not to the question of the impact of the second sentence of Article III: but in any event the whole thrust of the argument of Mr Edelman QC (in **Gater**, to which I shall return below), which found favour with Moses LJ and with Rix LJ (in paragraph 80, to the extent of affecting his view on discretion, though not as to

jurisdiction), was by reference to the alleged unavailability of security for costs in the enforcement of a domestic award, and thus to the discriminatory argument. It is fair to say that Buxton LJ did however address the point in terms (although without express reference to **Van den Berg**):

> "*115. As I understood it, the only basis of the argument before us that Article III prevented an order for security in the case of an international award was that such an order would not be available in the case of a domestic award. Since for the reasons set out that in my view is not the law in relation to domestic awards, the discrimination argument in my view must equally fail.*
>
> *116. Rix LJ, in para 81 above, expresses a more general concern (not, I think, advanced as part of Gater's case), and Moses LJ in his paragraph 95 agrees, that Field J's order, refusing enforcement unless security is given, infringes this country's obligations under the Convention to provide enforcement subject only to the exceptions recognised by the Convention itself. But Article III recognises in terms that enforcement has to be in accordance with the national rules of procedure. It is inherent in that provision that a refusal by an award creditor to respect those national rules of procedure will debar him from enforcement.*"

17. Since the majority decision in **Gater** was in fact that there was jurisdiction, I am not constrained by the conclusion of the Court of Appeal in **Gater**. I resolve this sub-issue in favour of the Defendant.

18. I turn then to the second sub-issue of 'discrimination'. If security for costs cannot be obtained against a party seeking to enforce a domestic award, then Article III would prevent it being available in relation to the enforcement of a Convention award. The argument which Mr Edelman QC put forward in **Gater** (recorded in paragraph 45 of the judgment of Rix LJ) was that security for costs was not so available domestically. The situation is as follows:

    i) An applicant to enforce a foreign judgment is amenable to an order for security for costs (CPR 74.5). There is no similar provision in relation to an applicant for enforcement of an arbitration award.

    ii) There is however provision for an order for security for costs to be made against a defendant challenging an arbitration award, if he makes an application under ss.67, 68 or 69 of the Arbitration Act. Thus once an application for permission to enforce an award is made under s.66 of the Act by reference to CPR 62.18 (the same provision as applies to permission under s.101 with regard to Convention awards – see paragraph 5 above), and an arbitration claim form is issued, then, provided that he does so within 28 days (s.70(3) of the Act), the defendant may bring an application under s.67 (challenging an award as to its substantive jurisdiction), s.68 (serious irregularity affecting the Tribunal, the proceedings or the award) – though he may have lost the right to object by virtue of s.73 effectively if he has taken

part in the proceedings without making a timeous objection – or s.69 (appeal on a point of law). Significantly for our purposes, by s.70(6) an applicant under ss.67, 68 or 69 may be ordered to provide security for the costs of the application or appeal. Thus security for costs may be awarded against such a Defendant.

19. Mr Cox submits (as did Mr Edelman in **Gater**) that it is improbable - Mr Edelman said inconceivable – that where there is an express provision whereby a defendant challenging enforcement of an award on one of the grounds in ss.67, 68 or 69 may have to give security for costs, a defendant who does not make such an application should be entitled to an order for security for costs in his favour. Rix LJ summarised Mr Edelman's argument, at paragraph 45, as being that he "*has submitted that it is inconceivable that an award debtor of an English award, having sat back and failed within the time required to object to an award as having been, for instance, made without or in excess of substantive jurisdiction or procured by fraud,* [the latter being the case alleged in **Gater**] *can obtain security for costs against his award creditor who seeks to enforce the award, when if he had taken timely steps to challenge the award on those grounds he would himself have been liable to provide security for the costs of his challenge*" ("the Edelman point"). If security for costs is not available domestically then it is not available under the New York Convention.

20. At first instance in **Gater** ([2007] 1 Lloyd's Law Rep 522) Field J at 525 was unmoved by the Edelman point, and concluded:

> "*16. In my judgment, Mr. Higham's submissions are correct. The CPR, including Rule 25.12 applies both to claims made under s.66 to enforce domestic awards and to claims made under s.101 to enforce a Convention award. Further, in my opinion, the word "conditions" in Article III of the New York Convention means rules or provisions and therefore the comparison to be made is between the rules and provisions imposed on the enforcement of, on the one hand, Convention awards, and on the other, domestic awards. As Mr Higham demonstrated, the provisions of the CPR apply equally to enforcement under s.101 as they do to enforcement under s.66. It follows that to construe CPR 25.12 to mean that an award holder with an enforcement order is a claimant against whom security for costs can be ordered in favour of a party seeking to set aside the enforcement order does not involve a breach of the New York Convention.*"

21. Rix LJ, notwithstanding the Edelman point, was prepared to *assume* that there was jurisdiction to grant security for costs. However on the questions of discretion (but not jurisdiction) he upheld Mr Edelman's arguments in paragraphs 79 to 80:

> "*80. . . . It follows that in the case of the enforcement of a domestic award under s.66, I do not consider that an award debtor would, in principle, be entitled to security for costs. I would therefore accept Mr Edelman's submission that to impose a security for costs regime upon an award creditor who seeks enforcement under section 101 would be to impose*

> *substantially more onerous conditions than are imposed in the case of the enforcement of domestic awards, in breach of Article III of the Convention. The question for these purposes must be not merely whether the security for costs jurisdiction applies formally in both cases, but whether it would in practice and in principle be successfully invoked in both cases. In my judgment the judge was in error in merely being satisfied that 'the provisions of the CPR apply equally' to s.66 and s.101 enforcements (at para 16).*"

22. Moses LJ concluded (at paragraph 93) that:

> ". . . *An award debtor, under a domestic award, who seeks to challenge an award timeously may be ordered to give security for costs . . . It is not possible to discern any coherence in a scheme which permits an award debtor, who fails to object, to be in a better position to obtain an order in his favour.*"

Buxton LJ did not agree, and stated at paragraph 112:

> "*First, it cannot be the case that a domestic award debtor can never challenge the award when the award creditor applies to the court to enforce the award. Such a rule would evacuate s.66(3) of all content. If such a challenge is mounted, for the reasons already set out there will be jurisdiction to order security against the party who is the CPR 25 creditor. Second, however, the jurisdiction is likely to be exercised against a domestic award debtor if he has not applied under sections 67 to 69 in a case where it would have been appropriate to do so. In the same way, an award debtor in respect of a Convention award will be vulnerable to objections, either in terms of the plausibility of his case or of the propriety of ordering security, if he has delayed in raising objections or has not taken advantage of protection offered by the curial law of the arbitration. In both cases, as Rix LJ says at the end of paragraph 72 above, those are considerations that go to discretion rather than to jurisdiction; but in fundamental terms both types of award are likely to be treated equally by the English court.*"

23. It is indeed unattractive that someone who could/should have brought an application under ss.67, 68 or 69 and is out of time is not only not subject to s.70(3) when he defends the enforcement of the award, but can actually obtain an order for security against the Claimant. However Mr Joseph submits that this misunderstands the statutory position. Although the onus of proof is always on a defendant who challenges an award, the only such defendant who can bring an application under ss.67, 68 or 69 is one who has a challenge which falls within those sections. The Defendant's challenge is not so based: it does not allege any defect in the substantive jurisdiction of the arbitrators, nor any serious irregularity by the arbitrators nor does it have an appeal on a point of law. The only issue is that the award is not yet binding.

There is thus no question of its being out of time for making such an application or being criticised for "*sitting back*". S.66 reads as follows in material part:

> "*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).*"

24. This section arose after consideration by the Departmental Advisory Committee ("DAC"), established to consider the Arbitration Bill, which reported in February 1996, and relevant extracts are contained in **Mustill and Boyd Commercial Arbitration 2001 Companion Volume to the Second Edition**. **Mustill and Boyd** point out at 349 that s.66(3) sets out only one of the grounds on which leave to enforce the award must be refused, but there are other grounds which may result in discretionary refusal to enforce. It seems that the DAC at first proposed to set out a fuller list of grounds for refusing enforcement, but in the end decided to recommend that the section should take its present form, relying on the fact that s.66(1) is discretionary (page 349). At paragraph 372 of the DAC Report the authors refer to "*what are described as 'passive' defences to the enforcement of an award. The 'positive' steps that may be taken are those . . . set out in* [sections] *67 to 69*".

25. In my judgment, Mr Joseph is right to reject the logic of the Edelman point, based as it was upon assuming that the party in question could have applied, but did not apply, under one of the 'active' sections. It may well be that, as both Rix LJ (by subsuming this argument into his section on Discretion) and Buxton LJ (in paragraph 112 cited above) considered, such a party would never be able (as a method of discretion) to obtain an order for security for costs in resisting an application for enforcement under s.66. Equally there is some sign of an indication that enforcement of an arbitration award may be intended to be easier than enforcement of a foreign judgment, by reference to the absence of such an express provision as is contained (see paragraph 18(i) above) in CPR 74.5 (although, pace Moses LJ at paragraph 96, this does not appear to be a point relevant to jurisdiction). But I see no reason why, unless disqualified from obtaining security by virtue of the fact that the onus of proof is upon him (a matter to which I shall turn below) a purely *passive* defendant, such as is described in the DAC Report, should not be able to seek, like any other defendant, pursuant to CPR 25.12 security for costs in defending such application. This argument seems to have been run in **Gater** in the Court of Appeal (paragraph 70) but does not appear to have been addressed by Rix or Moses LJJ

26. Consequently, if security for costs is available to a defendant in relation to enforcement of a domestic award (where he is not making an offensive application under ss.67, 68 or 69), then it may also be available to a defendant resisting enforcement of a Convention award by reference to Article V(e). Again in concluding that as a matter of jurisdiction a security for costs order is available, I do not consider I am failing to comply with the Court of Appeal decision in **Gater**, since by a majority the Court of Appeal found in that case that there was jurisdiction. Indeed in any event in **Gater** there was found thus to be jurisdiction in a case where (because the challenge was on grounds of fraud) there could have been in an analogous domestic situation an application under sections 67 or 68. The present case is therefore a fortiori.

27. The third sub-issue is whether in fact the Defendant is a defendant for the purpose of security for costs, so that there is the jurisdiction to award security for costs against it, whether in respect of enforcement of a domestic or Convention Award. This arises out of the fact that the onus of proof is on the defendant and, were it not for my conclusion in paragraph 8 above, this would be an application to set aside an ex parte order made pursuant to CPR 62.18 – albeit not an application under sections 67, 68 or 69.

28. HH Judge Chambers QC in **Dardana v Yukos (No.2)** [2002] 2 Lloyd's Law Rep 261 discussed the then Arbitration Practice Direction, in which it seems there was provision (under paragraph 31.3) that on an application to enforce an award there could be a direction by the court for the application to proceed on an inter partes basis, and he concluded that whether or not a para 31.3 order were made that should make no difference. He continued:

> "*21 . . . It seems to me that once the machinery of challenge is engaged, the Practice Direction must be read as treating the party who challenges the enforcement the same way regardless of the means by which the machinery has been engaged.*
>
> *22. My general reasoning also goes to address the proper approach to CPR r. 25.12. Both in respect of the practice direction and the rule one is concerned to identify the 'defendant'. It may rightly be said that, insofar as s. 103 is concerned, the burden is upon the applicant to make its case, except to the extent that a Court might itself take the initiative in a matter of public policy. But I do not think that that is the answer. What the applicant is doing is resisting enforcement. It is true that the consequence of proving the necessary situation may be to create an estoppel between the parties, but the exercise is an essentially defensive one. The end purpose is not to attack the award but to attack its enforcement. In those circumstances I think it right to treat the applicant as a defendant with the consequence that, whether the power is to be found hidden in the practice direction or in r. 25.12, there is jurisdiction to award security for costs against the holder of the award.*"

29. In the event he declined to order security. Field J accepted Judge Chambers' analysis, at first instance in **Gater** (at paras 18 to 21). Buxton LJ agreed at para 101. Rix LJ disagreed at paragraph 78:

> "*I therefore respectfully disagree with Judge Chambers' view in **Dardana** that the exercise which an applicant to set aside an enforcement order undertakes is 'an essentially defensive one'; or that 'The end purpose is not to attack the award but to attack its enforcement'. It is indeed to attack, rather than to defend, and to attack enforcement by means of an attack on the award. The dichotomy referred to is, in my judgment, unhelpful, save in a purely formal sense.*"

It is to be noted that the challenge which Rix LJ had in mind in that case was indeed an attack on the award, and thus not, as in this case, simply an attack on enforcement.

30. The issue whether the Defendant is a 'real' defendant arises out of the words of Rix LJ at para 78 when he refers to what he calls "*Ackner LJ's question*" derived from **Hitachi Shipbuilding & Engineering Co Ltd v Viafiel Compania Naviera SA** [1981] 2 Lloyd's Rep 498 CA:

> "*In substantive terms . . . if Ackner LJ's question ('Are the respondents in the position of the plaintiff?') is deployed, there could be no doubt as to the answer, that the award debtor is.*"

31. This reference to a question posed by Ackner LJ is to what he says in **Hitachi** at 510:

> "*I accordingly agree that the case of the **Banque Du Rhone v Fuerse Day Lawson Ltd and Promat (Third Party)**, [1968] 2 Lloyd's Rep 153 is relevant to the determination of the question – are the respondents in the position of the plaintiff? (See R.S.C., O. 23, r. 1 (3).) Having regard to the observations which I have made in relation to the pleadings, I conclude that the learned Judge was right in deciding that the respondents were not in such a position.*"

However, as is clear from the judgment of Donaldson LJ in that case (at 507) this arose as a result of consideration by the Court of Appeal of the express terms of what was then R.S.C. O. 23(1)(3):

> "*Order 23, r.1 (1) begins with the words-*
>
> *. . . Where, on the application of a defendant to an action or other proceedings . . .*
>
> *and all else stems from this opening. R.S.C., O, 23, r.1 (3) provides that-*
>
> > *The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position*

> *of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.*
>
> *This sub-rule enables the Court to look at the realities and determine who in relation to a particular cause of action is truly the plaintiff and who truly the defendant, without regard to the descriptions which they bear on the record. However, I do not think that the rule entitled the Court to sub-divide the cause of action into issues, treating the person upon whom the burden of proof of that issue lies as the plaintiff quoad that issue.*"

32. This is no longer the rule. CPR 25.12 no longer contains such a provision, but simply provides that "*a defendant to any claim may apply under this Section of this Part 4 security for his costs of the proceedings*". It may be a part of the simplification of the rules, by way of eliminating an extra consideration (as is clear from **Hitachi**, one carried out by reference to the pleadings, and perhaps also the evidence) to see who the 'real' defendant is. The discussion in the CPR Notes does not suggest the survival of any such investigation, but emphasises that a party does not become a defendant simply by the fact that he is a respondent to an interlocutory application – in **Re B (Infants)** [1965] 1 WLR 946 is cited for the proposition that who a defendant is does not depend upon who brings an interlocutory application, but rather who is the defendant in the (overall) claim.

33. Rix LJ's approach to the applicability of security for costs appears to have at least in substantial part depended upon whether the ex parte Judge had directed the service of a claim form:

> "*75. My present view, however, is that a distinction is to be made. Where, at the initial stage, the judge is not prepared to order summary enforcement but directs service of the claim form, the technical position is that the enforcement claim is assimilated to any claim and is brought within the ordinary CPR regime. Where, however, as here, there is summary, albeit provisional, enforcement, the enforcement proceedings remain outside the ordinary CPR regime.*"

It is in this regard that I took the view indicated in paragraph 8 above that the Claimant in this case should not be able to take advantage in its favour of any such distinction. However, the position now is, in the absence of the Practice Direction in force at the time of **Dardana**, that in any event there is a claim, on an arbitration claim form: unless there were an express order from the ex parte Judge for service, and there were service under CPR 62.18(3), it would be a claim not treated as being an arbitration claim within CPR 62.1 and 62.2, but it would still be a claim.

34. Moses LJ concentrated in paragraph 92 on the fact that the arbitration claim form was not required to be served, and on the Edelman point (paragraph 93), like Rix LJ, does not address the question of the 'passive defence' under s.66 (which in any event would not have applied, on the facts of **Gater**).

35. I am clear (as indicated in paragraphs 17 and 26 above) that the majority of the Court of Appeal in **Gater** decided (albeit by reference to Rix LJ's *assumption* and "*since these matters were not deeply canvassed before us*" (para 75)) that there was jurisdiction to order security for costs in favour of an award debtor resisting an award, whether that award was a domestic or Convention award: this in a case where, on the facts, the challenge was based (inter alia) upon fraud, and certainly upon matters which, unlike the present case, could have formed the basis of a timeous application under s.67 or 68, had it been a domestic award. In response to an arbitration claim form, the Defendant is here putting forward what would be described by the DAC Report as a *passive* defence. I am satisfied that there is jurisdiction for the Court to order security for costs in favour of such a defendant, albeit one upon whom the onus of proof lies, both in relation to enforcement of a domestic and, consequently, a Convention award. The Defendant is a defendant within CRP 25.12, and not an applicant rendered liable to security for costs by s.70(6) of the 1996 Act.

36. Subsequent to the hearing, as a result of my request to see if there were any decisions in other jurisdictions from which any conclusions could be reached, Mr Cox's team of Mr Riches and Miss Lahti has carried out some further research, which has been to an extent fruitful, but in the event has not altered, or run counter to, my conclusions. They unearthed a first instance Hong Kong case (**Bulk Handling GmbH v Meridian Success International Ltd** [1998] No. MP 4765 Findlay J in chambers) in which a somewhat similar conclusion to that in **Gater** was reached, though by application of the anti-discrimination provisions of Article III of the Convention, because of their conclusion, by reference to very different rules, that security for costs was not available in a Hong Kong domestic case. Further they uncovered two German appellate decisions (and an unparticularised reference to a German Supreme Court case) from the International Arbitration Law Review 2002, in which security for costs was refused in respect of enforcement proceedings, but it appears again by reference to the anti-discrimination provisions.

Discretion

37. There being jurisdiction, how should I exercise my discretion? The suggestion that there is a "*higher order of discretion*" came, as is clear from the judgment of Buxton LJ (paragraph 98), from Mr Edelman, and is adopted by Rix LJ (at paragraph 76). However, it is referred to without approbation by Moses LJ, in disagreeing with the fact that Rix LJ seemed to have used the arguments which had not in the event held sway on jurisdiction as relevant if not decisive on the question of discretion (paragraph 90). Buxton LJ concluded:

> "*117. Nor need parties to arbitral proceedings fear that the English jurisdiction as to security will be exercised in a way that renders such proceedings nugatory, or deters parties from entering upon them. The jurisdiction is exercised by the judges of the Commercial Court, who are expert in dealing with arbitration issues, and sensitive to the need to make arbitration proceedings effective.*"

Neither Moses LJ (paragraph 90) nor Buxton LJ (paragraphs 98 and 108) support the proposition that there must be "*wholly exceptional circumstances*" for the exercise of the discretion.

38. The caution of Rix LJ in relation to the grant of security for costs in the arbitration field appears to derive in part, so far as Convention awards are concerned, from his approach to Article III, and the imposition of a condition for security for costs by reference to the Convention (paragraphs 81-82), an issue with which I have dealt above, but also out of the approach to security for costs in the arbitration field discussed in **Coppée-Lavalin SA/NV v Ken-Ron Chemicals and Fertilizers Ltd** [1995] 1 AC 38, to which he refers in paragraph 83, and which he described in paragraph 39:

> "*Ultimately, in **Coppée-Lavalin** the House of Lords held that there should be jurisdiction to order security for costs even in arbitrations held under international arbitration rules such as those of the ICC, but that, as a matter of principle, in the exercise of its discretion the English courts should be circumspect in ordering it. The House nevertheless split by a narrow majority in its ultimate application of this approach, with Lords Keith, Slynn and Woolf favouring the grant of security for costs against a nominal, impecunious, claimant, while Lords Mustill and Browne-Wilkinson considered that even so an order for security should be refused 'notwithstanding that on a narrower view it appears to answer the justice of the case' (per Lord Mustill at [65f]). That of course was dealing with security for costs in the arbitration itself, where the claimant was still seeking to establish his claim in what was described as 'likely to be a long and very expensive arbitration'.*"

39. As Rix LJ says, it is plain that the very cautious approach of all their Lordships in **Coppée-Lavalin** arose out of the fact that it was exercising a jurisdiction which the majority found to exist by reference to the grant of security for costs for the purpose of an arbitration itself. Subsequent to this decision, and after academic criticism, the power for the Court to make such an order by way of security for costs in an arbitration was taken from the Court and given to arbitrators by s.38(3) of the 1976 Act. There is no suggestion that arbitrators do not exercise their discretion to award security for costs.

40. In a decision which in fact relates to an application for security for costs with regard to enforcement of a foreign judgment, where the court does have a specific power (paragraph 18(i) above) the Court of Appeal did not exercise it in **Relational LLC v Hodges** [2011] EWCA Civ 774, Longmore LJ referring (at paragraph 25 in a postscript) to the "*general tenor*", indicating caution, of the judgments of Rix and Moses LJJ in **Gater**.

41. I shall be cautious, as indeed I would be (and have been) in exercising the contrary power under s.103(5) in relation to the power to order security against a defendant, within Article VI of the Convention. However I agree with Moses LJ, if I have correctly assessed his view, that arguments which have not succeeded on jurisdiction should not be imported wholesale so as to determine the issue of discretion. Mr Cox did not specifically address me on the *higher* discretion. There is plainly a vigorous dispute, on which the Defendant bears the onus, in running its *passive* defence, as to whether there is a binding award, and it is common ground that if the English Court

were to find that there were a valid application for review by the Defendant then there would be no binding award.

42. I deal therefore with the exercise of my discretion under CPR 25.12:

i) The Claimant is impecunious. It has not traded since 1996. Mr Stava is spending an enormous amount of money (not surprising given the very substantial amount of the award if it can be enforced) in seeking to enforce the award in favour of the Claimant, particularly as there are considerable (and fully expressed) concerns on the part of the Claimant as to what may happen if new and, the Claimant contends, partial arbitrators are permitted to reopen the award. But he does not offer a bank guarantee. I am invited to conclude that Mr Stava will pay, and therefore the Claimant will not be unable to pay its debts: and he has paid, it is submitted, all the costs incurred to date in the various jurisdictions. So far as costs orders against the Claimant are concerned, there is dispute as to that, and in particular as to whether such costs ordered were paid promptly or otherwise than against the background of ongoing appeals which might be prejudiced by non-payment. I am unable to conclude that, without more, Mr Stava will pay the costs of some £250,000 incurred by the Defendant if this application to enforce in this country is unsuccessful. I am satisfied that the Defendant is a candidate for a security for costs order on the basis of the approach sanctified by Sir Donald Nicholls V-C in **Re Unisoft Group Ltd (No 2)** [1993] BCLC 532 and in any event within CPR 25.13(2)(c).

ii) The Claimant does not suggest its claim will be stifled by an order for security for costs – by reference to the position of Mr Stava.

iii) I have already indicated in paragraph 10(2)(ii) above that I was barely invited to, and do not, carry out any consideration of the merits, with a view to concluding that one side or the other is highly likely to succeed.

iv) It was suggested, but not amplified orally by Mr Cox, that there was material delay by the Defendant in making its application for security, which I should or could take into account. Apart from the possibility of suggestion that delay shows a lack of confidence in the basis of the application, the ordinary circumstance in which this arises is where an application for security is made so close to the relevant hearing that it would not be just to 'spring' a condition for payment on the Claimant, and that plainly does not arise in this case where the hearing is not till May. In any event I am not persuaded that the Defendant did in this case materially delay by virtue of waiting until after it saw the nature and strength of the Claimant's evidence in opposition, before making its application for security.

v) I am not persuaded that the case falls within the **Lindsay Parkinson** point discussed in paragraph 9(2)(ii)(b) above. The loss suffered by the Claimant as a result of the sending of the letter was grievous, and has already been partially compensated by the sum of £10 million, not paid until 2003, 11 years after the damage was, or started to be, incurred. However other than the inference to be drawn from that sizeable amount, there is no evidence drawn to my attention that the impecuniosity of the Claimant, in essence the loss of the Claimant's

entire business, was caused by the Defendant's conduct. I have no evidence about the other business of the Claimant, nor as to how it came about that the Claimant continued in business for another 4 years after the latter, nor the impact if any of the corporate restructuring that took place subsequently.

vi) Mr Cox makes no submission as to the quantum of the costs sought, by reference to its alleged excess or otherwise.

43. The fact that has caused me concern is that which was raised during the hearing, namely that the Defendant already holds security for the costs by virtue of the unsatisfied final award. Even if eventually, either in this jurisdiction or otherwise, the present award is unenforceable or set aside, and falls to be reviewed, the Claimant points out that the partial award was only for the amount of loss which, at a minimum, could be proved, and a very substantial further amount has now been quantified as a result of the final award, and, even if it were reduced on review by 90%, £14 million would still be due. In addition the partial award included no interest, and specifically indicated that there would in due course be quantification of the interest due.

44. So far as the damages are concerned, although it does seem to me most unlikely that, if the final award is set aside and the compensation is reconsidered, it will be reduced to nothing, (the Claimant's written note on this point conservatively calls it "*improbable*"), I cannot on the evidence before me rule that out.

45. However there is contained in the final award the very substantial amount of interest (set out in paragraph 1 above), which includes interest on the interim sums found due on the partial award. The Claimant relies upon the fact that the capital sum, calculated at CZK 326,608,334, as appears in paragraph 1 above, was awarded, as a minimum (and by reference to the Defendant's expert's report), in respect of the loss of profit suffered by the Claimant in respect of the period from 1992 to 2000 when Novo Nordisk ceased business in the Czech Republic, and that this sum so calculated was paid, without any interest, as a result of the partial award (as unsuccessfully reviewed) only on 15 January 2003. Ignoring any interest from 1992 to 2000, and assuming simple rather than compound interest, and at a conservative Czech Central Bank rate of 3% per annum throughout (as opposed to the rate of interest awarded in the Final Award of between 5% and 15% during the period) some £840,000 (at the present exchange rate) would be due in respect of the period from June 2000 to January 2003 alone (approximately CZK25.6 million): again this leaves out of account any interest on the unpaid interest since 2003.

46. The arbitrators upon the partial award in June 2002 concluded that since only a portion of the claim was then being decided, it was not advisable to award default interest at that stage, ruling that the statutory interest accrued would be decided on the final arbitration award. That partial award was upheld on review, where the review arbitrators pointed out that "*the delays in the arbitration proceedings result in the constant increase of the amount of delay interest, which will be finally paid by the Defendant*".

47. In his note subsequent to the hearing, filed with my permission, Mr Joseph submitted that at Czech law the role of the arbitrators on the partial award (and its review) was at an end after those awards, and that "*the arbitrators in the partial award and the partial award review arbitrators did not have the power to direct that other arbitrators should determine the question of interest on the award*". However it

seems to me clear that this is a wholly inapt description. Since the arbitrators made it clear that they were making only an interim award and not awarding interest (but leaving it to the final award together with the balance of the damages), no question of any issue estoppel can consequently arise out of the consideration by those arbitrators. Consequently the suggestion that "*if interest was to be awarded on* [the interim damages] *then it would have to have been awarded by the arbitrators in the partial award or partial award review arbitrations*" is unsupportable. If the Defendant's application to review the final award (if valid) were successful, such that the final award (which awarded substantial interest, as set out in paragraph 1 above, of more than £140 million) were set aside, no basis (apart from the apparent suggested issue estoppel) is put forward to challenge an award of interest, at least on the unchallenged sum already awarded. It seems to me fanciful that the Defendant can succeed in avoiding any payment of interest at all on the established loss of CZK 326,608,334.

48. Exercising my discretion cautiously, and in the knowledge that in no known reported case here or abroad (save for the overruled first instance decision in **Gater**) has security been in fact awarded in respect of a defendant, passive or otherwise, to proceedings seeking to enforce the New York Convention, I have no doubt at all that I should not grant security in this case in favour of the Defendant. I am satisfied that this is so, where there is a now admitted partial award of interim damages, paid 10 years ago without interest, and the final award which the Claimant is seeking to enforce, which awards substantial further damages and interest, would, even if reopened, be bound to leave an indebtedness in respect of interest which would far extinguish the amount of costs which, if this application to enforce in this country is unsuccessful, will fall to be due to the Defendant.

49. The application is accordingly dismissed.