Yukos Oil Company v Dardana Ltd. [2002] EWCA Civ 543 (18th April, 2002)
Neutral Citation Number: [2002] EWCA Civ 543
Case No: A3/2001/1029

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH
DIVISION, (HHJ CHAMBERS QC SITTING AS A
DEPUTY JUDGE IN THE COMMERCIAL COURT)
Royal Courts of Justice
Strand,
London, WC2A 2LL

18 April 2002

B e f o r e :
LORD JUSTICE THORPE
LORD JUSTICE MANCE
and
MR JUSTICE NEUBERGER

_____
Between:
YUKOS OIL COMPANY
Appellant

- and -

DARDANA LIMITED
Respondent

_____
(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

_____
Ali Malek QC (instructed by Messrs Reid Minty) for the Appellant
Anthony de Garr Robinson (instructed by Messrs CMS Cameron McKenna) for the Respondent

_____

HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

_____

Lord Justice Mance:

Introduction

This is an appeal against an order dated 2nd May 2001 made by HHJ Chambers QC, sitting as a deputy judge in the Commercial Court. Permission to appeal was granted by Tuckey LJ on 18th June 2001. By a majority award dated 21st March 2000, a Swedish arbitration panel concluded that the appellants had become party to a contract in writing dated 17th January 1995 which contained the arbitration clause under which the panel purported to act, and which was made originally between WAII and A.O. Yuganskenftegas ("YNG"). The respondents have succeeded to WAII's interest as a result of three assignments, the first of which was to PetroAlliance Services Co. Ltd. ("PetroAlliance"). The appellants held under 50% of the shares in YNG until the start of the arbitration (although they appear at all times to have had control over YNG) and have, subsequent to the arbitration, increased their shareholding on the evidence to about 90% (and now, we are told by the respondents, 100%). In consequence of its conclusion that the appellants had become party to the contract, the panel made an award against the appellants in the sum of $6 million plus interest, making a total of around $12 million. In a previous arbitration, conducted separately, the same panel had made a like award dated 7th May 1999 against YNG, rejecting complaints made by YNG about PetroAlliance's performance of the contract. The appellants on 22nd May 2000 issued proceedings in the Stockholm District Court to have the award against them set aside on the grounds of lack of jurisdiction. These proceedings to set aside are still in progress.

Pursuant to s.101 of the Arbitration Act 1996, the respondents on 27th June 2000 obtained an order from Steel J without notice to the appellants, giving permission to enforce the award against the appellants in this jurisdiction in the same manner as a judgment. Steel J's order gave the requisite liberty to apply to set aside his order within 21 days after its service under Arbitration Practice Direction para. 31.9 and concluded (mirroring the same provisions):

> "and the Award shall not be enforced until after the expiration of that period or, if the Respondent applies within that period to set aside the order, until the application is finally disposed of ".

By application notice dated 21st September 2000, the appellant applied, firstly, for an order setting aside Steel J's order under ss.100 and/or 102 of the 1996 Act, and, secondly and alternatively, for a stay pursuant to s.103(5) of the respondents' application to enforce the award pending the determination of the Stockholm proceedings. By a second witness statement made by their American lawyer, Mr Stinemitz, on 20th November 2000, the respondents resisted both these applications, and "further and in any event" invited the court to make an order for security in the full amount of the award. In counsel's skeleton on behalf of the respondents before the judge, this application was explained as consequential upon the appellants' alternative application for a stay pursuant to s.103(5). The appellants' application was argued on 31st January and 1st February 2001. On 21st March 2001 HHJ Chambers handed down a written judgment in which he said that "Yukos has chosen the Swedish courts as its battleground" and that "Dardana's position is that an order should be made under s.103(5) including an order for security for costs"; and, in those circumstances, he went on to say that he would "adjourn the applications before me to a date that will be the subject of further argument or agreement

between the parties and upon condition that Yukos provides security in the sum of $2.5 million".

Following 21st March 2001, there was disagreement between the parties as to the form in which an order should be drawn up. A conference telephone call took place between the judge and the parties, during which the judge decided in favour of the respondents' submissions. The order drawn up as a result recited that the appellants' alternative application was "being treated by the Court as an application, alternative to Yukos' application that [Steel J's] order be set aside immediately, for an order pursuant to section 103(5) of the Arbitration Act adjourning the decision on enforcement of the Award pending the determination of [the appellants' application in Stockholm to set aside the award]". It further recited that the respondents had applied then for an order requiring the appellants to give suitable security, and that the appellants and their solicitors had confirmed that $2.5 million had been lodged in a client account and had undertaken that it would remain unencumbered therein.

On that basis, it was ordered, in paragraph 1, that "Pursuant to [the appellants' alternative] application (as treated by the Court) the Court's decision on enforcement of the Award shall be adjourned pending the determination of [the appellants' Stockholm application]" and that the appellants' application to set aside should be adjourned accordingly. Paragraph 2 ordered that "Pursuant to the Dardana application [i.e. for security], the adjournment provided for in paragraph 1 shall be upon the condition that Yukos give security in the form of the confirmation and undertaking given by itself and Curtis & Co. [the appellants' solicitors]" as recited in the order. Paragraph 3 provided that "Subject to paragraph 2" the appellants' applications should be restored for further hearing after the determination of the appellants' Stockholm application to set aside. It was common ground between counsel before us, although the order does not state this explicitly, that it was understood on all sides that the security was required to be provided by the appellants as a condition of avoiding immediate enforcement of the order. In other words, if it had not been provided, the appellants' application to set aside would have been dismissed and immediate enforcement would have followed. In the circumstances, the appellants chose to provide security by depositing $2.5 million with their solicitors and by the undertakings reciting that this sum would remain there unencumbered pending further order of the court.

The appellants seek by this appeal to set aside HHJ Chambers' order ordering an adjournment and security. They seek, primarily, an order setting aside Steel J's order dated 27th June 2000 giving permission to enforce. Alternatively, if the stay ordered by HHJ Chambers in respect of their application to set aside Steel J's order stands, they seek the discharge of the order (and undertaking) in respect of the security ordered by HHJ Chambers. By a respondent's notice, the respondents seek to uphold HHJ Chambers' order if necessary on different or additional grounds. Before the judge, considerable attention was directed to the basis on which the appellants could resist enforcement of the Swedish award before the English courts. Mr Malek QC for the appellants argued that it was a condition to enforcement that there should have been an agreement to arbitrate binding on the appellants, and that the onus lay on the respondents to show that this condition was satisfied. Mr de Garr Robinson argued, successfully, that it was enough for the respondents to produce an arbitration award together with written terms (or here written contract) providing for arbitration which the arbitrators had treated as binding on both parties to the arbitration.

Ultimately, however, Mr Malek submitted to the judge that this issue went really only to the onus of proof. Before us, it played a lesser part than it seems to have done before the judge. Nevertheless, it is of some general importance. I therefore take it first, before considering in turn the course of the present proceedings (paragraphs 16-22); the power to adjourn (paragraphs 23-25; the principles governing security (paragraphs 26-31); the judge's exercise of the discretion to order security (paragraphs 32-34); the need for security (paragraphs 35-37); the merits (paragraphs 38-51); and the conclusions (paragraphs 52-54).

The scheme of ss.100-4 of the Arbitration Act 1996

The relevant provisions of the Arbitration Act 1996 provide as follows:

"5. - (1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing-

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

……

Recognition and enforcement of New York Convention awards

100. - (1) In this Part a "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards-

(a) "arbitration agreement" means an arbitration agreement in writing, and

(b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.

In this subsection "agreement in writing" and "seat of the arbitration" have the same meaning as in Part I.

….

(4) In this section "the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

101. - (1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal

proceedings in England and Wales or Northern Ireland.
(2) 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.
As to the meaning of "the court" see section 105.
(3) Where leave is so given, judgment may be entered in terms of the award.
102. - (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.
103. - (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.
104. Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66."

It is clear, and was effectively common ground before us, that s.103(2)(b) is one vehicle enabling the present appellants to challenge the recognition and enforcement of the Swedish award, by maintaining that they never became party to the contract dated 17th January 1995. Mr Malek QC maintains that the appellants can also resist recognition and enforcement, on the basis that it was and is for the respondents, under ss.100 and 102, to show a valid arbitration agreement in writing. He suggests that this is fair, since s.103(2) offers no more than what he described as "discretionary" relief, whereas any entitlement to rely on ss.100 and 102 would be as a matter of right. I am not impressed by that suggestion. S.103(2) cannot introduce an open discretion. The use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for this is found in van den Berg, The New York Convention of 1958 (Kluwer), page 265.

Mr Malek's submission that ss.100 and 102 can assist in the present situation would lead to a curious duplication and, moreover, an inconsistency in onus. On the one hand, the respondents would have to prove the actual existence of a valid arbitration agreement in writing, before the award could be recognised or enforced. On the other hand, under s.103(2), recognition or enforcement "may be refused" if the appellants could prove one of the matters there listed, which include the absence of any valid arbitration agreement.

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).

Ss. 100 to 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. Prof. van den Berg observes in the former work at page 116 that "Article II(2) poses fairly demanding requirements for the form of the arbitration agreement", in so far as it goes no further than to state that "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". So, there can, under the terms of the Convention, be little scope for argument whether an apparently valid arbitration agreement in writing exists and has been produced, as required at the first stage. The Departmental Advisory Committee on Arbitration Law, whose report led to the 1996 Act, considered, in contrast, that the English text of Article II(2) justified "a very wide meaning" of the words "in writing": see paragraphs 34 and 348. Hence, the wide definition in s.5(2)(c), (3) and (4) of the 1996 Act, whereby the phrase embraces both an agreement made "otherwise than in writing by reference to terms which are in writing" and an agreement "made otherwise than in writing [and] recorded by one of the parties, or by a third party, with the authority of the parties to the agreement". This creates potential difficulty, when one turns to consider what is required to be produced under s.102(1) as "the original arbitration agreement". One cannot produce an agreement made otherwise than in writing. However, one can produce terms in writing, containing an arbitration clause, by reference to which agreement was (allegedly) reached, and one can produce a record of an arbitration agreement made in writing with (allegedly) the authority of the parties to it. That, it seems to me, is all that is probably therefore required at the first stage. That conclusion supports, rather than undermines the further conclusion that, at the first stage, all that is required by way of an arbitration agreement is apparently valid documentation, containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority. On that basis, it is at the second stage, under s.103(2), that the other party has to prove that no such agreement was ever made or validly made.

The only authority to which we were referred on the point was the decision of the Irish Supreme Court in Peter Cremer GmbH & Co. v. Cooperative Molasses Traders Ltd. [1985] ILRM 564. The issue there was whether the parties to a GAFTA award had agreed on arbitration either at all or in London, as opposed to Hamburg. The legislation that the Supreme Court was considering corresponded in its terms with the United Kingdom Arbitration Act 1975, containing a narrower and more prescriptive definition of "arbitration agreement" as meaning "an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences …". This lent itself more readily than the wording of the 1996 Act to an argument that the validity of the arbitration agreement so produced could be assessed at the first stage. Even so, the reasoning of the Supreme Court is notably limited. The Court concluded

(rightly, I would agree) that the issue fell outside equivalent provisions to s.5(2)(d) and (f) of the 1975 Act (broadly corresponding with s.103(2)(d) and (f) of the 1996 Act). It moved straight to a conclusion that it fell to be examined at the first stage, under the definition of "award", coupled with the definition of arbitration agreement in the equivalent of s.7 of the 1975 Act. The Court did not consider the equivalent provision to s.5(2)(b) of the 1975 Act (s.103(2)(b) of the 1996 Act), or the overlap and inconsistency of onus, to which the existence of that sub-section would, on the construction that the Court adopted, appear to give rise. In these circumstances, I cannot regard the decision as any sure guide to the interpretation of the 1996 Act.

In the present case in order to satisfy s.102(1), Mr Stinemitz, a Texas lawyer who had drafted the contract dated 17th January 1995 and acted for the respondents in the Swedish arbitration, made a witness statement, producing the contract and the Swedish award, which concluded that the appellants had "through its conduct entered as a party into the contract", and submitted that the award thus fell within s.5(2)(c), read with s.5(4), and/or within s.5(3) of the 1996 Act. As I have indicated, that seems to me sufficient to satisfy s.102(1), read with s.100. So, the onus shifted to the appellants to apply under, and bring the circumstances within, one of the heads of s.103(2). The only alternative would have been simply to seek a stay of enforcement under s.103(5) pending the determination of the Stockholm application to set aside the award.

It is relevant to note at this point a potential discrepancy, although it may only be linguistic, between the provisions of s.103(5) of the 1996 Act, which follow those of Article VI of the Convention, and current English procedure. S.103(5) appears to contemplate that a respondent will be aware of the application for recognition or enforcement, and that consideration of the merits of an adjournment will therefore be possible, before any order for recognition or enforcement is made. That matched with former English procedure under RSC O.73 r.9(3) (requiring the issue of an originating summons). Now, however, the standard procedure under Practice Direction – Arbitrations (Civil Procedure 2001, Vol. 2, Section 2B) is different. Unless the court directs service on other parties under paragraph 31.3, any application and order for recognition or enforcement is made without notice, with a proviso reflecting the respondent's right under paragraph 31.9 to apply to set the order aside. By the time a respondent learns of the matter, therefore, it is too late for him simply to seek an adjournment of the actual application for recognition or enforcement. His only options are (a) to apply to set aside in England under s.103(2) and/or (b) to apply for a stay of the order for recognition or enforcement in England under s.103(5), pending determination of any application to set aside before the competent authority of the country (here Sweden) in which, or under the law of which, the award was made. A respondent may adopt the latter course alone and is under no duty to make any application to set aside in England. If a stay is granted and the foreign competent authority sets aside the award, the basis for the order recognising or enforcing the award will have fallen away, and it can then be set aside on an application under s.103(2)(f).

The course of the present proceedings

In the present case, the appellants' primary application was at all times an application in England to set aside the recognition or enforcement under s.103(2)(b) and/or (d). They were at all times keen that that application should be determined by HHJ Chambers. For a considerable time, that also appeared to be the respondents' attitude. Full written evidence was served on each side. Neither side suggested that the matter could not be determined on

that basis, or that, for example, trial of an issue or cross-examination on witness statements was necessary. In Mr de Garr Robinson's skeleton of 29th January 2001 for the hearing beginning 31st January 2001, he submitted:

> "47. In these circumstances, Yukos has by no means proved that Yukos was not party to an arbitration agreement. On the contrary, it is submitted that Dardana has shown that on the balance of probabilities, the careful approach adopted by the Swedish Arbitral Tribunal and the decision which it reached are correct.
>
> 48. In these circumstances, Yukos' application in paragraph (1) of its Application Notice must fail. The question then is whether the Court should maintain the permission which it has already given to Dardana to enforce the award or whether it should adjourn the matter pending the outcome of Yukos' application to set aside the Award in Sweden."

In his submissions towards the end of the hearing, matters changed. Mr de Garr Robinson accepts that he made a concession. The transcript (Day 2 page 302-3) shows that he submitted that the respondents had a Convention award, which "stands unless the grounds …. under s.103(2) are made out on which the burden of proof ….". The rest of the sentence was either never completed or obscured by the judge's "Yes", but Mr de Garr Robinson had obviously intended to say that the burden was on the appellants. Then he went on:

> "I say that on this summary hearing the burden of proof cannot be made out. It is not possible because it can only be done with a trial. That means that your Lordship has a choice. Your Lordship can either allow enforcement, as indeed your Lordship could even if these points were made out, because there is no requirement that your Lordship refuse enforcement even [sic] when it is only permissive. Or your Lordship can adjourn. If your Lordship is going to adjourn on the basis that there ought to be a trial, the appropriate mechanism for the adjournment should be an adjournment under s.103(5), and the trial ought to be in Sweden, which is the proper competent authority. There should not be a trial here.
>
> If, on the other hand, your Lordship is not minded to do that, then my submission is that your Lordship cannot decide now that the points being made by [Mr Malek] are made out and there would have to be a direction for a trial here. But I say that that would be a highly inappropriate course to adopt."

These submissions appear misconceived in two respects. First, if the appellants had failed to meet the burden of proof on them under s.103(2), their application to resist enforcement in this country would have been determined against them, for good and all. There would have been no question of them seeking a further "trial" of the point. The appellants were not seeking anything, other than to have their application under s.103(2) determined as soon as possible on the material before HHJ Chambers. The logic of Mr de Garr Robinson's submission that the appellants could not meet the burden of proof was that Mr de Garr Robinson should have been urging the judge to continue with the hearing and to determine the appellants' application under s.103(2). Second, so long as the appellants' application under s.103(2) remained undetermined, there could have been no question of the court allowing enforcement. That would have been a denial of justice. The word "may" at the start of s.103(2) does not have the "permissive", purely discretionary, or I would say arbitrary, force that the submission suggested. S.103(2) is designed, as I have said in paragraph 8, to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s.103(2).

A little later Mr de Garr Robinson went on to say:

> "In the particular circumstances of this case, where the matter will be decided by a court of competent jurisdiction in Sweden, applying Swedish law, I frankly accept that it would be very difficult for me to persuade your Lordship to adopt any course other than adjourning pending the determination of those proceedings. What I do suggest is that your Lordship cannot …. and, I would respectfully submit, should not …. decide the issue (a) because the evidence is not sufficient on this form of hearing on papers; and (b) because if your Lordship were to do so, that would cause a whole host of jurisdictional and conflict problems both in Sweden and elsewhere."

The reality was, therefore, that the respondents were no longer asking for the appellants' application under s.103(2) to be determined. On the contrary, they were resisting that, and they were asking the judge to adjourn pending resolution of the appellants' Stockholm application to set aside.

At transcript Day 2 page 323, an exchange occurred on which Mr de Garr Robinson placed reliance. He sought confirmation, which Mr Malek gave, that, if the appellants failed to prove that there was no award under s.103(2) summarily, they had as a "fall-back position" a request for an adjournment under s.103(5). Each side's position seems at this point to have been open to question. Mr de Garr Robinson tells us that in his mind the emphasis was on the word "summarily", in that he was contemplating that, if the appellants failed to set aside at "the hearing on the papers" in which the parties were engaged and to which he had earlier referred, they could re-apply for some form of fuller trial. That was wrong. Mr Malek had in mind that, if the appellants lost on their application under s.103(2), it would then still remain open to them to apply for an adjournment under s.103(5). That this was all that Mr Malek had in mind was expressly confirmed by him to the judge at Day 2 pages 325G-326B, where he first submitted that s.103(5) required an application for an adjournment and, secondly, made clear that he was only making such an application if he lost on his application under s.103(2). The judge immediately pointed out the problem about this submission:

> "Judge: If I rule against you, how can you actually use (f) and (5)?
> Mr Malek: With great difficulty. I have to accept that. If you come to the conclusion that there is a Convention award and there is an agreement to arbitrate then it is most unlikely that a successful application could be made for an adjournment."

It is right to record that the appellants (through the witness statement dated 20th September 2000 filed on their behalf by their in-house lawyer, Mr Alexanian) had previously indicated that their application for an adjournment under s.103(5) only arose if they failed on their application to set aside under s.103(2). It is also right to add, that in paragraph 48 of his skeleton before the judge (set out in paragraph 16 above) Mr de Garr Robinson had accepted the possibility that s.103(5) could be used in this situation, and that we do not have to decide the correctness or otherwise of this attitude.

Having so explained the appellants' alternative submission, Mr Malek returned to stress the appellants' primary case, namely that the judge should (for better or for worse) determine the appellants' application under s.103(2) then and there, on the papers and submissions before him. He pointed out that this was the basis on which the respondents had come to court and submitted that they should not be allowed to blow hot and cold, just because the evidence was so clear that they had had to take a different position. He resisted any suggestion that the Swedish courts were in a better position to apply to the facts what was were undisputed principles of Swedish law and he resisted any

adjournment of his clients' application under s.103(2) (Day 2 pages 326-7). Finally, the judge asked Mr de Garr Robinson to respond to Mr Malek's submissions on this aspect, and Mr de Garr Robinson's response was that the court had an overriding power to adjourn under s.103(5), indeed a power which it could exercise of its own motion (Day 2 page 331).

The power to adjourn

On this last point, I consider that Mr de Garr Robinson was clearly correct. The power to adjourn granted by the first part of s.103(5) is expressed generally, to apply "if the court thinks it proper". Contrast also the second part of s.103(5), where the power to grant security is expressly confined to cases where the party seeking recognition or enforcement applies for security. Under the first part, even though neither party sought an adjournment, a court might conclude of its own motion that the determination of an application under s.103(2) would be an inappropriate use of court time and/or contrary to comity or likely to give rise to conflict of laws problems, when there were concurrent proceedings which would be likely to resolve the issue in the country in which or under the law of which the award was made (cf Soleh Boneh v. Republic of Uganda [1993] 2 Ll.R. 208, considered in paragraph 26 below). More commonly, perhaps, a court would act under s.103(5) on the application of one or other party. In most cases, the application would be made by the party resisting recognition or enforcement and applying to set aside in the foreign court. But it is possible to envisage cases in which the party seeking recognition or enforcement might itself apply. It might for example wish to commence recognition or enforcement proceedings in England, in order to obtain freezing or other relief, but to have the resolution of any issues about the validity of the arbitration agreement resolved in the foreign court. The present case in my view also falls within this last category, though for a different reason. Having begun and pursued enforcement proceedings in England in optimism, the respondents appreciated, during the hearing of the appellants' application to set aside in England under s.103(2), that their case was less strong after all. Rather than risk losing, it was they who then resisted the determination of the appellants' application under s.103(2). The reality is that it was the respondents, not the appellants, who sought an adjournment under s.103(5).

The appellants in their notice of appeal and skeleton challenge the judge's exercise of any discretion that he had to adjourn the hearing of the appellants' application under s.103(5), on the ground that all relevant material was before the English court and the principles of Swedish law were not in dispute. In my judgment, once it is concluded, as I have concluded, that the jurisdiction existed, the judge's exercise of it to adjourn, even though this resulted from the respondents' change of heart during the hearing, is unassailable. Before us, Mr Malek accepted orally that, although the relevant principles of Swedish law were agreed, it was still preferable that Swedish law should be applied to the facts by a Swedish court. I agree.

It follows from what I have said above that the judge was wrongly persuaded in the telephone conference call after his judgment to make his order in a form which treated the adjournment as having been made on the appellants' alternative application. Whatever that alternative application may have meant, objectively or subjectively, at the time when it was issued, by the close of the hearing the position was clear. The appellants were seeking determination of their application to set aside under s.103(2), and the respondents were submitting that the matter must be adjourned under s.103(5). The judge acted on the latter submission, and in reality adjourned the determination of the appellants' application under s.103(2) at the respondents' instance until

after the resolution of the appellants' Stockholm application.

The principles governing security

I turn to the question of security. There was an application by the respondents for security which fell within the letter of s.103(5). The court had jurisdiction to order security. S.103(5) itself provides no express sanction to ensure compliance with any order for security. Soleh Boneh v Government of the Republic of Uganda [1993] 2 LI.R.208 is an example of the exercise of such jurisdiction, and indicates one set of circumstances in which a sanction may be attached under general principles of English law. Under the old rules, as I have said, an application to enforce would be made on an inter partes basis. In Soleh Boneh, the beneficiaries of a foreign award applied by originating summons in this country to enforce, but drew attention in their supporting affidavit to the court's power to order the respondent to provide security, if it adjourned. The respondent did not appear. The court nonetheless declined to order enforcement, but adjourned for three months, making an order for security which the respondent later applied to set aside and also appealed. The court of appeal reduced the security ordered, and ordered that, failing provision of the security ordered, there would be leave for immediate enforcement. In the absence of any application under s.103(2), the respondent had no ground for resisting enforcement under s.103(2), unless the court "considered it proper" to adjourn under s.103(5). So the court could impose terms, on which alone it would "consider it proper" to adjourn and would forego from enforcing the award.

Circumstances such as those considered in Soleh Boneh probably do not represent the most typical case that the authors of Article VI of the Convention and s.103(5) of the Act had in mind. In most cases, as I have said, it would be the party resisting recognition or enforcement, who had already begun proceedings to set aside in the foreign state, who would be seeking an adjournment of the recognition or enforcement proceedings, pending resolution of the foreign application. An order for security, on the application of the party seeking recognition or enforcement, would be the price of the adjournment sought by the other party, and would protect the party seeking recognition or enforcement during the adjournment. There is no power under s.103(5) to order security except in connection with an adjournment. If no foreign application had been made to set aside, the domestic proceedings under s.103(2) would have had to be fought out to a conclusion; and there would be no power under s.103(5) to order security during the period which that took. There could of course, in an appropriate case be an application for freezing relief, as I have already mentioned.

In a case where a party resisting enforcement applies under s.103(2), but later seeks an adjournment of its application pending resolution of foreign proceedings in which it is also challenging the award, adjournment may as a matter of general principle be ordered on condition that security be provided (failing which the order for adjournment will be vacated and the issues under s.103(2) will be determined). For a dictum in this sense, see also per Lloyd J, in SPP (Middle East) Ltd. v. The Arab Republic of Egypt (1985) X Yearbook Commercial Arbitration, 506, para. 5. That is how paragraphs 2 and 3 of the present order are in terms formulated. However, if these paragraphs were to be taken literally, the appellants (who resisted an adjournment) could (but for the fact that they had already made the deposit and given the undertakings) have refused to provide security and so have obtained the determination of their application under s.103(2) which they actually wanted.

The reality in the present case, as I have said in paragraph 5, is that the appellants were obliged to provide the security, on the tacit basis that, if

they did not do so, then enforcement would be ordered unconditionally against them, despite their outstanding application under s.103(2). The provision for security was, in other words, made a condition not of any adjournment sought by the appellants, but of avoiding immediate and final enforcement; and, failing its provision, the appellants' outstanding application under s.103(2) would have been liable to be struck out or dismissed, without determination of its merits. I do not consider that as a legitimate sanction to attach to any order made for the provision of security in the present circumstances. It would involve overriding or fettering an outstanding application under s.103(2), in a way for which ss.100-104 provide no warrant. It is inconsistent with paragraph 31.9 of the Arbitration Practice Direction, and the concluding words of Steel J's order, whereby the award was not to be enforced, if the appellants applied (as they did) to set aside his order, until the application was finally disposed of. It is not justified by the authority of Soleh Boneh where an order was made that, unless security of $5 million was provided, there be leave to enforce the award as a judgment. There, as I have pointed out, there was no application under s.103(2). So, neither paragraph 31.9 nor any outstanding issue under s.103(2) stood in the way of enforcement, and the court could postpone enforcement, on condition that the security ordered was put up.

In the different circumstances of the present case, the appellants are therefore, in my judgment, entitled, on any view, to be put in the same position as they would have been if an inappropriate condition had not been (tacitly) attached to the security which they were resisting. That means at the least releasing the deposit and discharging the undertakings given with respect to it. Further, the condition, which HHJ Chambers' order does express, making the adjournment conditional upon the provision of the security is, as I have explained, by itself inappropriate, in circumstances where the appellants did not want an adjournment, and could achieve their aim by failing to perform the condition.

These conclusions do not, however, resolve the issue whether an unconditional order for security could not and should not have been made. For my part, I am fully prepared to proceed on the basis that s.103(5) provides the court with jurisdiction to make such an order, in a case where it, either of its own motion (cf Soleh Boneh) or at the instance of the party seeking recognition or enforcement, decides to adjourn, pending a foreign application to set aside by the party resisting recognition or enforcement. However, it follows from what I have said that the order will have to be made without the conditions that were here attached to it, tacitly or expressly. That does not necessarily mean that the order for security cannot be enforced in any way. The court's powers to make freezing orders and/or appoint a receiver and order disclosure may enable this in an appropriate case.

The judge's exercise of the discretion to order security

I turn to the question whether the judge should have made an unconditional order for security on the facts of this case. It follows from what I have already said, that in my view the judge approached this from a wrong angle. He treated the appellants as the party seeking an adjournment. They were not. Although this in no way affected his jurisdiction, it was in my view a material factor when it came to the exercise of the court's discretion under s.103(5). The judge ought to have viewed this as a case where the respondents had, in the face of an outstanding challenge to the award in the Swedish courts, come to this jurisdiction to seek enforcement, had pursued proceedings to the lengths of a two day hearing, throughout most of which their case was that the court could determine that there should be enforcement by dismissing

the appellants' application under s.103(2), but had finally recognised that they might well not succeed on that basis; and had in those circumstances reversed their stance and sought an adjournment pending the resolution of the Swedish proceedings. In those circumstances, one may question the utility of the whole of the English proceedings. They were not begun, and until the hearing it was never the respondents' primary purpose in pursuing them, to obtain either an adjournment or security pending resolution of the Stockholm application; security was, as I have said, only sought in counsel's skeleton consequential upon the appellants' (alternative) application for an adjournment.

These considerations do not, however, mean that it would necessarily be inappropriate to order security. But they do in my judgment highlight some significant distinctions between the facts in this case and in Soleh Boneh. In Soleh Boneh the judge identified, and the court of appeal accepted, as two relevant factors, apparent lack of enthusiasm on the part of the English respondents in continuing with their application to the Swedish courts and enormous delay in the Swedish proceedings (which had lasted 14 years). The delay included delays which could specifically be attributed to the English respondents, who, Staughton LJ commented, "had no reason to see it [the Swedish application] decided promptly". Taking into account these factors and his view of the merits, the judge in Soleh Boneh had awarded security in the full amount of the arbitral award, some $29 million. In reducing this sum, the court of appeal took a different view of the merits of the Swedish application to set aside, considering it to be "seriously arguable" that the arbitrator was not properly appointed, and chose $5 million as "a significant sum, that should provide a real incentive for the employers to proceed with their Swedish application expeditiously". Before us, although the Swedish proceedings have taken longer than envisaged at the time of the hearing before HHJ Chambers (when it was thought that they would be concluded by September 2001), it has not been suggested that the appellants have lacked any enthusiasm for pursuing them or failed to pursue them diligently and they have as yet been on foot for less than 2 years. Further, the appellants have shown themselves keen to have the issues of validity determined in England, once the respondents' application to enforce made that possible, and it is the respondents who changed tack and argued against any early determination in England.

Soleh Boneh identifies two further important factors when deciding whether or not to order any and what security. As Staughton LJ said at page 212:

> "In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.
>
> The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within

the jurisdiction, the case for security must necessarily be weakened."

The need for security

With reference to the second point, HHJ Chambers said in the present case that: "Despite various allegations made against Yukos in respect of the merits of the case, there was no suggestion that Yukos would move funds presently within the jurisdiction so as to make the enforcement of the award more difficult". The respondents challenge the appellants' financial reliability in their respondents' notice, on four grounds: (i) the non-payment of the award by the appellants' subsidiary, YNG, (ii) the appellants' alleged promises to pay the amounts due under the contract in 1996-97, (iii) steps allegedly taken by the appellants in respect of the assets of its subsidiary YNG that would make it difficult to enforce payment of the award against YNG and (iv) the alleged existence of reason to fear that the appellant would take steps in relation to its own assets, such as moving assets out of the jurisdiction, to make enforcement difficult.

The material produced by the respondents by and exhibited to their witness statements indicates that the appellants have not dealt at arms' length with companies which they owned, or over which they acquired substantial control, such as YNG. In particular, oil appears to have been bought from YNG at domestic prices and re-sold to the appellants' profit on the world market at higher world market prices. The minority shareholders in YNG have complained. Mr Alexanian, the appellants' general counsel, responds that both the respondents and YNG's accounts have been audited and were not qualified, but Mr Stinemitz refers to passages in PricewaterhouseCoopers' audit letter relating to the 1996 accounts confirming that the terms of transactions between the respondents and YNG "are unlikely to be the same as those that would result from transactions among unrelated parties". Mr Gilmanov of YNG has confirmed this in a declaration made in New York proceedings. We were also referred to a number of newspaper articles, speaking in more graphic terms of "stripping" and "tolling". Mr Gilmanov in his declaration denied that there was "stripping" of assets. He also attests to YNG's solvency, and a net asset value in excess of $1 billion, as at December 2000.

This material would be significant if it indicated any likelihood that, during the adjournment of the appellants' application under s.103(2), which the judge ordered, the appellants would take steps to make enforcement of the award more difficult. The highest that it can be put is to say that the material throws up question marks about the objectivity of the appellants' treatment of YNG and YNG's minority shareholders. The treatment of minority shareholders in Russia may not match the standards expected elsewhere. The material does not however justify a conclusion that the appellants will dissipate or conceal their own assets, which is what matters for the purpose of enforcement of the present award. If anything, it tends to suggest that they have gained at their subsidiaries' expense. But even YNG appears to have achieved increased viability since 1996. Mr Stinemitz questions why YNG has not paid the award against it, but there is no actual indication of steps taken to enforce the award against YNG, or of any such steps being actually prevented or hampered by any conduct of YNG or the appellants. As to the appellants, the fact that they did not in 1996-97 pay sums which the arbitrators have found that YNG owed falls to be viewed in the light of (a) the appellants' case that they made no promise to pay such sums (and they have, as the judge found, a good arguable prospect of defeating the respondents' contrary suggestion) and (b) the text of the award against YNG indicating that YNG raised a number of substantial disputes which required resolution before any award was made against them. On the material before him, the judge concluded, and I would

agree, that the material produced does not go to or establish any likelihood that the appellants would move funds presently within the jurisdiction so as to make the enforcement of the award more difficult. Still less does it show any reason to think that during the adjournment the appellants would make themselves or become any less amenable to enforcement than they would have been without any adjournment. The appellants are evidently a very substantial concern. In fact, in a skeleton on the issue of a stay of execution of the judge's order for security, Mr de Garr Robinson summarised their position, by saying: "given that Yukos is one of the largest oil companies in Russia, there is no question of the provision of security operating harshly or oppressively or of it stifling any appeal." According to Mr Stinemitz's first witness statement, the appellants also have a United Kingdom subsidiary, Yukos (UK) Limited, an investment company with assets and subsidiaries of its own. In the circumstances shown by the evidence, I, like the judge, do not find in this area any real pointer towards a need for security during the period of the adjournment ordered.

The merits

This leaves for consideration the merits. HHJ Chambers concluded, as a result of the arguments before him and the considerations that he identified, that the appellants' case was "strongly arguable", but he was not prepared to hold that the respondents did not have an arguable case. The judge's order for security in a sum which was less than 25% of the total (including interest) at issue appears to have been based upon (a) the similarity as he saw it between this case and Soleh Boneh and (b) his view of the merits. Bearing in mind the approach indicated by the court in Soleh Boneh, we should certainly be cautious about any review of the judge's "preliminary conclusion" on the merits. However, both parties addressed this aspect at some length in material put before us, and Mr Malek submitted that the judge's treatment of it was brief to the point where it was not apparent what reason he had for treating the respondents as having even a bare arguable case. It is therefore necessary to cover the points raised to some extent, although not all in the detail in which they were presented to us.

The relevant questions under Swedish law are, in short, whether the appellants held themselves out by acts or statements as having become party to the contract between the respondents and YNG, whether the respondents or their predecessors reasonably relied upon such acts or statements, and whether the appellants ought to have known of such reliance. The majority award by the Swedish arbitrators concluded, after reviewing a number of elements, that together they demonstrated that the appellants were prepared to take over YNG's contract, that they agreed in a framework agreement to take over work "which remained to be performed under the geological project already agreed with YNG", that YNG had no independent administration or control of its payments for services performed by the appellants, and that this lack of independence and the appellants' control over YNG were "expressly stated by Yukos and YNG personnel to PetroAlliance" and that "Yukos did in no way hold YNG out as the Contract party and it must have appeared to PetroAlliance that Yukos acted in its own name and for its own account in the implementation and payment for the PetroAlliance Contract".

The witness statements exhibited for the hearing before HHJ Chambers deal with matters at considerable length. They are open to the general comment that they include, on both sides, some material of an assertive and argumentative nature, which tends positively to undermine their value. The important evidence of the respondents' state of mind was given by their attorney, Mr Stinemitz, who was involved in the negotiation of the contract of 17th January

1995 and conducted the Swedish arbitration proceedings, and attests to "his personal knowledge of various aspects of the performance of the Contract". His involvement in the negotiations and the conduct of the arbitration is common ground. Mr Alexanian of the appellants also accepted that Mr Stinemitz "may have some personal knowledge of various aspects of the performance of the [WAII] contract" but pointed out that none of the documents exhibited showed his alleged involvement and he had not exhibited a single document which he wrote or received at the time to support what he contended regarding his and PetroAlliance's knowledge or belief. In reply, Mr Stinemitz said that

> "Mr Alexanian accepts …. my personal knowledge of various aspects of performance of the Contract. Mr Alexanian observes, however, that I have not submitted documentary substantiations of these points. Since Mr Alexanian generously accepts my personal participation in and knowledge of the transactions, it seems unnecessary to submit such documentation".

The upshot of this response, which did not actually reflect or address the thrust of Mr Alexanian's point, is that Mr Stinemitz's evidence about PetroAlliance's beliefs remains at an extreme level of generality. It does not relate to any specific person or persons or derive from any specific communication or conversation. This is of some materiality when considering the elements on which the respondents rely.

The contract of 17th January 1995 was a general agreement for a "strategic alliance" between YNG and (at that stage) WAII to enhance the exploration and development of YNG's oil and gas prospects by utilization of WAII's technology and expertise. It was followed by four addenda, by the first of which WAII undertook to prepare a partial field study covering a 300 well segment of YNG's Prerazlomnoye oilfield, referred to before us by the respondents as "stage 1". Such a field study had been envisaged by a previous, non-contractual project proposal which also envisaged that it would be "an integral part of the full fieldwork study which will follow", referred to by the respondents as "stage 2". (The whole oilfield comprised some 800 wells.)

In early 1996 WAII entered into a joint venture with another company, forming PetroAlliance, and on 12th March 1996 it wrote informing YNG formally of the assignment, but stating that it was subject to receipt of YNG's written consent in accordance with Article 17 of the WAII contract. Article 17 prohibited any assignment of rights or obligations to a third party without the other party's prior written consent. There followed a letter dated 21st March 1996, in which the appellants referred to the assignment by WAII to PetroAlliance, and advised that it considered it possible to carry on the business of performing the contract with PetroAlliance, and was ready to discuss the issues related to re-executing the contract and proposed at its end to change the phrase "on behalf of [YNG]" to "on behalf of AO 'NK YUKOS'".

This letter the judge said constituted "the high point" of the respondents' case, but he went on immediately to say that quite why its effect should have been to add the appellants as a party to the contract "is something of a mystery as it was YNG that, in October 1996 signed the assignment".

Mr Stinemitz says that, after the letter of 21st March 1996, he and the respondents believed that the appellants had become a party to the contract and had accepted the assignment to PetroAlliance. But it is difficult to see how the letter can have led to this belief. Firstly, its terms were not followed up, and it is not the respondents' case that YNG was ever substituted by the appellants as the appellants proposed. Rather the respondents seek to treat the appellants as an additional party. Secondly, as to the judge's comment regarding the signature by YNG alone in October 1996 of formal written consent to the PetroAlliance assignment, Mr Stinemitz says that the

explanation why this was by YNG alone, rather than the appellants, is that the respondents considered that they already had the appellants' consent (by the letter dated 21st March 1996) and wanted simply to tie up a loose end regarding YNG. This lacks a certain compelling quality. Formal written consent was evidently important. The letter dated 12th March 1996 treats it as such. Mr Stinemitz's evidence also confirms that it was. The respondents took the trouble to follow up YNG's failure to sign and return the draft formal written consent which they had "many months earlier" submitted (it having been dated and, so far as appears, signed by the respondents on 7th June 1996, although Mr de Garr Robinson points out that this was also the effective date of the assignment mentioned in the letter dated 12th March 1996). Not only did the respondents not trouble to obtain any formal written consent from the appellants, but they were content to have the respondents sign on 10th October 1996 a written consent which, far from referring to the appellants as party to the WAII contract, referred expressly and only to the respondents and YNG as the parties.

When PetroAlliance submitted "Acts of Completed Work" (invoices) in October 1996, it addressed them to YNG as the "client". The evidence is that these were demanded by the appellants, and the respondents refer to a witness statement and rough transcript of oral evidence of a former PetroAlliance employee, Mr Boris Levin. His witness statement says however that he applied to Mr Efremov of the appellants with a request to assist getting payment for work done, that Mr Efremov told him to send a representative to YNG's offices, which he did, and that Ms Nadot of the appellants' "subsidiaries' department" explained that the documentation was "needed to authorize YUKOS to pay off the debt of YNG due to absence of money in YNG under condition of subsequent settlements schedule adopted in YUKOS". This shows that YNG depended at that time on the appellants for funds, but not that the appellants were or were thought to be party to the contract with YNG. It is true that the transcript of Mr Levin's oral evidence records him as saying at one point that he considered the appellants as a contracting party, and that, if he had not so considered them, he would not have dealt with them, because from his understanding they were the key player. But this entirely general assertion not only went beyond his witness statement but was combined with statements to the effect that the appellants explained that they were "paying all debts on behalf of YNG" and making cross-charges against YNG, and that he discussed the contract with YNG with the appellants, and that it was clear that they were talking on behalf of YNG. Mr Levin's evidence also puts a different complexion on Mr Stinemitz's hearsay statements (for which the only identified source appears to be Mr Levin), e.g. that "Yukos expressly told PetroAlliance's representatives (over and over) that PetroAlliance should look to Yukos for payments due under the Contract". In an internal email dated 17th September 1996 a Mr Garrett of the respondents records that "Boris met today with Yukos about getting their debts paid to us. They've agreed in principle to pay us, but require all documentation to support our calculation (AKT's)". Again, this relates to the subject of Mr Levin's evidence. The email also refers in its next paragraph to "preparing our historical relationship with them, including payments that we've received from them in the past (1995) based on the current contract". The relationship and payments in 1995 were not on any view with the appellants. More significantly, Mr Levin's general assertion that he viewed the appellants as a contracting party, and the respondents' informal internal email, can carry little weight by comparison with the ensuing formal documentation, the Acts of Completed Work, which identify the client and debtor as YNG. Further, after 15th November 1996 the respondents wrote to YNG,

under the heading, “re: Debt of [YNG] …. on the basis of the Contract …. dated 17th January 1995”, and referred in detail to the Acts of Completed Work and a table of “YNG” indebtedness.

The respondents rely on the fact that the respondents made proposals for technical cooperation with the appellants, on which the appellants evidently commented in early March 1996. By letter dated 20th May 1996, the appellants referred to these proposals and at the end of this letter they also suggested that the presentation of the Prerazlomnoye field geological model (evidently the 300 well study) be delayed because the Yukos and YNG experts would not be available at the contemplated date. On 4th December 1996 the framework agreement to which the arbitrators referred was entered into between PetroAlliance and the appellants. It was to serve as no more than a framework for PetroAlliance to participate in a complex corporate study of all Yukos oilfields. Services, as envisaged by the framework agreement, were only to be performed after the appellants decided that they were necessary, and it was further stated: “All conditions of service provision, including the amount of required services, payment terms and procedures, shall be outlined in separate contracts concluded between YUKOS and [PetroAlliance] based on the above-mentioned decisions by YUKOS”. No such separate contracts were in the event ever made. Among the potential services was the creation of a geological and hydro-dynamic model of the Prerazlomnoye oilfield, described as being “a continuation of the work already performed by [PetroAlliance] in the part of the field that includes 300 wells”, and “to continue the field model to include 800 wells”. This section ended: “Technical, legal and financial terms shall be agreed by the Parties in the Contract (Addendum to Contract) to do modelling of the Prerazlomnoye field”.

The respondents appear plainly correct in stating that the framework agreement contemplated that the appellants would thus do the full field study, to which the arrangements with YNG for a 300 well study were envisaged as preparatory or preliminary. That does not however mean that the appellants became party to the arrangements for the 300 well study. The respondents submit that the reference to terms to be “agreed by the Parties in the Contract (Addendum to Contract) to do modelling of the Prerazlomnoye field” must refer to the original WAII contract, on the basis that it takes a contract to make an addendum, and so that the parties must have been accepting that the appellants were a party to that contract. Other sections of the framework agreement refer simply to terms to be agreed in a contract. The judge did not regard the framework agreement “as indicative of the fact that Yukos had acceded to the contract”, and by itself the mere (and obscure) reference to the possibility of an “addendum to contract” does not in my view have much force. Nonetheless, it is capable of being deployed as part of a wider argument, in circumstances, where the appellants were at one time undoubtedly willing, indeed proposing, that they should replace YNG as party to the WAII contract. But the majority arbitral award appears vulnerable to a suggestion of inconsistency in this area. At one point the award recognises that the letter dated 20th May 1996 and framework agreement dated 4th December 1996 “do not, however, say that Yukos did take over the existing contract but in the arbitrators’ opinion they rather reflect a certain insistence by Yukos that the “phraseology” of the Contract should be changed to reflect the new parties if and when a “re-execution” of the Contract had been agreed”. On the other hand, a little later, in its summation, the award says that “Yukos had already expressly agreed in writing to take over in a new framework agreement what remained to be performed under the geological project already agreed with YNG”.

The respondents rely on internal instructions by YNG to the appellants in

January 1997 asking the appellants to pay PetroAlliance out of a "mutual" account sums claimed by the Acts of Completed Work. Bearing in mind YNG's evident financial dependence on its parent at the time, I do not see how these can assist. Reliance is also placed on minutes of meetings (on 25th February and 9th July 1997) headed as being between and as signed by the appellants and PetroAlliance, although it is clear that some of the personnel listed as present under the appellants' name were YNG employees. The meetings concerned inter alia the 300 well study (stage 1), as well as referring to the next stage, the full field study. The respondents submit that the discussions were of great significance. They acknowledge that the appellants could claim to have been acting for YNG, but point out that in the arbitration YNG denied that the appellants had authority to do so.

The minutes are not on any view formal contractual documents, whereas the appellants point out that, on 1st July 1997, there was a further supplemental agreement, varying the payment procedure under the WAII contract, which was entered into exclusively by YNG and the respondents. Mr Stinemitz, again without stating the basis or source of his knowledge, seeks to explain this as a document drafted in Russian by a junior employee of PetroAlliance (a Mr Sveshnikov) and signed by Murray Vasilev, a so-called "vice-president", whose title he says "did not necessarily reflect inclusion in senior management of PetroAlliance at the time [and who] does not read Russian". He says that he himself never saw a copy of the agreement before execution and does not believe that anyone senior at PetroAlliance did. He concludes that, accordingly, the senior management "had no idea that Yukos was not party to this agreement". Mr Stinemitz does not explain what the senior management did know about the negotiation of this agreement, when they saw its terms and how they thought that their junior employees would appreciate that the appellants should be shown as party to it.

This brings me to the last document, which is in my view in many ways the most significant. In addition to the 21st March 1996 letter and the framework agreement of 4th December 1996, the judge referred to a letter before arbitration dated 28th October 1997. This was signed by three very senior officers, two of them directors of PetroAlliance (one the President of WAII, the other the vice-president of WAII's joint venture partner). It was addressed by the respondents to both YNG and the respondents. It identified the WAII contract as made between WAII and YNG. It said that WAII and PetroAlliance "considered it an honor to sign such a Contract with you" and were proud to have fulfilled their obligations under it. It regretted that "during the last one-and-half years [YNG] has not fulfilled its payment obligations with respect to work performed under our Contract". It referred to failed negotiations for "a debt restructuring agreement with [YNG]". It identified "current debt of [YNG]" as over $6 million plus interest, and said that the respondents did "not believe that requiring payment of the amount owed by [YNG] is unreasonable". It said that "You are kindly requested to settle your debt …. by 15th November 1997. In case the debt is not paid by the date specified, you should note that we would have no choice but to proceed against [YNG] in accordance with our Contract's terms and applicable Swedish and Russian law". This letter was written less than two months before arbitration proceedings were brought against both companies. It is notable for treating both the contract as with and the debt as due by YNG, and for failure to treat the appellants as a party to the contract or to make any claim for payment or threat to proceed against them. Mr Stinemitz says that "The language of the demand letter [dated 28th October 1997] reflects the circumspect courtesy customary in dealing with foreign business entities so as

not to exacerbate matters with pointless insults or threats to Yukos. PetroAlliance, in short, believed that Yukos was subject to the Contract and the arbitration provision thereof". Mr Stinemitz does not particularise what basis he has for saying this, and no direct, or even indirectly ascribed, evidence has been adduced from any of the signatories. The judge found Mr Stinemitz's explanation "a little difficult to accept". I agree, and find it, if anything, more than a little difficult to accept.

This letter is also significant for a different reason. It was not put before the arbitrators at the arbitration. Had it been, the explanation now given for its terms would (presumably) have been considered and tested, even in the absence of the appellants. As it is, the majority award was based on incomplete material, which was clearly of very considerable potential relevance to the respondents' case that they believed, and were led to believe, that the appellants were party to the contract.

At the end of the day, we should - as I have said and despite the greater length of the review that I have undertaken - be reluctant to encourage too close an analysis of the merits either at first instance or before this court. I will only say that I would not view the respondents' case as having any greater strength than the judge attributed to it. Put bluntly, the appellants' case appears on the face of it substantially the stronger. This view is, I think, also reflected in the judge's remarks and also in the size of the security that he ordered.

Conclusions

Should the judge's order for security stand in these circumstances? Whilst I would not disagree with the judge's general assessment of the merits, the judge erred in principle, in other respects which entitle and require us to re-exercise the discretion that he exercised:

i) First, the judge treated the appellants as the party seeking an adjournment, when they were not and the respondents in reality were. Any order could not therefore be made a condition of an adjournment. The judge also erred in so far as he considered that the provision of security could be treated as a condition of avoiding enforcement, since the appellants were entitled to have their application under s.103(2) determined and to have a stay of execution in the meantime. Any order for security could be, at most, a simple order for the provision of security.

ii) Secondly, therefore, the judge ought to have viewed this as a case where the respondents had (a) decided to come to this jurisdiction, in the face of an outstanding challenge to the award in the Swedish courts, had (b) pursued proceedings for enforcement up to nearly the end of a two day hearing, but had (c) finally (and realistically) conceded that they faced very considerable problems if they persisted in asking the judge to determine the appellants' application under s.103(2), and had (d) in those circumstances reversed their stance and positively sought an adjournment pending the resolution of the Swedish proceedings.

iii) Thirdly, and as a lesser matter following on from point (ii), I consider that it would have been appropriate to identify expressly as a material factor that the present proceedings were begun, and pursued primarily, to obtain outright enforcement. The judge rightly concluded that the evidence produced does not suggest that security was required to avoid dissipation of assets here. No freezing relief or disclosure of assets has been sought, and on the material before us no such relief or disclosure would have appeared appropriate if sought.

iv) Fourthly, the reasoning whereby the judge explained his exercise of discretion was that the question of security was "inextricably linked with the

merits" (paragraph 48); and that: "If one adopts the approach laid down by the Court of Appeal in Soleh it seems to me that some security ought to be ordered. In my view the sum of $2.5million is a proper reflection of that approach" (paragraph 64). But Soleh Boneh is no authority that security should always be ordered reflecting the judge's assessment of the prospects. Staughton LJ was careful to point out that there might be other relevant factors besides the merits and any potential prejudice to enforcement. There are significant distinctions in other respects between this case and Soleh Boneh which the judge failed to identify: see paragraphs 32-33 above and the first three points of the present paragraph.

Exercising the discretion which it thus falls to us to exercise for ourselves under s.103(5), I would conclude, in the circumstances which I have identified in this judgment, that this was not an appropriate case to order any security. The present proceedings were brought primarily to achieve enforcement regardless of the Stockholm application. They have achieved no part of that aim, although they must have involved a good deal of time, effort and expense on both sides. It is the respondents who, in the event, sought the adjournment that the judge ordered, so that there is no question of making the provision of security a condition of adjournment. Still less is there any basis for making it a condition of avoiding immediate enforcement, in the face of the unresolved application under s.103(2). The merits as they appear (in relation to the validity of a majority award in an arbitration in which the appellants did not appear and one obviously relevant document was not produced) lend only modest support to an application for security. No need has been shown as against the appellants for any security during the adjournment. These factors combine to make security, in my judgment, unnecessary and inappropriate. To that extent this appeal succeeds.

The Stockholm proceedings challenging the award, the outcome of which the respondents now wish to await, should thus be pursued to their conclusion. The majority award will then be shown either to be valid and enforceable against the appellants or not. The outcome of the present proceedings will in all likelihood follow accordingly. Meanwhile, the appellants' application under s.103(2) should be adjourned pending further order.

Mr Justice Neuberger:

I agree.

Lord Justice Thorpe:

I also agree.

Order: Appeal against His Honour Judge Chambers QC's order dated 2nd May 2001 by Yukos allowed to the extent that the order for security is set aside; Yukos to be awarded 75 per cent of their costs, to be assessed if not agreed, across the board at both instances.

(Order not part of approved judgment)