England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2011] EWHC 1957 (Comm)

Case No: 2010 Folio 1539

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

Royal Courts of Justice
Strand, London, WC2A 2LL

27/07/2011

B e f o r e :

MR JUSTICE BURTON

Between:

DOWANS HOLDING SA
DOWANS TANZANIA LTD **Claimants**

- and -

TANZANIA ELECTRIC SUPPLY CO LTD **Defendant**

MR RICKY DIWAN and MR DAVID DAVIES (instructed by Stephenson Harwood) for the Claimant
MR ANTONY WHITE QC (instructed by Reed Smith LLP) for the Defendant
Hearing dates: 11 and 12 July 2011

HTML VERSION OF JUDGMENT

MR JUSTICE BURTON :

1. By an Arbitration Award dated 15 November 2010 ("the ICC Award"), an ICC Tribunal (consisting of Mr Gerald Aksen as Chairman, Mr Swithin Munyantwali and Sir Jonathan Parker) ordered the Defendant (also known as TANESCO, the State-owned National Electricity Generation and Supply Co of Tanzania), to pay to the First and Second Claimants jointly sums totalling more than US$65m plus interest and costs. By order of 11 January 2011, Steel J, on a without notice application under CPR 62.18, granted to the Claimants permission under s101(2) of the Arbitration Act 1996 ("the 1996 Act") to enforce the ICC Award in England and Wales.

2. There have been four applications before the Court, by the Defendant to set aside the order of Steel J under s103(2)(f) of the 1996 Act, alternatively to adjourn the issue of recognition or enforcement of the Award under s103(5) of the Act, and by the Claimants for orders, in the event that there were otherwise an adjournment, for partial recognition and enforcement of the Award and/or for an order, as a term of any such adjournment, that, within 21 days, the Defendant provide to the Claimants security for the sums due under the Award.

3. This has been the hearing of those applications, which have been ably argued by Mr Antony White QC on behalf of the Defendant and by Mr Ricky Diwan and Mr David Davies on behalf of the Claimants.

4. The dispute which was resolved by the Award arose out of the enforcement and enforceability of the Emergency Power Off-Take Agreement ("POA") with the Defendant dated 23 June 2006, assigned to the First Claimant on 14 October 2006 and to the Second Claimant on 20 March 2007. Electricity supply commenced on 26 January 2007, and the POA was continuously performed without complaint as to its performance until 11 August 2008. By letter of 30 June 2008, the Defendant stated to the Second Claimant that the POA was void *ab initio*, since it was entered into in contravention of express prohibitions contained in the Tanzanian Public Procurement Act 2004 and required the Second Claimant to decommission the plant by 1 August 2008. This purported termination of the contract was treated as repudiatory by the Second Claimant. The ICC Award found that the POA was valid, and that payment was due in debt to the Claimants under the contract in respect of supplies during its term in the sum of US$ 19.9m plus interest, and in respect of damages, after set-off for receipt of advance payments, of US$ 36.7m plus interest.

5. The ICC Award was filed on 10 January 2011 by the Arbitrators, via the ICC, with the High Court of Tanzania under s17 of the Arbitration Act (Chapter 15), which provides by subsection (1) that "*An award on a submission on being filed in the court in accordance*

with this Act shall, unless the court remits it to the reconsideration of the arbitrators or umpire or sets it aside, be enforceable as if it were a decree of the court". A petition was filed with the Tanzanian court by the Defendant on 9 February 2011, seeking to have the ICC Award set aside or remitted for reconsideration: there were also three third party petitions presented to the Court on 31 January, 9 February and 13 February 2011, all challenging registration of the ICC Award by the Tanzanian court. It is common ground that the application will be determined (either on paper or at an oral hearing if such be set by the Court) finally (subject to any appeal) in September 2011. If there were an appeal, the Defendant's evidence is that it could be expedited and could be resolved within 9 to 12 months. The Claimants' evidence is that an appeal would take between 12 and 18 months.

6. The applications to which I have referred above were supported by evidence including statements from a distinguished Tanzanian legal expert for each side. In the event, subject to the dispute as to the probable timing of any appeal (which it has not been necessary to resolve), the material to be drawn from both such experts has consisted of the Tanzanian Arbitration Act referred to above, the important recent decision of the High Court of Tanzania (per Msumi J) **D B Shapriya & Co Ltd v Bish International BV (No 2)** [2003] 2 East Africa Law Rep 404 (HCT) ("**Shapriya**") and the common ground that the Tanzanian courts will pay close regard to, and find persuasive, the decisions of the United Kingdom and the Indian courts. I have not needed to consider in any detail the respects in which they diverge, largely because of the way in which the parties' submissions before me developed (see in particular paragraph 11(iii)(d), (e) and (f) below. They held diametrically opposed views as to what the prospects of success were for the Defendant's application in Tanzania, which I have had to assess.

7. As can be seen from my summary of the outstanding applications, the relevant subsections of s103 of the 1996 Act in issue before me, were as follows:

"*(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 -

…

(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.

…

(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 (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."

8. The New York Convention (on the Recognition of Enforcement of Foreign Arbitral Awards) 1958 superseded the Geneva Convention (on the Execution of Foreign Arbitral Awards) 1927, which provided in Article 1 that a relevant Convention award would "*be*

recognised as binding and … be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the … award [had] *been made in a* [Convention] *territory*" but:

"*To obtain such recognition or enforcement, it shall, further, be necessary:*

…

(d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to ***opposition, appel or pourvoi en cassation*** *(in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of testing the validity of the award are pending.* "

9. It was further provided by Article 3 that:

"*If the party against whom an award has been made proves that under the law governing the arbitration procedure there is a ground … entitling him to contest the validity of the award in a Court of Law, the court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.*"

10. The New York Convention, upon which the UK 1996 Act is based, contained in almost identical wording the provisions of s103(2)(f) in Article V(1)(e), and s103(5) is in almost identical terms to Article VI. It is common ground that the intention of the New York Convention was to make enforcement of a Convention award more straightforward, and in particular to remove the previous necessity for a *double exequatur* – i.e. the need, before a Convention award could be enforced in any other jurisdiction, for it to be shown that it has first been rendered enforceable in the jurisdiction whose law governs the arbitration (the "home jurisdiction" – an expression which covers the case both where the law of the seat and the governing law of the arbitration are the same and where (as for example in the Indian Supreme Court decision of **Oil & Natural Gas Commission v Western Company of North America** AIR 1987 SC 674 ("**ONGC**"), to which I shall refer below) the arbitration which had its seat in London was governed by Indian law. See for example what both sides agree is the seminal commentary on the New York Convention, albeit written in 1981, **The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation** by Albert Jan van den Berg (**VDB**) at 266:

"*Another improvement of the New York Convention's scheme for enforcement of an award is the elimination of the "double exequatur". Under the Geneva Convention the party seeking enforcement of an award had to prove that the award had become "final" in the country in which it was made. In practice this could be proven only by producing an exequatur (leave for enforcement or the like) issued in the country in which the award was made. As the party had also to acquire a leave for enforcement in the country in which he sought enforcement, this amounted to the system of "double exequatur". The thought prevailed at the New York Conference that the acquisition of a leave for enforcement in the country where the award was made was an unnecessary time-consuming hurdle, especially since no enforcement was sought in that country. Moreover, it could lead to delaying tactics on the part of the respondent who could forestall the award becoming final by instituting setting aside procedures in the country in which the award was made.*

The elimination of the "double exequatur" is achieved in two ways. In the first place, the word "final" is replaced by the word "binding" in order to indicate that it does not include the exequatur in the country of origin (Art. V(1)(e)). In the second place, it is no longer the

party seeking enforcement of the award who has to prove that the award has become binding in the country in which the award is made; rather, the party against whom the enforcement is sought has to prove that the award has not become binding."

The Issues

11. A number of issues arose for consideration at the outset of the hearing, but, as will appear, all save five (which I shall identify) were effectively resolved or not pursued.

S103(2)(f)

i) Does the fact that there are pending petitions to set aside the ICC Award in the home jurisdiction (Tanzania) mean that the Award is *not yet binding* within the meaning of s103(2)(f)? [**Issue I**.] (There was a submission by Mr White in paragraph 38(ii) of his skeleton argument that the view of his expert on the issue should be preferred because it was "*based on an unusual feature of the law of Tanzania relating to the supervisory jurisdiction of the High Court over arbitral proceedings and awards, namely that a challenge to an award has an automatic suspensory affect which is not dependent upon a judicial decision. The award is automatically suspended pending the determination of the challenge and until such time it is not binding on the parties*". However that was not supported by his expert's evidence, and was, in any event, not pursued by Mr White.)

ii) If so, how should the discretion thus given to the English court under s103(2) be exercised? [**Issue II**.]

S103(5): if the enforcement of the Award is not refused:

iii) Are the merits of the Defendant's petition to set aside in Tanzania (it is common ground that there needed to be no consideration of the contents of the third party petitions) such that there should be an adjournment of the issue of enforcement in this Court? As to this:

a) It was not in issue that the prospects of success for such application fall to be weighed, and that the exercise of this discretion is set out most clearly in **Soleh Boneh International Ltd v Government of the Republic of Uganda** [1993] 2 Lloyd's Law Rep 208 CA at 212 ("**Soleh Boneh**").

b) It is not in dispute that the test which will be operated by the Tanzanian court to see whether there can be a challenge to the ICC Award is the 'old' (pre-1996 Act) test with regard to whether there is 'error on the face of the award', by reference to s16 of the Tanzanian Arbitration Act ("*Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award*"), which imports discussion of the old UK cases on error of law on the face of the award, which will, as appears in paragraph 6 above, be persuasive in Tanzania.

c) It is also not in dispute that there is an exception to the susceptibility of arbitration awards to challenge by reference to the old test of error on the face of the award, and that such exception applies in Tanzanian law, by reference to the House of Lords decision in **F. R. Absalom Ltd v Great Western (London) Garden Village Society** [1933] AC 592 ("**Absalom**"), as applied in the Indian Supreme Court in **Alopi Parshad & Sons Ltd v Union of India** AIR 1960 SC 588 and in the recent Tanzanian case of **Shapriya** referred to in paragraph 6 above ("the **Absalom** Exception").

d) Although the Claimants assert that, even applying the law of error on the face of the award to the ICC Award, there is no prospect of successful challenge to the fully reasoned findings in the (641 paragraph) ICC Award by a very distinguished international panel, Mr Diwan restricted his submissions before me to the case that there was no prospect of success in Tanzania by reference to the applicability of the **Absalom** Exception. [**Issue III**.] In essence, the case was put by Mr Diwan on the basis that the Defendant was "*seeking to put forward an incontestable and impermissible merits appeal before the High Court of Tanzania*" (paragraph 11(b)(i) of his skeleton).

e) Although Mr White, in his skeleton, had sought to argue that there was a separately arguable challenge to the Award, by reference to (Tanzanian) public policy, he accepted, not least in the light of the Kenyan authority of **Christ for All Nations v Apollo Insurance Co Ltd** [2002] 2 East Africa Law Rep 366 (CCK) at 370 and also by reference to **Ipco (Nigeria) Ltd v Nigerian National Petroleum Corporation** [2005] 2 Lloyd's Law Rep 326 ("**Ipco**") at paragraphs 13 and 50, that the public policy exception is a limited one, and in particular so where, as here, it covers exactly the same territory as the alleged error of law. Where, as in this case, there has been an express finding by the Arbitrators that the POA was not void and of no effect, as in contravention of mandatory statutory requirements of Tanzanian law relating to public procurement (paragraphs 393-4 and 496-507 of the ICC Award), the argument that there has been breach of Tanzanian public policy is not distinct from, but entirely dependent upon, the case as to error of law on the face of the award.

f) There is in the Tanzanian petition a case based on 'remission', in particular by reference to an alleged issue as to quantum. Mr Diwan, in his skeleton argument, made out a powerful case as to the unarguability of this aspect: (i) a claim for remission is not a basis for relief under s103(5) and does not materially feature in any jurisprudence on s103(2) (ii) the claim for remission is fact based and does not begin to satisfy the *error of law* test, which, by reference to e.g. **King v Thomas McKenna Ltd** [1991] 1 AER 653 CA it must do (iii) it is contrary to the agreed basis upon which the case was put before the Arbitrators. Mr White did not pursue any case by reference to it.

iv) In the light of the above, how should the discretion to adjourn be exercised? [**Issue IV**.]

v) If the application is to be adjourned, should it be on terms? As to this:

a) Mr Diwan did not pursue his application for a partial payment of at least the 'debt' aspect of the Award.

b) However he seeks, pursuant to the express terms of s103(5) an order for security in a substantial amount [**Issue V**]. Security has been considered in the following cases: **Soleh Boneh** (ordered, though in a lesser sum than at first instance), **Dardana Ltd v Yukos Oil Co** [2002] 2 Lloyd's Law Rep 326 (not ordered), **Ipco** (ordered), **Continental Transfert Technic Ltd v Federal Government of Nigeria and others** [2010] EWHC 780 (Comm) ("**Continental**") (ordered).

Issue I: Not yet binding

12. There is no doubt that the parties agreed that the decision of the Arbitrators would be binding:

i) By Clause 14.2 of the POA, the Choice of Law clause, "*this Agreement and all rights under this Agreement and the Annexes hereto shall be governed by, construed and*

enforced in accordance with the Laws of Tanzania." By virtue of paragraph 8 of Schedule 1 of the Tanzanian Arbitration Act, one of the provisions to be implied into such an arbitration agreement (unless otherwise ousted) would be that "*the award to be made by the arbitrators or umpires shall be final and binding on the parties and the persons claiming under them respectively*". In any event, however, the POA itself provided by Clause 14.1 that:

"*(e) The decision of the arbitrator shall be final and binding upon the Parties, and shall not be subject to appeal. Either Party may petition any court having jurisdiction to enter judgment upon the arbitration award. At the request of either of the Parties, the arbitrator shall cause such arbitration award to be filed with the High Court of Tanzania.*

(f) The Parties waive any right to challenge or contest the validity or enforceability of this arbitration agreement or any arbitration proceeding or award brought in conformity with this Section, including any objection based on venue or inconvenient forum."

ii) The arbitration was under the ICC Rules, which provide by Article 28(6) that:

"*Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"

iii) The Arbitrators settled, and the parties agreed, pursuant to Article 18 of the ICC Rules, Amended Terms of Reference, which contained the following provision:

"*8.9 Honoring Award – By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay in accordance with Article 28(6) of the ICC Rules and to have waived their right to any form of appeal insofar as such waiver can validly be made.*"

13. As set out in paragraph 10 above, the Geneva Convention word "*final*" was replaced in the New York Convention by the word "*binding*", although, as can be seen, the parties here agreed that their Award would be both *final* and *binding*. There is no definition of the word "*binding*" in the New York Convention or in the 1996 Act based upon it. In the "*Summary Analysis of Record of United Nations Conference May/June 1958*" by G W Haight it is recorded that "*the intention of the Working Party appears to have been that the time for taking an "appeal" must first expire before an award can be said to be "binding", but that the possibility of other means of recourse would not operate to prevent the attainment of this condition*"; but it is clear that, after discussion, no clarification was incorporated in the definition.

14. In this case the ICC Award is not yet enforceable in its home jurisdiction of Tanzania, because of the unresolved petitions, but Mr Diwan submits that that is of no relevance. At English law, the position was clearly expressed by Steyn J in **Rosseel N.V. v Oriental Commercial & Supply Co (UK) Ltd** [1991] 2 Lloyd's Law Rep 625, a case in which there was no application pending in New York to set aside or suspend a New York award, but the defendants resisted enforcement on the basis that it had *not yet become binding*. Expressly cross-referring to the passage in VDB, which I set out in paragraph 10 above, Steyn J, in rejecting such submission, stated as follows at 628 (LHC):

"*… the New York Convention eliminated the "double exequatur" requirement under the earlier Geneva Convention. Under the Geneva Convention a party who sought to enforce an award, had to prove an exequatur (leave to enforce) issued in the country in which the*

award was made as well as leave to enforce in the country in which he sought enforcement. The New York Convention abolished the need to obtain leave to enforce in the country where the award was made."

15. For some time before VDB, there was discussion as to whether the relevant test as to the Award being binding fell to be decided by reference to the local law (of the home jurisdiction), or by reference to an *autonomous* interpretation of the Convention. It is clear that Mr White does not, indeed cannot, espouse the proposition that a *double exequatur* is indeed required. His submission is more finessed. He relies on the existence of what he calls an "*impediment*" to the enforcement in the home jurisdiction, which means that the ICC Award cannot be binding while that *impediment* persists, in the sense that the ICC Award is thus at present not "*ripe*", or "*ready*" or "*inchoate*" for enforcement (he takes the last expression from the discussion by VDB at 339). Drawing support from obiter remarks from the Indian Supreme Court in the course of **ONGC**, to which I shall return, he submits that, although it is not necessary for there to be an *exequatur* in the home jurisdiction, there must be what he calls a "*step required to make the Award ready for enforcement*" and, those steps having in this case been taken, and having met with an *impediment*, this Award is *not yet binding*. He relies heavily on **ONGC**. Mr Diwan submitted, as will appear, that the decision as to whether the Award is binding is a matter for the English court, and the fact that the Tanzanian court would or might find the decision of the Indian Supreme Court persuasive was not directly relevant, but nevertheless he engaged with Mr White's submissions.

16. **ONGC** is a case where there was an arbitration award in London, but it was common ground that the governing law of the arbitration was Indian, so that, when the successful party sought to enforce the award in India, the Indian award was treated as a domestic award, such that the only question was as to whether the award should be enforced in what was effectively its home jurisdiction. The court concluded, by way of ratio (paragraph 14), that the award was unenforceable until it was made a rule of the Indian court and a judgment and consequential decree passed in terms of the award, and, notwithstanding that a New York court was prepared to enforce the Indian award, the Indian court should intervene to prevent it doing so by way of an anti-suit injunction. The most significant fact which emerges from such description is that, as was common ground between Counsel before me, the remarks of the Indian Supreme Court as to whether a foreign award would be regarded as binding in India if steps had not been taken to enforce it in its home jurisdiction were obiter. As Mr Diwan illustrated however, not only are the remarks obiter, but they are difficult to support:

    i) Much of the obiter discussion which followed the conclusion of the court in paragraph 14 is infected by the strength of its conclusion with regard to the enforceability of an Indian award in India:

    "*Life is infused into the award in the sense of its becoming enforceable only after it is made a rule of the Court, upon the judgment and decree in terms of the award being passed. The American Court would have therefore enforced an award which is a lifeless award in the country of its origin and under the law of the country of its origin, which law governs the award by choice and consent.*"

    ii) Although Thakkar J, who delivered the judgment of the court, does quote extensively from VDB, such quotation is very selective. The passage at pp266-267, which I have cited in paragraph 10 above, is not referred to. Thakkar J's citation is taken from the section of VDB at pp337-346 headed "*Meaning of the term "binding"*": but begins (in paragraph 15 of his judgment) with a short passage from p341 of VDB, reverts to include a short passage from p340 and then tracks further back to cite a lengthy passage from pp338 to 340. From such citations he reaches the following conclusions:

"*Following propositions emerge from the passage quoted hereinabove*

(1) *That the enforceability must be determined as per the law applicable to the award.*

(2) *French, German and Italian courts have taken the view that the enforceability as per the law of the country which governs the award is an essential pre-condition for the assertion that it has become binding under Article V(1)(e).*"

This conclusion is of course not only inconsistent with **Rosseel**, but trespasses beyond the common ground between the parties before me that the New York Convention abolished the requirement for a *double exequatur*, and goes much further than the more limited proposition that Mr White seeks to put forward.

iii) The citations from VDB referred to above by Thakkar J do not include, in the extract from p340 of VDB, the reference there to the decision of the Swedish Supreme Court which, as VDB there recorded, "*assigned a very limited role to the law of the country of origin for determining the question when an award is binding*", and to which VDB returned at greater length at pp343-344. More significantly, however, the citations did not include VDB's own conclusions, which are to the contrary of the views of others which VDB was setting out in the passages that were cited. At p341 of VDB (not included in the citation), after the passage at pp338-340, which was cited, VDB states:

"*The courts and authors mentioned above implicitly do give an autonomous interpretation to the term "binding" of Article V(1)(e) as far as the elimination of the "double exequatur" is concerned.*"

VDB's own conclusion, which is <u>contrary</u> to that derived by Thakkar J, which I have quoted above, is to prefer what he calls the *autonomous interpretation of the term* "*binding*" whose result would be [pp345-6] that "*in most cases an award can be deemed "binding" within the meaning of Article V(1)(e)*".

iv) VDB recognised that his view was (at that stage) a minority view, espoused by a then minority of court decisions, to which he referred (and Thakkar J did not). However, it was one to which he, and others, had by then given powerful support; and had the full passage in VDB been referred to by Thakkar J it would have been clear that the conclusion he reached was <u>not</u> that of VDB.

v) In any event, as will appear, so far as concerns the Indian Supreme Court's reliance upon the then majority position, as recorded by VDB, it is clear that views have moved on since 1981, and such views have been overtaken.

17. The VDB view that there was and should be an *autonomous* interpretation of *binding*, is best analysed by differentiating between *ordinary recourse* and *extraordinary recourse*. The former, which may not be permitted by the terms of the relevant agreement between the parties or the law governing the arbitration, would ordinarily be subject to a time limit, after which no such ordinary recourse (if otherwise available) would be permitted. Then there is the possibility of *extraordinary recourse*, which would be some limited challenge to the award, in the courts of its home jurisdiction, by reference to the restrictive terms of the New York Convention. Once *ordinary recourse* is excluded, the possible availability of *extraordinary recourse* does not prevent an award from being, or having become, *binding*. Mr Diwan submits that, although it is clear that there was sufficient discussion before the finalisation of the terms of the New York Convention to prevent any such agreed definition being included in the Convention, Article 31 of the Vienna Convention

allows for such commonsense and logical interpretation of the Convention notwithstanding.

18. Such *autonomous* interpretation is entirely consistent with the admitted purpose of ending the need for a *double exequatur*, and is inconsistent with any extension of the idea that an award is "*lifeless*", as per paragraph 14 of **ONGC**, until enforced by its country of origin, except insofar as that can be interpreted as simply referring to enforcement within that country.

19. There have been two more authoritative considerations of this topic in **Fouchard Gaillard Goldman on International Commercial Arbitration** (1999) ("FGG") (esp at paras 1676-1684) and **Poudret Besson Comparative Law of International Arbitration** (2007) ("Poudret") (esp at pp842-5). The latter is of course considerably more recent, and it considers both VDB and FGG and all the relevant cases internationally. Poudret makes clear at p843 that "*Qualified as a minority opinion by* [VDB] *when his work was published in 1981, this* [autonomous] *theory is today predominant and is confirmed by Swedish, Dutch, German and Belgian case law*", which he cites.

20. At the time of FGG, there was still argument being put forward, to which I shall refer, in support of a contrary proposition, but the "*predominant*" theory can be illustrated by a Swiss Federal Supreme Court decision of 26 February 1982, **Joseph Müller A.G. v Sigval Bergesen**, reported in Kluwer Arbitration 48 ATF 108 lb 85 (JdT 1982 I 367), referred to in FGG at para 1683 as if supporting what had by then become the minority view as to the significance of the local law, and the decision of the Hong Kong Court of First Instance of 20 December 2001 per Burrell J (**Société Nationale d'Opérations Petrolières de la Côte d'Ivoire - Holding v Keen Lloyd Resources Ltd**) HCCT 551 2001, a decision referred to by Poudret, and post-dating FGG.

21. In the Swiss case, there was a New York law award, which required, under New York law, confirmation within one year, and no such confirmation had taken place, so that it was not enforceable in New York. Nevertheless, the Swiss Federal Supreme Court concluded that it was binding and could be enforced in Switzerland, stating:

    "*The requirement of a declaration of enforcement in the country of the arbitral award's origin would go squarely against the New York Convention's aim of avoiding the double exequatur. Rather, it suffices to the binding force that the arbitral award is capable of an exequatur in the country in which enforcement is sought.*"

    That seems to me to be support for a VDB approach, although it would not be inconsistent with Mr White's middle way.

22. In the Hong Kong case, there was a French award, which was, at the time of the application to enforce in Hong Kong, the subject of proceedings to set aside the award in France, not dissimilar to the facts of the case before me. Burrell J concluded, by reference to **Redfern and Hunter Law and Practice of International Commercial Arbitration** (3rd Ed) and by reference to an identical statute to that before me (not surprisingly as it too mirrors the New York Convention) that the award was binding if it were no longer open to an appeal on the merits, and that the only issue that arose was by reference to the equivalent of our s102(5). That case firmly supports Poudret's conclusion as to the now *predominance* of the VDB view.

23. In the circumstances, even if the issue before me were whether the Tanzanian court would regard this award as binding, and would hence look for guidance to the Indian Supreme Court judgment in **ONGC**, I conclude that that court would not find the obiter

remarks of Thakkar J persuasive, but rather that they had in any event been overtaken by the subsequent international jurisprudence. I hasten to say that it was not the Defendant's expert who referred to **ONGC** at all in this regard, but it arose simply in the careful submissions of Mr White, who drew it to my attention. Insofar as he has also drawn to my attention two subsequent Indian cases, **Hindustan Copper Ltd v Centrotrade Minerals and Metals Inc** AIR 2005 Cal 133 and **Naval Gent Maritime Ltd v Shivnath Rai Harnarain (I) Ltd** 174 (2009) DLT 391, neither, in my judgment, assist his argument. The first case was dealing with enforceability of an award made in London, but which the court concluded to be subject to Indian law and hence to be a domestic award, which it found could not be enforced in India. There were some brief obiter references to the issue of the binding effect of a foreign award. In the second case, there was an issue of whether an English award could be enforced in India. It was enforced. There were obiter remarks as to what would have been the effect if there had been proceedings pending in England to challenge the award, in which case Dhingra J opined that it would be "*reasonable for the judgment debtor to argue that the award has not yet become final and binding between the parties*". The ratio of this case is certainly inconsistent with the obiter views of Thakkar J in **ONGC.** Given that in that case no step had even been taken by way of an application by the creditor to the English court, it is also inconsistent even with the limited (middle way) argument of Mr White that some step must have been taken in the home jurisdiction so as to render the award *inchoate* for enforcement.

24. I am satisfied that the issue as to whether the ICC Award has become *binding on the parties* is one for me, by way of deciding whether the UK court is in a position to recognise and enforce a Convention Award, and not by way of my assessment of whether the Tanzanian court would consider that it is binding. In any event, I conclude, not least because there is, as I have set out, no authority of the Indian Supreme Court which would be more binding upon, or persuasive to, the Tanzanian court than to the English court, that the answer would be, and should be, the same in both courts. I am entirely persuaded, not only by the clear reminder by Steyn J in **Rosseel** as to the effect of the New York Convention, but by the *predominant* international view.

25. However I can, and should, address a number of arguments canvassed, particularly in FGG, and by Mr White:

    i) Mr White relied upon the provision in s103(2)(f), and indeed in the Convention itself, that the "*award has not yet become binding on the parties*" to support a proposition that that must mean that the Award when given was not binding and subsequently becomes so at some later stage (and thus inferentially by reference to something done, or not done, or occurring, or not occurring, in the home jurisdiction). I see no basis for this suggestion. Some awards are subject to *ordinary recourse* and therefore can be said not to become binding (i.e. they are *not yet binding*) until either a time limit for such appeal is expired (see paragraph 13 above) or any such appeal has taken place. Other awards may be subject to an express need for confirmation. This in no way supports a proposition that all awards are (whatever the provisions of the arbitration agreement or of rules, such as those of the ICC, or indeed of the terms of reference such as in this case) not *binding* until some later date, to be the subject of exploration as to what has or has not occurred in the home jurisdiction.

    ii) Those opposing the *autonomous* theory of VDB have referred, as did Mr White, to the reference in s103(2)(f) to the local law. If, the argument goes, there is reference to the local law with regard to the second part of the subclause – "*has been set aside or suspended by a competent authority of the* [home jurisdiction]" – then there must be relevance for the law of the home jurisdiction in relation to both parts of the subsection. No one has gone so far as to suggest that the subsection should be read as if it said "*that*

the award has not yet become binding on the parties … under the law of which it was made": this would certainly be an impossible interpretation if any reliance is to be placed upon the presence of the commas. But if such is not to be, indeed cannot be, suggested, then I for one cannot see the relevance of the asserted inference of cross-reference. It is quite plain that the subsection deals with two quite separate matters, namely whether the award has not yet become *binding* on the parties or whether it has been actually set aside or suspended. The only relevant court which can perform the latter act is (and it is by the very subsection made clear to be) the home jurisdiction, which is specified because otherwise it might be thought that some relevance was being given to a purported setting aside or suspension by some entirely irrelevant court.

iii) It seems wholly clear to me that, as the Hong Kong court recognised, the issue as to whether there can or should be any effect upon enforcement as a result of steps taken in the home jurisdiction falls rather to be considered by reference to s103(5), and its parent in Article VI of the New York Convention. An application to set aside or challenge the award in the home jurisdiction is there expressly provided for. Also implicitly provided for is thus the possibility that such application is utterly hopeless and/or intended for delay only. The existence of such express provision appears to me to be significant in relation to the construction of s103(2)(f), so as to conclude that questions of the impact of the home jurisdiction (unless of course the home jurisdiction has actually set aside the award, in which case there is still discretion under s103(2) – see further paragraph 28 below) should be the subject of consideration by reference to s103(5) and <u>not</u> s103(2)(f). This is the conclusion reached by Gross J in **Ipco** at para 12:

"*… Section 103(2)(f) is not triggered automatically by a challenge brought before the court in the country of origin. This conclusion flows from the wording of section 103(2)(f) itself, it is supported by leading commentators* [VDB] *at page 352,* [FGG] *at pages 980-981 and it is consistent with the provisions of sections 103(5) of the Act – which would be otiose, or at least curious, if an application to the court in the country of origin automatically resulted in the award being suspended..*"

iv) The whole argument seems to me to undermine the admitted intention of the New York Convention to eliminate the need for a *double exequatur*. Mr White attempts, as I have explained in paragraph 15 above, to avoid this consequence by seeking to find some midway course of an award being *inchoate* for enforcement, followed (in this case) by there then being, or becoming, an *impediment*. But I do not accept this argument:

a) It seems to me arguably to offend against the other underlying principle of the New York Convention's change from the Geneva Convention, namely such as to remove any onus from the party seeking to enforce the award. It seems to me inevitable that on Mr White's case, the party relying on the award will be expected to show that it is *inchoate* for enforcement or not *lifeless*, or at any rate that he has, as Mr White would have it, taken a step within the home jurisdiction. If it were for the challenger to show that it has taken some steps to challenge the award, then there would be no distinction between Mr White's contention and the full-blooded case that if there is a pending challenge in the home jurisdiction, then the award is *not yet binding*. In the absence of such a challenge, there must then be an onus upon the party seeking to enforce an award to show that he has taken a step (and that step can only be a step towards enforcement) in the home jurisdiction.

b) As I have set out in paragraph 23 above, the Indian case of 2009 referred to by Mr White would not support this proposition that before enforcement some step must have been taken in the home jurisdiction and, with the possible exception of the Swiss case referred to in paragraph 21 above, there is no other authority which would support it. **ONGC** itself plainly goes for the full blooded conclusion set out in paragraph 16(ii) above

of "*enforceability* [in the home jurisdiction being an] *essential precondition*" for an award being *binding*, which I reject, and which Mr White does not espouse – and which Thakkar J himself recognises, in paragraph 15, in his quotation from VDB at 339, was not, at any rate in the view he there recites of the Court of Appeal of Naples, the position at English law ("*according to which the leave for enforcement is not necessary in order to confer binding force upon the award*").

26. I can see no distinction between the full-blooded proposition and that of Mr White. I do not consider that there is any logical difference between whether steps have been taken to enforce the award (or make it ready for enforcement) in its home jurisdiction and whether it is not *binding* as a result of some challenge or *impediment* in the home jurisdiction. I do not see any middle way. In either case it would have to be defeasibly *binding*. As I conclude, the *binding* effect of an award depends upon whether it is or remains subject to ordinary recourse. Once it is *binding*, it does not cease to be so as a result of some event in the home jurisdiction; and the absence of such *impediment* does not make it so.

27. I am accordingly entirely satisfied that, as the parties agreed and the ICC Rules provide, the ICC Award has become, and still is, *binding* on the parties. The third party petitions in the home jurisdiction, which have been accepted by the Tanzanian court to the extent that they will be adjudicated upon together with the Defendant's petition in September, are clearly of no relevance to whether the ICC Award is *binding*, and I reach the same conclusion with regard to the existence of the Defendant's petition.

Issue II: The Discretion

28. If I had reached the contrary conclusion that, by virtue of the existence of the petition(s) in Tanzania, the ICC Award is not yet binding, I would in any event have had a discretion to exercise under s103(2). It is not a question of an automatic refusal of recognition or enforcement simply because one of the subsections of s103(2) is satisfied. It is clear from **Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan** ("**Dallah**") both in the Court of Appeal ([2010] 1 Lloyd's Law Rep 119 at paragraphs 58-61 per Moore-Bick LJ) and in the Supreme Court [2010] 2 Lloyd's Law Rep 691 per Lord Mance at paragraphs 67-68 and 126ff, that, even if an award has been set aside in the home jurisdiction upon one or other of the grounds set out in the subsections, the English courts still retain a discretion to enforce the award, though that jurisdiction will be exercised sparingly. See also per Gross J in **IPCO** at para 11. I have no doubt that if I were to have been persuaded as to the applicability of s103(2)(f), I would have exercised my discretion under s103(2) in the same way as my discretion under s103(5), and indeed exercised both discretions simultaneously, since they would both have resulted from the same factual scenario, namely that there is pending the Defendant's petition in Tanzania. My particular discretion, with regard to security, would, on that analysis, only arise under s103(5), but my discretion as to whether to dismiss, enforce or adjourn under s103(2) would inevitably be exercised in the same way as my discretion to adjourn under s103(5), to which I now turn.

Issue III: The Absalom Exception

29. The **Absalom** Exception depends upon whether there has been a general reference of a dispute to arbitration or a specific reference of a point or points of law. The Claimants submit that there has been a sufficient specific reference of points of law. They point to the Amended Terms of Reference, which set out the issues and in particular, set out, at 4.15 and 4.26, the parties' cases as to the nature and effect of the Public Procurement Act 2004: namely whether the POA was made in breach of the 2004 Act because the Defendant's Tender Board did not approve the award of the POA, such that the POA and

the assignments of it are void and of no legal effect, or whether the 2004 Act does not render void a contract which had Government of Tanzania approval and had been partly performed: whether the Government of Tanzania's decision in the exercise of its powers meant that the validity of the POA could not be challenged by the Government of Tanzania: whether s31(4) of the Act sets out a non-compliance procedure and does not invalidate contractual rights: whether s59(2) negates the prescription of s31(1)(b): and whether the Defendant was estopped from denying the validity of the POA by waiver, affirmation and/or ratification. Clause 5.1 under the heading "*Issues to be Determined by the Tribunal*" sets out as follows:

"*5.1 The Arbitral Tribunal shall decide the issues necessary to resolve the claims for relief of the parties, as set forth above. More specifically, the questions of fact or law to be resolved by the Arbitral Tribunal in order to make the decisions on the issues in the present case shall be those appearing from the parties' submissions, statements and pleadings made and to be made and, in addition, any further questions of fact or law which the Tribunal in its own discretion, may deem necessary or appropriate to decide upon, after hearing the parties, for the purpose of resolving the present dispute.*"

30. Further, the Claimants refer to the seventeen issues concisely and clearly set out by the Arbitrators at paragraph 391 of its Award, each with a different description – "*the POA issue*", "*the Assignment issue*" etc. Mr Diwan submits that, if necessary, the court considering whether the **Absalom** Exception applies can consider not only the Amended Terms of Reference and the list of issues in paragraph 391, all of which are themselves derived from the pleadings, but the pleadings themselves.

31. Mr White submits that consideration of the pleadings is inapt, or, at any rate, insufficient. Although he does not limit his case to the suggestion that the **Absalom** Exception only arises if the original request for arbitration specifies a particular point of law, he submits that it only arises if there is an agreed list of issues, not simply a summary of issues made by the Arbitrators, such as in paragraph 391. He points to Article 18(1)f of the ICC Rules, which provides for the drawing up of a document defining the Arbitral Tribunal's Terms of Reference, which are to include the following particulars (c) "*a summary of the parties' respective claims and of the relief sought by each party, with an indication to the extent possible of the amounts claimed or counter-claimed*", and (d) "*unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined*". In this case, Mr White submits, there was no list of issues pursuant to Article 18(1)(d), but simply the summary under Article 18(1)(c), as is made clear in the very paragraph which listed the seventeen issues, paragraph 391 of the Award, which reads as follows:

"*391. The Terms of Reference do not contain a listing of the issues in the case: Rather, it was left to the discretion of the Tribunal to compile them, after the completion of the hearings. Now that the hearings are concluded, it is possible to provide a complete set of the issues that were submitted to the Tribunal. The Respondent at the Closing Oral Argument submitted a list of sixteen issues that the Tribunal adopts. In addition, the Claimants raised a seventeenth issue by way of an amendment to its Re-Amended Statement of Case. All seventeen issues are listed below; and addressed in turn by the Tribunal.*"

32. Mr Diwan also relies on that paragraph to indicate that, albeit that the Tribunal makes clear that the issues could not be precisely defined at the outset of the Arbitration, the list that follows is a "*complete set of the issues that were submitted to the Tribunal*".

33. The Law Lords in **Absalom** itself do not all speak with the same voice, or at any rate in the same words, when they conclude that they were entitled to review the decision of the arbitrator in that case. Mr Cave KC had submitted (596) that "*the question which of the*

alternative constructions of clause 30 was the right one was not expressly or specifically submitted to the arbitrator. He was charged in general terms to hear and determine disputes which had arisen "in regard to the certificates and the validity of the notice served by the architect"." Mr Monckton KC, unsuccessfully in the event, contended that "*the construction of s30 of the contract was submitted to the arbitrators. Too much weight is given in the argument for the appellants to the actual words in which a question is submitted. It is the fact and not the form of submission which gives jurisdiction to the arbitrator, and a question may be submitted by necessary implication as well as by express terms*".

34. The opportunity, if not obligation, to look at the (no doubt in those days somewhat exiguous) pleadings seems to have been made clear by at least the majority of their Lordships:

    i) Lord Warrington said at 599:

    "*I refer to the pleadings, as I think I am entitled to do, solely for the purpose of ascertaining whether any specific question of law was in dispute and was referred to the arbitrator for his decision.*

    From the pleadings it is abundantly clear that the whole dispute between the parties was as to the amount due to the contractor … In my opinion no specific question of construction arose, the validity or invalidity of the notice resulted from a decision as to the figures, and the application of such decision to the provisions of the contract".

    At 601 he concluded:

    "*In my opinion, no such question as that answered by para 3 was specifically submitted to the arbitrator for his decision. At most it was incidentally involved in the general question as to the validity of the notice purporting to have been given under clause 26 … (602) it must be shown that the point is specifically referred … the distinction* [is] *between cases in which a question of law is specifically referred for decision and those in which such a question is involved incidentally, as it is in the present case.*"

    ii) Lord Russell, at 608, considered the earlier decision of **Government of Kelantan v Duff Development Co** [1923] AC 396 and stated that, in that case, "*Lord Cave … came to the conclusion, after considering the submission and the pleadings there in question, that specific questions of construction had been submitted to the arbitrator for his decision, with the result that his decision could not be interfered with merely on the ground of its being wrong*".

    He continues at 610:

    "*The parties had, however, been ordered to deliver pleadings, and by their statement of claim the contractor had claimed that the arbitrator should under his powers revise the last certificate issued so as to include therein the excess net value which they had alleged … It is at this point that the question of the construction of condition 30 arose as a question of law, not specifically submitted, but material in the decision of the matters which had been submitted*."

    iii) At 612, Lord Wright begins by noting that "*As the motion is to set aside the award for matter appearing on its face, the Court is debarred from considering any matter which does not appear in the award itself or in documents incorporated in it*", but he continues (at 613), "*It appears that pleadings were delivered in the arbitration. As these are not*

referred to in the award they cannot in strictness be considered; but as these pleadings were put before this House as well as before the Court of Appeal, I have felt entitled to look at them, and find they confirm the conclusion I reach on the award by itself".

35. It is however upon the later words of Lord Wright that Mr White rests his argument. At 615, he refers to what I have now called the **Absalom** Exception as applying "*when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all the arbitrator is required to decide, no fact being, quoad, that submission, in dispute*". He concludes at 616 "*There is no reason to think that the parties had any specific questions of law in mind at all. What was wanted was a practical decision on the disputed issues. Even if questions of law were bound to emerge, the parties may never have envisaged them in going to arbitration.*"

36. It is common ground, as set out in paragraph 11(iii)(c) above, that the Tanzanian court will not only consider and apply the law as set out by the House of Lords in **Absalom**, but also by the Indian Supreme Court decision of **Alopi Parshad** and, naturally, the recent Tanzanian decision of **Shapriya**. In **Alopi Parshad**, the Indian Supreme Court does not appear in terms to have considered **Absalom**, or the various different formulations by their Lordships in that case, but there was express reference to three decisions which were referred to by their Lordships in **Absalom**, including **Kelantan**. The Indian Supreme Court concluded that the **Absalom** Exception did not apply in that case, and that there was an error on the face of the award with which the court was entitled to interfere. The judge at first instance had concluded that specific questions were expressly referred for adjudication to the arbitrators, although that decision had been reversed on the first appeal. The original claim in the arbitration had contended, among other things, that an agreement was void and not binding upon it, *inter alia* by reference to alleged representations or assurances. It is clear from paragraph 13 of the judgment that "*on the claim made by the Agents and the denial thereof, the arbitrators incorporated the points of contest in the form of certain issues*". The conclusion, at paragraph 17 of the judgment, was that there was a general reference of the dispute and:

    "*… Issues were undoubtedly raised by the arbitrators, but that was presumably to focus the attention of the parties on the points arising for adjudication. The Agents had made their claim before the arbitrators, and the claim, and the jurisdiction of the arbitrators to adjudicate upon the claim, were denied. The arbitrators were by the terms of reference only authorised to adjudicate upon the disputes raised. There is no foundation for the view that a specific reference, submitting a question of law for the adjudication of the arbitrators, was made.*"

37. In **Shapriya** however, a contrary conclusion was reached by Msumi J in the High Court of Tanzania at Dar-es-Salaam, although Mr White has submitted that, as it was found that there was not error on the face of the award, the decision as to the **Absalom** Exception may be said to be obiter rather than the second of two ratios. Nevertheless the headnote concludes "*If a question of law is specifically referred and it becomes evident that the parties desire to have a decision on that specific question from the arbitrator rather than from the court, the court will not interfere with the award of the arbitrator on that question on the grounds that there is an error of law apparent on the face of the record even if the view taken by the arbitrator does not accord with the view of the court*", which is in fact a citation from 410i, where the learned judge accepted and cited the view of the author of **S D Singh's Law of Arbitration** (10th Ed). At 406e, the learned judge stated that "*in order to resolve the conflicting stands of the parties, the arbitrator, with the consent of the parties, recorded the following issues for determination*." Issue 8 was "*Whether the assumption of position of architect under the contract by the respondent which is not*

registered as architect under the Architects, Quantity Surveyors and Building Contracts Registration Act No 35 of 1972 was irregular and/or unlawful".

At 410f, Msumi J sets out Issue 8 and records:

"*… the petitioner is challenging the finding of arbitrator on this issue. It is contending that the arbitrator erred when he held that the respondent's assumption of the position of architect was not irregular and that the term "architect" under the submission is wider than under the Act hence it is seeking the intervention of this Court. With respect this Court has no power to fault this finding even if it is of the opinion that the same is wrong. This being a determination of a specific question of law submitted to the arbitrator, it cannot be challenged before the court.*"

38. It is perhaps difficult to see the distinction between the facts of **Alopi Parshad** and **Shapriya** which led to a different conclusion in each, although it is not suggested by the parties' experts that the two are inconsistent; I am sure that it is more likely that the High Court of Tanzania will follow (although presumably will not be bound by) its own previous decision, rather than be persuaded by the Indian Supreme Court decision, if indeed there be any distinction between the two. It is similarly difficult to see a distinction between the facts of **Shapriya** and that of the present case, although I have already set out in paragraph 31 above the contentions of Mr White. Mr Diwan submits that, even though the Tanzanian court will be applying, as it is obliged and entitled to do, the "old" test of entitlement to challenge an arbitration award by reference to error on the face of the award, nevertheless it will be entitled to take into account the more modern approach to arbitration adopted internationally. At the time of the decision in **Absalom**, it would appear clear that the courts would have been addressing a postulated ouster of the court's jurisdiction, by reference to the **Absalom** Exception, and would have been, at that stage, astute to limit that exception. In the modern context, and particularly in the light of the New York Convention, it would be more likely that the courts would rather be astute to prevent an ouster of, or a limitation upon, the ambit of arbitrations, and thus to expand, rather than to contract, the **Absalom** Exception.

39. It is not for me to resolve this issue.

Issue IV

40. What is, however, for me to resolve is, pursuant to my discretion under s103(5), whether this Court should adjourn its decision on the recognition or enforcement of the ICC Award. Mr Diwan submitted that this was a case in which I could conclude, by reference to the dicta in **Dallah**, to which I referred in paragraph 28 above, that, where there is a pending application to set aside, or even if there had already been an order setting aside, an award by reference to an approach which was so out of line with the international approach to arbitrations, i.e. one permitting impermissible reconsideration of the merits, whether of law or fact, I should take that into account in the exercise of my discretion. He referred to the opinion of Professor Paulsson, as expressed both in **Enforcing Arbitration Awards under the New York Convention (UN, 1999)**, **Awards set aside at the place of arbitration** (pp24-26) and in **Towards Minimum Standards of Enforcement: Feasibility of a Model Law (ICC 1998 Paris Vol 9 (Kluwer Law International 1999)** at 575). In both works he contends that, in order to avoid giving effect to idiosyncrasies of local arbitration law at the seat of the arbitration, the exercise of discretion should distinguish between what he calls an "*international standards annulment process*" and a "*local standards annulment process*", with little deference being given to the latter. At pp25-26 of the former work he said "*It would seem unfortunate to bring the international arbitral process, which by its essence contemplates minimal court intervention, back into a regime which focuses on the role of the courts …*

The enforcement judge should determine whether the basis of the annulment by the judge in the place of the arbitration was consonant with international standards."

41. It seems to me that where, as here, the Tanzanian court will – and plainly, if the decision in **Shapriya** is anything to go by, will with very great care – consider the issue of enforcement, by reference to a legal principle (error on the face of the award, but tempered by the **Absalom** Exception) which would now be a minority approach internationally, but which was, until relatively recently, the approach of this Court, I should be slow indeed to detract from such approach. It would seem difficult to equate this to a genuine **Dallah** situation, where an award had been set aside upon grounds which a court subsequently asked to enforce the award notwithstanding, would deprecate.

42. I shall simply therefore approach the question of "merits" by reference to a weighing of the prospects of success for the application in Tanzania in accordance with what I understand to be the law the Tanzanian court will apply. But I shall do so in the confident expectation that, in applying that law, the Tanzanian court will have full regard to the international approach to the undesirability of interfering with the careful decisions by arbitrators on issues which, by virtue of an arbitration agreement such as in this case, have been referred to those arbitrators in order for them to make a final and binding decision. I have referred in paragraph 11(iii)(a) above to the guidance of the Court of Appeal in **Soleh Boneh** per Staughton LJ at 212 in relation to an application for an adjournment, where he considers together the issue of adjournment and the provision of security:

    "*If, for example, the challenge to the validity of an award is manifestly well-founded, it would in my opinion be quite wrong to order security until that is demonstrated in a foreign Court.*

    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 by 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."

43. This creates what has been called a *sliding scale* as between manifest validity of the pending application in the home jurisdiction and manifest invalidity. Gross J, in **IPCO**, at paragraph 16, emphasised that the New York Convention was intended to facilitate international arbitration, such that, where, as here, there was an international element, in the sense that both parties were not domestic within the home jurisdiction, less deference might be shown to the home jurisdiction than where both parties were domestic – "*pre-empting the decision on a challenge to an award before the court exercising supervisory jurisdiction in the country of origin would be a strong thing in a case where all parties were domiciled or incorporated in that country.*" However, subject to that, at paragraph 15, while endorsing Staughton LJ's *sliding scale*, he concluded that it would be likely to be relevant "*whether the application before the court in the country of origin has at least a*

real (i.e. realistic) prospect of success (the test in this jurisdiction for resisting summary judgment)." Hamblen J, in **Continental**, applied that test, at paragraph 22, when he concluded, on the facts of that case, that he was not satisfied that the defendants had shown that there was a real prospect of success, although in the event he did grant an adjournment, but subject to very substantial security in the sum of £100m.

44. My conclusion in respect of this case is that I cannot say that the Defendant's chances of success of setting aside the Award are fanciful. There are substantial hurdles to surmount for the Defendant, first by way of establishing that their case does not fall within the **Absalom** Exception and secondly, and in any event, by any easy access to the jurisdiction of error of law on the face of the Award. My conclusion of its prospects is that they are not fanciful, and hence real, but that those prospects are such that if security is otherwise appropriate, this would be a case towards the lower end of the *sliding scale*, such as to justify an adjournment being coupled with an order for security if I so conclude.

Issue V: Security

45. The first question to consider in the context of security is the issue of delay. It is quite apparent that an important factor in those cases where security was ordered (set out in paragraph 11(v)(b) above) was that the grant of security was in the context of, and as a considerable incentive against, continued delay.

46. In **Soleh Boneh** there had been very considerable delay by the party now seeking to challenge the Swedish award, and (at 213) Staughton LJ concluded that the ordering of security in a significant sum should "*provide a real incentive for the employers to proceed with their Swedish application expeditiously*". Similarly, Hamblen J, at paragraph 32, in **Continental** concluded that an order for security would "*provide the defendants with an opportunity to show that they are serious about their challenge to the award and an incentive to progress that application as expeditiously as possible*".

47. There has been no dragging of feet by the Defendant in this case. Its petition having been lodged in February, it is now common ground that the decision, at any rate at first instance, will be in September. But I am entitled to look at delay in the round, irrespective of whether it has been deliberately caused or acquiesced in. I have referred to the dispute as to how long an appeal would be likely to take against a first instance decision, assuming that an appeal were pursued – see paragraph 5 above. I conclude that this is not an appropriate case to take any risk as to there being delay subsequent to a first instance hearing. The decision of the first instance judge might be wholly clear in favour of one party or another, such that any appeal, even if pursued, might be of no substance (eg thus altering the application of Staughton LJ's *sliding scale*). Or the position may be complicated by the position of the third parties, which would appear to me to be wholly irrelevant to the decision of this court, though no doubt of relevance in Tanzania. There might also be a change of circumstance by September 2011, perhaps arising out of some unexpected delay in the resolution of the first instance decision. There was a concession in the course of argument by Mr White that, if he were successful in his application for an adjournment, he would not oppose its being limited to a time-limit such as the middle of November, by which stage both parties expect that the decision not only would have been reached but pronounced in Tanzania. I agree that that was an appropriate concession, intended no doubt to limit or mitigate the effect of Mr Diwan's inevitable complaints about delay and prejudice, but one which I conclude is a correct appreciation of the proper period of any adjournment.

48. Inevitably, Mr Diwan's case is founded upon the prejudice caused to his client by any delay in enforcement of this very substantial Award, which was fully argued in the arbitration on both sides by leading and junior Counsel and solicitors, and which was

resolved after hearing oral evidence from nine witnesses by a distinguished international panel of arbitrators. He points to the words of Gross J in **IPCO** at paragraph 51(v) "*Given the size of the award, it may be inferred that any delay in enforcement is likely to prejudice IPCO. Very few commercial entities would not be prejudiced by delay in the availability of US152 million. It must be right to seek to minimise any such prejudice, so far as it is practical and appropriate to do so*". The Claimants have been out of US$63m since a period starting in 2007, when the invoices commenced to be unpaid in respect of the supply of service, which was both continuous and uncriticised. He makes a specific complaint that, at the time of termination, the Defendant sought and obtained from the Tanzanian court an injunction restraining the Claimants from removing and using their plant, which injunction was only lifted after the outcome of the Arbitration, so that the Claimants were unable to begin to mitigate their loss. However:

i) With specific regard to their inability to use the plant, I accept Mr White's submissions that that complaint adds nothing to the Claimants' case. First they have, in any event, recovered, as part of the Award, the damages which would otherwise have been capable of being mitigated, so that any further recovery would be double-counting, and secondly, if they had sought to recover the specific loss caused by the injunction, they could and should have done so by seeking and enforcing a cross-undertaking in damages.

ii) I accept Mr White's submissions both that Gross J's statement and the general case for prejudice caused by delay or otherwise can and must be rooted in what was described by Mance LJ in **Dardana** as "*the need for security*", to which I now turn.

49. Mr Diwan has pointed out that there is no limitation upon the exercise of my discretion either in s103(5) or in the New York Convention itself at Article VI. That is of course right, but I agree with Mr White that my discretion must be rationally exercised, and that, in that regard, I must be guided, if not bound, by the approach in the cases to which I have referred. I have already cited, at paragraph 42 above, the concern of Staughton LJ about an adjournment rendering enforcement of the award more difficult if enforcement were delayed. The same concern was addressed by Mance LJ in **Dardana** at paragraph 37. Staughton LJ referred at 213 to the order for security which he made not only as the incentive to which I referred at paragraph 46 above, but also as "*some protection for the contractors against any deterioration of their prospects of enforcement here.*" I agree with Mr White that the imposition of security, even though it would only arise where the application to adjourn is, as I have concluded this is, towards the lower end of the *sliding scale*, is not simply intended either as a penalty imposed upon the party seeking to resist an award or, certainly, as Mr White submits it would be, as a way of positively improving the position of the party seeking to enforce the award by having money brought into the jurisdiction. The comparison must be between the position of the would-be enforcing party if he were allowed to enforce immediately, and his position if any steps by way of enforcement were delayed as a result of the grant of an adjournment.

50. Mr White submits that, at least in part because the order would result in the bringing within the jurisdiction of sums not otherwise here, I could not, or should not, order such security unless I am satisfied that there are, or may be, assets within the jurisdiction which could be the subject of enforcement if enforcement were not delayed. It is right to say that in **Dardana**, **IPCO** and **Continental** there were assets within the jurisdiction, with regard to which, in relation to the latter two cases, it could be said that there was consequently a risk of dealings with those assets within the jurisdiction such as to render enforcement more difficult if it were delayed. In **Soleh Boneh**, the conclusion of the court was that (212-213) "*it cannot in my opinion be said that further delay would definitely not prejudice the enforceability of the award here, as would be the case of a substantial company carrying on business in this country*", from which it can be argued that the court concluded that there might therefore be assets within the jurisdiction. Mr White submits

that it is only in relation to assets within the jurisdiction that I should be concerned. I should certainly not be concerned in relation to any delay in enforcement, for example, in Tanzania, because it is the delayed enforcement in Tanzania itself, and not any delay in enforcement in England and Wales, which is preventing recovery of the sums due in the place where the Claimants have chosen first to target the Defendant's assets. He also points out that the order by Steel J in this case was to enforce the ICC Award in England and Wales. However, as is made quite clear by Steyn J in **Rosseel** at 629 "*the presence of assets in the jurisdiction is not a precondition under the statute to the enforcement of the award*": see also in a different context **Fonu v Demirel** [2007] 1 WLR 2508. It seems to me that, although I accept Mr White's submission that I ought to be looking for prejudice specifically by reference to any delayed enforcement of the award by converting it into an English judgment, there is nothing in the authorities which limits me to considering assets within the jurisdiction.

51. The significant fact in this case is that there is specific, and unchallenged, evidence from the Claimants as to their intention and determination in relation to recovery of assets from the Defendant, if and when an English judgment is entered pursuant to their application and the present *ex parte* order of Steel J. Mr Miles, the Claimants' legal Counsel, said as follows, at paragraph 29 of his third witness statement:

    "*Whilst I am not in a position to challenge the assertion that the Defendant has no assets in the jurisdiction of England and Wales, I do know from documentation disclosed in the original arbitration that the Defendants have consistently in the past purchased equipment and parts needed to supply the national grid from European suppliers, with payment in advance. In view of the Defendant's refusal to honor the Award, and their unmeritorious attempts to have the Award set aside in Tanzania, the claimants are left with no choice but to consider all enforcement options, including those available outside Tanzania.*"

52. I have no doubt at all that I can rely upon this evidence in order to consider whether the delay, even until, say, 20 November, in enforcing the judgment which would otherwise have followed upon Steel J's *ex parte* order if I did not adjourn this application, is likely to cause the Claimants prejudice by way of the loss of opportunity to recover assets and/or the deterioration in their prospects of recovery. This is not a speculative argument, such as, for example, Mr White postulated by reference to a loss of opportunity which could always be argued, once a party has obtained an English judgment, of taking steps to enforce it anywhere in the world; but one which is specifically founded upon (i) the highly likely possibility of the existence of assets in a European country subject to the Judgments Regulation and (ii) the ease of enforcement of an English judgment within those countries as a result of the Judgments Regulation. It is right to record, as Mr White has pointed out, that in, for example, **Soleh Boneh**, there was only consideration of enforcement in England, at a time when it could similarly have been argued that assets in Europe should be treated just as if they were in England and Wales. But neither was the argument run nor was there the evidence which I have now before me.

53. Exercising my discretion whether to grant an adjournment, and whether to do so on terms of the grant of security, I have already concluded, in paragraph 44 above, that this is a case in which I would only grant an adjournment on terms of the grant of security, if it were otherwise proper to do so. I conclude that there must be a real risk, if there be an adjournment to 20 November, that, within the period between now and December 2011, which would be the earliest time when the Claimants could be in a position to enforce, there will be assets in relevant European countries which might have been the subject of execution and/or in relation to which, if another five months were to pass by, other arrangements so as to make them secure from execution might be taken. Plainly, this will not be likely to relate to anywhere near the full amount of the award. The reference is to

consistent "*purchase of equipment and parts needed to supply the national grid*". I conclude that the appropriate way to safeguard the Claimants in relation to their loss of opportunity and prejudice suffered by the adjournment is to order security in the sum of US$ 5m as a condition for the grant of an adjournment.