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FAR EASTERN SHIPPING CO v AKP SOVCOMFLOT

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

[1995] 1 Lloyd's Rep 520

HEARING-DATES: 3, 14 November 1994

14 November 1994

CATCHWORDS:

Arbitration -- Foreign arbitral award -- Enforcement -- Convention award made in plaintiffs' favour -- Defendants granted stay of execution on order granting leave to enforce award -- Application for removal of stay -- Whether Court had jurisdiction to grant stay of enforcement of Convention award -- Arbitration Act, 1975, ss 3, 5 -- Arbitration Act, 1950, s 26 -- RSC, O 47, r 1.

HEADNOTE: On Feb 4, 1993 a New York Convention arbitration award was made by the Maritime Arbitratois Commission (MAC) of the Chamber of Trade and Industry of the Russian Federation in favour of the plaintiffs as claimants against the defendants as respondents in the sum of US$6,338,558.

The MAC award came into force in Russia on Aug 20, 1993 and the defendants "complaint" by way of appeal to the Russian Supreme Court was rejected on Jan 18, 1994.

Following unsuccessful attempts to enforce the award in Moscow the plaintiffs applied to the English Court to enforce the award in the same way as a judgment or order to the same effect and to enter judgment against the defendants. On May 26, 1994 Mr Justice Rix granted the plaintiffs leave to enforce the award, together with a Mareva-type of injunction over the defendants' assets within the jurisdiction and other ancillary relief.

On July 5, Mr Justice Cresswell made an order by consent to the effect that on the defendants undertaking to prosecute their application to the Russian Supreme Court to challenge the award with despatch, and on payment of security the Mareva injunction would be discharged and a stay of execution of the judgment granted for a period of four months from the date of the order.

On July 29, 1994 the Deputy Chairman of the Russian Supreme Court notified the defendants by letter that their latest challenge to the award had been rejected. The defendants have made further attempts in Russia to challenge the award.

The defendants applied for the renewal of the stay contending that the court had jurisdiction to stay the enforcement of a New York Convention award once it had been converted into an English judgment for the purposes of execution.

-- Held, by QB (Com Ct) (POTTER, J), that (1) having elected to convert an award into an English judgment the plaintiff ought in principle to be subject to the same procedural rules and conditions as generally applied to the enforcement of such judgments and the wording of the Arbitration Act, 1975 did not dictate a different conclusion (see p 523, col 2);

(2) s 3 of the 1975 Act provided for enforcement of an award either by action or in the same manner as the award of an arbitrator was enforceable by virtue of s 26 of the Arbitration Act, 1950; there was nothing in the text of either of those sections to suggest that once judgment had been entered in the terms of the award, it should for purposes of enforcement be treated differently from any other judgment or order; accordingly the Court had in principle jurisdiction to entertain an application for a stay (see p 523, col 2; p 524, cols 1 and 2);

(3) however it would rarely if ever be appropriate to order a stay in respect of a Convention award when, by definition under the Convention, the time for enforcement had arrived; on the facts and the evidence there were no special circumstances which rendered it inexpedient to enforce the plaintiffs' judgment: the stay of execution imposed by the order of Mr Justice Cresswell would be removed (see p 524, col 2; p 525, col 1).

CASES-REF-TO:
Burnet v Francis Industries Plc, (CA) [1987] 1 WLR 802;
Canada Enterprises Corporation Ltd v MacNab Distilleries Ltd, [1987] 1 WLR 813;
Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd, [1991] 2 Lloyd's Rep 625.
INTRODUCTION:
This was an application by the plaintiffs Far Eastern Shipping Co for the removal of a stay of execution on an order granting leave to the plaintiffs to enforce a New York Convention arbitration award made in favour of the plaintiffs against the defendants AKP Sovcomflot.
The further facts are stated in the judgment of Mr Justice Potter.
Judgment was delivered in Chambers but publication was authorized.
COUNSEL: S Boyd, QC for the plaintiffs; S Males for the defendants.
PANEL: POTTER J JUDGMENTBY-1: POTTER J
JUDGMENT-1:

POTTER J: Introduction

This judgment was delivered in Chambers but I have authorized its publication because it concerns the principles of enforcement in relation to foreign arbitral awards.

The plaintiffs apply for the removal of a stay of execution on an order granting leave to the plaintiffs to enforce a New York Convention arbitration award made by the Maritime Arbitration Commission of the Chamber of Trade and Industry of the Russian Federation ("MAC") on Feb 4, 1993 in favour of the plaintiffs as claimant against the defendants as respondent. The amount of the award was US$6,338,558 with additional sums for

interest and costs.

The MAC award apparently came into force in Russia on Aug 20, 1993. The defendants' "complaint" by way of appeal to the Russian Supreme Court was rejected on Jan 18, 1994.

Following unsuccessful efforts to enforce the award in Moscow, the plaintiffs applied to the English Court. By order of Mr Justice Rix dated May 26, 1994 the plaintiffs were granted leave to enforce the award in the same manner as a judgment or order to the same effect and to enter judgment against the defendants in the sum of US$7,029,079.71 inclusive of interest to the date of the order, its sterling equivalent at that date being L4,659,956.90. Oh May 27, 1994 the plaintiffs entered judgment in that sum.

The order of Mr Justice Rix also granted a Mareva-type injunction over assets of the defendants within the jurisdiction up to US$7.5m, together with further ancillary relief. However, the defendants having made a further application to the Russian Supreme Court to challenge the award and doubt existing as to whether such challenge had been finally disposed of, Mr Justice Cresswell on July 5, 1994 made an order by consent to the effect that, upon the defendants undertaking to prosecute their Russian application with despatch, upon payment by the defendants of the sum of US$7.5m into a joint interest bearing account in the names of the parties' solicitors, the Mareva injunction would be discharged and a stay of execution of the judgment granted for the period of four months from the date of the order. The defendants provided such security and the order came into effect.

On July 29, 1994, the Deputy Chairman of the Russian Supreme Court notified the defendants by letter that their latest challenge to the award had been rejected and on Aug 10, 1994 the file was returned to the MAC. Thereafter, the defendants have made yet further attempts without success in Russia to challenge the award. However, it is the case for the plaintiffs that the award came into legal force on Aug 20, 1993, alternatively when the first complaint was rejected in January, 1994, and has remained in force ever since. While formally reserving their position in this respect, the defendants have not sought to argue to the contrary on this application. However, they seek to renew

the stay upon the plaintiffs' judgment imposed by Mr Justice Cresswell, this time by way of application for a stay pursuant to RSC, O 47, r 1(1)(a) which provides that:

> Where a judgment is given or an order made for payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution -- (a) that there are special circumstances which render it inexpedient to enforce the judgment or order . . . then, . . . the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.

The grounds advanced to justify a stay

The award was made in respect of moneys due from the defendants to the plaintiffs under a loan agreement, pursuant to which the plaintiffs had made payments to Japanese banks at the request of the defendants in connection with the construction of vessels by Japanese shipyards to the order of the defendants for acquisition by the plaintiffs as part of their fleet under bareboat chartering arrangements.

The dispute referred to arbitration was one limited aspect of a far wider dispute between the parties relating to an overall agreement for the acquisition and bareboat chartering of 18 vessels The existence of these disputes was raised in the Moscow arbitration; however, the reference to arbitration, which was an ad hoc submission, was not in sufficiently wide terms to cover other than the immediate dispute. Subsequently, the defendants sought to refer their wider claims to arbitration in London before the London Court of International Arbitration ("LCIA"), but the plaintiffs objected that the LCIA had no jurisdiction to deal with them Accordingly, by a writ in action 1994 Folio 1316, the defendants commenced proceedings in this country against the defendants, obtaining leave ex parte from Mr Justice Clarke to issue and serve a concurrent writ upon the plaintiffs in Russia. That order was made on Sept 9, 1994. There the matter stands, service not yet having been effected.

On behalf of the defendants, Mr Males submitted that the

Court has a very wide discretion under O 47, r 1(1)(a) to order a stay where enforcement is "inexpedient" (which in this context simply means "unjust": See Canada Enterprises Corporation Ltd v MacNab Distilleries Ltd, [1987] 1 WLR 813). He also submitted that the requisite "special circumstances" to justify a stay exist, having regard to the matters identified by Mr Justice Bingham (though not as an exhaustive list) in Burnet v Francis Industries Plc, [1987] 1 WLR 802 at p 811D-H. In that regard his submissions were as follow. First, that the nature of the plaintiffs' claim is not of a type (such as a dishonoured bill of exchange or compensation for loss of an individual's livelihood) which renders a stay inappropriate. Second, the identity of the parties and the inter-relationship of their claims militate in favour of a stay, the plaintiffs' claim for payment under the loan agreement and the defendants' claim in respect of the 18 vessels all being part of the same overall transaction. Accordingly, he submits that the defendants' claim is "more like a true counterclaim" (see Burnet at p 811E) despite the fact that the dispute referred to the MAC was so circumscribed that the matters of counterclaim were not within the scope of the reference.

Third, he submits that the defendants' claim is a strong one and he relies upon the absence of any contrary evidence from the plaintiffs in answer to the affidavit as to the merits of the claim which was before Mr Justice Clarke on the ex-parte application to serve out. Fourth, he relies on the relative size of the parties' claims, pointing out that the plaintiffs' judgment is for some US$7m, whereas the claim against the defendants was estimated at US$71m. at the time of preparation of the points of claim. Fifth, he acknowledges that there is bound to be delay in determining the defendants' claim against the plaintiffs, but complains that the current source of the delay is the plaintiffs' refusal to accept service of the writ; he says that, once jurisdictional obstacles are overcome, there is no reason why the case should not proceed with reasonable despatch. Finally, in terms of relative prejudice, he points out that the plaintiffs' claim is already fully secured by the sum held in escrow and therefore he argues that there is little prejudice to the plaintiffs if the stay is granted. On the other

hand, he submits that, if the money is paid out of the escrow account it is likely to be removed from the jurisdiction of the Court, the plaintiffs apparently having no further assets in this country.

The grounds for resisting a stay

[4] "Mr Boyd, QC for the plaintiffs first takes the point that the Court has no jurisdiction to grant the stay sought by the defendants. He asserts that s 5 of the Arbitration Act, 1975 ("the 1975 Act") precludes an English Court from refusing immediate enforcement of a Convention award except on the grounds set out in s 5, none of which applies in this case. Alternatively, he says that, having regard to the considerations listed in the case of Burnet, the Court should refuse any stay under O 47, r 1(1)(a).

Sections 3 and 5 of the 1975 Act, which Act was passed to give effect to the New York Convention on the recognition and enforcement of foreign arbitral awards, provides as follows:

3. Effect of Convention Awards

(1) A Convention award shall, subject to the following provisions of this Act, be enforceable -- (a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of Section 26 of the Arbitration Act 1950 . . .

5. Refusal of Enforcement

(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section. (2) Enforcement of a Convention award may be refused if the person to whom it is invoked proves -- (a) that a party to the arbitration agreement was . . . under some incapacity; or (b) that the arbitration agreement was not valid under the law . . . of the country where the award was made; or (c) that he was not given proper notice . . . or was otherwise unable to present his case; or (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; or (e) that the composition of

the arbitral authority or the arbitral procedure was not in accordance with the agreement . . . or . . . the law of the country where the arbitration took place; or (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 . . . it was made. (3) Enforcement of a Convention 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 enforce the award.

(5) Where an application for the setting aside . . . of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this Section, the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the parties seeking to enforce the award, order the other party to give security.

It is the case for the plaintiffs that, the defendants' challenge to the award having been rejected and none of the grounds set out above having been advanced, this Court has no jurisdiction to stay the application of the plaintiffs to enforce the judgment which they have obtained. Mr Boyd relies upon what he says are the clear and unqualified terms of 5(1) and the authority of Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd, [1991] 2 Lloyd's Rep 625, a case in which the plaintiffs applied for leave pursuant to s 3 of the Arbitration Act, 1975 to enforce a New York arbitration award against a foreign company which had no assets within the jurisdiction. In the face of a submission that there was no sufficient jurisdictional connection and that it was therefore not a proper case for granting leave to serve out Mr Justice Steyn said (at p 629, col 1):

I disagree. The English Court is bound by a statute, arising from treaty obligations, to enforce the award. The presence of assets in the jurisdiction is not a precondition under the statute to the enforcement of the award. It ought not to be regarded in the exercise of the Court's discretion as a pre-requisite to the granting of leave to serve out of the jurisdiction. A contrary view would in effect introduce into the statute, which carefully reflects our treaty obligations, a precondition which is not to be found in the 1958 New York

Convention. That Convention has now entered into force in the laws of some 80 countries. It is the great success story of international commercial arbitration. This Court ought to be astute to avoid making an order which will derogate from the efficacy of the New York Convention system and our treaty obligations as enshrined in the 1975 Act.

The question of jurisdiction

In relation to the case of Rosseel Mr Males submits (rightly in my view) that, while the remarks of Mr Justice Steyn are highly relevant to the exercise of any discretion of the Court which might defeat the apparent purpose of the New York Convention and/or the 1975 Act, they are not addressed to the specific question of whether the Court has jurisdiction to stay enforcement of a New York Convention award once it has been converted into a English judgment for the purposes of execution. In answer to that question, Mr Males submits that in principle the Court does have such power.

I think Mr Males is correct.

It seems to me that, having elected to convert an award into an English judgment, the plaintiff ought in principle to be subject to the same procedural rules and conditions as generally apply to the enforcement of such judgments and I do not consider that the wording of the 1975 Act dictates a different conclusion.

Section 3(1) of the 1975 Act provides for enforcement either by action or in the same manner as the award of an arbitrator is enforceable by virtue of s 26 of the Arbitration Act, 1950. Section 26 of the Arbitration Act, 1950 provides:

(1) An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in the terms of the award.

Taken separately or together, there is nothing in the text of either of those sections to suggest that, once judgment has been entered in terms of the award, it shall for the purposes of enforcement be treated in any different manner from any other judgment or order, (and thus be subject in its turn to O 47, r 1). Nor do I consider that the terms of s 5(1) achieve, or are

intended to achieve, a different result. It seems to me that the "enforcement" which "shall not be refused" as therein referred to, is intended simply to refer to the enforcement contemplated by the sections I have just quoted. This seems to me to be inherent in the structure of s 5 itself, in which sub-s (2) plainly refers to a number of grounds of fundamental objection or defect which it contemplates as justifying the Court to refuse to make an order for enforcement at all. Equally, sub-s (5) is addressed to the power of stay open to the Court before enforcement of the award is ordered; it does not purport to deal with the regime of enforcement after entry of judgment.

Nor am I driven to a contrary conclusion by reference to the New York Convention itself. Article III which imposes the obligation of mutual recognition upon Contracting States provides:

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Thus, while the Convention is concerned to see that the rules of the enforcing State do not impose "more onerous conditions" than in respect of domestic awards, it does not require that a regime any more advantageous to a foreign judgment creditor be created in respect of Convention awards.

In the course of his argument, Mr Boyd submitted that, to grant a stay upon a judgment enforcing a Convention award was, in effect, to refuse enforcement of it (contrary to s 5(1)). His submission was that, on any ordinary understanding of the word, "enforcement" means "immediate enforcement". Whereas that may be so in other contexts, I do not think it is a correct interpretation in the context of enforcement by execution following entry of judgment. Accordingly I consider that the Court has, in principle, jurisdiction to entertain and accede to an application of this kind.

The question of discretion

That said, however, I envisage that the Court will rarely, if ever, regard it as appropriate to make such an order in respect of a Convention award, when, by definition, under the Convention, the time for enforcement has arrived. Plainly the rationale of the Convention is aimed at the enforcement of foreign arbitral awards unless either the unsuccessful party is seeking to have it set aside in the country where the award was made (in which case an adjournment of the enforcement proceedings under s 5(5) may be appropriate) or there is some fundamental ground of objection on grounds provided for in s 5 (2)-(4). I do not venture to speculate on what circumstance if any, might induce a Court in another case to grant a stay in respect of a judgment upon a Convention award properly obtained. I am certainly satisfied that none such exists in this case.

The proceedings upon which the defendants rely to justify their application for a stay afford no more than a remote and uncertain prospect of recovery at best. Service has not yet taken place. It is plain that the defendants are likely to be in difficulties if the plaintiffs apply to set aside service under O 12, r 8 (as Mr Boyd has indicated will be their intention). I say this because, while the points of claim plead a very large claim for damages, the principal relief claimed is a declaration by the Court that the disputes giving rise to such claim are governed by an agreement for LCIA arbitration according to English law. Yet no written arbitration agreement exists, nor indeed was there any express oral submission; it is simply alleged that the terms relied on arise by implication of law, given that the shipbuilding contracts concluded by the defendants for the plaintiffs' benefit and the 18 bareboat charters which were drafted (though only one was executed) contained such arbitration clauses. That is plainly difficult ground, given that the overall agreement pursuant to which the defendants sue was one made between two organs of the Russian State making internal arrangements as to the financing of the scheme. If the defendants fail to satisfy the Court that they have an arguable case on the implied term point, (in which event the matter would be further pursued in the LCIA and not in this Court) the claim for damages in the writ will not fall within the jurisdiction of the Court,

since it relates entirely to parties and transactions outside the jurisdiction. Thus, whatever the defendants' eventual prospects of success, the trial or hearing of their claims is years rather than months away. Conclusion

Accordingly, quite apart from the general concern of the Court to ensure the enforcement of Convention awards, I see no special circumstances which render it inexpedient to enforce the plaintiffs' judgment in this case. I order the removal of the stay of execution imposed by the order of Mr Justice Cresswell upon par 1 of the order of Mr Justice Rix and of the judgment entered by the plaintiffs pursuant thereto and (subject to the submissions of the parties as to the final form of such order) I further order payment to the plaintiffs or their solicitors, in satisfaction of the judgment, of the moneys paid into the escrow account, together with accrued interest thereon.

DISPOSITION: Judgment accordingly

SOLICITORS: Lawrence Graham; Shaw & Croft

MEALEY PUBLICATIONS, INC., WAYNE, PA

Far Eastern Shipping Company

v.

AKP Sovcomflot

QUEEN'S BENCH DIVISION

HEARING-DATES: 14 November 1994

JUDGMENT: POTTER J

Introduction.

This judgment was delivered in chambers but I have authorised its publication because it concerns the principles of enforcement in relation to foreign arbitral awards.

The plaintiffs apply for the removal of a stay of execution on an Order granting leave to the plaintiffs to enforce a New York Convention Arbitration Award made by the Maritime Arbitration Commission of the Chamber of Trade and Industry of the Russian Federation ("MAC) on 4 February 1993 in favour of the plaintiffs as Claimant against the defendants as Respondent. The amount of the award was US $6,338,558.00 with additional sums for interest and costs.

The MAC award apparently came into force in Russia on 20 August 1993. The defendants' "complaint" by way of appeal to the Russian Supreme Court was rejected on 18 January 1994.

Following unsuccessful efforts to enforce the award in Moscow,

the plaintiffs applied to the English Court. By order of Rix J dated 26 May 1994 the plaintiffs were granted leave to enforce the award in the same manner as a judgment or order to the same effect and to enter judgment against the defendants in the sum of $7,029,079.71 inclusive of interest to the date of the order, its sterling equivalent at that date being £4,659,956.90. On 27 May 1994 the plaintiffs entered judgment in that sum.

The order of Rix J also granted a Mareva-type injunction over assets of the defendants within the jurisdiction up to US $7.5m, together with further ancillary relief. However, the defendants having made a further application to the Russian Supreme Court to challenge the award and doubt existing as to whether such challenge had been finally disposed of, Cresswell J on 5 July 1994 made an order by consent to the effect that, upon the defendants undertaking to prosecute their Russian application with dispatch, upon payment by the defendants of the sum of US $7.5m into a joint interest bearing account in the names of the parties solicitors, the Mareva injunction would be discharged and a stay of execution of the judgment granted for the period of 4 months from the date of the order. The defendants provided such security and the order came into effect.

On 29 July 1994, the Deputy Chairman of the Russian Supreme Court notified the defendants by letter that their latest challenge to the Award had been rejected and on 10 August 1994 the file was returned to the MAC. Thereafter, the defendants have made yet further attempts without success in Russia to challenge the Award.

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However, it is the case for the plaintiffs that the award came into legal force on 20 August 1993, alternatively when the first complaint was rejected in January 1994, and has remained in force ever since. Whilst formally reserving their position in this respect, the defendants have not sought to argue to the contrary on this application. However, they seek to renew the stay upon the plaintiffs' judgment imposed by Cresswell J, this time by way of application for a stay pursuant to RSC Ord 47, r.1(1)(a) which provides that:

> "Where a judgment is given or an order made for payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution -
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> > (a) that there are special circumstances which render it inexpedient to enforce the judgment or order.
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> then,...the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit."

The Grounds Advanced to Justify a Stay.

The Award was made in respect of monies due from the defendants to the plaintiffs under a Loan Agreement, pursuant to which the plaintiffs had made payments to Japanese Banks at the request of the defendants in connection with the construction of vessels by Japanese shipyards to the order of the defendants for acquisition by the plaintiffs as part of their fleet under bare-boat chartering arrangements.

The dispute referred to arbitration was one limited aspect of

a far wider dispute between the parties relating to an overall agreement for the acquisition and bare-boat chartering of 18 vessels. The existence of these disputes was raised in the Moscow arbitration; however, the reference to arbitration, which was an ad hoc submission, was not in sufficiently wide terms to cover other than the immediate dispute. Subsequently, the defendants sought to refer their wider claims to arbitration in London before the London Court of International Arbitration ("LCIA"), but the plaintiffs objected that the LCIA had no jurisdiction to deal with them. Accordingly, by a writ in action 1994 Folio 1316, the defendants commenced proceedings in this country against the defendants, obtaining leave ex parte from Clarke J to issue and serve a concurrent writ upon the plaintiffs in Russia. That order was made on 9 September 1994. There the matter stands, service not yet having been effected.

On behalf of the defendants, Mr Males submitted that the Court has a very wide discretion under O.47 r.1(1)(a) to order a stay where enforcement is "inexpedient" (which in this context simply means "unjust": See Canada Enterprises Corporation Limited -v- MacNab Distilleries Limited [1987] 1 WLR 813. He also submitted that the requisite "special circumstances" to justify a stay exist, having regard to the matters identified by Bingham LJ (though not as an exhaustive list) in Burnet -v- Francis Industries PLC [1987] 2 All ER 323, [1987] 1 WLR 802 at 811D-H of the latter report. In that regard his submissions were as follows. First, that the nature of the plaintiffs' claim is not of a type (such as

dishonoured bill of exchange or compensation for loss of an individual's livelihood) which renders a stay inappropriate. Second, the identity of the parties and the inter-relationship of their claims militate in favour of a stay, the plaintiffs' claim for payment under the Loan Agreement and the defendants' claim in respect of the 18 vessels all being part of the same overall transaction. Accordingly, he submits that the defendants' claim is "more like a true counterclaim" (see Burnet at 811E of the latter report) despite the fact that the dispute referred to the MAC was so circumscribed that the matters of counterclaim were not within the scope of the reference.

Third, he submits that the defendants' claim is a strong one and he relies upon the absence of any contrary evidence from the plaintiffs in answer to the affidavit as to the merits of the claim which was before Clarke J on the ex-parte application to serve out. Fourth, he relies on the relative size of the parties claims, pointing out that the plaintiffs judgment is for some $7m, whereas the claim against the defendants was estimated at $71m at the time of preparation of the Points of Claim. Fifth, he acknowledges that there is bound to be delay in determining the defendants' claim against the plaintiffs, but complains that the current source of the delay is the plaintiffs' refusal to accept service of the writ; he says that, once jurisdictional obstacles are overcome, there is no reason why the case should not proceed with reasonable dispatch. Finally, in terms of relative prejudice, he points out that the plaintiffs' claim is already fully secured by the sum held in

escrow and therefore he argues that there is little prejudice to the plaintiff if the stay is granted. On the other hand, he submits that, if the money is paid out of the escrow account it is likely to be removed from the jurisdiction of the Court, the plaintiff apparently having no further assets in this country.

The Grounds for Resisting a Stay.

Mr Boyd QC for the plaintiffs first takes the point that the Court has no jurisdiction to grant the stay sought by the defendant. He asserts that s 5 of the Arbitration Act 1975 ("the 1975 Act") precludes an English Court from refusing immediate enforcement of a Convention Award except on the grounds set out in S5, none of which applies in this case. Alternatively, he says that, having regard to the considerations listed in the case of Burnet, the Court should refuse any stay under 0.47 r. 1(1)(a).

S5of the 1975 Act, which Act was passed to give effect to the New York Convention on the recognition and enforcement of foreign arbitral awards, provides as follows:

"3. Effect of Convention Awards

(1) A Convention award shall, subject to the following provisions of this Act, be enforceable -

(a) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of Section 26 of the Arbitration Act 1950;

5. Refusal of Enforcement

(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person to whom it is invoked proves -

(a) that a party to the arbitration agreement was

under some incapacity; or

(b) that the arbitration agreement was not valid under the law ... of the country where the award was made; or

c) that he was not given proper notice ... or was otherwise unable to present his case; or

(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; or

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement ... or ... the law of the country where the arbitration took place; or

(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 ... it was made.

(3) Enforcement of a Convention 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 enforce the award.

(5) Where an application for the setting aside ... of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f) of this Section, the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the parties seeking to enforce the award, order the other party to give security."

It is the case for the plaintiffs that, the defendants' challenge to the award having been rejected and none of the grounds set out above having been advanced, this Court has no jurisdiction to stay the application of the plaintiffs to enforce the judgment which they have obtained. Mr. Boyd relies upon what he says are the clear and unqualified terms of S.5(1) and the authority of Rosseel -v- Oriental Commercial & Shipping Co. [1991] 2 Lloyd's Rep 625, a case in which the plaintiffs applied for leave pursuant to section

3 of the Arbitration Act 1975 to enforce a New York arbitration award against a foreign company which had no assets within the jurisdiction. In the face of a submission that there was no sufficient jurisdictional connection and that it was therefore not a proper case for granting leave to serve out Steyn J. said:

"I disagree. The English Court is bound by a statute, arising from treaty obligations, to enforce the award. The presence of assets in the jurisdiction is not a precondition under the statute to the enforcement of the award. It ought not to be regarded in the exercise of the Court's discretion as a pre-requisite to the granting of leave to serve out of the jurisdiction. A contrary view would in effect introduce into the statute, which carefully reflects our treaty obligations, a precondition which is not to be found in the 1958 New York Convention. That Convention has now entered into force in the laws of some 80 countries. It is the great success story of International Commercial Arbitration. This Court ought to be astute to avoid making an order which will derogate from the efficacy of the New York Convention System and our treaty obligations as enshrined in the 1975 Act."

The Question of Jurisdiction.

In relation to the case of Rosseel Mr Males submits (rightly in my view) that, while the remarks of Steyn J are highly relevant to the exercise of any discretion of the Court which might defeat the apparent purpose of the New York Convention and/or the 1975 Act, they are not addressed to the specific question of whether the Court has jurisdiction to stay enforcement of a New York Convention award once it has been converted into a English judgment for the purposes of execution. In answer to that question, Mr Males submits that in principle the Court does have such power.

I think Mr Males is correct.

It seems to me that, having elected to convert an award into

an English judgment, the plaintiff ought in principle to be subject to the same procedural rules and conditions as generally apply to the enforcement of such judgments and I do not consider that the wording of the 1975 Act dictates a different conclusion.

S3(1) of the 1975 Act provides for enforcement either by action or in the same manner as the award of an arbitrator is enforceable by virtue of s 26 of the Arbitration Act 1950. S26 of the Arbitration Act 1950 provides:

> "(1) An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in the terms of the award."

Taken separately or together, there is nothing in the text of either of those sections to suggest that, once judgment has been entered in terms of the award, it shall for the purposes of enforcement be treated in any different manner from any other judgment or order, (and thus be subject in its turn to 0.47 r.1). Nor do I consider that the terms of s 5(1) achieve, or are intended to achieve, a different result. It seems to me that the "enforcement" which "shall not be refused" as therein referred to, is intended simply to refer to the enforcement contemplated by the ss I have just quoted. This seems to me to be inherent in the structure of s 5 itself, in which subsection (2) plainly refers to a number of grounds of fundamental objection or defect which it contemplates as justifying the Court to refuse to make an order for enforcement at all. Equally, subsection (5) is addressed to the power of stay open to the Court before enforcement of the award is ordered; it does not purport to deal with the regime of enforcement

after entry of judgment.

Nor am I driven to a contrary conclusion by reference to the New York Convention itself. Article III which imposes the obligation of mutual recognition upon Contracting States provides:

> "Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

Thus, while the Convention is concerned to see that the rules of the enforcing State do not impose "more onerous conditions" than in respect of domestic awards, it does not require that a regime any more advantageous to a foreign judgment creditor be created in respect of Convention awards.

In the course of his argument, Mr Boyd submitted that, to grant a stay upon a judgment enforcing a Convention award was, in effect, to refuse enforcement of it (contrary to s 5(1)). His submission was that, on any ordinary understanding of the word, "enforcement" means "immediate enforcement". Whereas that may be so in other contexts, I do not think it is a correct interpretation in the context of enforcement by execution following entry of judgment. Accordingly I consider that the Court has, in principle, jurisdiction to entertain and accede to an application of this kind.

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The Question of Discretion.

That said, however, I envisage that the Court will rarely, if ever, regard it as appropriate to make such an order in respect of a Convention award, when, by definition, under the Convention, the time for enforcement has arrived. Plainly the rationale of the Convention is aimed at the enforcement of foreign arbitral awards unless either the unsuccessful party is seeking to have it set aside in the country where the award was made (in which case an adjournment of the enforcement proceedings under s 5(5) may be appropriate) or there is some fundamental ground of objection on grounds provided for in s 5 sub-sections (2)-(4). I do not venture to speculate on what circumstance if any, might induce a Court in another case to grant a stay in respect of a judgment upon a Convention award properly obtained. I am certainly satisfied that none such exists in this case.

The proceedings upon which the defendants rely to justify their application for a stay afford no more than a remote and uncertain prospect of recovery at best. Service has not yet taken place. It is plain that the defendants are likely to be in difficulties if the plaintiffs apply to set aside service under 0.12 r.8 (as Mr Boyd has indicated will be their intention). I say this because, while the Points of Claim plead a very large claim for damages, the principal relief claimed is a declaration by the Court that the disputes giving rise to such claim are governed by an agreement for LCIA arbitration according to English Law. Yet no

written arbitration agreement exists, nor indeed was there any express oral submission; it is simply alleged that the terms relied on arise by implication of law, given that the shipbuilding contracts concluded by the defendants for the plaintiffs' benefit and the 18 bare-boat charters which were drafted (though only one was executed) contained such arbitration clauses. That is plainly difficult ground, given that the overall agreement pursuant to which the defendants sue was one made between two organs of the Russian State making internal arrangements as to the financing of the scheme. If the defendants fail to satisfy the Court that they have an arguable case on the implied term point, (in which event the latter would be further pursued in the LCIA and not in this Court) the claim for damages in the writ will not fall within the jurisdiction of the Court, since it relates entirely to parties and transactions outside the jurisdiction. Thus, whatever the defendants' eventual prospects of success, the trial or hearing of their claims is years rather than months away.

Conclusion.

Accordingly, quite apart from the general concern of the Court to ensure the enforcement of convention awards, I see no special circumstances which render it inexpedient to enforce the plaintiffs' judgment in this case. I order the removal of the stay of execution imposed by the order of Cresswell J upon para 1 of the order of Rix J and of the judgment entered by the plaintiffs pursuant thereto and (subject to the submissions of the parties as to the final form of such order) I further order payment to the

plaintiffs or their solicitors, in satisfaction of the judgment, of the monies paid into the escrow account, together with accrued interest thereon.

DISPOSITION:

Judgment accordingly

(Transcript: Harry Counsell)

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