Neutral Citation Number: [2007] EWCA Civ 988

Case No: A3/2007/0738

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Field
[2007] EWHC 725 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 17/10/2007

Before :
LORD JUSTICE BUXTON
LORD JUSTICE RIX
and
LORD JUSTICE MOSES

- -

Between :

Gater Assets Limited	**Appellant Claimant**
- and -	
Nak Naftogaz Ukrainiy	**Respondent Defendant**

- -
- -

Mr Colin Edelman QC & Mr Charles Dougherty (instructed by **Messrs Clyde & Co**) for the **Appellant/Claimant**
Mr John Higham QC (of **Messrs White & Case**) for the **Respondent/Defendant** Hearing dates : 5 July 2007

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Judgment

Lord Justice Rix :

1. Gater Assets Limited ("Gater") is the assignee of a New York Convention arbitration award and seeks to enforce it in England against the award debtor, Nak Naftogaz Ukrainiy (the National Joint Stock Company Naftogaz of Ukraine, "Naftogaz"). Naftogaz wishes to resist enforcement on the ground (inter alia) that the award was procured by fraud (a ground implicitly allowed under the Convention, which provides that enforcement may be refused on the basis that it would be contrary to public policy). It seeks security for costs against Gater on the ground that it is the defendant to Gater's claim to enforce the award, and that it is just that security for the costs of the enforcement issue should be provided. Gater submitted to the judge, Field J, that there was no jurisdiction to grant security for costs, and that even if there was in theory jurisdiction, nevertheless in practical terms Naftogaz was the applicant, so that if anyone should provide security for costs it should be Naftogaz, but in any event it should not be the (assignee of the) award creditor, Gater. The judge agreed with Naftogaz's submissions and awarded security for costs in the amount of £250,000 against Gater, who appeals. In giving permission to appeal, Toulson LJ remarked that arguable questions of some importance were raised.

2. The judge made his decision in favour of security under CPR 25.12 (1), which provides –

> "A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings."

3. The judge was satisfied that Naftogaz was a defendant to Gater's claim to enforce the award; that he therefore had jurisdiction; and that since Naftogaz had shown a prima facie case of fraud, he should order security in his discretion.

The award

4. The award in question is dated 31 May 2000, and was made by the International Commercial Court in Moscow ("ICAC"). The arbitration agreement pursuant to which the award was issued was contained in a Transit Contract dated 16 January 1998 between the legal predecessor of Naftogaz, which is the national gas company of the Ukraine, and Gazprom, the Russian gas company (the "contract").

5. The contract between Gazprom and the legal predecessor of Naftogaz (to which I will refer also as "Naftogaz") concerned the use by Gazprom of the "Brotherhood" gas pipeline through Ukraine. Gazprom paid for the use of this pipeline in kind by allowing Naftogaz to draw off a certain amount of gas for its own use. Gazprom insured against gas being misappropriated as it passed through the pipeline with its captive insurer, Sogaz Insurance Company ("Sogaz"). Between 1 November 1998 and 31 December 1999 Sogaz reinsured the risk with Compagnie Monegasque de Reassurance ("Monde Re"). Gazprom claimed that in December 1998 Naftogaz withdrew more gas (1.482 billion cubic metres) than it was entitled to, and Sogaz, its captive

insurer, and in turn Monde Re, the reinsurer, reimbursed the claim in the sum of $88,256,704.89. Under Russian law, the rights of Gazprom passed by way of subrogation to Monde Re. It was Monde Re which pursued the Gazprom claim against Naftogaz in arbitration, and succeeded in obtaining the award, in its own name, in its favour.

6. It is this award which Monde Re has now assigned to Gater, and which Gater is seeking to enforce as a judgment in England. The award is in the sum of $88,256,704.49 plus costs. The assignment to Gater, made by Monde Re when in liquidation, is dated 3 May 2006.

The challenge to the award

7. One of the issues considered by the arbitral tribunal was whether the arbitration agreement contained in the contract was binding between Monde Re and Naftogaz. It considered that it was. That should come as no surprise to English lawyers. In English law a subrogated insurer would sue in the insured's own name, so that its claim would be bound to be brought in any arbitration in which its insured was obliged to participate. The tribunal's jurisdictional competence was also disputed, but again unsuccessfully.

8. Naftogaz carried its challenge to the award itself to the Moscow City Court. It was again said that the arbitral tribunal lacked jurisdiction, that the dispute was not within the arbitration agreement, that the composition of the tribunal was contrary to the arbitration agreement, and that the award was contrary to Russian public policy. The public policy allegations included one to the effect that there was no proof of a reinsurance agreement (inter alia because the copy before the tribunal was unsigned), and another that there was no proof of payment of the claim. It was also alleged that the Sogaz insurance contract was a fiction, because the limit of liability at $8.5 billion was the same as the amount of the premium. By these arguments, Naftogaz sought to show (inter alia) that Gazprom was illegitimately seeking to avoid a prohibition on assignment contained in the contract. In a reasoned decision, the Moscow City Court rejected all these (and other) grounds of challenge. There was a further appeal by Naftogaz to the Russian Supreme Court, heard on 24 April 2001, but again without success.

9. In September 2000, while the award was still under appeal in Russia, Monde Re sought to enforce it in New York against both Naftogaz and the State of Ukraine, against the latter on the ground that it was an alter ego of Naftogaz. The object of the proceedings was to execute against the assets of Ukraine in the US, where Naftogaz itself had no assets. Monde Re was unsuccessful in obtaining jurisdiction in New York, principally on the basis of *forum non conveniens*. There was no challenge to enforcement in New York on the ground of public policy or fraud.

The New York Convention

10. Russia and the UK are parties to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "Convention"). Relevant provisions are as follows:

“Article 1

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought…

Article III

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

Article IV

To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

The duly authenticated original award or a duly certified copy thereof;

The original agreement referred to in article II or a duly certified copy thereof…

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity…

(b) The party against whom the award is invoked was not given proper notice…

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration…

(d) The composition of the arbitral procedure was not in accordance with the agreement of the parties…

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country of which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

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

11. It may be observed that: (1) the provisions of the Convention are for the most part mandatory (see articles III, V.1); (2) the formal requirements for the party seeking enforcement are limited (article IV.1); (3) subject to article V.2 (which contains the saving in favour of public policy), enforcement may not be refused unless the party against whom enforcement is sought sustains the burden of proving some formal defect in the arbitration (article V.1) ; (4) a contracting state may not impose substantially more onerous procedural conditions upon enforcement than apply to domestic awards (article III); and (5) the only reference to the possibility of security relates to security for the award where enforcement proceedings are adjourned pending a challenge to the award in the country, under the law of which or in which it was made (article VI).

Enforcement under the Arbitration Act 1996

12. The provisions of the Convention are reflected in Part III of the Arbitration Act 1996 (the "1996 Act"), which provides –

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

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect…

(3) Where leave is so given, judgment may be entered in terms of the award.

102. (1) A party seeking the recognition or enforcement of a New York Convention award must produce –

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it…

103. (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Recognition or enforcement may also be refused if the award is in respect of a matter which is not capable of

> settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award…
>
> (5) Where an application for setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection 2(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.
>
> It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.
>
> 104. Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66."

13. I will refer further to section 66, and other relevant provisions of the 1996 Act, below.

14. It will be observed that sections 101/103 reproduce the essential provisions of the Convention (see para 10 above), save that there is no need in England to reproduce the second sentence of article III.

15. Under both the Convention and the 1996 Act, whereas the burden of proving the formal exceptions to enforcement is expressly placed upon the party against whom enforcement is sought (article V.1 and section 103(2)), the defence that enforcement would be contrary to public policy is stated without an express burden of proof (article V.2 and section 103(3)). This is no doubt because it must always be open to the court to take a point of public policy of its own motion. However, in as much as a complaint that an award was procured by fraud comes within the public policy exception, it was common ground, in my judgment rightly so, that the burden of proving that complaint must rest upon the party alleging it.

The English proceedings, and the allegation of fraud

16. On 23 May 2006 Gater issued its arbitration claim form in London against Naftogaz. Gater is described in the claim form as "claimant" and Naftogaz is described as "defendant". The claim form stated that it was a claim for the enforcement of the award pursuant to section 101 of the Arbitration Act 1996; claimed both (a) permission to enforce the award in the same manner as a judgment and (b) judgment itself against Naftogaz; and also claimed permission to serve the claim form (and a freezing order also requested) out of the jurisdiction pursuant to CPR 62.18(4).

17. In its evidence to the court for the purpose of this claim to enforce the award Gater not only filed the essential documents required by article IV and section 102, but also exhibited (inter alia) the Sogaz and Monde Re insurance and reinsurance contracts. In the case of the Monde Re contract, Gater's English

solicitor, Michael Payton of Messrs Clyde & Co, did not exhibit the unsigned copy of that contract dated 27 November 1998 which had been before the arbitrators, but an identical executed copy signed and additionally dated in manuscript 17 March 1999. That copy, unlike the unsigned copy, also had attached to it signed and dated Addenda Nos 1, 2 and 3, dealing with profit commission payable to Sogaz (No 1); a limitation on the amount recoverable to "1. The amounts actually recovered from third parties plus 2. The total of gross premium plus accrued interest" (No 2); and management fees payable to Monde Re in the sum of the greater of $150,000 or 0.3125% of gross premium (No 3). Naftogaz relies on the fact that the executed copy, with its addenda, had not been before the arbitrators.

18. On the same day as the arbitration claim form was issued by Gater, 23 May 2006, Colman J made an order, without notice to Naftogaz, inter alia as follows:

> "1. Pursuant to section 101 of the Arbitration Act 1996, the Claimant be permitted to enforce in the same manner as a judgment or order to the same effect the award…
>
> 2. Judgment be entered for the Claimant as against the Defendant…
>
> 3. The Claimant be permitted to serve the claim form and any freezing order out of the jurisdiction pursuant to CPR 62.5 and/or CPR 62.18(4)…
>
> 4. The Defendant shall pay the costs of this arbitration claim to be assessed if not agreed.
>
> PROVIDED THAT, within [21] days after service of this order on it, the Defendant may apply to set aside this order and the award shall not be enforced until after the expiration of that period or, if the Defendant applies within that period to set aside the order, until after the application is finally disposed of…"

19. That order reflected the terms of CPR 62.18 dealing with the enforcement of awards (see below). On the same day, by a further order, Colman J made a freezing order against Naftogaz in the amount of the award. That freezing order was continued by David Steel J by his order dated 10 June 2006.

20. Notice of these orders was promptly given to Naftogaz, on behalf of whom Messrs White & Case, London, responded by their letter dated 12 June 2006 to say that they were not instructed to accept service, insisting that service be effected in Ukraine. The letter said that, once served, Naftogaz intended to apply to set aside the enforcement order; it also asked Gater to provide security for costs. On 4 December 2006, nearly six months later, but still before service, White & Case wrote again to say that they were now instructed to accept service, proposing that service be treated as being effected that day. On the same day Mr Jason Yardley of White & Case made a (first) witness

statement in support of Naftogaz's application, issued that day, that the orders of Colman J and David Steel J be set aside.

21. The grounds on which Naftogaz relies in seeking to set aside Colman J's enforcement order are (see Field J's judgment at para 10): (1) there was no arbitration agreement between Gater and Naftogaz; (2) neither Sogaz nor Monde Re nor Gater as Monde Re's assignee are entitled to be subrogated to any right of Gazprom to claim arbitration under the contract; (3) the award dealt with a difference not contemplated by and not falling within the scope of the submission to arbitration contained in the contract; (4) the composition of the arbitral tribunal was not in accordance with the contract; (5) the award was obtained by fraud; (6) the enforcement of the award would be contrary to public policy; and (7) Gater failed to make full and frank disclosure to the court on 23 May 2006.

22. To a large extent these submissions (other than ground (7)) had been made to the arbitral tribunal, to the Moscow City Court, and to the Russian Supreme Court in turn. Ground (5), however, was raised on the basis of the executed copy of the Monde Re reinsurance contract, said to be seen for the first time when exhibited to Mr Payton's first affidavit. The following are extracts from Mr Yardley's first witness statement:

> "13. On the contrary, I believe that there are strong grounds to believe that the Moscow Award was obtained by fraud, very probably with the complicity of individuals now either behind or involved with Gater Assets. It is clear that crucial documents were deliberately withheld from the Moscow Tribunal and, I believe, that untrue statements were deliberately made to the Moscow Tribunal by Monde Re in order to obtain the Moscow Award…
>
> 16…such documents have been used to disguise the true nature of the underlying transactions, which I believe to have been designed to defraud Naftogaz and/or Sogaz and/or Gazprom…
>
> 48. It is clear that the signed copy of the Monde Re Reinsurance Contract now exhibited to the Payton Affidavit…is materially different from the copy submitted to the Moscow Tribunal…
>
> 53. I cannot see any legitimate reason why the signed and dated copy of the Monde Re Reinsurance Contract, which predated the commencement of the Moscow Arbitration, would not have been produced by Monde Re to the Moscow Tribunal, unless it was to avoid alerting the Moscow Tribunal to this date issue.
>
> 54…The unsigned copy submitted to the Moscow Tribunal was also materially and, in my view, deliberately incomplete in that it did not include the three Addenda

which are attached to the copy now exhibited to the Payton Affidavit…

59. As to the nature and effect of the Addenda, they are not all easy to follow, but a careful examination reveals the follows:

(i)…Essentially, therefore, under Addendum 1 (read alone) Monde Re can never come out of the deal much better than even. Even if it recovers everything it is liable to pay to Sogaz, it must still return 97% of the premium to Sogaz. The so-called "premium" is plainly not a genuine insurance premium…

(ii)…Contrary to the impression that might be gained by reading the Monde Re Reinsurance Agreement without the benefit of Addenda 1 and 2, as the Moscow Tribunal had to do, therefore, it is clear that Monde Re was in fact taking no financial risk at all under the Monde Re Reinsurance Agreement. Its liability could not exceed any amount it recovered from…Naftogaz, plus the gross premium received from Sogaz…

61…Monde Re will <u>always</u> end up receiving a net payment of between US$150,000 and $2,923,503.33. Monde Re will never lose.

62. Sogaz, on the other hand, will <u>always</u>...end up losing exactly the amount that Monde Re gains. Sogaz does, of course, have potential liability to Gazprom under the Sogaz contract, but only to the extent that Sogaz receives payment from third parties via a recovery by Monde Re. It will also according to the Sogaz Insurance contract, have received an insurance premium of more than US$8.5 billion…

64. Had the Moscow Tribunal been provided with copies of such documents, in my view it would not have been able to avoid the conclusion that the Monde Re Reinsurance Contract was not a genuine contract of reinsurance, but rather a sham transaction intended to disguise the simple transfer of the conduct of the claim against…Naftogaz from Sogaz to Monde Re.

65. That being the case, there could be no right of subrogation in favour of Monde Re, which had no right to commence an arbitration against Naftogaz."

23. It appears, however, from the second witness statement of Mr Payton dated 7 March 2007 (see para 12) that the executed and signed Monde Re reinsurance contract may have been at least before the Moscow City Court and the Russian Supreme Court (although that is disputed); as to which Mr Yardley rejoined

(in his fourth witness statement dated 15 March 2007, at para 23) that this was "neither here nor there".

24. In his first witness statement, dated 9 February 2007, Mr Payton had also observed that Naftogaz had spent six months resurrecting a series of arguments which had been rejected in the arbitration and in the Russian courts, and had also raised a serious allegation of fraud, which Clyde & Co had commenced (but not completed) investigating: and that this involved reviewing boxes full of documentation and interviewing those who were dealing with the claim at Clyde & Co and Musin & Partners (both in St Petersburg), such as Mr Trevor Barton and Professor Musin. In the meantime they had categorically denied any attempt to mislead arbitrators or courts.

25. This was the state of the evidence at the time when Naftogaz's application for security for costs came before Field J on 22 March 2007. The judge observed (at para 24 of his judgment):

> "Mr Edelman says in his skeleton argument that it will be Gater's case that this structure was not the first example of its kind and had as one of its purposes the transfer of the claim to a third party entity independent of Gazprom so as to prevent Naftogaz's predecessor and the Ukrainian government avoiding the consequences of misappropriations of gas by insisting that the issues were dealt with at an inter-governmental level. Realistically, he accepted, however, that at this stage, with Gater yet to file its reply evidence, Naftogaz had a *prima facie* case for setting aside Colman J's order on the ground of fraud. Mr Edelman made this concession whilst at the same time submitting that Naftogaz had to prove a true causative fraud to the requisite standard and the points now taken must not have been available from the evidence presented or obtainable before the tribunal or the Russian courts acting in their supervisory jurisdiction."

26. It was on 25 January 2007 that Naftogaz had issued its application for security for costs, which is the subject matter of this appeal. Its application was made pursuant to CPR 25.12, and also asked that if security ordered was not provided, then Gater's claim "be struck out" and there be judgment for Naftogaz. The application stated that it would be just to make such an order because Gater was registered in the BVI and would be unable to pay Naftogaz's costs if ordered to do so by the court. Reference was made in the application to CPR 25.13.(2)(a) and (c): (a) is the condition that a claimant is resident out of the jurisdiction other than in an EU or EFTA state; (c) is the condition that the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. The basis of the latter assertion is Gater's own evidence that its only asset is the award itself.

27. The judge acceded to this application, and ordered Gater to provide security in the sum of £250,000, in default of which its claim "be struck out".

28. Subsequently to the judgment of Field J of 22 March 2007 Gater filed further evidence, in particular from Mr Barton and Professor Musin, who had had conduct of Monde Re's claim in the Russian proceedings, the latter as a Russian advocate. In brief, their evidence amounts to a complete denial of any fraud, deliberate withholding of documents, or any attempt to mislead the various tribunals. They allege that all of the arguments now raised were considered by those tribunals and rejected; that the argument that the claim for subrogation failed had been withdrawn before the arbitral tribunal, although resurrected in the courts; that the executed reinsurance contract had been before the Moscow City Court; and that similar arguments to those raised in relation to the addenda to the reinsurance contract had been raised in relation to an addendum to the Sogaz insurance contract which had been considered by the arbitral tribunal. Thus Mr Barton states in his witness statement of 4 May 2007:

> "33. I also recall that the issue of whether this constituted a "sham transaction" was, in fact, raised by Naftogaz, particularly in the Moscow City Court. This argument centred around the amounts of the premiums and the insurance payments, the payments themselves, and the subrogations. These were extensively considered in the proceedings in Russia, and my recent review of the pleadings and other documents confirms this. In particular, it was vigorously argued by lawyers representing Naftogaz in the appeal proceedings before the Moscow City Court and the Russian Supreme Court, despite the note in the ICAC Award that *"As a result of a discussion which took place between the parties [at the hearing] on the question of subrogation, the respondent's representative declared that he was withdrawing his objections regarding the illegality of the subrogation."* I recall Professor Musin addressing the arbitrators/court on this issue, pointing out that while the insurance and reinsurance arrangements may have been unusual, they were perfectly legal and acceptable as a matter of Russian law, the proper steps had been followed, and appropriate documentation had been put in place. At each instance, the arbitrators/courts preferred the arguments of Monde Re to those of Naftogaz…
>
> "45. As I recall Naftogaz did not argue vigorously that the gas had not been taken or that it was inappropriate that the claim was brought under [the transit contract] at the ICAC, nor did Naftogaz argue these points at all on subsequent appeal (when they produced what seemed to be every possible argument they could think of to challenge the decision of ICAC). As noted above, the ICAC arbitrators examined the issue of whether there had been an unsanctioned withdrawal of gas, and they reached the conclusions, having examined the evidence and listened to the arguments presented by both sides, that there had been

> an unsanctioned withdrawal of gas, and that it was appropriate that the claim was brought under [the transit contract]…""

The CPR and security for costs

29. Naftogaz's security for costs application was made and acceded to under CPR 25.12. It is necessary therefore to consider both the general provisions contained in the CPR relating to security for costs, but also any specific provisions contained there or elsewhere relating to security for costs in arbitration, and in enforcement procedures. While the regime of security for costs is long familiar in English law, under which a claimant (but not a defendant) may be required, under certain conditions, to provide security for costs, on the basis that it might be unfair if a successful defendant should be unable, or find it difficult, to recover its costs against a claimant who had unsuccessfully invoked the English jurisdiction, it is not necessarily apparent that the same rationale should apply to arbitrations (where the parties agree on their tribunal and forum) or to enforcement (where ex hypothesi the claimant seeking enforcement is already a judgment or award creditor).

30. I have already stated the general provision in the CPR relating to security for costs at the outset of this judgment. It is to be found in CPR 25.12(1), which I repeat for convenience:

> "A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings."

31. "A defendant" is defined in CPR 2.3(1) as "a person against whom a claim is made". A "claimant" is also there defined as "a person who makes a claim". "Claim", however, is not defined. It is established that a counterclaim, or any Part 20 claim, is a claim for these purposes. However, it seems that a mere interim application, such as that to amend pleadings, is not a claim: see the note to *Civil Procedure, 2007* at para 25.12.4.

32. Part 7 is concerned with the claim form as the initiating step in the start of proceedings. Thus CPR 7.2(1) states that "Proceedings are started when the court issues a claim form at the request of the claimant". Part 23, on the other hand, is concerned with "applications" and is headed "General rules about applications for court orders". CPR 23.1 defines "application notice" as a document in which the applicant states his intention to seek a court order"; and "respondent" as "the person against whom the order is sought". It might appear therefore that one way of identifying a claim is by reference to the substantive subject matter of a claim form; and that applications only occur within proceedings which have already commenced. That, however, would not be entirely accurate: for instance, applications for interim measures, such as the important field of freezing orders which can lead to substantial litigation, may be initiated in the absence of a claim form, eg where substantive proceedings take place outside the jurisdiction, but "must be made in accordance with the general rules about applications contained in Part 23". I am reluctant to go further into the possible distinctions between a claim and an application, because it has not been explored at all in submissions to the court.

33. In any event, the case of the counterclaim indicates that a "claim" can exist outside a claim form itself. The jurisprudence in relation to counterclaims and security for costs may be in some flux. In the early case of *Neck v. Taylor* [1893] 1 QB 560 (CA), it was held that while a claimant might be able to obtain security for costs of a counterclaim which was wholly distinct from his own claim, he could not do so where the counterclaim arose out of the same matter or transaction as the claim. Lord Esher MR said (at 562):

> "…the Court…will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it might take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly."

34. That reads like a rule of discretion rather than of jurisdiction, and so this court decided in *The Silver Fir* [1980] 1 Lloyd's Rep 371, where Lawton LJ said (at 374):

> "What Lord Esher M.R. was saying was that there is a discretion to award security for costs even in cases which arise out of the same subject-matter. But if the counter-claim is a defence and nothing more then normally the discretion should not be exercised in favour of ordering security."

35. The court there took a more pragmatic view of the overall situation, even to the extent of departing from the view of the commercial judge below, who had seen the fact that the same issues arose there on both sides as counting against the claimant alone. However, this court on that ground thought that justice required that security for costs be awarded in the same amount on both claim and counterclaim. Lawton LJ said (at 374):

> "In my judgment, where, as in this case, both parties carry on business outside the jurisdiction, both are claiming against the other as parties who have been badly treated and have suffered damage, and it was mere chance that one started the arbitration before the other could get in a claim, then both should be treated alike."

36. In *Hitachi Shipbuilding & Engineering Co Ltd v. Viafiel Compania Naviera SA* [1981] 2 Lloyd's Rep 498 this court took the analysis a stage further by asking both whether there was a formal and a substantive counterclaim. Donaldson LJ said that the existence of a counterclaim undoubtedly gave jurisdiction to order security for costs against the respondent to an arbitration, but as a matter of discretion he would only so order to the extent that the counterclaim involved additional costs beyond that of the claim (at 508). Ackner LJ formulated the overall question as: "are the respondents in the position of the plaintiff?" (at 510).

37. Subsequently this court has held, as an alternative to the solution in *The Silver Fir*, that where claim and counterclaim are linked neither party should get security for costs: *BJ Crabtree (Insulation) v. GPT Communications Systems* (1990) 59 BLR 43.

38. The conditions to be satisfied if the court is to have jurisdiction to make an order for security for costs are set out in CPR 25.13. They are, first that the court has to be satisfied having regard to all the circumstances of the case, "that it is just to make such an order", and secondly that one or other qualifying conditions are met, eg that the claimant is resident out of the jurisdiction other than in an EU or EFTA state, or that there is reason to believe that the claimant, wherever incorporated, would be unable to pay the defendant's costs if ordered to do so. It is common ground that the first qualifying condition is met in the case of Gater, but there is a measure of dispute as to the second. Thus it is said that Gater has no asset other than the award, the validity of which is of course the bone of contention in the enforcement proceedings. Ultimately the making of an order is a matter for the court's discretion. That it is "just to make such an order" goes both to the jurisdiction to do so, and also, of course, must enter very largely into the court's discretion.

The Arbitration Act 1996 and security for costs

39. The application of the regime of security for costs in the field of arbitration has proved controversial, and is now dealt with largely by statute. Under the Arbitration Act 1950, security for costs was available in arbitration, but could only be ordered by the court, pursuant to section 12(6)(a). There was debate about whether and to what extent the English court should be prepared to order security for costs in international arbitrations which, save for taking place in this country, otherwise had no connection with England: see *Merkin, Arbitration Law,* at para 14.66. Ultimately, in *Coppée-Lavalin SA/NV v. Ken-Ron Chemicals and Fertilizers Ltd* [1995] 1 AC 38 the House of Lords held that there should be jurisdiction to order security for costs even in arbitrations held under international arbitration rules such as those of the ICC, but that, as a matter of principle, in the exercise of its discretion the English courts should be circumspect in ordering it. The House nevertheless split by a narrow majority in its ultimate application of this approach, with Lords Keith, Slynn and Woolf favouring the grant of security for costs against a nominal, impecunious, claimant, while Lords Mustill and Browne-Wilkinson considered that even so an order for security should be refused "notwithstanding that on a narrower view it appears to answer the justice of the case" (*per* Lord Mustill at 65f). That of course was dealing with security for costs in the arbitration itself, where the claimant was still seeking to establish his claim in what was described as "likely to be a long and very expensive arbitration" (at 65c).

40. *Merkin* comments (at para 14.68) that the result of *Coppée-Lavalin* was –

> "greeted with widespread disapproval. The market perceived a threat to the use of England as a forum for international arbitration if the courts were prepared to exercise powers not generally recognised in other jurisdictions, simply because the parties happened to agree upon England as their preferred venue. The general view was, therefore, that the courts should no longer have the power to order security for costs."

41. A few years later, in the 1996 Act the power of the courts to order security for costs under section 12(6)(a) of the Arbitration Act 1950 was removed and confined to the arbitrators themselves, who may order a "claimant" (which expression "includes a counterclaimant") to provide security for the costs of an arbitration (sections 38(3) and 82(1)). As *Dicey, Morris & Collins, The Conflict of Laws*, 14th ed, 2007, Vol 1 at para 8-097, footnote 67 remarks, in this respect the effect of *Coppée-Lanvin* was reversed by statute. Thus a power to order security for costs in an arbitration is not listed among the powers of the court exercisable in support of arbitral proceedings (section 44). However, if a party to an arbitration wishes to challenge the arbitrators or an award by an application or appeal to the court, then the court may require that party to provide security for the costs of the application or appeal (section 70(6) (see below): section 70 contains supplementary provisions regulating challenges or appeals pursuant to sections 67, 68 and 69). In neither case can security be ordered on the ground that the claimant or applicant is resident out of the jurisdiction (sections 38(3) and 70(6)). Therefore in this respect the jurisdiction to order security for costs in an arbitration or in application or appeal under sections 67/69 differs from the general CPR security for costs regime (see CPR 25.13 referred to above).

42. The power in the court to order security for costs pursuant to section 70(6) against a party who seeks to challenge the arbitrators or an award is a significant provision, for it indicates that such a challenge is not to be regarded as merely incidental to the arbitration itself. In the case of a section 69 appeal, that is wholly understandable, for it has generally been the case that an appellant (or a respondent who also appeals) is regarded as a claimant for the purposes of an appeal and may be required to provide security for its costs: CPR 25.15. In the cases of a section 67 challenge to the arbitrators' substantive jurisdiction, however, or a section 68 challenge on the ground of serious irregularity, both of which may occur during the course of the arbitral proceedings as well as after an award, the section 70(6) provision emphasises that for these purposes the costs are not merely incidental to the claimant's claim in the arbitration. They are also, of course, new invocations of the jurisdiction of the court.

43. The issues have therefore been raised on this appeal as to whether an application to set aside an enforcement order made pursuant to the Convention under section 101 of the 1996 Act (a) should be regarded in the same light, not as incidental to the claim to enforce but as essentially a separate claim or counterclaim; and (b) as to whether an attempt to challenge a foreign Convention award on the limited grounds permitted under the Convention

should be regarded as essentially analogous to the challenges permitted in the case of an English award under sections 67/68 of the 1996 Act. Issue (a) will need some consideration of the enforcement procedures under the Convention and section 101, to which I will turn below. However issue (b) raises the question whether a challenge to an attempt to enforce a domestic award could lead to the requirement of security for costs from the party seeking enforcement as distinct from the party challenging enforcement.

44. For these purposes it is necessary to consider some of the provisions of sections 66/68, 70, 73 and 81 of the 1996 Act. Section 66 is the section which deals with enforcement of awards generally, and is supplemented by section 81. Section 73 is concerned with the loss of right to object to substantive jurisdiction or irregularities affecting the arbitral tribunal or its proceedings. Thus –

> "66.(1) An award made by a tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
>
> (2) Where leave is so given, judgment may be entered in terms of the award.
>
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).
>
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule or law, in particular…the provisions of Part III of this Act relating to the recognition or enforcement of awards under the New York Convention or by an action on the award.
>
> 67. (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

68. (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant …..

(g) the award being obtained by fraud or the award exceeding its powers…

70.(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is –

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

73.(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

81.(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular any rule of law as to –

(a) matters which are not capable of settlement by arbitration; ...

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy."

45. On the basis of these provisions, Mr Colin Edelman QC, on behalf of Gater, has submitted that it is inconceivable that an award debtor of an English award, having sat back and failed within the time required to object to an award as having been, for instance, made without or in excess of substantive jurisdiction or procured by fraud, can obtain security for costs against his award creditor who seeks to enforce the award, when if he had taken timely steps to challenge the award on those grounds he would himself have been liable to provide security for the costs of his challenge.

Enforcement and security for costs

46. Naftogaz's principal submission, accepted by the judge, is that an application to enforce an award is a "claim" like any other claim, to which it is a "defendant", and that as such the claim comes within CPR 25.12. The submission is said to be supported by a consideration of the provisions of the CPR relating to the enforcement of awards. Thus CPR Part 58, which applies to claims in the commercial court, provides:

"58.3 These Rules and their practice directions apply to claims in the commercial list unless this Part or a practice direction provides otherwise."

47. CPR Part 62 "contains rules about arbitration claims" (CPR 62.1(1)) and CPR 62.1(3) refers back to Part 58, stating that "Part 58 (Commercial Court) applies to arbitration claims in the Commercial Court…except where this Part provides otherwise." CPR 62.2(1), which begins Section I of Part 62, headed "Claims under the 1996 Act", defines "arbitration claim" in that Section as meaning "any application to the court under the 1996 Act", but immediately goes on to state in CPR 62.2(2) that "This Section of this Part does not apply to an arbitration claim to which Sections II or III of this Part apply". Section III, headed "Enforcement", provides separately for the rules relating to enforcement under statute, albeit not under the common law.

48. Thus the following provisions of Section III are relevant:

> "62.17 This Section of this Part applies to all arbitration enforcement proceedings other than by a claim on the award.
>
> 62.18 (1) An application for permission under –
>
> (a) section 66 of the 1996 Act;
>
> (b) section 101 of the 1996 Act…
>
> to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form.
>
> (2) The court may specify parties to the arbitration on whom the arbitration claim form must be served.
>
> (3) The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this Part.
>
> (4) With the permission of the court the arbitration claim form may be served out of the jurisdiction irrespective of where the award is, or is treated as, made…
>
> (8) An order giving permission may be served out of the jurisdiction –
>
> (a) without permission; and
>
> (b) in accordance with rules 6.24 and 6.29 as if the order were an arbitration claim form.
>
> (9) Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set –
>
> (a) the defendant may apply to set aside the order; and
>
> (b) the award must not be enforced until after –
>
> (i) the end of that period; or
>
> (ii) any application made by the defendant within that period has been finally disposed of.
>
> (10) The order must contain a statement of –

(a) the right to make an application to set the order aside; and

(b) the restrictions on enforcement under rule 62.18(9)(b).

49. The order of Colman J in this case complied with these rules. It may be noted therefore that: (i) Colman J made an order giving permission to enforce (sub-rule (8)); (ii) he did *not* require the arbitration form to be served on Naftogaz pursuant to sub-rule (2); (iii) he did permit service of the claim form out of the jurisdiction pursuant to sub-rule (4); (iv) the proviso to the order contained the matters provided for in sub-rules (9) and (10); (v) the order referred to Gater as claimant and Naftogaz as defendant.

50. There is no specific reference to security for costs in Parts 58 or 62, but the argument accepted by the judge is that the language of Part 62 suggests that a claim to enforce is in essence an arbitration claim like any other (CPR 62.18(3)); that arbitration claims are like any claims in the commercial court in being governed by Part 58, subject to contrary provision (CPR 62.1(3)); and that through Part 58, the whole panoply of the Rules in general apply, including CPR 25.12, in the absence of any contrary provision in any part of the CPR (CPR 58.3). Thus, so Naftogaz submitted and so the judge held, the security for costs provisions of the CPR apply, by incorporated reference if not expressly, to an arbitration claim to enforce a New York Convention award under section 101 of the 1996 Act, just as they apply to an arbitration claim to enforce a domestic award under section 66. Moreover, since the same rules apply to the enforcement of both domestic and Convention awards, it cannot be said that there would be any breach of the provision in article III of the Convention that "there shall not be imposed substantially more onerous conditions" on the enforcement of Convention awards than on the enforcement of domestic awards.

51. On behalf of Gater, Mr Edelman submitted to the contrary, namely that security for costs was not available in the enforcement of domestic awards under section 66 (see paras 44/45 above) and that therefore there would be a breach of article III if it was available in the enforcement of a Convention award. And more generally, Mr Edelman also submitted that enforcement proceedings were not like other proceedings, because in enforcement the "claim" had already been established by a judgment or award.

52. The judge rejected this submission as well. He said –

> "18…In applying for and obtaining the order made under s.101(2) Gater was advancing a claim to be entitled to such relief against Naftogaz. Naftogaz is therefore properly to be regarded as a defendant who, by seeking to have the order set aside, is defending Gater's claim and will incur substantial costs in doing so."

53. The judge went on to support his view that Naftogaz was defending Gater's claim by reference to a passage in the judgment of HHJ Chambers QC in *Dardana Ltd v. Yukos Oil Co* [2002] 2 Lloyd's Rep 261. There, a similar issue

arose between an applicant for enforcement of a Convention award and an award debtor who sought security for the costs of his application to set aside the enforcement order. At that time the Arbitration Practice Direction supplementing Part 49 (the forerunner of Part 62, see *Civil Procedure, 2000,* Vol 2 at section 2B) did contain an express reference to security for costs, in para 17.1, viz:

> "17.1 Subject to section 70(6) of the Arbitration Act, the Court may order any applicant (including an applicant who has been granted permission to appeal) to provide security for the costs of any arbitration application."

54. However, that provision appeared in Part I of the Direction, where "arbitration application" did not include "proceedings to enforce an award" (see paras 2.1, 2.2 and 3). Enforcement proceedings were dealt with in Part III (see paras 30.1, 31.1 and 31.2). Paras 31.3/4 provided that where a judge hearing the application for permission to enforce directed that the "enforcement form" be served, inter alia para 17.1 "shall apply with the necessary modifications as they apply to applications under Part I". There was an issue in *Dardana* as to whether para 17.1 applied where, on the contrary, the judge made an enforcement order without notice, as had occurred in that (and in this) case. Para 31.3, describing the case where the judge made the direction for service of the enforcement proceedings, appears to be dealing with the case where the judge was not prepared to make an *ex parte* order for enforcement. It follows that there would be no need for the award debtor to apply to set aside an enforcement order (the subject-matter of para 31.9).

55. Judge Chambers was not attracted by this distinction. However, he dealt with it, as it seems, not by a process of construction of the rules, but by denying that there should in principle be a distinction between the case where the judge makes an ex parte enforcement order, which needs to be set aside, and the case where he merely directs service of the enforcement form on the award debtor. He therefore considered that he had to decide how the award debtor who challenges enforcement should be regarded in both cases, without distinction. As here, he was faced by the submission that it is the award debtor who seeks to challenge an award who is in the real position of claimant:

> "11. The starting point for the submission is the suggestion that, whatever the technicalities, it is Yukos [the award debtor] who is in the position of a claimant by seeking to set aside the leave to enforce. It is said that if one considers the various potential challenges to an award to be found in ss. 67 to 69 of the Act, it is the party against whom the award has been made who, as the person challenging the award, runs the risk of having to provide security for costs. This appears from s. 70(6)."

56. Judge Chambers' general answer, however, was that the award debtor is not in truth a challenger but a defender. He said:

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

57. When it came to his exercise of that jurisdiction, however, Judge Chambers was against awarding security for costs. The factual background was somewhat complex. Dardana, an assignee of an assignee of the award creditor, had obtained an ex parte enforcement order of a Swedish award. Yukos, the award debtor, had challenged the award in the Stockholm District Court. Yukos had sought to set aside the enforcement order on the basis that it was for Dardana to prove that there was a binding arbitration agreement. In a previous judgment, Judge Chambers had ruled that on the contrary it was for Yukos to prove that there was no arbitration agreement, as to which, however, it had a strongly arguable case: [2002] 1 Lloyd's Rep 225. He therefore refused to set aside the enforcement order, but he agreed (on Dardana's application) to stay it under section 103(5) of the 1996 Act, pending the decision in Stockholm, on condition that Yukos provided security for the award in the sum of $2.5 million. An appeal from that judgment was pending.[1] Yukos was concerned that Dardana, if it lost in Stockholm, would simply "walk away" from the London proceedings, in respect of which £169,000 in costs had already been incurred. The judge's decision, refusing security for costs, was premised on three factors: first, the acceptance even by Yukos that "in principle, the enforcement of awards does differ from the ordinary run of claims" (para 24); secondly, that the costs had already been incurred (para 27); and thirdly, that Yukos had already accepted in Stockholm exposure to the risk that Dardana would walk away from an adverse decision (paras 28/29). This was despite the fact that, as will be recalled, Judge Chambers had previously

[1] The court of appeal said that Judge Chambers had been wrong in his discretion to order security for the award as a condition of not granting immediate enforcement: that could only be done if the enforcement proceedings were adjourned for the specific purpose of allowing the curial court to consider the validity of the award; but there, it had been Dardana, the award creditor itself, which had asked for an adjournment when it saw that it would not be able to push through immediate enforcement in England; and on the merits, Yukos's case appeared substantially the stronger. [2002] EWCA 543, [2002] 2 Lloyd's Rep 326. Other than in the case specifically dealt with in section 103(5) (reflecting article VI of the Convention), a court where enforcement of a Convention award is sought cannot require the posting of security for the award.

decided that Yukos, in alleging that there had been no arbitration agreement, had a strongly arguable case.

58. *Dardana* is the only case which has been brought to our attention where the question of security for costs of an application to enforce an award has been considered. It was refused, albeit as a matter of discretion.

59. Reference to enforcement procedures in general has raised the question as to whether security for costs is available throughout such proceedings in favour of a judgment debtor against his judgment creditor. Of course, an award is not yet a judgment, and a fortiori a foreign award or even a foreign judgment is not yet a judgment of the English court. On the other hand, it is plainly the intent of the Convention to make awards to which they apply enforceable with ease and, subject to the narrowly confined exceptions, almost as a matter of administrative procedure. It is well acknowledged that one of the principal advantages of international arbitration is that it is easier to enforce a New York Convention award internationally (in states which are party to the Convention) than it is to enforce a national judgment in a foreign country.

60. It was not suggested on behalf of Naftogaz at the hearing of this appeal that the security for costs regime applied in general to proceedings for the enforcement of a *domestic* judgment. However, after the hearing, White & Case on behalf of Naftogaz wrote to the court to draw its attention to CPR 74.5. Part 74 is headed "Enforcement of Judgments in different jurisdictions". Section I deals with the enforcement in England and Wales of the judgments of foreign courts. CPR 74.3 deals with applications for the registration of foreign judgments for enforcement here pursuant to the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Civil Jurisdiction and Judgments Act 1982, and the Judgments Regulation (Council Regulation (EC) No 44/2001). CPR 74.5 deals expressly with security for costs:

> "74.5(1) Subject to paragraphs (2) and (3), section II of Part 25 applies to an application for security for the costs of –
>
> (a) the application for registration;
>
> (b) any proceedings brought to set aside the registration; and
>
> (c) any appeal against the granting of the registration,
>
> as if the judgment creditor were a claimant.
>
> (2) A judgment creditor making an application under the 1982 Act or the Judgments Regulation may not be required to give security solely on the ground that he is resident out of the jurisdiction.

> (3) Paragraph (1) does not apply to an application under the 1933 Act where the relevant Order in Council otherwise provides."

61. As White & Case point out, the restriction in CPR 74.5(2) derives from article 45 of the Brussels and Lugano Conventions and article 50 of the Judgments Regulation. The restriction in CPR 74.5(3) derives from section 3(2) of the 1933 Act. They further submit:

> "The above provisions clearly demonstrate that there is no overriding policy consideration whereby the Court should decline as a matter of principle to order security for costs of proceedings to register foreign judgments. They therefore support the Respondent's argument that there is no such overriding policy consideration in the closely analogous field of applications to enforce arbitration awards, whether under section 66 or section 101 of the Arbitration Act 1996."

62. On behalf of Gater, the response of Clyde & Co was that CPR 74.5 indicated the need for a specific rule in relation to enforcement of a foreign judgment, and thus if anything supported Gater's general submissions.

63. CPR 74.4 provides detailed rules relating to evidence in support of an application for registration of such foreign judgments. CPR 74.3(2) states that such applications may be made without notice, and CPR 74.7 makes provision for "An application to set aside registration" under the 1920 and 1933 Acts, stating in CPR 74.7(3) that the court hearing the application "may order any issue between the judgment creditor and the judgment debtor to be tried". CPR 74.8 makes provision for "An appeal against the granting or refusal of registration" under the 1982 Act or the Judgments Regulation. CPR 74.6 provides that no measures of enforcement may be taken before the end of the period allowed for such applications or appeals.

64. In these circumstances the detail of CPR 74.5 is interesting. While incorporating the security for costs provisions of Part 25, it also provides its own code. Thus it seems to define the CPR 25.12 "defendant to any claim" as the judgment debtor by stating, obliquely, that the Part 25 provisions apply "as if the judgment creditor were a claimant", and that this is to be the case even so far as "proceedings brought to set aside the registration" or "any appeal against the granting of the registration". It is, however, clear from section 3(1) of the 1933 Act that express statutory jurisdiction was thought necessary for the provision of a security for costs regime in enforcement proceedings, and that such jurisdiction was granted so as to provide for such security only "by persons applying for the registration of judgments". Finally, it may be observed in passing that there exist a number of international conventions by which the requirement of security is expressly prohibited: see *Dicey, Morris & Collins* at para 8-096.

The judgment

65. I have sufficiently referred in the passage above to the reasons why Field J considered that he had jurisdiction to order security for costs against Gater. In brief, he accepted the submission that CPR 25.12 applied directly, via CPR 62.1(3) and 62.18(3) and CPR 58.3, to award enforcement applications; he rejected the submissions based on sections 66/70 and 73 of the 1996 Act and article III of the Convention (but without further elaboration, on the basis that CPR 25.12 applied under both section 66 and section 101); he regarded the award debtor as for all purposes the "defendant to a claim"; and he stated his agreement with Judge Chambers in *Dardana*.

66. As for the exercise of his discretion, he set out his reasons for ordering security in a brief passage, as follows:

> "26. Notwithstanding that the legal hurdles confronting Naftogaz on its set-aside application are high, on the evidence before me Naftogaz has shown a *prima facie* case of fraud, as is accepted by Mr Edelman. In the light of this, and in the light of the very large sum for which judgment has been entered, and notwithstanding the submissions made by Mr Edelman as to the exercise of the discretion, I am satisfied that it is just and appropriate to order Gater to provide security for Naftogaz's costs. Since it is not disputed that Gater is domiciled outside a Brussels-Lugano Regime State I accordingly propose to make an order that Gater should provide security."

67. Thus two factors are mentioned: a *prima facie* case of fraud (albeit the legal hurdles facing Naftogaz are high), and the size of the award. No mention is here made of Gater being without funds, even though the qualifying condition that it is domiciled (outside the UK but also) outside the EU or EFTA is specifically mentioned. It is not clear what the relevance of the size of the award is. As for Mr Edelman's submissions on behalf of Gater, they were largely matters of principle: viz, the submissions already addressed in relation to article III of the Convention and the absence of any security being available in favour of an award debtor of a domestic award; the policy of the 1996 Act and the Convention to give effect to Convention awards by speedy and effective enforcement; and the fact that Naftogaz had misappropriated the gas and thus had benefited to the extent of $88 million in any event. While citing and rejecting those submissions as a matter of discretion, the judge gave no separate reasons for doing so.

68. Thus the judge did not specifically address the argument based on the 1996 Act and article III of the Convention under either the heading of jurisdiction or discretion: beyond accepting that CPR 25.12 applied equally to the enforcement of both domestic awards (under section 66) and Convention awards (under section 101).

The submissions

69. The submissions addressed to this court by Mr Edelman on behalf of Gater and by Mr John Higham QC on behalf of Naftogaz are very similar to the

submissions addressed to the judge below, and have already been sufficiently indicated. In brief, Mr Edelman relies, on the question of jurisdiction, on the oddity of security for costs against the award creditor of a domestic award being available under section 66, when it would not be available to the award debtor if he challenged an award under sections 67/69; and on the substantive application being that of the award creditor to set aside the enforcement order of the judge, to which application the award creditor is respondent. And on the question of discretion, he relies on the same factors as constituting reasons why as a matter of principle, save possibly in some wholly exceptional case, security for costs should be in any event refused. However, he accepts that if he fails at this "higher order" of discretion, he does not appeal an order for security for reasons of a "lower order".

70. Mr Higham submits, on the other hand, that the judge was right for the reasons that he gave, just as Judge Chambers was right on the question of jurisdiction in *Dardana*. The rules of the CPR are plain and applicable. If anything they are plainer than the different rules applicable in *Dardana*. Security for costs is available to the award debtor under a domestic award, when faced by enforcement proceedings. There is an essential difference between challenging an award under sections 67/69 of the 1996 Act and merely defending enforcement under section 66. The latter is merely defensive. An award debtor can sit back and await enforcement, free of the responsibilities of an active challenger, subject only to the limitations of the doctrine of abuse of process. CPR 74.5 on the matter of security for costs in the enforcement of foreign judgments is essentially analogous. As for discretion, a prima facie case in fraud, and Gater's lack of funds, clearly support the judge's view.

Discussion (1): Jurisdiction

71. I acknowledge that the present day provisions of the CPR may be viewed as suggesting that an application to enforce an arbitration award is to be regarded as a "claim" to which Naftogaz is defendant, because such an application is to be made in an "arbitration claim form" (CPR 62.18) and the court's own order giving permission to enforce and entering judgment against Naftogaz refers to Gater as claimant in an arbitration claim and to Naftogaz as "defendant". Moreover, CPR 62.18(3) says that parties on whom the arbitration claim form is served "must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under Section I of this Part". Section I at CPR 62.1(3) says that Part 58 applies to arbitration claims; and CPR 58.3 applies the Rules in general to "claims in the commercial list unless this Part or a practice direction provides otherwise". I would regard that as a strong, even formidable, argument.

72. Nevertheless, these provisions are complex and not without their mystery for present purposes: and it remains the case that there is no express application of the security for costs regime to the statutory enforcement of an arbitration award. Moreover *Dardana* appears to be the sole authority for saying that such a regime applies, and even there the judge was unwilling to order security, in part because enforcement is in principle different from an ordinary claim. Above all, there is something counter-intuitive about an award debtor being

able to obtain security for costs in order to challenge the formal or public policy validity of an award in what are clearly intended to be, in the absence of a challenge by the award debtor, highly summary and essentially quasi-administrative proceedings. If anything, that counter-intuition is increased by knowing that, in the case of a domestic award, any challenge has to be made timeously, by the challenger, and at risk of that challenger being himself, by express statutory provision outside the CPR regime, required to give security for costs of his challenge. Does it really make all that difference that the challenge comes by way of a defensive response to a move for enforcement, especially as in the meantime it has always remained the obligation of an award debtor to pay the award? It may be that all these matters go only to discretion, rather than to jurisdiction; but it will be recalled that one of the conditional gate-ways of the security for costs regime under CPR 25.13 itself is that an order is just in all the circumstances.

73. It is in any event reasonably clear that absent the provisions of Section III of Part 62 itself, there would not be much of a case for saying that the security for costs regime applied to enforcement proceedings pursuant to statute. The provisions of Section I of Part 62 (viz CPR 62.2(2)) expressly exclude Section III applications, viz "all arbitration enforcement proceedings other than by a claim on the award" (CPR 62.17).

74. Turning then to Section III and in particular CPR 62.18, I note that, although the terms of Part 62 have altered since the practice direction which was interpreted in *Dardana* was in force, the point of construction which, in my judgment, was never very satisfactorily resolved in that case, has remained: in that the effect of CPR 62.18(2) and (3) seems to suggest that it is only where the court specifies parties to the arbitration on whom the arbitration claim form "must be served" that what are described as "the enforcement proceedings" are said to continue "as if they were an arbitration claim under Section I of this Part". The "as if" suggests that without that assimilation an application for permission under Section III is not an arbitration claim to which Part 58 applies. It may be noted moreover that where the award is enforced summarily and without notice, it is the enforcement *order* rather than the claim form in which application to enforce is made which is assimilated to an arbitration claim form ("as if the order were an arbitration claim form" (CPR 62.18(8)(b)). In this case, however, there is no additional assimilation to an arbitration claim form within Section I (*cf* CPR 62.18.(3)). Given that there is no longer any specific reference to security for costs in what is now Part 62 at all, this is, it may well be said, an unsatisfactory basis upon which a counter-intuitive application of the security for costs regime is to be founded. If the question is asked why these distinctions (which are referred to by Mance LJ in *Dardana v. Yukos* [2002] 2 Lloyd's Rep 326 at para 15, and also by *Merkin* at para 19.65) should be made, one possible answer is that enforcement under sections 66 or 101 of the 1996 Act is intended to be "mechanistic" (*ibid* at para 19.48). It is only where the judge feels unable on the evidence before him to enforce an award summarily and without notice that he will direct service of the claim form and decline to make any enforcement order. In these circumstances, the absence of specific provision

for the applicability of the security for costs regime can be contrasted with the position under CPR 74.5.

75. It is unsatisfactory that these matters should still be subject to any degree of controversy. One possibility, however, is that they have been deliberately left uncertain, because of the importance of the issue in the special context of international arbitration – or simply because, with the problematical exception of *Dardana* there never appears to have been any attempt to claim security for costs in enforcement proceedings. Even so, since these matters were not deeply canvassed before us, and because in any event in my judgment this appeal can ultimately be decided as a matter of principle under the rubric of discretion, I would be prepared to assume, but not decide, that there is technical jurisdiction to order security for costs against any award creditor who brings enforcement proceedings pursuant to statute. My present view, however, is that a distinction is to be made. Where, at the initial stage, the judge is not prepared to order summary enforcement but directs service of the claim form, the technical position is that the enforcement claim is assimilated to any claim and is brought within the ordinary CPR regime. Where, however, as here, there is summary, albeit provisional, enforcement, the enforcement proceedings remain outside the ordinary CPR regime. In any event, for the reasons given below, I consider that as a matter of principle, the courts should be reluctant, save in an exceptional case, to order security for costs against the award creditor, even if the power to do so is technically available. I proceed, however, contrary to my view, on the basis that the regime is available here.

Discussion (2): Discretion

76. Even so, in my judgment, the ordering of security for costs in this case was wrong in principle, that is to say that it was wrong at a "higher order" of discretion. For similar reasons of principle, it would not be just for security to be ordered in favour of Naftogaz. My reasons are several and cumulative. I would seek to put them as follows.

77. (i) The award debtor of a Convention award may be defending himself against enforcement, but he can only do by destroying the formal validity of the award, either as a matter of substantive jurisdiction or serious irregularity or as a matter of public policy. His remedy, the burden of proof of which lies entirely on him, is to show that the award requires not to be enforced because it is not binding, or is invalid, or is against public policy. It may be that in the case of a Convention award the court which has been asked to enforce, unlike the court of the country where the award was made, is unable itself to set an unenforceable award aside. However, sections 67(3) and 68(3) of the 1996 Act, dealing with equivalent challenges to a domestic award, show that setting aside or declaring an award to be of no effect are remedies available in the domestic context. As for the analogous case of refusing enforcement of a domestic judgment because of an allegation that it had been procured by fraud: domestic jurisprudence shows that, save in exceptional cases where it may be that an appeal out of time will be permitted, the judgment debtor complaining of fraud will be required to commence a new action: see *Jaffray v The Society of Lloyds [2007] EWCA 586 (20 June 2007)*. That demonstrates as clearly as

anything who in such a case is the substantive claimant; as the analogies of sections 67/69 of the 1996 Act also demonstrate.

78. There is no claim for security for costs against Naftogaz in this case, and I do not have to determine whether that regime could apply to Naftogaz as the applicant who seeks to set aside the enforcement order. It may be that, even if the regime could apply to the party seeking enforcement, it could not apply to the counter-applicant, on the basis that the arbitration claim form claimant is simply not in the formal position of being a defendant to a counterclaim. In substantive terms, however, if Ackner LJ's question ("Are the respondents in the position of the plaintiff?") is deployed, there could be no doubt as to the answer, that the award debtor is. In the case of an application to set aside registration of a foreign judgment under Part 74.7, the court can order any issue between judgment debtor and judgment creditor to be tried (CPR 74.7). No doubt the same might occur in connection with an application to set aside an enforcement order under Part 62. In such an issue, the award debtor might well be defined as the claimant, effective and formal. Under CPR 74.5, even so, it is the judgment creditor who is to be assimilated (again the "as if" terminology) to the position of claimant ("as if the judgment creditor were a claimant"). That, however, is by express provision. It is not the realistic situation. I therefore respectfully disagree with Judge Chambers' view in *Dardana* that the exercise which an applicant to set aside an enforcement order undertakes is "an essentially defensive one"; or that "The end purpose is not to attack the award but to attack its enforcement". It is indeed to attack, rather than to defend, and to attack enforcement by means of an attack on the award. The dichotomy referred to is, in my judgment, unhelpful, save in a purely formal sense.

79. (ii) Whether or not an award debtor challenging enforcement is an effective claimant, the case of enforcement of a domestic award under section 66 of the 1996 Act shows that he should be regarded as such. Section 66(3) makes the point, by reference to section 73, that the right to raise an objection to enforcement may have been lost. Section 73 ("Loss of right to object") states that a party to arbitral proceedings cannot complain of lack of substantive jurisdiction or irregularities or the like if he takes part in or continues to take part in the arbitration without objecting within at latest the time allowed by the statute (eg section 70(3)'s 28 days of the date of an award) *unless* he proves that at the time he took part or continued to take part he neither knew nor could with reasonable diligence have discovered the grounds for the objection. That does not mean that participation itself must have been complicit: the test is objective. Therefore, an award debtor under a domestic award who simply sits back and awaits enforcement rather than meets his liability to pay the award should not be in a better position than if he had challenged the award or irregularity timeously. If he had done so, he would have been liable himself to a security for costs regime. In effect, the award debtor is in the position of having to justify himself for not issuing his own arbitration claim form under sections 67ff at an earlier stage. He may of course be able to do that, and the question of whether he might be able to do that might be in issue. In either event, however, I do not see why an award debtor, who has to bring himself within section 73(1), can claim to be morally free of the provisions under

which a timely challenge to an award would take place, viz a liability to the security for costs regime under section 70(6). It may be noted, moreover, that that regime is different from the CPR 25.13 regime, in that no foreign claimant can on that ground alone be required to provide security.

80. (iii) It follows that in the case of the enforcement of a domestic award under section 66, I do not consider that an award debtor would, in principle, be entitled to security for costs. I would therefore accept Mr Edelman's submission that to impose a security for costs regime upon an award creditor who seeks enforcement under section 101 would be to impose substantially more onerous conditions than are imposed in the case of the enforcement of domestic awards, in breach of article III of the Convention. The question for these purposes must be not merely whether the security for costs jurisdiction applies formally in both cases, but whether it would in practice and in principle be successfully invoked in both cases. In my judgment the judge was in error in merely being satisfied that "the provisions of the CPR apply equally" to section 66 and section 101 enforcements (at para 16).

81. (iv) Under the Convention, an award creditor is entitled as of right to the enforcement of his award, and each state party is obliged to provide such enforcement, subject only to the narrow exceptions allowed. This is part of an international agreement to make international arbitration attractive and efficient. In such circumstances, to say that an award creditor cannot enforce his award unless he provides security for the costs which will be incurred because his award debtor wishes to try to prove that he can bring himself within those narrow exceptions would seem to me to run counter to the essential basis of the Convention. It is not simply a matter of a "more onerous condition" in the sense in which that expression is used in article III, viz rule of procedure: see *Van den Berg, The New York Arbitration Convention of 1958*, 1994, at 239/240. It is refusing to effect enforcement unless security is provided, and derogates from article III's requirement that enforcement be accorded "under the conditions laid down in the following articles" (viz articles IV/VI). Field J, however, was prepared to refuse enforcement, on the ground of failure to provide the security for costs ordered. That was the order that Field J made, setting aside the enforcement order if the security was not provided, and doing so on a ground not expressly within the Convention. There is no express basis in the Convention for that condition. Enforcement may be refused "only if" one of the exceptions within article V is made good. Security is discussed in the Convention, but only security *for the award* itself, and only in the context of an adjournment of enforcement proceedings pending an application to set aside or suspend the award to the competent authority of the country in which, or under the law of which, that award was made (article VI, reproduced in section 103(5) of the 1996 Act). That is not just an example of a circumstance in which such security might be ordered, but is the only circumstance in which it might be: see the decision of this court in *Dardana v. Yukos* [2002] 2 Lloyd's Rep 326 at para 27.

82. Since no submission quite in these terms was addressed to the court, I do not make this a separate ground of decision: but it is my opinion that the structure of the Convention as a whole, reflected in the 1996 Act, makes it unlikely that

the framers of the Convention, or of the Act, conceived that a form of security not mentioned in these circumstances in either (contrast the express provisions relating to security for costs in section 70(6) of the Act) could be imposed on the party seeking enforcement. Whether this is put as a matter of jurisdiction, on the ground that the Convention and the 1996 Act are a complete code relating to all aspects of security, or as an indication of how, as a matter of principle, the question of security for costs should be considered, may not matter. The essential point is this: if even the party prima facie entitled to enforcement of a Convention award can only obtain security for the award where there is an adjournment of the enforcement proceedings for the purposes of article VI or section 103(5), there does not appear to be much justice in the idea that the award creditor can only obtain enforcement by providing security for the costs of the award debtor's challenge.

83. (v) The place of security for costs in the international arbitral setting has been a controversial one (see the discussion of *Coppée-Lanvin* above). Its application within arbitration itself was there restricted, and its survival in the hands of the court was abolished in the 1996 Act: it became a matter for the arbitrators themselves. Although enforcement, in one of course important sense, lies outside the arbitration itself, since the arbitrators have made their award, and is now centred in the court, nevertheless many of the considerations which were in play in relation to security for costs in the arbitration itself survive in this wider sphere. It is true that an award creditor who comes to England to seek enforcement is invoking the English jurisdiction and may be said therefore to have to be prepared to take it as a whole, for better or worse: nevertheless he does so as a participant in an arbitration setting which itself has nothing whatsoever to do with England and, in the case of a Convention award, under the regime of the New York Convention which is his guarantee that the state parties to it, which are very numerous, will enforce his award under its provisions. In that context Lord Mustill's view that even the impecuniosity of a claimant does not make it just for security for costs to be imposed, although in the minority in that case, becomes in my respectful judgment compelling in the context of enforcement. There he was considering a claimant who had yet to make his case good in what promised to be a long and expensive arbitration. Here, we are considering an award creditor of a Convention award, which has already survived attack in its domestic sphere, up to the Russian Supreme Court, and which the award debtor bears the burden of showing has been procured by fraud.

84. (vi) Against this background, the judge's positive reasons for the exercise of his discretion do not, in my respectful judgment, carry the day. One was that there was a *prima facie* case of fraud. I suppose that was meant in the sense of being arguable. He did not qualify the argument further, other than to say that "the legal hurdles confronting Naftogaz on its set-aside application are high". The issue is indeed highly controversial, disputed on the evidence, governed by foreign law, and, to a greater or lesser degree and Gater says completely, the subject-matter of prior dispute in the Moscow City Court and Russian Supreme Court. In my judgment, as expressed above, that is analogous to a situation of a litigant who seeks to prove, by a new action which at any rate

until tested may be assumed not to be capable of being struck out, that a judgment against him was procured by fraud. The other matter relied on by the judge was the size of the award, a matter whose relevance I do not understand. As for Gater's lack of funds, this is a risk of litigation; just as Monde Re has taken the risk of Naftogaz's failure to pay the award against it these many years. In the meantime, there has never been any real dispute, and it is a matter of the merits which cannot itself be a matter of challenge, that Naftogaz has long benefited by the $88 million worth of gas extracted from the Brotherhood pipeline.

85. Moreover, there is some uncertainty as to the relevance of Gater's lack of funds, about which there has been no effective submission before us. The judge did not found upon it, possibly, but the judgment is silent, because Gater does have the ICAC award in its favour. He only mentions as a qualifying condition that Gater is domiciled abroad but outside the EU or EFTA. The validity of the award is of course the bone of contention in these proceedings: but the judge agreed with Judge Chambers in *Dardana* that the purpose of the challenge in these proceedings is to the enforcement not to the award itself. I have not found that distinction helpful, but, subject to the effect of doctrines of res judicata in other countries, including Russia itself, it may well be only the Russian court itself which can set aside the award. Therefore Naftogaz is and remains an award debtor. Moreover, the judge said nothing about a separate matter raised in Naftogaz's evidence (but not in its application), that Gater should be regarded as a nominal claimant within CPR 25.13(2)(f). In these circumstances, Gater's lack of ready funds is of uncertain relevance, but I am nevertheless prepared to assume that the condition laid down by CPR 25.13(2)(c) is to be treated as having been formally fulfilled. Even so, for the reasons given above, I do not regard it as a decisive factor. As *Zuckerman on Civil Procedure*, 2006, at paras 9.182/3 observes:

> "Since security for costs is strictly a measure against evasion or unequal treatment, a defendant is not entitled to security simply because the claimant is poor and there is a danger that costs will not be recoverable."

86. The judge's reasons on discretion perhaps reflect the way in which Mr Higham argued the matter. Certainly before us, Mr Higham placed the great bulk of his submissions on discretion (see his skeleton argument) on the allegation of fraud. He did not submit that, if he was wrong on the issue of principled approach to discretion discussed above, there were nevertheless special circumstances here to take this case out of the normal.

87. I have had the advantage of reading Lord Justice Buxton's penetrating judgment in draft. I regret to find myself in disagreement with it, and feel that I should, respectfully, add these brief comments. He finds no difference between the question of formal jurisdiction and the principled application of discretion, but I think that is because in deciding both in the same way he

essentially eschews the more formal issues of jurisdiction and deals with the question as a matter of principled discretion. Yet *Coppée-Lanvin* in a closely analogous context, and many other cases in different contexts, show that there are, or may be, important distinctions between formal jurisdiction, a principled approach as a matter of discretion to a general situation, and lower order discretionary decisions on particular cases. He accepts the parallel between the enforcement of domestic and Convention awards, as I think logic, the state party's obligations under the Convention, and the similarity of the Convention's exceptions to domestic principles compel: but I find his solution, that the security for costs regime applies at large in the former, and therefore in the latter, unattractive. Even so, he appears to contemplate that the absence of previous challenge may prejudice the application for security: but there are difficulties in descending into the merits of the award debtor's case, save perhaps where they are plain. Finally, as for discretion, Lord Justice Buxton has been impressed by the judge's reasoning: but, for the reasons given above, I cannot find that he has given serious consideration or reasoned opposition to the argument of principle, once he has decided that the award debtor remains, in form at least, a defendant and therefore entitled as a matter of jurisdiction to claim security for costs. I have nevertheless gone on to consider whether there were to be found in the judge's reasoning exceptional factors which even so should lead to the dismissal of this appeal. I have not found any, and there were no submissions that we should.

Conclusion

88. For these reasons, I would conclude that, even if there is jurisdiction to order security for costs against Gater, which I assume but do not decide, there are reasons of principle which mean that such jurisdiction should not here have been exercised against Gater in support of Naftogaz's application to set aside an enforcement order of a New York Convention award against it. In my judgment it would not be just in all the circumstances for such an order for security for costs to be made. I would therefore allow this appeal.

Lord Justice Moses :

89. I am grateful for the opportunity my Lords afforded me to read their draft judgments. They place me in the happy position of arbitrating between their opposing conclusions. But I have the misfortune to disagree, in some respects, with both.

90. For the reasons given by Buxton LJ in the second paragraph of his judgment, I see no alternative to reaching a concluded view as to the jurisdiction of the court to make an order for security of costs against an award creditor in a Convention arbitration in favour of an award debtor who seeks to resist enforcement on the grounds of fraud. I do not think that if the arguments which tell against jurisdiction fail, they should be re-deployed in favour of some higher order of discretion, which requires the court to refuse an application as a matter of principle, save in wholly exceptional circumstances.

91. I take the view that once it is accepted that the court has jurisdiction, then the fact that the award creditor succeeded and rebuffed attempts to set aside the award is

merely a factor, possibly of some strength, in the exercise of the discretion. Nor, with respect to Rix LJ, do I regard the provision that a court must be satisfied *that it is just to make* an order for security for costs, in CPR 25.13, as a requirement which goes to jurisdiction at all (see paragraph 38). The rule merely provides (apart from the conditions specified in (1)(b) an unsurprising standard to be applied when the court exercises its judgment.

92. But in my judgment, Buxton LJ is incorrect in concluding that the court has jurisdiction in the circumstances of this case, that is where Colman J made a without notice order which did not require the arbitration form to be served on Naftogaz pursuant to 62.18 (3). I conclude that the court did not have jurisdiction to make an order for security of costs. My reasons for that conclusion rest on the very grounds which found Rix LJ's refusal to endorse such an order as a matter of discretion. I should explain my reasoning.

93. The crucial issue, as I see it, is whether, in relation to the enforcement of a domestic award, an award debtor could seek security for costs from the court. An award debtor, under a domestic award, who seeks to challenge an award timeously may be ordered to give security for costs (see s.70(6) of the 1966 Act, cited paragraph 44). It is not possible to discern any coherence in a scheme which permits an award debtor, who fails to object, to be in a better position to obtain an order in his favour. In those circumstances, to require an award creditor, under a Convention award, to provide security is to impose more onerous conditions, contrary to Art. III of the Convention. Buxton LJ's riposte, at paragraph 115, does not seem to me fully to meet the point that such an order may be made *against* an award debtor in a domestic arbitration

94. Buxton LJ accepts that the language of CPR 62.18 is not dispositive of the issue. He founds his decision on the very fact that an award creditor must come to court to enforce the award.

95. In cases where an order for enforcement is made summarily without notice, I agree with Rix LJ and *Merkin* (referred to in paragraph 74) that the process is merely a matter of machinery. But Buxton LJ distinguishes, like HHJ Chambers before him, between a challenge to an award and a challenge to its enforcement. If Buxton LJ is right, then that distinction justifies the power to make an order for security in favour of an award debtor in the latter but not the former case. It is unrealistic, and runs counter to the purpose of the Convention to seek to make such a distinction. The essential rationale of Convention awards is explained by Rix LJ in paragraph 81. Where a party agrees to settle disputes in a Convention arbitration he agrees that, if he loses, the award creditor may, as of right, enforce the award in the courts of any of the High Contracting Parties, subject to specified exceptions. The essence of the Convention is the acceptance in one state of the effect of an award in the curial state.

96. I do attach significance to the express provision for security for costs in CPR 74.5. No such provision has been made in respect of the enforcement of Convention awards. That is not surprising. The parties have agreed to submit their disputes to a process which is intended, as Rix LJ explains in paragraph 59, to achieve easier enforcement in the courts of any Convention state than in relation to a foreign judgment. I would allow the appeal.

Lord Justice Buxton :

97. I have the misfortune to take a different view of this appeal from that which commends itself to Rix LJ. I do not need to say that I differ from my Lord in a case falling within this area of work only with very considerable hesitation. And I cannot improve on my Lord's comprehensive statement of the facts and of the relevant statutory and other provisions, which I gratefully adopt. I also venture to comment on the judgment of Moses LJ, a draft of which I have equally had the benefit of seeing.

98. Rix LJ indicates, in §86 above, that he assumes, without deciding, that Field J had jurisdiction to make an order for security, but that he erred in making the order that he did. Since I do not agree with the latter conclusion, I must demonstrate as a matter of decision, and not merely of assumption, that Field J indeed had the jurisdiction that he exercised. There is however a difficulty in analysing this appeal simply in terms of discrete issues of jurisdiction and discretion. In his admirable submissions Mr Edelman based this part of his case on what he called the "higher order" of discretion, that in a Convention case, as a matter of principle, and save possibly in wholly exceptional circumstances, security for costs should be refused as a matter of course: see the account of Mr Edelman's argument in §69 above. But the argument in support of that contention, as both Mr Edelman and my Lord recognise, largely repeats, or at any event substantially overlaps with, arguments already deployed to demonstrate absence of jurisdiction: see §§ 76-83 above. If those arguments fail, and the issue is simply that of the exercise of the discretion of the commercial judge, in the usually understood meaning of that expression, then as I understand it Mr Edelman did not contend that he could dislodge the order of Field J: see the last sentence of §69 above.

99. I have therefore seen no alternative in what follows to treating the issue before the court as substantially one of jurisdiction, even though that presents some problems in terms of organisation of the material. As Moses LJ says in his § 93, because of the "discrimination" provisions of Article III of the Convention the crucial issue is whether, in relation to the enforcement of a domestic award, an award debtor could seek security for costs. To understand the domestic rules however requires in the first instance analysis of the status and implications of the process for the enforcement of an arbitration award that is provided by section 66 of the 1996 Act, a process that is required of the award creditor in respect of domestic as in respect of Convention awards.

The jurisprudential status of the English rules for enforcement of an arbitration award

100. Much of the difficulty in this case stems from the need to apply, or to try to apply, the rules in relation to security for costs, formulated in the context of ordinary domestic litigation, to applications for the enforcement of arbitral awards. The order made at the end of domestic litigation is, to use an inaccurate expression, self-executing, in that it is res judicata between the parties, and is subject to the court's processes of execution without a further and separate application to the court to qualify the order for execution. An

arbitration award, whether a domestic or a Convention award, has none of those qualities. It cannot be implemented by the enforcement mechanisms of the court without a separate order under section 66 of the 1996 Act.

101. It follows that when an award-holder makes an application under section 66, as Gater did in this case, he is, within the domestic legal order, in the same position as anyone else who seeks to court's assistance, save that he does not have to establish the merits of his claim. Put colloquially, he cannot get what he is owed under the award unless the court makes an order in his favour. In this connexion I respectfully agree with what the judge says in §§ 17-18 of his judgment.

102. The process for registration of a foreign judgment under the 1933 Act, to which reference was made at various stages of the argument is different, in being an administrative process that is a precondition to enforcement, rather than an application for enforcement as such. It is therefore not surprising that it was thought prudent, in CPR 74.5, to make specific provision bringing that process within Part 25 by treating the judgment creditor as if he were a Part 25 claimant. For the reasons already indicated, no such special rule is required in the case of a person applying to enforce an award under section 66.

103. I should also add that the expression "Part 25 claimant" is used here, and throughout this judgment, as a convenient form of words to identify a party who is vulnerable under the provisions of CPR 25.13. That rule does not give him the status of a claimant, but only recognises that he is to be regarded as a claimant by the rules of the substantive law. It is section 66 of the 1996 Act, and not the provisions of the CPR that provide machinery for administering that and other statutory rules, that requires the award creditor to come to court before he can enforce his award.

104. I therefore conclude, for the reasons set out in §§ 100-101 above, that a person seeking an order for enforcement under section 66 is to be regarded as a "claimant" under RSC 25.13. It follows from that analysis that I am unable to agree with two matters that attract Rix LJ.

105. First, (see §§ 71-75 above) I do not regard the language in terms of "claim" adopted in CPR 62.18 as essential, or even central, to the conclusion that an applicant under section 66 is a claimant: however much, as I fully acknowledge, those provisions were relied on by Naftogaz. As already observed, Part III of Part 62 is essentially instrumental in nature, providing the mechanism whereby various statutory applications are to be administered, but not able in itself to affect the jurisprudential nature of those applications. To look on the other side of the coin, CPR 62.18 could not turn an applicant who was not, on analysis of his application, a Part 25 claimant into such a claimant simply by saying that his application must be made in an arbitration claim form.

106. Second, (see §77 above) in domestic litigation a person complaining that a judgment was obtained by fraud has to start a new action, in which he and not the holder of the judgment will be the claimant. But that is because the judgment is indeed a judgment, enforceable automatically as such: see § 100

above. By contrast, the holder of an arbitration award, if he is to secure enforcement by the machinery of the domestic legal order, has to initiate a separate process, in which he is not entitled to judgment just because he is the holder of the award.

Security for costs in relation to a domestic arbitration award

107. It was Mr Edelman's case that it was "not open" to the court to order security for costs against an award creditor and judgment creditor in a domestic case. That cautious phraseology was, as I understood, intended to keep open both of the alternatives that there was no jurisdiction to make such an order; or that the court, while having jurisdiction to make such an order, should as a matter of discretion never exercise that jurisdiction. I have already indicated the obvious importance of the point, because if an order cannot be made, for whatever legal reason, in an analogous domestic case, then what may be loosely called the equal treatment provisions of Article III of the New York Convention prevent such an order being made in a case involving a Convention award.

108. Rix LJ has substantially accepted that argument. I understand his position to be that he assumes, while expressing considerable doubts, that there is jurisdiction to order security for costs against an award creditor who brings enforcement proceedings (see §75 above); but considers that in the exercise of that jurisdiction an award debtor enforcing a domestic award would not, in principle, be entitled to security for costs (see §80 above). As I have already observed, the latter approach is tantamount to a denial of jurisdiction, and I will continue to address it in those terms.

109. The argument has two, interrelated, limbs. First, stressed by Mr Edelman and adopted in §77 above, that in substance an award debtor resisting enforcement under section 66 is the claimant, not the respondent, in those proceedings. Second, as set out in §79 above, the statutory provisions relating to the enforcement of domestic awards show that whether or not the award debtor is the effective claimant he should be treated as such. The first limb again has two aspects, the first relating to enforcement actions generally, and the second relating to the special case of international awards.

110. As to enforcement actions generally, Rix LJ in §74 above points to the procedure under CPR 62.18, and suggests that the substantial effect of those provisions is that the without notice order, such as was made in the present case, is in all but exceptional cases the operative order. The substance of the proceedings is, therefore, that it is the award debtor who has to take the initiative under CPR 62.18(9). Moses LJ in his § 92 attaches equal importance to the structure of the enforcement proceedings, reflected in the ex parte order of Colman J in the present case, but as indicating absence of jurisdiction ever to make an order for security in favour of the award creditor, rather than as a dispositive factor in the exercise of such a jurisdiction. But the machinery provided by the rules, as opposed to the underlying statutory scheme, cannot determine questions of jurisdiction. CPR 62.18, like all of the rules, is merely instrumental in providing the details of the process, and cannot of itself affect the substantive law that that process implements. The need for the award

debtor, in most cases, to make an application under CPR 62.18(9) is no more indicative of his status as a CPR 25 claimant than is the repeated reference in CPR 62.18 to the award creditor making a claim conclusive of his status under CPR 25.

Some further aspects of international awards.

111. Mr Edelman argued, and Rix LJ in his §77 accepts, that the substance of an objection to enforcement by the award debtor is that he is attempting to destroy the formal validity of the award. In respect of a domestic award, such a challenge is provided for by sections 67-69 of the 1996 Act, proceedings in which the award debtor, as claimant, could not claim security; which makes it odd that the debtor in respect of an international award can claim security in respect of proceedings of substantially the same nature (see § 72 above). Two points must however be made.

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

113. The different histories from which there spring an application to enforce a domestic award on the one hand; and an application to enforce an international award on the other; serve also to illuminate the objection that in relation to a domestic award the award debtor must in any event be treated as the claimant: the second limb of the argument identified in § 109 above. To take up the argument as described in § 79 above, the tail-piece to section 66 of the 1996 Act says no more than that the right to object to an enforcement order may be lost in a domestic case. That will occur if the award debtor is guilty of the failings identified in section 73; but not otherwise. That does not mean, or imply, that in other cases, where section 73 has not disabled the domestic award debtor, he is in some way transformed into the claimant in the award creditor's enforcement proceedings.

Conclusion as to jurisdiction in the case of domestic awards.

114. I therefore remain of the view that for the purposes of CPR 25 a party enforcing the award of a domestic arbitral tribunal is a claimant; and therefore in cases in which the award debtor has, under the rules of the domestic legal

order, not lost the right to object to enforcement, the court has jurisdiction to order security for costs in favour of the award debtor.

Article III

115. As I understood it, the only basis of the argument before us that article III prevented an order for security in the case of an international award was that such an order would not be available in the case of a domestic award. Since for the reasons set out that in my view is not the law in relation to domestic awards, the discrimination argument in my view must equally fail.

116. Rix LJ, in § 81 above, expresses a more general concern (not, I think, advanced as part of Gater's case), and Moses LJ in his § 95 agrees, that Field J's order, refusing enforcement unless security is given, infringes this country's obligations under the Convention to provide enforcement subject only to the exceptions recognised by the Convention itself. But article III recognises in terms that enforcement has to be in accordance with the national rules of procedure. It is inherent in that provision that a refusal by an award creditor to respect those national rules of procedure will debar him from enforcement.

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

The judge's exercise of his discretion

118. Rix LJ considers that the judge was wrong in respect of what Mr Edelman called the higher order of discretion, and that that therefore enables this court to intervene, even if the "higher order" arguments do not lead to entire denial of jurisdiction. I respectfully agree that the judge must give the policy of the Convention and the history of the arbitration considerable weight. But Field J was well aware of all of those considerations, which had been placed before him no doubt with considerable force. He so said at the start of his §22, and went on to explain, in some detail, why in the state of the case as it came before him it would be unjust to oblige Naftogaz to defend the very large claim that had been made against them by a party not resident either in this country or in a Brussels-Lugano state without the protection of the order for security that he had jurisdiction to make. In that connexion, the judge's reference to the size of the claim made against Naftogaz was in my respectful view entirely in point, both as indicating the likely intensity, and thus expense, of the enforcement proceedings; and the simple justice of not forcing Naftogaz to be unprotected as to costs while defending so large a claim in a case where for the moment at least fraud remains in issue. While I appreciate, and am concerned by, the fact that Rix LJ takes a different view, I do not think that we are in any position to hold that Field J went so far wrong that this court is entitled to interfere.

Disposal

119. I did not understand complaint to be made about the amount of security, granted that security was to be ordered at all. I would dismiss this appeal.