Neutral Citation Number: [2023] EWHC 1691 (Comm)

Case No: CL-2022-000307

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 07/07/2023

Before :

MR JUSTICE BRIGHT

- -

Between :

The Czech Republic **Claimant**

- and –

(1) Diag Human SE
(2) Mr Josef Stava **Defendants**

- -
- -

Lucas Bastin KC and Peter Webster (instructed by Arnold & Porter Kaye Scholer (UK) LLP)
for the Claimant
Patrick Green KC, Philip Riches KC and Jonathan Ketcheson (instructed by Mishcon de Reya)
for the Defendants

Hearing date: 28 June 2023

- -

Approved Judgment

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Mr Justice Bright:

Introduction

The applications before the Court

1. This action concerns an Arbitration Award dated 18 May 2022 ("the 2022 BIT Award"), which culminates with an award in the Defendants' favour of CZK 4,089,716,666.00, plus very substantial interest. The Claimant challenges the 2022 BIT Award under ss. 67 and 68 of the Arbitration Act 1996 ("the Act"). The merits of the Claimants' challenges will be decided conclusively at a later date. The Defendants have applied for the s. 67 and s. 68 challenges to be summarily dismissed under §O8.6 of the Commercial Court Guide. The hearing to determine those merits issues will commence in January 2024 and has been listed for seven days.

2. Today's hearing concerns two applications by the Defendants:

   i) Under s. 70(6) of the Act, the Defendants apply for security for costs in relation to the substantive determination of the Claimant's challenges.

   ii) Under s. 70(7) of the Act, the Defendants apply for security for the amount of the 2022 BIT Award.

3. The s. 70(6) application was argued for the Defendants by Mr Philip Riches KC. The s. 70(7) application was argued for by Mr Patrick Green KC. The Claimant's case was presented by Mr Lucas Bastin KC. I am grateful to all three of them, and to their respective juniors, Mr Jonathan Ketcheson and Mr Peter Webster.

Background

The Czech arbitration proceedings

4. The underlying disputes date back to 1992 and concern conduct on the part of the Claimant which, say the Defendants, violated Czech competition and commercial law rules and caused damage to Conneco (the Czech company through which the Defendants say the Czech business was carried out and to which the First Defendant is the successor in interest). The focus of the underlying disputes was a letter written by the then Czech Health Minister, Dr Martin Bojar, on 9 March 1992 ("the Bojar Letter").

5. Czech domestic arbitration proceedings were commenced by the First Defendant against the Czech Ministry of Health. These Czech arbitration proceedings resulted in an Interim Award of 19 March 1997 ("the Interim Award") and a Partial Award of 25 June 2002 ("the Partial Award"). The Partial Award declared that, pending final resolution, the Ministry of Health should pay the First Defendant the sum of CZK 326,608,334, with other damages and interest being reserved.

6. The sum awarded by the Partial Award was paid, I believe, in 2003. However, no interest on that sum has ever been paid.

7. A Final Award of 4 August 2008 ("the 2008 Final Award") awarded approximately CZK 8.3 billion in further damages and interest. My understanding is that the interest element of 2008 Final Award included the reserved interest on the sum awarded by the Partial Award.

The Czech Review proceedings

8. The arbitration agreement provided for review proceedings, and the Ministry of Health applied for a review of the 2008 Final Award ("the Review"). The Review

tribunal issued a Resolution on 23 July 2014 ("the 2014 Resolution") which stated that the proceedings were discontinued.

9. The parties have not been in agreement as to the effect of the 2014 Resolution, either historically or in their submissions before me.

10. Furthermore, the Defendants' case has long been, and was before me, that the Review proceedings were corrupt. They say that the Claimant unlawfully used its intelligence services, its police force and a Parliamentary Enquiry Commission to obtain information and pressure the members of the Review tribunal. They also say that the Claimant improperly ensured that those appointed to the Review tribunal lacked independence and were pressurised and/or bribed.

Proceedings in Luxembourg

11. In Luxembourg, judgment no. 70/2018 of the Court of Cassation confirmed that the 2008 Final Award was enforceable in Luxembourg, upholding an exequatur order (which I understand to be a form of enforcement order). The First Defendant has not succeeded in enforcing in Luxembourg. It obtained a saisie-arrêt over two banks with which the Claimant held accounts. After extensive litigation over 8 years, it transpired that no money was held in the accounts.

12. In the context of the saisie-arrêt proceedings, on 24 September 2020, the Luxembourg court made a costs order in the First Defendant's favour, which the Claimant has not paid ("the Luxembourg Costs Order"). The amount of the Luxembourg Costs Order was about €500,000. However, the First Defendant (or its lawyer) did not succeed in enforcing the Luxembourg Costs Order over the next two years. On 29 June 2022, it was set aside on appeal.

13. Mr Riches KC for the Defendants told me that proceedings are still ongoing in Luxembourg as to the status of the Luxembourg Costs Order, so that its status is not certain. The Claimant disputes this.

Proceedings in other jurisdictions

14. In various other jurisdictions, the outcome has been different.

15. In the Netherlands, Supreme Court ruling 17/02024, issued on 15 June 2018, upheld the conclusion of the Court of Appeal that the effect of the 2014 Resolution was that the 2008 Final Award was deprived of binding effect. In summary, the reasoning of the Supreme Court was that the Review Tribunal decided that the Partial Award (and a subsequent Review Partial Award) had settled the entirety of the matters in dispute in the arbitration, thus depriving the Czech arbitrators of any further jurisdiction. In effect, the Partial Award was not properly so-called: it was, itself, a final award and was in fact the last effective act in the Czech arbitration proceedings.

16. In the United States, on 26 October 2018, the Court of Appeals, District of Columbia 3rd Circuit, came to a similar conclusion to that of the Dutch Supreme Court. It held that the Final Award was not binding because the Review Tribunal had terminated the proceedings, and, in doing so, nullified the 2008 Final Award: 907 F.3d 606 (2018).

17. In Austria, on 5 July 2019, ruling 46 R 165/19h of the Vienna Higher Civil Court confirmed the view of the lower court that the effect of the 2014 Resolution was that the 2008 Final Award was replaced by a termination order. The 2008 Final Award therefore was not binding.

18. In Belgium, the ruling of the Court of Cassation of 10 February 2022 overturned the earlier decision of the Belgian Appeal Court and held that the 2008 Final Award did

not become binding, and that regard must be had to the 2014 Resolution whose effect was to prevent the 2008 Final Award from becoming binding.

Proceedings in this jurisdiction

19. In this country, the First Defendant commenced enforcement proceedings in respect of the 2008 Final Award by case no. 2011 Folio 864. An interlocutory judgment of Burton J rejected an application by the Claimant for security for costs, in part because of the interest that Burton J considered likely to arise on the sum awarded by the Partial Award, which he estimated as likely to amount to at least £840,000: [2013] EWHC 3190 (Comm).

20. The merits determination of the enforcement proceedings took place in May 2014 – shortly before the 2014 Resolution. Eder J held that, in circumstances where the Review proceedings were not complete, the 2008 Final Award could not be considered final and binding, and so was not enforceable. He came to this view in part because of an earlier decision of the Austrian court to this effect, which he found gave rise to an issue estoppel. However, he said that this was the conclusion he would have reached in any event. He also rejected the First Defendant's alternative argument that there should at least be enforcement in respect of the interest on the Partial Award.

21. On 12 October 2018, this Court granted a costs order in the Claimant's favour, against both the Defendants ("the English Costs Order"), in the sum of £1,063,263.15. This sum has not been paid by the Defendants.

22. In January 2022, the Claimant issued proceedings in Liechtenstein seeking to enforce the English Costs Order. I understand that the claim was dismissed, but is subject to a pending appeal by the Claimant.

The BIT arbitration

23. In the meantime, on 22 December 2017, the Defendants commenced fresh arbitration proceedings against the Claimant, under the Czech and Slovak Federal Republic-Swiss Confederation bilateral investment treaty ("the BIT"). It is these arbitration proceedings, whose seat is in London, which have given rise to the 2022 BIT Award.

24. The gist of the case being advanced by the Defendants included that, by the Bojar letter, but still more by its conduct in the context of the Review proceedings, the Claimant breached the fair and equitable standard required under the BIT.

25. This case was broadly accepted in the 2022 BIT Award.

26. It is relevant to note that, in their reasons, the BIT tribunal set out in some detail all the relevant factual matters, often quoting or reproducing the underlying evidential material, as well as stating the findings that they made on the basis of that material.

Security for costs

Legal principles

27. The power to order security for costs in this context is given by s. 70(6) of the Act, as follows:

> "(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."

28. The Defendants say that the leading authority on the exercise of this power remains the judgment of Longmore J in *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 39 at p. 41 rhc:

> "… cases will be rare in which a Court or indeed an arbitrator would think it right to order security for costs if an applicant for relief has sufficient assets to meet any order for costs and if those assets are available for satisfaction of any such order for costs. In this case it is therefore relevant for me to enquire whether Azov have assets which are available for the satisfaction of any judgment as to costs. If Azov does have such assets, then I would not be inclined to make any order for security; whereas, if it does not have such assets or if such assets are not readily available to satisfy any Court order, I would be inclined to make an order for security."

29. This passage has been cited and applied in a number of subsequent cases, all cited by the Defendants and the Claimant alike, including *X v Y* [2013] 2 Lloyd's Rep 230, per Teare J at [12]-[15]; *Konkola Copper Mines Plc v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm), per Eder J at [25]-[26]; *Progas v Pakistan* [2018] EWHC 209 (Comm), per Picken J at [20].

30. Mr Riches KC, for the Defendants, highlighted the fact that this test requires the court to consider not only what assets the party challenging the award has, but also whether those assets are readily available for the satisfaction of any order for costs.

31. The additional element of ready availability is critical in this case, because the Defendants do not assert that the Claimant does not have the resources to pay any costs order. They say, rather, that the Claimant's assets have proven difficult to track down and enforce against, as illustrated by the First Defendant's inability to enforce in Luxembourg. Thus: the Claimant's assets no doubt exist, but they are not readily available to the Defendants, in the sense that the Defendants may well not be able to avail themselves of such assets, or at least to do so readily.

32. The Claimant does not fully accept that Longmore J's judgment is good law. In submissions, the Claimant has suggested that I should prefer the judgment of Eder J in *Konkola*, which (the Claimant says) indicates at [24] that the correct approach under s. 70(6) is the same as that under CPR 25.12 and CPR 25.13. I understood the Claimant therefore to be submitting that I should not apply the additional test of ready availability. However:

i) It cannot be right that the approach under s. 70(6) should precisely mirror that under the CPR, not least, because s. 70(6) effectively excludes the ground that is one of those most commonly relied on under CPR 25.13(2) – limb (a), that the claimant is resident out of the jurisdiction and not in a Hague Convention state. Furthermore, CPR 25.13(1)(a) suggests that, even if one does have regard to CPR 25.13, it is not necessary to adhere slavishly to CPR 25.13(2), if the statutory context suggests otherwise.

ii) While it is true that Eder J referred in *Konkola* to the CPR approach, he also referred with apparent approval both to *Azov* and to *X v Y*, specifically quoting the passage from Teare J's judgment in *X v Y* that addresses "the real risk that the assets of X are not readily available": *Konkola* at [26]. That is the test he then went on to apply in his case, at [27].

iii) Eder J's reference to the CPR approach was in the context of the adoption of *Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468, [31]-[32]. However, the Court of Appeal was there concerned with the approach to be taken to a specific issue – whether the court will make a further order for security, having already awarded security; to which the answer, both under s. 70(6) and under the CPR, is only if there has been a material change of circumstances. The

Court of Appeal was not stating that security for costs must, for all purposes, be approached in precisely the same way under s. 70(6) as under the CPR.

iv) The Court of Appeal in *Kazakhstan* also said that the court must of course act justly in accordance with the overriding objective in CPR Part 1. This is undoubtedly the case, both under s. 70(6) and under CPR 25. However, it is that very precept that justifies the approach of Longmore J in *Azov* and its reference to "availability" (as further emphasized by Teare in *X v Y*). The goals set out in CPR 1.1(2) make it desirable that an order for costs can be enforced without great expense and expeditiously. See further Picken J's reference to CPR 1.1(2) in *Progas* at [19] – immediately before his reference to a passage in *X v Y* which emphasizes the need to ensure that a costs order can be enforced "without considerable delay and further expense".

v) In short, I see nothing in *Azov* that jars with *Kazakhstan*.

33. I therefore accept that it is relevant not only to consider what assets the Claimant has, but also whether they are readily available.

The Claimant's undertaking

34. It is a common feature of applications for security for costs that the respondent to the application – normally, the claimant in the case – generally (a) says that of course he will comply with any order as to costs and (b) seeks to demonstrate this by identifying at least some assets that can be used to effect payment, or (if required) might be the object of enforcement proceedings.

35. Unusually, the Claimant in this case did not do either of these things, in any of the seven witness statements made by Ms Mallorie or Ms Wessel (who together have the

conduct of the case for the Claimant at Arnold & Porter Kay Scholer (UK) LLP), prior to the hearing. I note that, in *X v Y*, Teare J's remarks at [17] suggest that he regarded it as a clinching factor that:

> "There is no witness statement on behalf of X expressing either a willingness to pay such costs as may be ordered against it or explaining how such a liability could readily be enforced by Y."

36. When I raised in submissions the fact that the Claimant's evidence did not say anything along these lines, Mr Bastin KC took instructions. I was told that a witness statement would be forthcoming that would confirm the Claimant's willingness to pay.

37. On the morning after the hearing, I duly received Ms Mallorie's Seventh Witness Statement, where she says as follows:

> "I am informed by the Czech Republic that it confirms that it will, and undertakes to the Court to, comply with any order by the Court in Claim No.: CL-2022-000307 requiring the Czech Republic to pay costs in favour of the Defendants (or either of them)."

38. The fact that the Claimant has not only expressed its willingness to pay, but has also given a formal undertaking to this Court, goes somewhat further than the indication that I received from Mr Bastin KC at the hearing. On the other hand, the Claimant has not indicated what assets it has against which the Defendants could readily enforce any order in their favour (i.e., non-sovereign assets).

The Defendants' submissions

39. Mr Riches KC submitted for the Defendants that the past conduct of the Claimant meant that I should not be impressed by any mere indication from the Claimant that it will pay. In this regard, he relied specifically on the difficulties that the First

Defendant has had enforcing against the Claimant in Luxembourg, but also on overall conduct of the Claimant, as outlined in the 2022 BIT Award.

40. As regards the First Defendant's difficulties in Luxembourg, while it is no doubt frustrating for the First Defendant that the exequatur order remains unsatisfied, my understanding is that, being an enforcement order, this was not, strictly, an order made by the court in Luxembourg that the Claimant should make a payment to the First Defendant. Rather, it was an order permitting the First Defendant to enforce against the Claimant's assets in Luxembourg. If that is right, the distinction is significant, because it means that this is not an instance of the Claimant having failed to comply with a court order. I have not been provided with a copy of the Luxembourg exequatur order, which means that I have not been able to test this point directly. However, I put this distinction to counsel in submissions and neither party suggested that my point was inapposite.

41. Mr Riches KC relied in particular on (i) the fact that, at the end of the saisie-arrêt proceedings, the bank accounts were found to have no money, (ii) what he said was a commitment given by the Claimant to the Luxembourg court on 12 August 2013 that it would pay in accordance with the 2008 Final Award ("the August 2013 statement") and (iii) a public statement made in October 2017 by Mr Andrej Babiš, who had been the Czech Finance Minister at about the time of the Luxembourg exequatur order, which (Mr Riches KC said) indicated that the Claimant had deliberately removed assets from Luxembourg, possibly items such as works of art ("the Babiš statement"). However:

    i) The fact that bank accounts were frozen, but ultimately were found to be empty, comes nowhere close to establishing that the Claimant deliberately

removed funds from those bank accounts. The only safe inference I can draw is that there was no money in those bank accounts when they were frozen.

ii) The August 2013 statement was a comment made in the Claimant's written concluding arguments, in one phase of the Luxembourg proceedings. The Claimant (or, strictly, its lawyer, presumably on its behalf) said, that, just as the Claimant had paid the Partial Award, it would adopt the same approach to the 2008 Final Award, "as soon as the commitments provided for in the award of August 2008 will acquire res judicata and will become enforceable, following the reviewing process which is currently pending." It is not clear to me that this was equivalent to a formal undertaking. In any event, the outcome of the Review process (approximately 12 months later) was, at least arguably, that the 2008 Final Award was not binding or enforceable.

iii) The Babiš statement came in a speech where Mr Babiš said that the Claimant had "lost the Diag Human case worth 14 billion in Luxembourg. When I held the office of the Finance Minister, I withdrew the [Claimant's] assets…". I find the meaning of this somewhat obscure. In any event I do not regard it as coming anywhere close to establishing that significant non-sovereign assets that would otherwise have been available for enforcement in Luxembourg were deliberately removed in order to prevent enforcement.

42. More broadly, Mr Riches KC relied on the fact that the 2022 BIT Award sets out many instances of the wrongdoing on the part of the Claimant that the BIT tribunal found to have been established. Mr Riches KC explained that his reason for taking me to the 2022 BIT Award, for this purpose, was not because he relied in this context on the findings and conclusions of the BIT tribunal – which, he acknowledged, were

subject to the Claimant's s. 67 and s. 68 challenges. Rather, it was because the BIT tribunal's reasons conveniently set out the underlying factual materials, from which (he said) the relevant acts of misconduct were readily apparent and, indeed (he said), were common ground. He acknowledged that a one-day hearing, only a small part of which could be devoted to this point, meant that he simply did not have enough time to take me directly to the primary materials, with one or two exceptions. The most prominent such exception was the translation of a handwritten note made by Mr Michal Švorc, the then Director of the Legal Department of the Ministry of Finance ("the Note"). The Note appears to record a meeting that occurred in the Prime Minister's office on around 8 December 2009, in relation to the Review proceedings. At least on one reading of the Note, the view was being expressed that the Claimant held one member of the Review tribunal "by the balls" and that another member was asking the Claimant for "subsidies".

43. This particular document was the high point of this part of Mr Riches KC's submissions. However, even this does not go far enough, in the context of an interlocutory hearing where the Note – let alone the many other points that were broached with me much more elliptically – was not explored fully in submissions, let alone on the evidence. In the 2022 BIT Award, the tribunal commented on the fact that a number of different features of the Note (including those I have set out above) were contentious before them, there being opposing views expressed as to their meaning and significance. The BIT tribunal were able to come to firm conclusions about all this. I am not able merely to adopt their conclusions, because they are subject to the Claimant's challenges. Nor, however, am I able to reach my own conclusions, because the limited nature of the hearing before me simply did not make

this possible. That will be the task of the Court at the merits hearing of this matter, in January 2024.

44. It would normally be a cause for regret that the Court is unable to determine some of the issues before it. Where that come about because of a shortage of time, it might lead the Court to remedy this by making more time available. In this case, that is not a course that either party sought to persuade me to follow – in my view, rightly.

45. This is in part for the very reason I have noted in the preceding paragraph – i.e., that the merits points that Mr Riches KC drew to my attention (but did not fully ventilate) are all due to be explored in proper detail in January 2024.

46. However, a still more compelling reason is that it is strictly unnecessary for me to decide those merits points now, at least in the context of an application under s. 70(6), because to do so would make no difference to the outcome. Both parties cited *Ackerman v Ackerman* [2011] EWHC 2183 (Ch), per Roth J at [16], which they agreed was a correct distillation of the principles governing the making of an order for security for costs under CPR 25.13(2)(g), i.e. on the basis that the claimant has taken steps in relation to its assets that would make it difficult to enforce an order for costs. At [16(i)], Roth J said:

> "The requirement is that the claimant has taken in relation to his assets steps which, if he loses the case and a costs order is made against him, will make that order difficult to enforce. It is not sufficient that the claimant has engaged in other conduct that may be dishonest or reprehensible: *Chandler v Brown [*2001] CP Rep 103 at [19]-[20]."

47. If made out, Mr Riches KC's criticisms of the Claimant's conduct in Luxembourg would have been characterizable as going to a propensity to take steps to make any costs order difficult to enforce. However, I have found those criticisms not to have been made out.

48. Mr Riches KC's broader criticisms of the Claimant's conduct are different in kind. They have nothing to do with taking steps to make it difficult to enforce a costs order. They are (in Roth J's phrase) "other conduct". Accordingly, they would not have helped the Defendants, even if I had been able to resolve the relevant issues in the Defendants' favour in the course of this hearing.

Conclusion on the Claimant's undertaking

49. When this Court receives a formal undertaking, from any litigant, it starts with the assumption that the undertaking should be taken at face value, and will not generally be moved from that assumption without good reason. This applies all the more where the litigant in question is not a mere individual or a corporate entity, but a state with which this country enjoys friendly relations. I read and listened to Mr Riches KC's submissions with care, but do not consider that I can or should disregard the Claimant's undertaking.

50. If I had not received Ms Mallorie's seventh witness statement, I would have formed the view that the Claimant does or at least may not have assets readily available to satisfy any Court order. However, the undertaking is an unequivocal promise given by the Claimant to comply with any costs order requiring the Claimant to pay the Defendants' costs. This means that any such order will be satisfied.

51. Having received this undertaking, I see no reason to make an order for security for costs.

The English Costs Order

52. That is sufficient to dispose of the application under s. 70(6). However, I received substantial submissions in relation to the English Costs Order of 12 October 2018, which remains unpaid. I should address some of the points made to me.

53. First, the Claimant said the fact that the Defendants ask the Court for this relief, despite having owed over £1 million in costs to the Claimant for nearly five years, is highly significant. The Defendants have known about the English Costs Order since at least December 2018. It is deeply unattractive that they did not simply comply with it.

i) I note the consideration given in *JSC BTA Bank v Ablyazov* [2011] EWHC 2500 (Comm) to various alleged failures to comply with Court orders, per Teare J at [50] to [72]. Teare J assessed each allegation separately, taking into account the significance of the obligation, the gravity of the breach, the explanations given and the overall relevance (including how long ago each matter had occurred, and what had happened since).

ii) In this case, I was shown oral evidence given by the Second Defendant in the BIT arbitration, where he explained the Defendants' failure to pay the English Costs Order on the basis that the English Costs Order had still not been formally served on the Defendants (who were not taking an active part in the English proceedings when the English Costs Order was made) and that, when it was served, it would not be paid because the Defendants would be entitled to set against it the Luxembourg Costs Order and an order made by the Court of Appeal in Belgium.

iii) It is fair to say that circumstances have changed since then – the First Defendant has now been formally served with the English Costs Order, and the Luxembourg Costs Order and the order of the Court of Appeal in Belgium have been set aside. However, having considered the First Defendant's evidence, I do not consider the Defendants' failure to comply with the English

Costs Order to have been contumelious. I therefore would not have refused to grant security for costs, merely for this reason.

54. Second, the Defendants have contended before me that the English Costs Order should be ignored, because there are sums to be set off against it: (i) the Luxembourg Costs Order and (ii) the interest outstanding on the Partial Award, which Burton J provisionally estimated in 2013 as at least £840,000. As to this:

i) As already noted, the Luxembourg Costs Order was set aside on 29 June 2022. Even if it is right that the Defendants are still seeking to have it restored (the Claimant says their efforts on this score have all failed), the simple fact is that, since that date, there has not been any costs order in existence, to be set off against the English Costs Order.

ii) The Defendants were unable to identify where, when or by whom they have been awarded interest on the Partial Award – save for the 2022 BIT Award, which is the subject of the Claimant's challenges and which therefore does not assist the Defendants for present purposes. In some parts of Mr Riches KC's submissions, he referred to the judgment of Burton J as though it were a judgment deciding that interest was due to the Defendants. It clearly is nothing of the kind. Burton J was merely anticipating what entitlement to interest was likely to arise in the First Defendant's favour. However, he did not anticipate the outcome of the Review proceedings and the 2014 Resolution. On one view of matters, and as many courts have found, the effect of the 2014 Resolution is that the 2008 Final Award has no effect. This means, in turn, that the Defendants have not been awarded any interest on the Partial Award, and there is, therefore, no entitlement to interest to set off

against the English Costs Order. I find it extremely disappointing that the obvious points arising here, and the Defendant's difficulties with them, were not acknowledged in their evidence or in their skeleton argument; or at all, until I raised them in their oral submissions. Indeed, the Defendants' reading list did not suggest that I should read any of the relevant foreign decisions.

55. Third, the English Costs Order is in a sum that is bound to wipe out a substantial part of any costs order in this action in the Defendants' favour, even if they succeed.

i) Although the total quantum of security for costs that the Defendants seek is over £4 million, I regard this as absurdly high. The hourly rates charged by Mishcon de Reya are all well above the guideline rates, in general by about one-third. The hours are much higher than I would expect to have been incurred, or to be anticipated as likely to be incurred in the future. I do not understand why the Counsel team requires two KCs. If I had been inclined to order security, it would have been for a much lower sum. I would add that I found it an interesting indicator that the Defendants' schedule of costs for this hearing had a total figure approximately twice that of the Claimant's schedule (which was, itself, a large amount).

ii) Mr Bastin KC suggested that, if I were to order security for costs, the amount should be no more than £2 million. In reply submissions, Mr Riches KC made no submissions about quantum.

iii) I was told in submissions (and subsequently received a letter from the Claimant confirming the position) that the present value of the English Costs Order, taking account of interest, is now about £1.4 million.

iv) Accordingly, if I had been minded to order security for costs, I would have done so in the sum of £600,000 – being the difference between (a) the maximum suggested by Mr Bastin KC in respect of the Defendants' costs and (b) the present value of the English Costs Order.

Security for costs: conclusion

56. In all the circumstances, the application under s. 70(6) of the Act for security for costs fails.

57. I have only reached this conclusion because of the Claimant's undertaking, which I did not receive until after the hearing. That is of obvious significance in terms of the costs of the application. On the other hand, if I had not received that undertaking, I would not have granted security for anything like the sum sought by the Defendants.

Security for the 2022 BIT Award

Legal principles

58. The power to order security in this context is given by s. 70(7) of the Act, as follows:

> "(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with."

59. It is well-established that, in the context of a s. 67 challenge, there are generally two requirements to be satisfied: *Konkola* at [37]; *Progas* at [50].

60. First, the applicant must persuade the Court that the challenge appears weak on the merits, specifically that it is "flimsy or otherwise lacks substance" (this formulation having emerged in *A v B* [2011] 1 Lloyd's Rep 363, per Flaux J at [32]). This is because the award is not presumed to be valid, in the context of a s. 67 challenge, i.e.,

the Court proceeds on the basis that the challenge may succeed, unless the applicant can show that its prospects are flimsy.

61. Second, the applicant must show that the challenge in some way prejudices his ability to enforce the award (or diminishes the other party's ability to honour the award). This is generally done by showing a risk of dissipation, as required for a freezing injunction: *A v B* at [47].

62. The first limb does not apply to a s. 68 challenge: *Progas* at [51]. The reason for this is that, in this context, the award is presumed to be valid, unless and until the challenge succeeds. In a s. 68 challenge, therefore, there is no need for the applicant for security to demonstrate flimsiness.

63. I should say that 'Merkin & Flannery On the Arbitration Act 1996' (6th ed.) argues that some sort of merits test should be applicable both to s. 67 challenges and to s. 68 challenges. This is not an approach that either party pressed upon me.

First limb: flimsiness

64. Like Eder J in *Konkola*, I heard only very limited arguments as to the merits of the challenges advanced by the Claimant (see *Konkola* at [45]). Unlike him, however, the limited nature of the arguments left me neither wiser nor better informed.

65. This was inevitable in circumstances where the Defendants' application for summary dismissal of the Claimant's challenges has not been listed for a short, early hearing by itself (as is often the case for summary assessments of any kind). Instead, at a directions hearing in December 2022, it was recognised that the application for summary dismissal was both so complex and so utterly overlapping with the merits of the Claimant's challenges themselves that they should all be heard together, in the

same hearing. Thus it is that the issues arising on the application for summary dismissal will be heard in the course of a hearing that will last seven days, it having been decided that this was the best way to ensure a fair determination.

66. By contrast, by the time that Mr Riches KC had finished his submissions on the Defendants' s. 70(6) application, the amount of the time allocated for the Defendants' submissions that remained at Mr Green KC's disposal, for his submissions on the entirety of the s. 70(7) application, was four minutes.

67. In the event I allowed Mr Green KC about five minutes extra. Furthermore, the economy with which Mr Bastin KC then made the Claimant's submissions on both applications (partly because Mr Green KC had given him so little to respond to) meant that, when the time came for the Defendants' oral reply, Mr Green KC was able to luxuriate in about twenty further minutes. Nevertheless, the practical reality is that neither side had any real opportunity to develop submissions on the facts. Mr Green KC sought to remedy this by adopting all the points Mr Riches KC had made on the merits in the context of the s. 70(6) application (i.e., Mr Riches KC's submissions on the Claimant's historic wrongdoing, based on the materials and evidence set out in the 2022 BIT Award). However, that fell a long way short of a complete review of the entirety of the Claimant's case on the merits, and certainly came nowhere near showing me that the entirety of that case could be described as flimsy.

68. In advance of the hearing, I was asked to read more than I possibly could in the half-day that the parties had estimated as appropriate for pre-reading, but not nearly enough to understand the merits properly. In the course of the hearing, the submissions on this part of the case were made, on both sides, in a condensed manner

that might, possibly, have made sense to someone with a very profound familiarity with the materials. They did not make sense to me.

69. The result was that the parties' submissions did not persuade me that the Claimant's challenges are flimsy, nor of the opposite. They simply left me unqualified to form any real view as to the substance or flimsiness of the Claimant's case. Any meaningful assessment of the merits of that case, even one of a limited nature, would have required far more time, and more assistance from Counsel, then was afforded to me. The first time this Court will be able to conduct that kind of assessment will be at the full merits hearing, in January 2024.

70. This does not matter greatly, however, in circumstances where the fact that the Claimant challenges the 2022 BIT Award under s. 68 of the Act means that the first limb cannot be decisive, by itself. It was common ground that, in the context of a s. 68 challenge, the flimsiness limb of the test does not arise – only the second limb matters.

Second limb: prejudice

71. As regards that second limb, the Defendants did not have any real evidence that the Claimant is likely to dissipate its assets. That would be very difficult to establish in the context of a sovereign state, which may be able to move some of its assets around (albeit the bulk of them are bound to be located within its own borders) but cannot transfer them to a third party, in the way that conventional litigants can, often via new offshore corporate vehicles.

72. The Defendants principally relied on the difficulties that the First Defendant had enforcing the 2008 Final Award in Luxembourg, and the conduct of the Claimant in this regard. I have already addressed this.

73. Otherwise, the Defendants once again relied on what it characterised as the unacceptable conduct of the Claimant in relation to the Defendants and in relation to the underlying arbitration proceedings, in particular the Review proceedings, as set out in the 2022 BIT Award.

74. I did not find this helpful. This was primarily because of my difficulty in evaluating the relevant material properly (a task that would have required far more time, and more assistance from Counsel, than was afforded to me). However, it was also because none of this alleged misconduct comprised behaviour directly analogous to the peril that the Defendants now claim to face – i.e., that, in the interval between now and January 2024, the Claimant might put its non-sovereign assets beyond the Defendants' reach.

75. I think in recognition of the obvious forensic problems that he faced under both limbs of the normal approach under s. 70(7), Mr Green KC focussed on the fact that, in *Progas*, Picken J said at [50] that there are "generally" two requirements to be met. Mr Green KC said that the position should be different where the Claimant has acted as egregiously, as alleged here.

76. The easy answer to this would be that accepting it would, as a first step, require me to accept, at least provisionally, all the factual allegations that the Defendants advance. As I have now explained more than once in this judgment, these are allegations that the Claimant rejects and which I find myself unable to assess properly.

77. The more analytical answer is to note that, in *Konkola*, counsel for the party applying for security (Mr Dale QC) sought to persuade the Court not to apply the conventional two-limb test. At [42] the judgment records him contending, among other things, that:

> "there was… no specific requirement on the part of the applicant to show that the challenge itself caused prejudice to the applicant's ability to enforce the award."

78. Having referred to the commentary in 'Merkin & Flannery' (5th ed.), on which counsel relied, Eder J summed up his own position at [44]:

> "I remain in agreement with the analysis and approach outlined by Flaux J in *A v B*; and I also agree with the further observations of Teare J in *X v Y* – although it is important to emphasise what Flaux J himself said in *A v B*, i.e. it would not be advisable or appropriate to lay down hard and fast rules in this context. In particular, it seems to me that such approach is consistent with the rationale underlying section 70(7) as stated in the Departmental Advisory Committee report referred to above."

79. Eder J's earlier reference to the Departmental Advisory Committee report was at [41], where he summarised submissions made about that report by counsel for the claimant (Mr Dunning QC). The specific text Eder J must have had in mind must have been this part of that earlier passage in his judgment:

> "… the stated purpose of section 70(7) of the 1996 Act was only "to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may (by design or otherwise) be diminished" (the Departmental Advisory Committee Report on the Arbitration Bill, February 1996, para 380)…"

80. The submission made to Eder J on the basis of this was that security should only be ordered if this test can be satisfied. It seems to me that Eder J accepted that submission. In any event, my own view is that the explanation of the Departmental Advisory Committee Report strongly indicates that security may be ordered if this risk is identified, but not otherwise.

81. It follows from this that s. 70(7) is indeed related to prejudice that may arise from the s. 67 or s. 68 or s. 69 challenge; specifically, the risk the award may become more difficult to enforce during the period while the challenge is pending. This calls for a comparison between the enforceability of the award before the challenge was issued, and the enforceability by the end of the challenge proceedings.

82. It further follows that misconduct or alleged misconduct alleged to have occurred long before the s. 67 or s. 68 or s. 69 challenge is not of obvious relevance. Mr Green KC's submissions only concerned allegations of historic misconduct.

83. I would add that I note that the current (6th) edition of 'Merkin & Flannery' suggests both (a) that there should be a "flimsiness" examination both in the context of s. 67 challenges and in the context of s. s. 68 challenges and (b) that there should not be a separate enquiry into risk of dissipation or prejudice: see at §70.7, culminating at §70.7.3. My understanding of the editors' reasoning is, in essence, as follows: if a party that has lost in arbitration chooses to commence proceedings to challenge the award even though the merits of the challenge are flimsy, it is reasonable to infer that it does so for ulterior purposes – in all likelihood, to prejudice the winning party by using the time bought by the (ex hypothesi, doomed) challenge in order to make enforcement difficult.

84. This is an interesting suggestion. It really boils down to the suggestion that, if flimsiness is demonstrated, the court should infer risk of dissipation.

85. Seen in that way, the 'Merkin & Flannery' position strikes me not so much as a proposition of law as a proposition about factual probabilities. Accordingly, it is not applicable as a matter of principle to every case. Its applicability will depend on the facts of every case; it may be true for some cases but untrue for others. Viewed in this way (furthermore), even if accepted, it does not mean that the existing jurisprudence is wrong in principle; merely that, in some of the previous cases, the court may, in the editors' view, have been slow to draw an inference about risk of dissipation.

86. All of this may need to be considered in the appropriate case. This, however, is not that case. This is not a case where flimsiness has been demonstrated, from which risk of dissipation can be inferred. Rather than contending that only the first limb of the conventional test has to be satisfied, Mr Green KC has instead sought to be persuade me that neither limb need be satisfied. This is not something I can accept.

87. For all these reasons, I reject Mr Green KC's submissions.

Conclusion on security for 2022 BIT Award

88. The application under s. 70(7) of the Act for security for the 2022 BIT Award also fails.