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## COMMENT

# RECENT DEVELOPMENTS IN THE ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS IN ENGLAND & WALES

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### I. INTRODUCTION

Enforcing an arbitration award in England & Wales is usually a relatively straightforward process. Once an arbitral award is issued, then subject to any contrary agreement by the parties or right of challenge, the award is immediately enforceable. Clearly, however, situations can and do arise which may complicate the process. This comment considers three such cases in the English courts which have addressed more unusual issues. First, the decision of the Supreme Court in *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* clarified the extent to which an English court may revisit the underlying award which a party is seeking to enforce and the tribunal's reasoning in relation to it.<sup>1</sup> Second, in *Gater Assets Limited v. Nak Naftogaz Ukrainiy*, the Court of Appeal dealt with the issue of whether security for costs could or should be available in enforcement actions in England & Wales.<sup>2</sup> Finally, in *National Ability SA v. Tinna Oils & Chemicals Ltd* the Court of

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<sup>1</sup> *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, (2009) 1 All E.R. (Comm.) 505, (2010) 2 W.L.R. 805, (2010) UKSC 46 (hereinafter "Dallah"); see Jacob Grierson & Mireille Taok, *Comment on Dallah v Pakistan: Refusal of Enforcement of an ICC Arbitration Award against a Non-Signatory*, 26 J. INT'L ARB. 903907 (2009) (providing detailed commentary on the Dallah v Pakistan case (prior to the Supreme Court judgment) and Jacob Grierson & Mireille Taok, *Comment on Dallah v Pakistan*, 26 J. INT'L ARB. 467-77 (2009).

<sup>2</sup> *Gater Assets Ltd. v. Nak Naftogaz Ukrainiy*, [2007] EWCA (Civ) 988 (hereinafter "Gater").

Appeal considered the question of time limits within which awards may be enforced.<sup>3</sup> This comment begins with a short overview of the procedural steps necessary to enforce an arbitration award in England & Wales and then discusses the three selected cases in turn.

## II. ENFORCING ARBITRAL AWARDS IN THE ENGLISH COURTS

Arbitration awards can be enforced in England & Wales through a number of different mechanisms, the most common of which is under the Arbitration Act 1996.<sup>4</sup> Enforcement proceedings may also be brought (i) under section 66 of the Arbitration Act 1996,<sup>5</sup> which permits the enforcement of all foreign or domestic awards as an English judgment, or (ii) under sections 100-103 of the Arbitration Act 1996,<sup>6</sup> which enshrines the New York Convention in English law.

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<sup>3</sup> *Nat'l Ability SA v. Tinna Oils & Chems. Ltd.*, [2009] EWCA (Civ) 1330 (hereinafter "Nat'l Ability").

<sup>4</sup> Other methods include under the 1927 Geneva Convention, the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933, or by a common law "action on the award."

<sup>5</sup> Section 66 of the Arbitration Act 1996 provides:

- (1) An award made by the 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 of law, in particular under Part II of the [1950 c. 27.] Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

<sup>6</sup> Section 103 of the Arbitration Act 1996 provides:

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

Under the summary procedure in section 66 of the Arbitration Act 1996, the court's permission is required for an arbitration award to be enforced. Generally, in order to enforce an award under section 66, the party seeking enforcement has to show only that the dispute is within the terms of the arbitration agreement, that the tribunal was properly appointed, that the award is final

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- (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
  - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
  - (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
  - (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
  - (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
  - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
- (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
- (5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.



and binding and that there are no public policy reasons preventing enforcement. Although the court has discretion not to enforce the award, permission to enforce the award is usually granted,<sup>7</sup> and the onus of showing that the tribunal lacked jurisdiction is on the party resisting enforcement. In such cases, given that the application to enforce is usually made *ex parte*, the party resisting enforcement will need to return to court to make an application to set aside the order enforcing the award. Where permission is given by the court, it is usually given such that the award may be enforced in the same manner as a judgment or order of the court.

Sections 100-03 of the Arbitration Act 1996 contain provisions dealing with the enforcement of arbitration awards under the New York Convention. Under section 101 of the Arbitration Act 1996, a New York Convention award must be recognized as binding on the parties and may be enforced in England and Wales in the same manner as an English judgment or court order. In the same way as under section 66, enforcement of a New York Convention award can be sought directly under section 101(2) by applying for permission to enforce the award in the same manner as a judgment or order of the court. Recognition or enforcement of the award may be refused on certain specified grounds, or the court may refuse to recognize or enforce an award where to do so would be contrary to public policy. The court has discretion to refuse to enforce an award if one of the narrow, specified grounds is proved by the party resisting enforcement, but the court is not obliged to refuse to enforce an award.

The Arbitration Act 1996 also contains certain procedural requirements. A party seeking enforcement must produce the duly authenticated award and the original arbitration agreement<sup>8</sup>

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<sup>7</sup> See MATTHEW GEARING, JUDITH GILL & DAVID ST. JOHN SUTTON, *RUSSELL ON ARBITRATION* 8-004 (23d ed. 2009).

<sup>8</sup> The "arbitration agreement" means an arbitration agreement in writing, as defined in section 5 of the Arbitration Act 1996, which provides:

(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

or duly certified copies of each.<sup>9</sup> Generally, the application is made in writing without notice to the other party. If the court grants permission to enforce the award, then the order must be served on the other party within fourteen days, if the defendant is within the jurisdiction.<sup>10</sup>

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The expressions "agreement," "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing—

- (a) if the agreement is made in writing (whether or not it is signed by the parties),
- (b) if the agreement is made by exchange of communications in writing, or
- (c) if the agreement is evidenced in writing.

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

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

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

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

<sup>9</sup> Section 102(1) of the Arbitration Act 1996 provides:

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

- (a) the duly authenticated original award or a duly certified copy of it, and
- (b) the original arbitration agreement or a duly certified copy of it.

(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

<sup>10</sup> Civil Procedure Rules Part 62.

### III. UNUSUAL SITUATIONS IN ENFORCEMENT ACTIONS BEFORE THE ENGLISH COURTS

The three selected cases addressed fairly unusual situations in enforcement actions before the English courts. These were (A) the extent to which a court may revisit the arbitral tribunal's reasoning in rendering its award; (B) whether a party could – or should – provide security for the costs of enforcing an arbitration award; and, (C) the time limits for enforcing an arbitration award.

#### A. *Extent to which an English Court May Revisit the Tribunal's Reasoning*

A recent case on the enforcement of international arbitration awards in the English courts, *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*<sup>11</sup> illustrates a refusal to enforce solely on the Court's *de novo* review and disagreement with the conclusions of the arbitral tribunal. In this case, the award of US\$20.5 million was made by an arbitral tribunal organized under the auspices of the International Chamber of Commerce ("ICC") against the Government of Pakistan (the "Government") in favor of Dallah Real Estate and Tourism Holding Co ("Dallah"), a Saudi Arabian real estate development company.

Dallah had long-standing commercial relations with the Government of Pakistan and, in 1995, it made a proposal to the Government to provide housing for pilgrims on a 55-year lease with associated financing. The Government approved the proposal in principle and a Memorandum of Understanding ("MOU") was concluded. In time, Dallah acquired a larger and more expensive plot of land than contemplated by the MOU. An agreement was signed between Dallah and Awami Hajj Trust (the "Trust") which set out various obligations regarding the real estate development and contained an arbitration clause referring disputes between Dallah and the Trust to ICC arbitration. The Trust ceased to exist as a legal entity in December 1996 following the change of Government in Pakistan.

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<sup>11</sup> Dallah, *supra* note 1.

Dallah invoked ICC arbitration against the Government in 1998, on the basis that the Government was the valid successor of the Trust and claimed damages for breach of the agreement. Dallah nominated Lord Mustill as its arbitrator. The Government maintained a jurisdictional reservation throughout the arbitration and did not do anything to submit to the jurisdiction of the tribunal or waive its claim to sovereign immunity. The ICC appointed Dr. Ghaleb Mahmassani as chair and Dr. Nassim Shah as the Government's arbitrator.

The tribunal issued its first partial award on jurisdiction in 2001, in which it found that the arbitration clause was governed by "those transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business."<sup>12</sup> Applying those principles, it found that the Government was bound by the arbitration agreement.<sup>13</sup>

In a second partial award in 2004, the tribunal found for Dallah on the merits<sup>14</sup> and in a final award in 2006, the tribunal ordered the Government to pay Dallah a total of US\$20,588,040.<sup>15</sup>

Dallah applied to enforce the award against the Government in England under section 101 of the Arbitration Act 1996. The application was granted by an order of Christopher Clarke, J., on a without notice application by Dallah, but was subsequently overturned at first instance by Aikens, J., in the Queen's Bench Division, Commercial Court.<sup>16</sup>

In a decision rendered on July 20, 2009, the Court of Appeal upheld the judgment of Aikens, J., refusing to enforce the ICC

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<sup>12</sup> See Jacob Grierson & Mireille Taok, *Comment on Dallah v Pakistan*: 26 J. INT'L ARB. 467-77 (2009).

<sup>13</sup> See Jacob Grierson & Mireille Taok, *Comment on Dallah v Pakistan: Refusal of Enforcement of an ICC Arbitration Award against a Non-Signatory*, 26 J. INT'L ARB. 903-07 (2009).

<sup>14</sup> Dallah, *supra* note 1, at ¶¶ 1, 9.

<sup>15</sup> *Id.* at ¶10.

<sup>16</sup> Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan (2008) APP.L.R. 08/01, [2008] EWHC 1901.



award against the Government on the basis that the Government was not a party to the arbitration agreement.<sup>17</sup> Aikens, J., reached this decision in a detailed analysis of the law and the facts, even though a distinguished arbitral tribunal had found that the Government was bound by the arbitration agreement. Aikens, J., held that, under section 103 of the Arbitration Act 1996, the Government of Pakistan needed to "prove" that the arbitration agreement was not valid.<sup>18</sup> He stated: "if a party has to 'prove' a matter, that must mean, in the context of English civil proceedings, prove the existence of the relevant matters on a balance of probabilities."<sup>19</sup> During the proceedings, the parties had agreed that French law was applicable in determining whether or not the Government of Pakistan was bound by the arbitration agreement, the Government was resisting enforcement on the ground that "the arbitration agreement was not valid . . . under the law of the country where the award was made" (Arbitration Act 1996, section 103(2)(b), reflecting Article V(I)(a) of the New York Convention), that is under French law (as the award was made in Paris).<sup>20</sup> Accordingly, evidence of French law was presented to the court. After considering the application of the relevant legal principles, Aikens, J., concluded that the Government was not bound by the arbitration agreement.

The case was appealed to the Supreme Court and judgment was handed down on November 3, 2010.<sup>21</sup> The Supreme Court Justices (Lords Hope, Saville, Mance, Collins, and Clarke) unanimously refused to enforce the ICC award. After analyzing the proceedings, Lord Mance concluded that the common intention or belief of both, Dallah and the Government, that the

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<sup>17</sup> *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA (Civ) 755, (2009) W.L.R. (D) 250 (Ward, Rix, Moore-Bick L.J.J.).

<sup>18</sup> *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* (2008) APP.L.R. 08/01, ¶ 69.

<sup>19</sup> *Id.*, ¶ 82.

<sup>20</sup> See Jacob Grierson & Mireille Taok, *Comment on Dallah v Pakistan*: 26 J. INT'L ARB. 467-77 (2009).

<sup>21</sup> *Dallah Real Estate & Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46.

Government should be or was a party to the arbitration agreement was not justified.<sup>22</sup> The Supreme Court accepted that a tribunal should be able to rule on its own jurisdiction, but held that section 103 of the Arbitration Act 1996 entitled it to revisit the tribunal's decision.<sup>23</sup> The Supreme Court therefore upheld the

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<sup>22</sup> *Id.*, ¶¶ 132-7, 145.

<sup>23</sup> Section 103 of the 1996 Arbitration Act provides:

- (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
- (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves -
  - (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
  - (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
  - (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
  - (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
  - (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
  - (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
- (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
- (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
- (5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied

“excellent judgments” (*per* Lord Collins) of Aikens, J., and the Court of Appeal and refused to enforce the ICC award.<sup>24</sup>

In relation to the issue of the “eminence” of the arbitral tribunal, which was relied upon heavily by *Dallah*, Lord Mance stated:

[T]he nature of the present exercise is . . . also unaffected where an arbitral tribunal has either assumed, or, after full deliberation, concluded that it had jurisdiction . . . the tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal.<sup>25</sup>

The Supreme Court’s thoughtful approach in *Dallah* confirms that, whilst it is clear that an arbitral tribunal has the power to rule on its own jurisdiction, it does not have an exclusive power to do so. The question of jurisdiction may be re-examined by both the court of the seat in relation to a challenge to the tribunal’s jurisdiction and by the English courts should the award come to be enforced in England & Wales. The level of scrutiny will vary depending on the applicable national law. In England, the practice has been that the courts will re-examine the jurisdiction of the arbitrators. In particular, the Supreme Court in *Dallah* made it clear that the fact that jurisdiction, for whatever reason, could no longer be challenged in the courts of the seat does not preclude the consideration of the tribunal’s jurisdiction by an enforcing court. The Supreme Court went so far as to say that the court was bound

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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.

<sup>24</sup> On February 17, 2011, Cour d’Appel de Paris dismissed the Government of Pakistan’s action to set aside the award before the French courts, *available at* <http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=4523> (last visited February 18, 2011).

<sup>25</sup> *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [31].

to revisit the question of the tribunal's decision on jurisdiction in the light of all the evidence where the party resisting enforcement asserted that there was no arbitration agreement.<sup>26</sup>

### B. *Security for Costs*

The question of whether a party could – or should – provide security for the costs of enforcing an arbitration award has arisen only rarely in the English courts. One case in which this issue was discussed at length was the Court of Appeal decision in *Gater Assets Limited v. Nak Naftogaz Ukrainiy*.<sup>27</sup> There is no express application of the security for costs regime in relation to the enforcement of arbitral awards. It is a further question whether an award debtor should be awarded security for its costs in resisting the enforcement of an award in proceedings which are essentially intended to be summary. The decision in *Gater* is interesting for its analysis of not only the availability of security for costs but also its consideration of whether such security should be granted.

The arbitration arose out of an agreement between Gazprom, the Russian gas producer, and the legal predecessor of Nak Naftogaz Ukrainiy ("Naftogaz"), under which Gazprom had the right to send gas through the Brotherhood pipeline, located in Ukraine, in exchange for allowing Naftogaz's legal predecessor to take a specified quantity of the transiting gas. Gazprom had insured against gas being misappropriated as it passed through the pipeline. This risk was then reinsured with Monde Re.

Monde Re paid out on the policy and commenced arbitration against Naftogaz at the International Commercial Arbitration Court in Moscow. The arbitral tribunal considered whether the arbitration agreement was binding between Monde Re and Naftogaz, and concluded that it was and that the tribunal had jurisdiction to hear the dispute. The tribunal also held that Monde Re was entitled to recover the payout of the US\$88 million it had made from Naftogaz. Monde Re subsequently assigned the arbitration award to Gater Assets Limited ("Gater").

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<sup>26</sup> *Id.*, ¶ 104.

<sup>27</sup> *Gater*, *supra* note 2.



Gater sought to enforce the award against Naftogaz and obtained an order from Colman, J., on a without notice basis, permitting Gater to enforce the award.

Unusually, Naftogaz made an application to the Commercial Court in March 2007, for an order that Gater provide security for Naftogaz's costs in resisting the enforcement of the award against it.<sup>28</sup> The application was brought under the Civil Procedure Rules Parts 25.12 and .13 on the basis that Gater was domiciled outside Europe and that, apart from the arbitration award, it had no assets. Gater contended that the court did not have jurisdiction to order security for costs against a judgment and award creditor in respect of a New York Convention award. Gater asserted that it would be a breach of the New York Convention if the English court allowed security for costs in favour of a party that challenged a Convention award.

The judge at first instance in the Commercial Court (Field, J.) granted security pursuant to Civil Procedure Rule 25.12 (1).<sup>29</sup> Civil Procedure Rule 25.12 (1) provides: "A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings." Field, J., was satisfied that Naftogaz was a defendant to Gater's claim to enforce the award; that he therefore had jurisdiction to award security for costs; and that since Naftogaz had shown a *prima facie* case of fraud, he had discretion to order security and he should do so.<sup>30</sup>

In the Court of Appeal, Toulson, L.J., granted leave to appeal, remarking that arguable questions of some importance were raised.<sup>31</sup> When hearing the appeal, the Court of Appeal considered both general provisions relating to security for costs in the Civil Procedure Rules and specific provisions relating to security for costs in arbitrations and in relation to enforcement proceedings.<sup>32</sup> Rix, L.J., stated:

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, ¶ 16.

<sup>30</sup> *Id.*, ¶ 26.

<sup>31</sup> *Id.*, ¶ 1.

<sup>32</sup> Gater, *supra* note 2.



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).<sup>33</sup>

Rix, L.J., noted that a court should be reluctant to order security for costs save in exceptional cases and also noted that only one other case (*Yukos Oil Company v. Dardana Ltd.*<sup>34</sup>) had been brought to his attention in which security for costs of enforcement had been sought and, in that case, security had not been ordered as a matter of discretion. He commented that the requirement in the Civil Procedure Rules that an order could only be granted if it could be shown that it was "just to make such an order"<sup>35</sup> was relevant both to the court's jurisdiction to grant such an order and to the question of the exercise of the court's discretion to grant such an order.<sup>36</sup>

The Court of Appeal held that Field, J., had wrongly ordered security (Buxton, L.J., dissented). Rix, L.J., emphasized the lack of certainty as to whether there was jurisdiction to order security for costs in relation to the statutory enforcement of an arbitration award.<sup>37</sup> He acknowledged that the *Dardana* case was the "sole authority" for saying that such a regime applied and that, in *Dardana*, the judge had been unwilling to order security "in part because enforcement is in principle different from an ordinary claim."<sup>38</sup> After commenting that the situation was unsatisfactory,

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<sup>33</sup> *Id.*, ¶ 29.

<sup>34</sup> *Yukos Oil Company v. Dardana Ltd.*, [2002] APP.L.R 04/18.

<sup>35</sup> Civil Procedure Rules, Part 25.13.

<sup>36</sup> Gater, *supra* note 2, at ¶ 38.

<sup>37</sup> *Id.*, ¶¶ 58-9.

<sup>38</sup> *Id.*, ¶ 72.

Rix, L.J., concluded that he "would be prepared to assume, but not decide" that there was technically jurisdiction to order security for costs against any award creditor who brings statutory enforcement proceedings.<sup>39</sup> However, he stated 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."<sup>40</sup>

Buxton and Moses, L.J.J., were more emphatic, stating that jurisdiction to make an order for security existed in relation to proceedings for statutory enforcement of awards. Buxton, L.J., dissented on the basis that he did not consider that Field, J., had erred in the exercise of his discretion.<sup>41</sup>

In conclusion, therefore, even if an applicant succeeds in persuading an English court that it does have jurisdiction to award security for costs to arbitral award debtors, there will be a very high threshold to cross in order to persuade an English court to exercise any discretion it may consider it has to grant security in such proceedings. This decision underscores the summary nature of enforcement proceedings: an arbitral award debtor who waits for enforcement then seeks security for its costs to resist payment is unlikely to be looked upon favorably by the court in the absence of exceptional circumstances.

### C. *Time Limits for Bringing Enforcement Actions*

The New York Convention is silent on the time limits for enforcing an arbitral award. Generally, such time limits will be determined by the law of the place where enforcement is sought.<sup>42</sup> In England, section 7 of the Limitation Act 1980 states: "An action to enforce an award, where the submission is not by an

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<sup>39</sup> *Id.*, ¶ 75.

<sup>40</sup> *Id.*

<sup>41</sup> Naftogaz ultimately failed in getting the order set to enforce set aside. Coleman J.'s order was upheld by Tomlinson, J., on Feb. 15, 2008. *Gater Assets Ltd v Nak Naftogaz Ukrainy* [2008] APP.L.R. 02/15 (judgment of Tomlinson, J., in the Commercial Court, refusing to set aside the Order made by Coleman, J.).

<sup>42</sup> NIGEL BLACKABY, CONSTANTINE PARTASIDES WITH ALAN REDFERN & MARTIN HUNTER, REDFERN & HUNTER ON INTERNATIONAL ARBITRATION § 11.34 (5th ed. 2009).

instrument under seal, shall not be brought after the expiration of six years from the date on which the cause of action accrued." Although, as with security for costs discussed above, limitation issues have arisen only rarely in enforcement actions before the English courts, a 2008 case which was decided by the Court of Appeal is interesting in light of its analysis of the arguments before it.<sup>43</sup>

National Ability SA ("National") was a Panamanian shipping company which had chartered a vessel to Tinna Oils & Chemicals Ltd ("Tinna"), an Indian company. The charterparty provided for the resolution of disputes by arbitration in London under English law. Disputes arose which were referred to arbitration, and the arbitrators awarded National approximately US\$820,000 in awards dating back to 1998 and 1999. In July 2008, National obtained an order enforcing the awards and converting the awards into judgments under section 26 of the Arbitration Act 1950.<sup>44</sup> Tinna was successful in getting the order set aside on the ground, *inter alia*, that the limitation period under section 7 of the Limitation Act 1980 had expired.<sup>45</sup>

On appeal to the Court of Appeal, National argued that the procedure under section 26 of the Arbitration Act was first an application to obtain a judgment and then, once that judgment had been obtained, it became an application to enforce that judgment. National asserted that "viewed in that way there were no proceedings to enforce an award under s.26, merely proceedings to obtain a judgment" and that, by its terms, section 7 of the Limitation Act did not apply to proceedings to enforce a

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<sup>43</sup> Nat'l Ability, *supra* note 3.

<sup>44</sup> The action was brought under section 26 of the Arbitration Act 1950 due to the age of the contract, but section 26 of the Arbitration Act 1950 and section 66 of the Arbitration Act 1996 are in all material respects identical.

<sup>45</sup> The order giving permission to enforce the award under section 26 of the Arbitration Act 1996 was made by at first instance by Aikens, J. The respondents successfully applied to Burton, J. to set the order aside, [2008] EWHC 2826 (Comm). Burton, J., first decided that the order was obtained by material non-disclosure and discharged the order on that ground and permission to appeal from that part of the decision was refused. Burton, J., also decided that the application failed because the limitation period under section 7 of the Limitation Act 1980 had expired and section 7 of the Limitation Act applied to the application. Permission was granted to appeal this part of the decision.

judgment.<sup>46</sup> National further asserted that section 24(1) of the Limitation Act 1980 was relevant to the enforcement of a judgment.<sup>47</sup> Section 24(1) states: "An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable."<sup>48</sup>

This argument was not accepted. Thomas, L.J., stated:

In the first place there is a clear distinction between an arbitration award and a judgment. An arbitration agreement is in essence enforceable because of the implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract. The provisions of s.26 of the 1950 Act and s.66 of the 1996 Act must be seen in that context. They are simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. This is quite different to the pronouncement of a judgment by a court where the State through its courts has adjudged money to be due.<sup>49</sup>

Lord Justice Thomas placed great importance on the issue of clarity in this regard, observing as follows:

It seems to me a matter of considerable importance to the conduct of international arbitration in London that the law should be simple and clear. Where it is set out in a statute, a court should be very reluctant to construe that statute in a manner that does not follow the clear language of the statute.<sup>50</sup>

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<sup>46</sup> Nat'l Ability, *supra* note 3, at ¶¶ 11-12.

<sup>47</sup> *Id.*, ¶ 12.

<sup>48</sup> Section 24 of the Limitation Act 1980 provides:

- (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
- (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

<sup>49</sup> Nat'l Ability, *supra* note 3, at ¶ 14.

<sup>50</sup> *Id.*

Accordingly, unless the contract containing the arbitration agreement was made under seal, a successful party has six years from the date an award is rendered to enforce the award before the English court.

#### IV. CONCLUSION

The English courts are supportive of arbitration and respectful of the autonomy of the arbitration process. Although the case of *Dallah v. Pakistan* in particular has caused some consternation in the international arbitration community on the basis that for some it shows excessive judicial interference in the arbitral process, the better view is that a national court has a duty to satisfy itself that the award before it for enforcement is sound, and that the courts in *Dallah* were simply discharging this duty. The obligation on the court to be satisfied in relation to the award which is being sought to be enforced is particularly important where it appears that the party against whom enforcement is sought might not be bound by the arbitration agreement.

Although less controversial, the Court of Appeal's treatment of the divergent issues in *Gater* and *National Ability* also show a clear understanding of both the arbitral process and the particular need to maintain clarity and simplicity during an enforcement process which is largely intended to be a summary procedure. In all the selected cases, the higher courts of England & Wales have clarified the state of the law. As Thomas, L.J., said in *National Ability SA v. Tinnco Oils & Chemicals Ltd*, "[it] seems to me a matter of considerable importance to the conduct of international arbitration in London that the law should be simple and clear."<sup>51</sup> The decisions of the English courts in the three selected cases followed this approach admirably.

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<sup>51</sup> *Nat'l Ability*, *supra* note 3, at ¶14.



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