JUDGMENT : Mr Justice Field: Commercial Court. 22nd March 2007

1. There is before the court an application for an order that Gater Assets Limited ("Gater") provide security for costs in respect of an application by Nak Naftogaz Ukrainiy ("Naftogaz"), a Ukrainian Corporation, to set aside an order made by Coleman J pursuant to s.101 (2) of the Arbitration Act ("the Act") permitting Gater to enforce an award dated the 31st May 2000 made at the International Commercial Arbitration Court in Moscow.

2. The agreement to arbitrate is contained in a transit agreement made between Gazprom, the Russian gas producer, and Naftogaz's legal predecessor. Under this agreement Gazprom had the right to send gas through the Brotherhood pipeline in the Ukraine in exchange for allowing Naftogaz's legal predecessor to take a specified quantity of the transiting gas.

3. It was alleged in the arbitration that: (1) Gazprom insured against gas being misappropriated as it passed through the Brotherhood pipeline in the Ukraine with its captive insurer, Sogaz; (2) between the 1st November 1998 and the 21st December 1999 Sogaz reinsured the risk with Monde Re, a company incorporated in Monaco; (3) in December 1998 the legal predecessor of Naftogaz took more gas than it was entitled to under the terms of the transit agreement with Gazprom and Sogaz paid US$88,256,704.49 under the original insurance to Gazprom and Monde Re in turn paid Sogaz the like sum under the terms of the reinsurance; (4) in these circumstances under Russian law the rights of Gazprom in respect of the misappropriated gas passed to Monde Re by way of subrogation; and (5) accordingly Naftogaz owed Monde Re US$88,256,704.49.

4. By the award dated the 31st May 2000 the tribunal awarded Monde Re US$88,256,704, 49, plus US$ 117,697 costs. The tribunal specifically considered whether the arbitration agreement was binding between Monde Re and Naftogaz and concluded that it was, and that the tribunal had competence to hear the dispute.

5. Russia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

6. Naftogaz sought to challenge the award in the Moscow City Court on a number of grounds, including: (i) that the award was in respect of a dispute not provided for by the arbitration agreement; (ii) the arbitration panel lacked jurisdiction; (iii) the composition of the tribunal was contrary to the arbitration agreement; and (iv) the award was contrary to public policy. The public policy allegations included the allegation that there was no proof of a reinsurance agreement or payment of a claim and that the liability corresponded to an alleged premium of $8.5billion. The Moscow City Court rejected these grounds. It held that Monde Re and Naftogaz were both subject to the arbitration contract as legal successors to the parties to the agreement and upheld the award. Naftogaz appealed to the Russian Supreme Court but without success.

7. In September 2000 Monde Re sought to enforce the award in New York against Naftogaz and the State of Ukraine on the basis that the Ukrainian state was an alter ego of Naftogaz. Monde Re was unsuccessful, however, principally on *forum non conveniens* grounds.

8. On the 3rd May 2006 the award was assigned by Monde Re, which was then in liquidation, to Gater.

9. On the 23rd May 2006 Colman J made the enforcement order to which I have already referred on Gater's ex parte application. He also made a freezing order against Naftogaz's assets in the jurisdiction up to the value of the award.

10. The grounds on which Naftogaz rely in seeking to set aside Mr. Justice Coleman's order are: (1) there was no arbitration agreement between the claimant and the defendant, (2) neither Sogaz nor Monde Re nor Gater as Monde Re's assignee is entitled to be subrogated to any right of Gazprom to claim arbitration under the transit agreement; (3) the award dealt with a difference not contemplated by and not falling within the scope of the submission to arbitration contained in the transit agreement; (4) the composition of the arbitral tribunal was not in accordance with the transit agreement; (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 the 23rd May 2006.

11. Naftogaz's application for security for costs is made under CPR 25.12 and 13. It is not disputed that Gater is domiciled outside a Brussels-Lugano Regime State and that, apart from the arbitration award, it has no assets. Nonetheless Mr. Edelman QC, for Gater, contends that the court has no jurisdiction to order security for costs against a judgement and award creditor in respect of a New York Convention award. Mr. Edelman's principal submission in support of this contention is that it would be a breach of the New York Convention if the United Kingdom allowed the award of security for costs in favour of an arbitration party who challenged a Convention award and therefore CPR 25.12 (1) should be construed so as to exclude an application for security for costs made by a party against whom a Convention award is made who is seeking to have an enforcement order made set aside.

12. At this stage I think it would be helpful to set out or summarise, so far as they are material, the relevant provisions in the New York Convention, the Arbitration Act 1996 and the CPR.

The New York Convention, 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.

The Arbitration Act 1996
Section 66
(1) An award by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect.
(2) Where leave is given judgement 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 …..or the provisions or 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.

Sections 67, 68 and 69
As is well known, these provisions allow an arbitration party to challenge a domestic award on grounds of a lack of substantial jurisdiction (s. 67) or serious irregularity (s. 68) or on a point of law by way of an appeal to the court (s. 69).

Section 70(1) and (6)
(1) The following provisions apply to an application or appeal under sections 67, 68 or 69. ……..
(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….

Section 81(1)
(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 …
(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

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

CPR 62.1(3)
Part 58 (Commercial Court) applies to arbitration claims in the Commercial Court…..except where this Part otherwise provides.

CPR 62.18 (1) and (3)
(1) An application for permission under (a) section 66 of the 1966 Act;
(b) section 101 of the 1996 Act; ……
to enforce an award in the same manner as a judgement or an order may be made without notice in an arbitration claim form.
(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 1 of this Part.

13. Responding to the opening submissions of Mr Higham QC for Naftogaz, Mr. Edelman QC for Gater submitted that security for costs can never be ordered in favour of a party resisting enforcement of a domestic award because such resistance must be made before an enforcement judgement or order is entered by a challenge under sections 67 or 68 or 69 of the Act, and in such challenge proceedings the party seeking to uphold the award will always be a defendant and not a claimant. This being so, if there were a power to award security for costs against a claimant who has entered judgement to enforce a New York Convention award, Article III of the Convention would be breached because there would be more onerous conditions on the enforcement of a Convention award than on the enforcement of domestic awards.

14. In reply, Mr. Higham submitted that Mr. Edelman had entirely left out of account section 66 of the Act, which, to the extent that it applied to the enforcement of domestic awards, was the domestic equivalent of section 101. Under CPR 62.18 (3) an application to enforce a New York Convention award proceeds as if it were an arbitration claim under Part 1 of Order 62. Under Order 62.1(3), CPR 58 applies to arbitration claims in the Commercial Court and CPR 58.3 provides that the CPR applies to claims in the commercial list. Thus, submitted, Mr. Higham, CPR 25.12 applies to claims to enforce a domestic award under section 66 just as it does to claims to enforce a New York Convention award under section 101. It follows, contended Mr. Higham, that to construe CPR 25.12 as conferring jurisdiction to order security for costs in favour of an arbitration party seeking to have an enforcement order set aside would not involve a breach of Article III of the Convention.

15. Having heard these submissions from Mr. Higham, Mr. Edelman returned to the fray and submitted that the practical reality was that in respect of a domestic arbitration an application to resist enforcement under section 66 would lead to the court inquiring whether or not applications had been made under the appropriate section in the group of sections 66 to 69. In practice, said Mr. Edelman, all grounds which could be relied on by way of resistance under s.66 would have to have been taken under sections 67 through to 69 and under those provisions there can be no question of an order of security for costs in favour of the party challenging the award and thereby seeking to resist its enforcement. On the contrary, under section 70 (6) the court has a power to order the party challenging the award under any of sections 67 to 69 to provide security for the other party's costs. And if

the court did allow a challenge under section 66 that had not been made under sections 67 to 69 it is inconceivable that security would be ordered against an award creditor because that would be to reverse section 70 (6).

16. In my judgement, Mr. Higham's submissions are correct. The CPR, including Rule 25.12 applies both to claims made under section 66 to enforce domestic awards and to claims made under s.101 to enforce a Convention award. Further, in my opinion, the word "conditions" in Article III of the New York Convention means rules or provisions and therefore the comparison to be made is between the rules and provisions imposed on the enforcement of, on the one hand, Convention awards, and on the other, domestic awards. As Mr Higham demonstrated, the provisions of the CPR apply equally to enforcement under s.101 as they do to enforcement under section 66. It follows that to construe CPR 25.12 to mean that an award holder with an enforcement order is a claimant against whom security for costs can be ordered in favour of a party seeking to set aside the enforcement order does not involve a breach of the New York Convention.

17. Mr. Edelman also submitted that a judgement and award creditor does not fit within the words *"A defendant to any claim may apply under this Section of this part for security of his costs in the proceedings"* in CPR 25. 12. "A defendant" is defined in CPR 2.3(1) as "*a person against whom a claim is made*", but the word "claim" is not defined. In Mr. Edelman's submission, the word *"claim"* must be referring to a claim for some form of original relief, and a person against whom a judgement or award is sought to be enforced cannot be said to be someone against whom a claim is being made. A claim is what led to the judgement or award. The application to enforce is merely giving effect to the decision on the claim and is not a claim in itself. This is exemplified by the fact that the remedy for failure to provide security for costs is to stay or dismiss a claim. Such relief is simply inapposite where a judgement is being enforced. The judgement or award remains extant and enforceable. CPR 25.12 is therefore simply inapplicable to any steps taken by the holder of a judgement or a Convention award to enforce the judgement or award. It is only the application to set aside that can be said to fall to be treated as a claim for some form of original relief and therefore to constitute the claim.

18. I cannot accept these submissions. 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.

19. Both sides referred to the decision of His Honour Judge Chambers QC in *Dardana Ltd. v. Yukos Oil* Co [2002] 2 Ll.R.261. There, an application for security for costs against a Convention award creditor who had obtained an enforcement order ex parte was resisted on the ground, *inter alia*, that the Arbitration Practice Direction then in force made no express provision for the grant of security in those circumstances, whereas there was such power where the court ordered that the application be dealt with on notice (paras. 17.1 and 31.4). Judge Chambers QC held that the Practice Direction must be read as treating the party who challenges the award in the same way regardless of the means by which the machinery was engaged. To the extent that this case turned on the wording of the old practice direction, it is of little assistance. But Judge Chambers QC went on to say, in paragraph 22 of the judgement:

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 section 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 the 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.

20. I respectfully agree with this reasoning. It accords with the view I have already expressed on the meaning and effect of CPR 25.12.

21. Accordingly, for the reasons I have given, I find that the court does have jurisdiction to make the order sought.

22. I turn to how I should exercise the discretion provided for in CPR 25.13 (1). Bearing in mind in particular that it is the policy of the Arbitration Act and the New York Convention to give effect to Convention awards by speedy and effective enforcement, I think it is appropriate that I make some brief observations on the merits. At the heart of Naftogaz's case is an allegation that the award was procured by fraud, in particular by putting forward an unsigned reinsurance contract in conventional terms whilst suppressing a document in the same terms which was signed only after the occurrence of the insured event and two addenda to the contract which completely changed its character. The first addendum provides that Monde Re shall pay a profit commission of 97 per cent. on income, being the gross premium less losses paid and outstanding net of actual recoveries from third parties, plus interest on those recoveries. The second addendum provides:

Notwithstanding anything contained herein to the contrary, the amount recoverable hereunder shall not exceed (1) the amounts actually recovered from third parties, plus the total of gross premium, plus accrued interest.

23. The combined effect of these addenda is that certainly as a matter of English law the transaction provided for in the contract and the addenda is not a contract of insurance at all. It follows, says Mr. Higham, that the contention

that Monde Re was subrogated to the rights of Gazprom was a baseless contention and the arbitral tribunal were fraudulently misled. Mr. Higham also places reliance on the parties' apparent agreement that the premium should be $8.5 billion, a truly astronomical sum. The real function of the so-called insurance, submits Mr. Higham, was to work an assignment of rights under the transit agreement to Monde Re, and this was done covertly because clause 10.7 of the transit agreement prohibits assignment of any of the rights arising thereunder.

24. 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.

25. Mr. Edelman submitted that even if the court had jurisdiction account should be taken of the submissions he made in respect of Article lll of the New York Convention, including the contention that in the real world security for costs would never be ordered against an award holder in the domestic sphere, and for these reasons as a matter of principle the court should not exercise the CPR 12. 3 discretion in favour of awarding security for costs for the benefit of a party seeking to have an order enforcing a Convention award set aside. Mr. Edelman also relied on the policy of the Arbitration Act and the New York Convention to give effect to Convention awards by speedy and effective enforcement and in addition asked me to take account of what he says is the fact that Naftogaz had misappropriated the gas and, to that extent, had profited to the extent of $88 million-odd. He further relied on the fact that Naftogaz had not set aside money for the award as ordered to do so by the tribunal, and drew my attention to Gater's payment into court of £40,000 to reinforce its cross-undertaking given in respect of the freezing order.

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 judgement 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.

27. I turn then to consider what sum should be ordered to be provided. Naftogaz has put before the court a professionally drawn bill of costs itemising its legal costs to date and the estimated future costs down to the conclusion of the set-aside hearing. The profit costs and disbursements to date total £238,000, and the estimated future profit costs and disbursements total £222,570. The total security sought is the staggering sum of £583,133. Mr. Edelman submits that Naftogaz should have no security for costs incurred to date without the benefit of any security. He relies on the delay between the making of Colman J's order (23 May 2006) and the application to set that order aside (4 December 2006) and the yet later application for security (25 January 2007). He cited *Dardana Ltd. v Yukos Oil* as an example of a case where security in respect of past costs was refused. Mr. Edelman also points out that the hourly rate charged for the partner in charge of the case and for Mr. Higham, who is "of counsel" within Naftogaz's solicitors, are significantly above the guideline rate of £359 applicable pre-2002, and £380 applicable in 2007. Mr. Edelman also says that the hours claimed are excessive and that the £101,750 claimed for Ukrainian lawyers' fees, with a further estimate of £51,000 to come, are almost entirely unparticularised.

28. In the ordinary way security will be ordered for past costs if the application for security is made promptly. Mr. Higham told me that his clients waited until the 4th December 2006 in order to conduct a thorough investigation. The time in which an application to set aside must be made after service is 21 days, a period of time which would not have allowed for a proper investigation and the preparation of Naftogaz's evidence if service had been accepted shortly after 23 May 2006.

29. In my judgement, it would not be right to exclude the whole of Naftogaz's past costs but, having regard to the periods of time which went by before service was accepted and the applications were made, I think it right that a proportion of the past costs should not be protected by an order. Further, and in any event, notwithstanding the complexity of the case and the sum involved, I am satisfied that the sum claimed is excessive to a significant degree. Naftogaz's solicitors are providing a Rolls Royce service for their client, but at a level of cost well above what I consider to be a reasonable and appropriate sum to order by way of security.

30. Having regard to all of the evidence and material before the court, I have concluded that the appropriate sum for which security must be provided is £250,000, and I order that Gater should provide security in that amount. I shall hear submissions as to the time in which Gater ought to comply with the order and the manner in which security is to be provided.

Mr John Higham QC (instructed by White & Case) for the Applicant/Defendant
Mr Colin Edelman QC and Mr Charles Dougherty (instructed by Clyde & Co) for the Respondent/Claimant