Neutral Citation Number: [2019] EWHC 2738 (Comm)

Case No: CL-2018-000672

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 17/10/2019

Before :

MR JUSTICE JACOBS

- -

Between :

LEIDOS INC	**Claimant**
- and -	
THE HELLENIC REPUBLIC	**Defendant**

- -
- -

Ben Williams (Solicitor Advocate, **King & Spalding**) for the **Claimant**
Craig Morrison (instructed by **Enyo Law LLP**) for the **Defendant**

Hearing dates: 11th October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE JACOBS

Mr Justice Jacobs:

Introduction

1. On 11 October 2019, I heard argument on issues arising out of an order of Teare J dated 30 October 2018. The principal issue concerned the allocation of the costs of proceedings relating to the enforcement of an arbitration award. But the argument encompassed an issue, on which there is no prior authority, as to the interpretation of the Arbitration Act 1996, s 103 (2) (f), and what is meant by an award which has been "suspended by a competent authority of the country in which … it was made".

2. By his order, Teare J granted the Claimants ("Leidos") permission to enforce an arbitration award ("the Award") dated 2 July 2013 which had been made pursuant to an ICC arbitration between Science Applications International Ltd. (the former name of Leidos) and The Hellenic Republic in the same manner as a judgment or of the Court to the same effect.

3. The application to Teare J, resulting in that order, was made pursuant to the Arbitration Act 1996, s 101. As is usually the case, and indeed expressly provided for in CPR 62.18 (1) which concerns the enforcement of awards, Teare J's order was made on the basis of a without notice application. As his order recites, it was made after reading three witness statements submitted by Leidos, namely those of Mr James Cockburn, Mr William O'Brien and Mr Gregory Pelecanos. The order also contained the required protection, as provided for in CPR 62.18 (9) and (10), for the party against whom the order is made: namely, (i) that it must not be enforced until after the end of the period permitted for an application to set the order aside or the determination of that application if made, and (ii) that the order should contain a statement of the party's right to set aside the order and these restrictions on enforcement.

4. At the time that the application to enforce was made, there was an ongoing challenge to the Award by The Hellenic Republic in the Greek courts. There has been a protracted history of challenge which I shall describe in more detail below. In addition, an attempt by Leidos to enforce the Award in Greece had, at the time of the application, recently been halted as a result of a decision of the Greek Supreme Court, so that enforcement in Greece was not possible. As explained in the witness statement of The Hellenic Republic's Greek lawyer, Dimitrios Katopodis – in evidence which was not controversial – Leidos had taken steps in June 2018 to enforce the Award in Greece. These steps had resulted in a petition from The Hellenic Republic to issue an interim order suspending the enforcement of the Award. On 7 September 2018, the Greek Supreme Court accepted this request and issued an interim order, suspending the enforcement of the Award until a further "discussion" in early October. The Greek Supreme Court then published its written decision No. 158/2018 on 18 October 2018. The court's decision was that:

> "The court SUSPENDS the enforcement of the arbitrary decision dated 2-7-2013 of the International Arbitrary Court of the International Trade Chamber in the case 16394/GZ/MHZ, until a decision of the Supreme Court is delivered on the petition for cassation dated 14-3-2018, exercised by the petitioning party against the decision 3567/2017 of the Appeal Court of Athens and on condition of the hearing of the petition for cassation on 3-12-2018."

5. The reasoning of the majority (there being a dissenting opinion by the Presiding judge) was as follows:

> "After the service to the petitioning party on 29-6-2018, a copy of the exemplification order of the above court decision, no further deeds of compulsory enforcement have been followed. From the enforcement of the attacked decision from the [arbitral] decision, it is speculated that a risk of damage will result against the petitioning party, the restitution of which will not be easy, since in case of affirmance of petition for cassation, the reinstatement of the things to the state before the enforcement and the recovery of such a big amount by the petitioning party (it already runs into 50,000,000 euros approximately) will not be easy, since the respondent is a foreign company, has not assets in Greece, whilst the petitioning party offered to pay the amount, asking the respondent to deposit a letter of guarantee, as per provisions of article 4 par.1 of law 3068/2002, and the latter refused by its letter dated 17-9-2018 to deposit a letter of guarantee, pleading unfoundedly an unconstitutionality of the above provision. Therefore, the petition under judgment should become accepted as substantially grounded, as especially specified in the enacting part of the decision."

6. The effect of this decision was not in dispute. Mr Pelecanos, the Greek lawyer acting for the Claimants, had explained the history of the proceedings in his witness statement served in support of the enforcement application. In a section headed "Temporary Restraining Order and Suspension/ Stay of Enforcement Injunction – Opposition to Payment Order", he said that "enforcement of the Award in Greece is not possible until the Supreme Court renders its decision" on the challenge to the Award. Similarly, Mr Katopodis for The Hellenic Republic said that:

> "the enforcement of the arbitration award has been suspended until the judgment on the appeal application is issued. This means that, as far as the Greek legal order is concerned, Leidos cannot impose compulsory measures against the private property of the State to satisfy its claim which is accepted by the arbitration award, until a judgment has been given by the Supreme Court on the application for appeal".

7. It was therefore uncontroversial that enforcement of the Award had been suspended pending the outcome of the challenge proceedings.

8. Teare J's order was in due course served upon The Hellenic Republic on 22 March 2019. At the time of service, the challenge by The Hellenic Republic to the Award in the Greek courts had not yet been resolved. After service, but prior to making an application to set aside Teare J's order, The Hellenic Republic proposed to stay that order pending the final resolution of the challenge by the Greek Supreme Court. This offer was refused by Leidos, who would not agree a stay unless The Hellenic Republic paid the full sum due under the Award as security.

9. Accordingly, on 13 June 2019, The Hellenic Republic applied to set aside the Teare J order. The application was supported by a witness statement of Mr Edward Allen. The Hellenic Republic's application was based primarily on the Arbitration Act s.103 (2) (f). Section 103 provides:

> "103.- Refusal of recognition or enforcement.

> (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 involved proves –
>
> …
>
> (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.
>
> …
>
> (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."

Mr Allen's witness statement also made it clear that The Hellenic Republic's case was also based on an allegation of non-disclosure at the time of the without notice application. The essential ground of non-disclosure relied upon concerned the alleged failure of Leidos to draw Teare J's attention to the provisions of s 103 (2) (f), and The Hellenic Republic's potential case that enforcement should be refused on the basis of that section.

10. Within a week of the application to set aside being made, the landscape was transformed. On 20 June 2019, the Greek Supreme Court handed down judgment dismissing The Hellenic Republic's final appeal by way of challenge to the Award. This had the effect also of lifting the Greek Supreme Court's suspension of enforcement. The Hellenic Republic then took steps to pay the amounts due under the Award, and a payment of € 53,158,997.37 was in due course made on 10 September 2019. There is a dispute as to whether the Award has in fact been paid in full, or whether there remain certain outstanding amounts. In particular, there is a dispute concerning a deduction by The Hellenic Republic of around € 1 million in respect of stamp duty, and a smaller dispute as to interest. It was ultimately common ground, however, that these disputes did not fall to be resolved within the context of the present hearing. The parties' respective arguments at the hearing did not, in any significant way, rely upon the existence of these remaining disputes.

11. The effect of the dismissal by the Greek Supreme Court of The Hellenic Republic's challenge, and the lifting of the suspension on enforcement, was that there was no longer any available ground on which it could realistically be argued by The Hellenic Republic that the Award should not be enforced pursuant to the provisions of s. 103. That section provides for only a limited number of grounds of challenge to the enforcement of an award, and (leaving aside procedural questions relating to non-disclosure) the only ground for challenge identified in the application to set aside (s. 103 (2) (f)) had fallen away.

12. Both parties therefore gave consideration as to how matters should proceed in relation to The Hellenic Republic's application to set aside Teare J's order, which had not at that stage been determined. A consent order ("the Consent Order") was agreed between the parties, and sealed by the Court on 16 August 2019. This Consent Order contained a number of recitals, followed by a timetable for the service of evidence, the preparation of a hearing bundle, and the exchange of skeleton arguments. The recitals provided as follows:

> "[3] AND UPON the agreement, in principle, of the Defendant to withdraw the Set Aside Application subject to recovery of its costs of the Set Aside Application
>
> [4] AND UPON the listing of a half-day hearing 11 October 2019 to determine the issue of the award of costs relating to the Enforcement Order and the Set Aside Application "

13. The fourth recital makes clear that half-day hearing on 11 October was "to determine the issue of the award of costs relating to the Enforcement Order and the Set Aside Application". Similarly, in the second witness statement of Mr Allen (for The Hellenic Republic) served on 27 September 2019, Mr Allen stated that as a result of the Greek Supreme Court's decision "the only live issue in these proceedings should be the question of costs". This was clearly how Leidos understood the nature of the hearing on 11 October 2019. Paragraph 1 of the skeleton argument of Mr Williams said that "as the grounds of the Set Aside Application have entirely fallen away, the hearing remains listed solely for the purpose of disposing of the Parties respective arguments on costs". This submission thus reflected the fourth recital of the Consent Order.

14. However, in his skeleton argument served on the day before the hearing, and as developed at the outset of his oral submissions, Mr Morrison for The Hellenic Republic sought to advance arguments which were not limited to the determination of the issue of costs. Instead, he sought to revive the application for the order of Teare J to be set aside, submitting in his skeleton argument that the order "falls to be set aside for material non-disclosure". This approach was objected to by Mr Williams, whose submission was that the present hearing was (as reflected in the Consent Order) not concerned with an application to set aside, but solely with the issue of costs. Whilst he accepted that arguments based on alleged non-disclosure were permissible in the context of the allocation or assessment of costs, he submitted that it was not permissible for The Hellenic Republic now to seek to set aside the Teare J order itself. This debate meant that the first issue which I need to resolve is the nature of the hearing which took place on 11 October and the permissible scope for argument.

The nature and scope of the 11 October hearing

15. I consider that the effect of the Consent Order is that the 11 October hearing is solely to determine the issue of the award of costs relating to the prior applications. The fourth recital cannot in my view be read in any other way. That recital is the consequence of the previous recital, in which the Respondent agreed "in principle" to withdraw the Set Aside Application. I do not accept that the words "in principle" mean that the Respondent can unilaterally change its mind as to the withdrawal of the application, and change the nature of the 11 October hearing from an argument about costs into an argument about whether or not the Teare J order should be set aside. In my view,

looking at the context of the third recital as a whole, when read together with the fourth recital, the words of the third recital clearly mean that The Hellenic Republic would not be pursuing its set aside application, but that all arguments about costs remained open to be determined hereafter. Costs were therefore the only outstanding issue which remained for determination at the hearing listed.

16. In any event, I also consider that it would not be appropriate, as a matter of case management, for the scope of the hearing to be widened at a late stage. Any reasonable reader of the Consent Order would have formed the view that the only matter to be determined at the 11 October hearing was the issue of costs. That was clearly how the legal representatives of Leidos understood it. That view would have been reinforced by Mr Allen's statement that the only live issue "should be" the issue of costs. I consider that if The Hellenic Republic wished to change its position, so that it wished to argue that its "in principle" agreement to withdraw the Set Aside Application could be revoked, then sufficient warning should have been given to Leidos well in advance of the hearing; not least because this might have affected Leidos's approach to the hearing and the evidence that it wished to serve. I do not consider that, against the background of the Consent Order, it was appropriate for The Hellenic Republic to change its position when skeletons were exchanged at 1 pm on the day before the hearing.

17. This conclusion means that whilst I will consider the argument that there was non-disclosure in the context of my decision as to how costs are to be allocated, I do not need to decide whether or not I would, as a matter of discretion, have set aside Teare J's order for non-disclosure. For reasons set out below, I am satisfied that there was indeed material non-disclosure by Leidos of the arguable legal implications of the facts which were properly disclosed to Teare J. It does not automatically follow, however, that the order of Teare J would have been set aside because of such non-disclosure. If the issue had arisen, I would have needed to consider the various matters conveniently summarised in paragraph [102] of the decision of Christopher Clarke J. in *Re OJSC Ank Yugraneft v Sibir Energy PLC* [2008] EWHC 2614 (Ch), ultimately forming a view as to whether to continue the order taking into account all the relevant circumstances. Suffice it to say that I would have exercised my discretion to continue the order of Teare J, principally because:

    a) There is no basis for supposing that there was a deliberate non-disclosure, and Mr Morrison in his submissions for The Hellenic Republic did not suggest otherwise.

    b) The facts relating to the proceedings in Greece, including the order suspending enforcement in Greece, were clearly set out in the witness statement of Mr Pelecanos. The relevant failure concerned the fact that the court's attention was not drawn to the potentially significant legal consequence of those facts.

    c) The effect of the Greek Supreme Court decision was to uphold the Award and the right of Leidos to enforce the Award. Accordingly, any possible substantive ground of challenge to the Award under s.103 completely fell away on 20 June 2019. My discretion as to whether to continue the order of Teare J would thus fall to be exercised at a time when Leidos had, as a matter of substance, established its right to the enforcement of the Award as a matter of principle.

d) I would regard it as inappropriate to discharge the order of Teare J on the basis of the innocent non-disclosure in October 2018 of a possible argument for resisting enforcement which, by the time of the determination of the application to set aside, had completely fallen away; and to do so in circumstances where the facts (albeit not the legal consequences) relating to that possible ground had been fairly disclosed.

18. It does not follow, however, that there should be no costs consequences in relation to the non-disclosure, for reasons explained below.

Costs – the parties' arguments

19. Each side seeks its full costs of these proceedings from the other party. The costs claimed by Leidos amount to £ 215,647.78, which it has split between £ 151,496.54 for its application to enforce and £ 64,151.24 in relation to The Hellenic Republic's application to set aside. Although I have not heard detailed submissions on these figures, I had sympathy with Mr Morrison's submission that these figures were unreasonable and disproportionate; particularly bearing in mind that there had been no contested hearing in this matter, save for the present costs hearing (the costs of which are not included in the above figures), and that the application to set aside was resolved by the Consent Order prior to the time when Leidos had served any evidence in relation to it. By contrast, the costs claimed by The Hellenic Republic were £ 53,576.03, which is close to only a quarter of Leidos' figure.

20. The parties' arguments were in summary as follows.

21. Leidos contends that it is the successful party on the application to enforce as well as on the set-aside application which was withdrawn after the decision of the Greek Supreme Court. It contends that it was entitled to make the application to enforce, even if s. 103 (2) (f) were potentially applicable. This is because the Court has a discretion to enforce, even if s. 103 (2) (f) were potentially applicable. However, Leidos disputed the applicability of s.103 (2) (f). This was because there had been no suspension of the Award in Greece, but only a suspension of the enforcement of the Award. The only relevant section was, therefore, s. 103 (5), to which reference was made in the witness statements served on the application. Leidos also disputed that there had been any non-disclosure. Apart from contending that there could be no non-disclosure relating to a section that was inapplicable, Leidos gave a number of reasons why any non-disclosure was immaterial or at any event forgivable. Leidos also contended that it had not acted unreasonably in refusing the offer of The Hellenic Republic to stay enforcement of the Teare J order: it was reasonable for Leidos to ask for security as a condition of a stay.

22. The Hellenic Republic argued that the enforcement application was misconceived when made and that the set aside application was justified when it was made. Section 103 (2) (f) was clearly applicable, because there had been a suspension of the Award by the court in the seat of the arbitration. The subsequent decision of the Greek Supreme Court, dismissing the challenge to the Award, did not retrospectively justify Leidos's conduct in making the enforcement application, or render unjustified The Hellenic Republic's decision to make the set aside application. Still less did it make Leidos the successful party in any relevant sense. No application should have been made whilst the suspension was in place. An application to enforce made subsequently would have been unnecessary, since The Hellenic Republic took prompt steps to pay the Award and did

so. In any event, some costs were incurred after Leidos had unreasonably refused its offer to stay enforcement of the Teare J order pending the determination by the Greek Supreme Court. The Hellenic Republic also relied upon the non-disclosure as a relevant factor in relation to the award of costs, even if the Teare J order was not set aside.

Discussion

23. The general principles concerning the Court's discretion as to costs are set out in CPR 44.2. The court has a discretion as to whether costs are payable by one party to another. The general rule, as set out in CPR 44.2 (2) (a), is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court can make a different order. CPR 44.2 (4) requires the court to have regard to all the circumstances, including the conduct of all the parties. Under CPR 44.2 (5), the conduct of the parties includes conduct before, as well as during, the proceedings, as well as whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue.

24. In the light of this provision, I must therefore begin by addressing the question of whether Leidos is the successful party in this case. I consider that it is. Leidos began these proceedings at a time when there had been an Award in its favour which had been issued many years before, and where there was a failure to honour that Award. Its claim arose out of a contract for the development of a public security system for use during the Athens Olympic and Paralympic games as long ago as 2004. The relevant arbitration proceedings were commenced in 2009, and an award was issued in Leidos' favour on 2 July 2013. Leidos was awarded just under € 40 million, inclusive of arbitration costs, together with interest. The Award was then subject to annulment proceedings in Greece. The Hellenic Republic was initially successful before the Athens Court of Appeals in June 2014, but this was overturned by the Greek Supreme Court in September 2016 and the Award was reinstated. The matter was then returned to the Athens Court of Appeals for reconsideration. On 13 July 2017, the Athens Court of Appeal, by a majority, rejected the petition to annul the Award, but The Hellenic Republic then filed an appeal against this decision with the Greek Supreme Court. This appeal was still live at the time when Leidos commenced the present enforcement proceedings in England, resulting in the order of Teare J. However, as set out above, the appeal was subsequently dismissed, with the consequence that there was no longer any substantive ground on which The Hellenic Republic could resist enforcement. The Award, or at least the substantial part of the Award was then paid, albeit not immediately after the decision of the Supreme Court but within a few months, and albeit that a dispute remains as to whether it has been paid in full. Also as previously discussed, The Hellenic Republic then agreed, in principle, in the Consent Order to withdraw their application to set aside, no doubt in recognition of the fact that there was no longer a substantive ground on which to resist enforcement. It is not possible or necessary for me to examine why the substantial amount of the Award was thereafter paid. But it is not unrealistic to consider (as Mr Williams submitted) that a factor which may have resulted in the payment in September, without much further delay, was the fact that Teare J's enforcement order had been made in England and an application to set it aside was, to say the least, problematic in view of the 20 June decision, and the subsequent Consent Order.

25. Accordingly, the position in summary is that: Leidos started proceedings for enforcement and obtained an order (on a without notice basis) for enforcement; the order has not been set aside; the substantive grounds for opposing the order fell away;

and the Award has now, at least in substantial part, been paid. I think that in these circumstances it is correct to regard Leidos as the successful party. Accordingly, the general rule is that The Hellenic Republic should pay Leidos' costs. The question, therefore, is whether or not the court should make some different order bearing in mind all the circumstances of the case.

26. The Hellenic Republic argues that the court should focus, and focus exclusively, on the position at the time when Leidos made its application (in October 2018) to Teare J, and when The Hellenic Republic made its application (in early June 2019) to set aside. The position at those points in time was that the Greek Supreme Court had not finally determined the outcome of the appeal on The Hellenic Republic's challenge to the Award. Instead, it had made a decision (prior to Teare J's order) to suspend enforcement of the Award, pending the Supreme Court's final decision. That suspension of enforcement was granted on an interim basis on 7 September 2018 and confirmed by the judgment given on 1 October 2018 and in writing on 18 October 2018. The decision to suspend enforcement was based on the risk of harm to The Hellenic Republic if enforcement took place while a challenge was outstanding, since any such harm could not easily be reversed. The Hellenic Republic therefore submitted that, at the time that it was made, Leidos' enforcement application was misconceived; because enforcement at that time was inappropriate because of the Arbitration Act 1996, s 103 (2) (f). Similarly, the set aside application was entirely justified, at the time, because of that section. The fact that the Greek Supreme Court subsequently dismissed the appeal, thereby lifting the suspension of enforcement, did not retrospectively justify Leidos' conduct in seeking enforcement, nor render unjustified The Hellenic Republic's decision to apply to set aside.

27. I do not accept that, given the terms of CPR 44.2, it is appropriate to approach the question of costs, including the question of whether Leidos is the successful party, with the narrow focus upon which this argument depends. Nor do I think that the decision of the Greek Supreme Court, dismissing the final appeal and thereby upholding the Award, should be disregarded when considering the question of costs in the context of the present case. The circumstances of the present case, to my mind, must include the fact that Leidos obtained an Award more than 6 years ago, in July 2013. Leidos was then faced with a lengthy and protracted battle with The Hellenic Republic in relation to that Award. The Greek Supreme Court, upholding the decision of the Athens Court of Appeal, has determined that The Hellenic Republic's challenges to the Award were to be rejected. This was, therefore, an award which should have been paid many years ago. Accordingly, this is a case where the conduct of the parties, relevant to the question of costs, includes a sustained but unjustified challenge by The Hellenic Republic to a valid and binding Award.

28. The appropriateness of taking into account the subsequent decision of the Greek Supreme Court, namely to reject the challenge, is consistent with the approach which in my view the court would have taken to the set aside application, had this been pursued notwithstanding the decision of the Supreme Court. It would not, in my view, have been a tenable argument for The Hellenic Republic to invite the court to set aside Teare J's order on the basis of s.103 (2) (f), once the challenge in Greece had been finally disposed of and rejected. The court would exercise its discretion at the time when the set aside application was heard, and would clearly be entitled to reject such an application if, at the time of the hearing, s.103 (2) (f) no longer applied –

notwithstanding that it might have applied at an earlier time. Similarly if, at the time of the hearing to set aside, an award had been set aside by the courts in the seat, that would lead the court to apply s.103 (2) (f), and it would do so even if, at the time of the original application for enforcement, the award had not yet been set aside. In other words, the court's decision on a set aside application cannot focus exclusively on the position at an earlier point in time, but must take into account the fate of an award at the time that the application is determined.

29. In circumstances where the substantive grounds of opposition to enforcement became unsustainable in view of the decision of the Greek Supreme Court, with the consequence that The Hellenic Republic agreed in principle to withdraw its set aside application, I am doubtful as to the utility or relevance (in the context of an argument about costs) of examining what the position would have been if these events had not occurred. If, however, the set aside application had been heard at a time when the Greek Supreme Court had not yet determined and dismissed the challenge, then I consider it highly probable that the application to set aside would have succeeded; with the consequence that Leidos would have been unable to recover the costs of its application to enforce, and The Hellenic Republic would have recovered its costs of the application to set aside.

30. The reason that the application would likely have succeeded is, as Mr Morrison submitted, the effect of s. 103 (2) (f), coupled with the narrow discretion to permit enforcement when one of the defences to enforcement in s.103 (2) is made out: see *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755 para [89] (CA). I was not referred to any authority, either in England or elsewhere, on the meaning of the words "… the award … has been … suspended by a competent authority of the country in which … it was made", which appear in identical form in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. I was told that the researches of counsel had not identified any authority which addressed the concept of the "suspension" of the Award. I was also told that there appeared to be no case where there had been a stay of enforcement ordered by a court in the seat of the arbitration, but there had nevertheless been an application to enforce in a different jurisdiction.

31. I had little doubt, however, that the effect of the September and October 2018 orders of the Supreme Court were to "suspend" the Award. Those orders prevented any enforcement of the Award, pending the determination of the substantive challenge before the Supreme Court. If this did not qualify as a "suspension" of the Award, then it is difficult to see what would suffice. I do not accept Leidos' argument that the "suspension" has to be permanent in nature. In my view, a suspension denotes something which is temporary. Nor do I accept that it is necessary for the "suspension" to be expressed to have extra-territorial effect: it is sufficient if, as here, the Greek Supreme Court (obviously a "competent authority") makes it clear that there can be no enforcement of the Award pending its determination of the substantive application. Nor do I consider that a suspension of the enforcement of the Award is to be distinguished from a suspension of the award. I agree with Mr Morrison that the question of whether there has been a suspension of the award must be considered as a matter of substance, and that this occurs where the courts of the seat have stayed enforcement pending determination of a challenge to the Award. I also agree that, in the context of s 103 – which is concerned with enforcement and which identifies the circumstances in which

enforcement should not or may be refused – it makes no sense to distinguish between suspension of the Award and suspension of the enforcement of an award.

32. Subsequent to drafting the above conclusions, I have considered a number of commentaries, referred to below, which discuss the relevant part of the New York Convention and which confirm the view I have expressed. These indicate that no clear definition of "suspended" emerges from a consideration of the New York Convention's drafting history. However, these commentaries also indicate that the term "suspended" does extend to the suspension of the enforcement of an award by a judicial decision, albeit that it arguably does not apply where an award is automatically suspended as a result of the mere bringing of an action to set it aside: see e.g. Gaillard and Bermann (eds) *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Brill 2017); Christoph Liebscher, "Article V (1)(e)" in Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Beck/Hart 2012); and Nadia Darwazeh, "Article V(1)(e)" in H Kronke, P Nacimiento, D Otto and NC Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010).

33. These commentaries also refer to a number of decisions which support the proposition that "suspended" encompasses the situation where enforcement of an award is suspended. For example, Gaillard and Bermann (eds) *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (Brill 2017) refer to:

    a) A decision of the Swiss Federal Tribunal, which held that the term "suspended" covers a situation in which a court "noticing that a fault is likely to impact the award, prevents its enforcement until such time as the issue is settled substantively by the court examining the action to set aside the award";

    b) A decision of the Swedish Supreme Court holding that the term "suspended" refers to a "situation where, after specific consideration of the matter, the foreign authority orders the setting aside of a binding and enforceable award or the suspension of its enforcement."

34. However, even though, in the hypothetical scenario that I am considering, it is highly probable that the application to set aside would have succeeded, this does not mean that the application to enforce was "plainly misconceived". The scheme of the New York Convention, reflected in s 103, is that neither challenges to an award in the courts of the seat, nor the determination of such challenges, automatically prevent enforcement elsewhere. Thus, if there is an unresolved application to set aside an award to the courts of the seat, s. 103 (5) provides that another court "may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award". If that application has resulted in the setting aside of an award, or its suspension, then s.103 (2) (f) applies, with the consequence that recognition of the Award "may be refused". The court therefore, even in the latter case, has a discretion, albeit one that will be a "narrow" one. It was therefore open to Leidos to seek enforcement notwithstanding the suspension, and to identify the reasons why the court should enforce notwithstanding s.103 (2) (f). Any question as to whether or not such reasons might have existed in the present case became academic once the suspension itself fell away.

35. Although I have addressed in some detail the question of what conclusion the court would probably have reached in different circumstances, this does not alter my view that Leidos is the successful party in the circumstances which have actually transpired. Nor do I consider that a significant factor, in the exercise of my discretion under CPR 44.2, is to identify how costs would or might have been allocated in circumstances which did not actually transpire. Accordingly, my starting point remains, as set out in CPR 44.2 (a), that The Hellenic Republic should pay Leidos' costs of an application which ultimately was successful.

36. The question remains, however, as to whether there are other factors which affect this conclusion. In my judgment, there are two such factors. I start with the first, which in my view is the more significant and concerns non-disclosure on the without notice application.

37. There was no dispute, and can be no doubt, that the without notice application to Teare J required Leidos to give full and frank disclosure. Mr Morrison cited authority to the effect that the golden rule is that an applicant for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion: *Knauf UK GmbH v British Gypsum Ltd.* [2001] EWCA Civ 1570 at [65]. This includes identifying the crucial points for and against the application, and this extends to significant factual, legal and procedural aspects of the case: see the authorities cited in paragraphs [68] – [72] of *OJSC v Sibir Energy* (above).

38. It seems to me that there was a very clear failure to do so in the present case. None of the witness statements provided to Teare J in support of the without notice application referred to the potential defence to enforcement which was available under s.103 (2) (f). The witness statements of Mr Cockburn and Mr O'Brien both contained sections which addressed full and frank disclosure, and possible arguments that might be advanced by The Hellenic Republic in response to the application. But there was no reference to s.103 (2) (f), even though the facts set out in Mr Pelecanos' witness statement clearly gave rise to the potential applicability of that section. There was reference to s 103 (5), but this was not the relevant or at least the most important section – given that the application for suspension of the Award had in fact been determined by the Greek Supreme Court. I have no doubt that reference should have been made to s.103 (2) (f), since it should have been appreciated that this was the crucial section. This could have been done in conjunction with an explanation as to why, on Leidos' case, that section was arguably inapplicable or why the court's discretion to enforce should be exercised in Leidos favour notwithstanding the narrow scope of the discretion. In my view, the omission to do so was material. It is not appropriate to speculate as to whether Teare J would have granted the order for enforcement if his attention had been drawn to the section. It is possible that he might have done, if a coherent case had been advanced as to why the section did not apply or why the court should enforce notwithstanding the section. It is possible that he would have required Leidos to attend to address him orally, as happens from time to time if the court has concerns about the case advanced on a without notice application. Whatever the outcome might have been, the argument should have been fairly disclosed so that Teare J could evaluate it.

39. A number of responses were given in relation to the issue of full and frank disclosure but I did not consider that any of them excused the failure to refer to the crucial section.

a) It is true that Mr Pelecanos did set out the facts concerning the suspension of enforcement. But I do not accept that this was sufficient to discharge the duty of full and frank disclosure. The legal significance of those facts was not properly referred to, notwithstanding sections in the other witness statements which identified points which The Hellenic Republic might take.

b) It is true that Leidos did refer to s. 103 (5) of the 1996 Act, and that this contains a cross-reference to s.103 (2) (f). But this was not sufficient: the cross-reference is simply for the purpose of identifying the "competent authority". There was nothing which told the court that there was any potentially applicable section other than s. 103 (5). Indeed, Mr Cockburn's witness statement referred to the possibility of an adjournment or stay under section 103 (5), thereby implying that this was the only applicable section and that there was only a pending challenge to the Award in Greece, rather than an already successful application to suspend enforcement.

c) Leidos said that it anticipated that there would be a hearing for the determination of its enforcement application, and that it would prepare a skeleton argument in advance of such hearing with additional details of the procedural status in Greece, as well as the legal bases of The Hellenic Republic's potential challenges to the grant of any enforcement order. It is not clear to me whether Leidos in fact applied for any hearing, and the usual practice is for without notice applications under CPR 62.18 to be determined on paper. However, the witness statements of Mr Cockburn and Mr O'Brien contained sections dealing with full and frank disclosure, and I do not consider that there could be any justification for including some points within those statements, and reserving others for a skeleton argument. In any event, if the determination of the application by Teare J on the papers took King & Spalding by surprise, and there was a concern that relevant materials had not yet been given to the court in relation to the requirement for full and frank disclosure, the court should have been promptly informed.

d) Leidos argued that the alleged material non-disclosure was procedurally barred because The Hellenic Republic had not issued an application to that effect. There was no substance to this point. Mr Allen's first witness statement took the point on full and frank disclosure fairly and squarely. Furthermore, I am dealing with the issue of how to allocate costs, and there can be no objection to reference being made to this point in that context without a separate application.

40. I agree with The Hellenic Republic that this omission was highly culpable. I also consider that this is a matter which is sufficiently serious that it justifies a departure from the general approach that a successful party is entitled to his costs. The importance of proper preparation of without notice applications, and full and frank disclosure in that regard, has been made clear in many authorities, including those to which I have referred. In the present case, an important legal argument, material to the resolution of the application, was not drawn to the attention of the court, although a number of other arguments were identified. I consider that it would be unjust to require The Hellenic

Republic to pay the significant costs claimed by Leidos in circumstances where there was a culpable failure to make disclosure of a highly material matter at the outset of the enforcement proceedings. I also bear in mind that the costs claimed are very high, and include the substantial costs of making the enforcement application in circumstances where that application was not properly prepared in view of the culpable non-disclosure. This does not, however, mean that it would be appropriate to require Leidos to pay any costs to The Hellenic Republic, not least because I do not consider that it would be just to order a successful party to pay the costs of an unsuccessful party.

41. The second matter which is relevant to the exercise of my discretion concerns the position taken by the parties after the Teare J order had been served. Prior to making its application to set aside, The Hellenic Republic sought a compromise by offering to stay the order pending the Greek Supreme Court's final decision. Leidos refused this offer, saying that it would not agree to a stay unless The Hellenic Republic paid the full sum due under the Award as security. The Hellenic Republic was therefore forced to issue its application to set aside. I consider that The Hellenic Republic's proposal should reasonably have been accepted by Leidos, and that this would have resulted in the saving of some costs on both sides, in particular the costs incurred by The Hellenic Republic in issuing their set aside application. The reason why the proposal should reasonably have been accepted is because the demand for security was inappropriate in the light of the existence of a defence to enforcement under s. 103 (2) (f). It was common ground between the parties that although the court would have a discretion to order security if only s.103 (5) was engaged, there was no such discretion in the context of the exercise of any discretion under s.103 (2) (f). Again, I do not consider that this particular point would render it just to order the successful party to make a payment to the unsuccessful party in this litigation. But it is an additional factor which in my view renders it just that, looking at the matter overall, there should be no payment to Leidos in respect of its costs.

42. Accordingly, I consider that the appropriate resolution of the issues as to costs in this case is that there should be no order as to costs: i.e. that each side should bear its own costs. I provisionally consider that this should also apply to the costs of the hearing on 11 October 2019 itself, as well as the prior costs. This is because each party's application has, in substance, failed. I would express the hope that neither party would wish to have further argument upon this topic, and that an order consequential upon this judgment could be agreed. However, if necessary I will of course hear further argument as to the consequences of this judgment.