



Neutral Citation Number: [2022] EWHC 1744 (Ch)

Case No: BL-2022-000160

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**  
**IN THE MATTER OF THE ARBITRATION ACT 1996**

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

Date: 07/07/2022

**Before :**

**MR JUSTICE MILES**

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**Between :**

**Consilient Health Ltd**

**Claimant**

**- and -**

**Gedeon Richter PLC**

**Defendant**

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**Stephen Houseman QC and Angeline Welsh (instructed by Allen & Overy LLP) for the**  
**Claimant**  
**Lord Goldsmith QC and Andrew Scott QC (instructed by Debevoise & Plimpton LLP) for**  
**the Defendant**

Hearing dates: 14–15 June 2022  
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**APPROVED JUDGMENT**

**This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 7 July 2022 at 10:30am.**

**Mr Justice Miles :**

**Introduction**

1. By an arbitration claim form dated 12 January 2022 the claimant seeks recognition and enforcement of an arbitral award issued on 11 October 2021.
2. The award was made in the Netherlands by an arbitral tribunal in a Dutch-seated ICC arbitration pursuant to an arbitration agreement contained in the parties' written Collaboration Agreement concluded on 19 July 2012 and amended on 19 December 2014 ("the CA").
3. The award uses certain defined capitalised terms which I shall adopt unless otherwise indicated.
4. The award is a New York Convention ("NYC") award.
5. The application for enforcement is brought under section 101 of the Arbitration Act 1996. The claim form also refers to section 66 but the claimant confirmed that the application was made under section 101.
6. The dispositive part of the award is contained in Section X. It required the defendant, in the event that the claimant exercised an option to purchase, to transfer to the claimant certain trade marks, regulatory authorisations and certain information and documents relating to specified pharmaceutical products marketed in the UK and Ireland.
7. Specifically, ¶X.3.a defined the defendant's transfer obligations in the event, as happened, that the claimant elected "to purchase full ownership of the Trade Marks of the Collaboration Products and the Marketing Authorisations of the Richter Products" in accordance with ¶X.2. The Trade Marks ("the TMs") and associated Marketing Authorisations ("the MAs") relate to branded generic oral contraceptives distributed in the UK and Ireland ("the Collaboration Products"). Most are manufactured by the defendant and delivered to the claimant ("Richter Products"); a limited number are made by other manufacturers and delivered to the claimant ("Non-Richter Products").
8. Award ¶X.3 required the defendant to transfer and provide to the claimant (a) the TMs, (b) the MAs, (c) the full Registration Dossiers, and (d) certain information or documents to be transferred by means of the Registration Dossiers or otherwise. For convenience the term "the Registration Dossiers" is used below to refer to both (c) and (d). There was a 45 day deadline from the date of exercise of the option for these steps to take place.
9. There were further orders contained in award ¶X.5-6 concerning other elements of the parties' relationships.
10. The 45 day deadline for the asset transfer and business acquisition in award ¶X.3.a ended on Sunday 5 December 2021. The claimant provided transfer documents and tendered payment of the purchase price (£9.6m) before the deadline. The defendant returned the funds and disputed that it was required to make the transfers. It raised concerns about the confidentiality of the information required to be provided to the

claimant under the award and contended that it was entitled under the terms of the award to the protection of further confidentiality terms.

11. At the hearing before me the focus of the claimant's application was the enforcement of award ¶X.3. The claimant said that the other elements of Section X could be addressed later.
12. The claim form also seeks specific mandatory relief against the defendant requiring it to take steps to transfer the TMs, MAs and the Registration Dossiers as referred to in ¶X.3 of the award.
13. The defendant contested the application on three main grounds: (a) that the application for enforcement should be adjourned under section 103(5) of the 1996 Act pending the defendant's application to set aside the award in Amsterdam as the curial court; (b) the court should in any event refuse to enforce the award because ¶X.3 consists solely of declarations and/or prescriptive orders that are too vague for enforcement by the English court; and (c) that the court should not grant the relief sought by the claimant because this relief seeks to modify the terms of the award. The defendant also contended specifically that the court should decline to grant mandatory relief (save possibly in relation to the English TMs and MAs) since there were insufficient connections with this jurisdiction.
14. The claimant contends that the defendant is seeking to obstruct and delay the business acquisition in order to further its own commercial position and is preventing the claimant from receiving and exploiting vital business assets to which it is entitled. It contends that the defendant is acting tactically and is seeking to stall to prepare to compete with the claimant once the separation has been consummated. It also contends that the defendant is seeking to pressurise it into giving up its rights to the TMs and associated rights.
15. The defendant denies that it is behaving tactically. It contends that it has made a genuine and substantial challenge to the award by its proceedings in the curial seat; that it has valuable proprietary know-how which will be lost or damaged if it is required to hand it over to the claimant and its suppliers. It denies that it is trying to stall to prepare to compete with the claimant in the UK and Ireland or to pressurise the claimant commercially. It accepts that it does intend to compete with the claimant once the relationship is finally severed but says that it has been preparing to do this for some years and is already ready to start competing, so there is no need for it to buy more time.

### **Further factual background**

16. The claimant is a company incorporated in Ireland.
17. The defendant is a listed company incorporated in Hungary.
18. The parties entered the CA on 19 July 2012. The CA is governed by Dutch law. It contains an arbitration agreement incorporating the rules of the ICC. It is common ground that the arbitration agreement is governed by Dutch law.
19. The CA governs a joint business of the parties for the production, marketing and distribution of oral contraceptives (i.e. the Collaboration Products) in the UK and

Ireland. Under the CA the parties had 50-50 joint ownership of the TMs under which the products are sold. The claimant was responsible for the marketing and distribution of the Collaboration Products. The defendant was responsible for manufacturing most of the Collaboration Products (the Richter Products) but some were sourced from third parties. For the Richter Products, the defendant holds the relevant MAs. These are approvals granted by the regulators in the relevant territories (here the UK and Ireland) required for the manufacture and sale of the products.

20. From 2015 onwards the relationship between the parties deteriorated and this led to disputes.
21. The claimant commenced an arbitration by a request dated 1 August 2016 (“the first arbitration”). This was concluded by an award issued on 17 December 2018 in favour of the claimant. The first tribunal found that the defendant had breached the CA in a number of ways. It had failed to confirm the claimant’s orders, had not supplied orders on the requested delivery dates, had proposed increases to the ex-works prices while obstructing the claimant’s attempts to review the basis of the increases, had attempted to gain access to the claimant’s staff and business information, and had unjustifiably inflated its pharmacovigilance costs. The first tribunal also found that the defendant had acted against the spirit of the CA as interpreted under Dutch law.
22. The first tribunal granted a number of declarations in respect of the defendant’s conduct and ordered the defendant to comply in the future with the CA. In particular the first tribunal ordered the claimant properly to perform its obligations under the CA until the contractual termination date of 19 December 2019 and declared that from February 2016 onwards the defendant had substantially breached its contractual obligations and/or acted unlawfully in various respects.
23. The first tribunal found that until 19 December 2019 neither party was allowed to prepare for the sale and distribution of products in a manner which could constitute unfair competition. It also concluded that the parties had a contractual obligation properly to discuss their post-termination relationship and that immediately after the award they should start consulting on a transition to address their post-termination relationship.
24. In January 2019 the claimant invited the defendant to start discussing the issues relating to the termination of the CA. Meetings took place in February 2019. The claimant stated that there were two possible options: either an amicable agreement leading to the claimant’s acquisition of the TMs, or a contractual route under which the claimant would exercise a right of early termination of the CA for substantial breach followed by the claimant’s acquisition of the TMs and related rights under clause 19.5 of the CA. In broad terms that clause provided that where there was a substantial breach of the CA, the innocent party had an option to acquire the TMs and associated rights for 40 per cent of their fair value.
25. The parties failed to reach agreement on a consensual acquisition of the TMs by the claimant.
26. On 2 April 2019 the claimant gave notice that it was terminating the CA on the basis of the breaches established in the first award (“the old breaches”) with effect from 29 November 2019. The defendant rejected the validity of this notice.

27. The claimant then initiated the second arbitration by notice of 14 May 2019 seeking (a) confirmation that it had validly exercised its early termination rights and (b) specific relief giving effect to the transfer of the TMs, MAs and Registration Dossiers (for convenience referred to below as the TMs and associated rights).
28. On 14 June 2019 the defendant gave its own notice of early termination of the CA and of its intention to acquire the TMs on the basis that the claimant had substantially breached the CA by wrongfully giving notice of early termination.
29. While the second arbitration was proceeding the parties undertook a parallel process for valuing the trade marks in accordance with clause 20 of the CA. A fair value of £24 million was agreed on 6 December 2019.
30. The second arbitral tribunal was constituted with different members from the first. The second arbitration concerned a number of issues including: whether the claimant had validly terminated the CA, giving rise to an option to purchase the TMs for 40% of their fair value; what obligations applied in the “interim period” between termination of the CA and completion of the transfer of the TMs; and the scope and nature of the parties’ obligations in the three year Transitional Supply Period following the transfer of the TMs and associated rights.
31. In the second arbitration the defendant contended (among other things) that the claimant was precluded from invoking early termination on the basis of the breaches established in the first award by reason of Dutch law principles of *res judicata*. It argued that the first tribunal had already ruled on the legal relationship between the parties (which it said included relief for the old breaches) and that the claimant should have brought before that tribunal all claims for relief in respect of the old breaches, including for early termination of the CA.
32. The defendant also argued that, in the event that it was obliged to transfer the TMs to the claimant, its obligations to provide related information and know-how were far more limited than was contended for by the claimant.
33. The second tribunal found in favour of the claimant. It concluded that the principles of *res judicata* did not prevent the claimant from relying on the breaches established in the first award.
34. The second tribunal found that the claimant had validly terminated the CA for substantial breaches (being the same breaches as had been established in the first arbitration) and the claimant therefore had a contractual right under clause 19.5 to acquire the TMs and MAs and related information and know-how for a price representing 40% of the Fair Value of the TMs.
35. The tribunal also determined disputes about the specific categories of documentation and information required to be provided by the defendants to the claimant. As already explained, in the dispositive part of the award, section X, the tribunal made declarations, ordered the defendant to transfer the TMs, MAs and Registration Dossiers to the claimant in the event that it exercised a purchase option.
36. The tribunal also required continued cooperation between the parties. It provided that they should enter into a transitional supply agreement to govern their relationship

during the Transitional Supply Period (as defined in ¶X.6.c of the award). The parties were specifically ordered to continue to discuss and negotiate in good faith the terms of the transitional supply agreement immediately following the date of the arbitral award.

37. During the second arbitration the claimant presented the tribunal with two draft agreements and asked the tribunal to require the parties to execute them as part of the relief. The first was a draft asset transfer agreement (or ATA) which contained proposed terms governing the transfer of the TMs, MAs and the Registration Dossiers. It went further than bare assignments and contained further obligations. The second was a draft of a transitional supply agreement (or TSA). This contained proposed terms to govern the relationship between the parties in the period following the effective transfer of the TMs and associated rights. The version of the TSA placed before the second tribunal by the claimant included proposed terms covering the provision of certain confidential information.
38. The claimant contended that the tribunal should require the defendant to execute the two agreements as a means of giving effect to its obligations under clause 19.5 of the CA.
39. The tribunal did not require the defendant to enter into the ATA or the TSA. In summary it concluded that, to the extent these agreements exceeded the clear obligations of the parties (for instance to transfer the TMs and MAs), it was beyond the arbitrators' mandate to impose the terms. The parties were under an existing obligation to negotiate contractual terms in good faith and the tribunal decided that it could not go beyond the contractual freedom of the parties to negotiate. The second tribunal also considered that both parties had commercial incentives to seek to agree appropriate contractual terms rapidly, and expected them to do so.
40. As already explained one of the key disputed issues in the second arbitration was the treatment of the proprietary technical and manufacturing information held by the defendant in relation to the manufacture of the Collaboration Products. The defendant contended that, in the event it was required to transfer the TMs and MAs, its contractual obligations to provide information were limited to what was known as the common technical documents (or CTD) relating to the products. These were documents and information required to be maintained and provided to the relevant regulators. The defendant contended that it should not be required to provide additional information or know-how as this would enable third-party suppliers of products to replicate the defendants' manufacturing processes and would enable those third-party suppliers to compete with the defendant. The defendant said that the information would enable competitors not only to manufacture the particular products subject to the TMs but more generally would give them an advantage in manufacturing other generic pharmaceutical products.
41. The claimant contended that it was inherent in the purchase option that it needed information and know-how which would allow third party suppliers to manufacture the Collaboration Products and that without this information the purchase of the TMs would not make sense commercially. It referred to the parties' statements during the negotiations of the CA (which are admissible under Dutch law) to support its arguments that the parties had agreed that there would be an effective and broad transfer of information.

42. In broad terms the second tribunal decided that the defendant was obliged to provide such information as the claimant or third-party manufacturers required in order to understand how to manufacture the Collaboration Products and that this went beyond the information contained in the CTDs. The tribunal accepted that commercially sensitive information and know-how of the defendant would potentially be disclosed to third parties but concluded that this was part of the bargain contained in the CA. It concluded that the transfer of the TMs would not be effective without the provision of the various categories of information which it specified in the award.
43. In [525] of the award the tribunal said that the defendant's concerns about confidentiality could not substantially curtail the viability of the claimant's contractually granted right to acquire the TMs. It pointed out that there was a carveout in clause 19.5 in respect of particularly confidential information called the "active substance master file" or "ASMF" which did not require to be disclosed, and that this gave the defendant at least partial protection. The tribunal went on in [525] to say this:
- "In light of the bilateral nature of the good faith obligation in clause 19.10 of the CA, the arbitral tribunal moreover considers it entirely reasonable for [the defendant] to seek - and [the claimant] to grant - contractual safeguards from [the claimant] or its chosen third-party manufacturer to protect [the defendant's] intellectual property rights. Finally, the arbitral tribunal has not been presented with any arguments why [the defendant] would be precluded from offering to continue to manufacture the Products for [the claimant] instead of a third party, should its concerns over proprietary technology and intellectual property right prove unable to be adequately addressed through contractual safeguards. This was, after all, the default solution envisaged by the parties in the course of their negotiations in 2012."
44. There were other passages in the award where the tribunal specifically addressed the various categories of documentation and information which the claimant contended were covered by clause 19.5 of the CA. One of the categories was described as "items 34 to 37-master and batch manufacturing and packaging records". In [575] the tribunal found that the defendant's interest in preventing the claimant from gaining access to some of its proprietary know-how cannot stand in the way of the parties' contractual agreement to transfer the relevant know-how necessary to enable the claimant to outsource manufacturing of the specific oral contraceptives covered by the CA to a third party. As a result the defendant could not rely on the fact that the parties' relationship had deteriorated to refuse to transfer documents and information within this category which the tribunal understood was reasonably expected to form part of the necessary transfer of know-how.
45. In the dispositive part of the award (section X) the tribunal set out the various categories of information and documentation to be provided by the defendant to the claimant. In doing so the tribunal did not state in terms that the provision of information was dependent on the parties having agreed suitable confidentiality terms.
46. On the other hand, as the defendant observed before me, the award required the parties to seek to agree a TSA and the draft that was before the tribunal included confidentiality terms.

47. As explained further below, the parties are in dispute about the meaning and effect of the award. The claimant contends that it is entitled to the information listed in section X of the award unconditionally. The defendant contends that it is entitled to further contractual protections and relies particularly on [525] of the award.
48. The second award was notified to the parties on 19 October 2021.
49. On 21 October 2021 the claimant notified the defendant that it elected to acquire the TMs at 40 per cent of the fair value in accordance with clause 19.5 of the CA. This started running the 45 day period for the transfer of the TMs, MAs and Registration Dossiers. The period ended on 5 December 2021.
50. After the notice of 21 October 2021 the parties had a number of meetings and other communications to discuss the practical arrangements for completion. There is a dispute about whether some of these communications were without prejudice but nothing turns on that for present purposes.
51. It became clear from these discussions that the defendant required contractual confidentiality arrangements before it was prepared to provide the information contained in the Registration Dossiers. In the course of November 2021 the defendant set out its proposed confidentiality framework. The claimant disagreed. Its position was that the award required the defendant to provide the Registration Dossiers unconditionally and that the defendant was not entitled to contractual confidentiality protections. In order to break the impasse and without prejudice to its principal position the claimant did offer a different set of confidentiality terms. Between 1 and 3 December 2021 meetings were held and a number of draft confidentiality contracts were exchanged. But the parties were unable to reach an agreement.
52. On 3 December 2021 the claimant provided a signed copy of the terms it was prepared to offer together with signed contractual documentation designed to effect the transfer of the TMs, MAs and Registration Dossiers to the claimant. The claimant also paid the purchase price to the defendant on the same day.
53. The confidentiality terms offered by the claimant in the 3 December 2021 draft agreement would impose an obligation on the claimant to maintain confidentiality in the information provided by the defendant. They would also require the claimant, before sharing proprietary information with alternative manufacturers and other third parties, to enter direct confidentiality agreements with them containing terms no less stringent than those contained in the agreement between the claimant and the defendant.
54. On 6 December 2021 the defendant and its solicitors provided an alternative draft confidentiality agreement, but those were not acceptable to the claimant.
55. In the event the defendant did not transfer the TMs, MAs or Registration Dossiers to the claimant on 5 December 2021. It returned the purchase price to the claimant.
56. On 17 December 2021 the claimant submitted a petition to the District Court of Amsterdam requesting leave to enforce the second award in the Netherlands pursuant to section 1062 of the Dutch Code of Civil Procedure (“the DCCP”). The claimant notified the defendant of the petition on the same day.



57. On 21 December 2021 the District Court of Amsterdam granted that permission to enforce. The order was served on the defendant on 4 January 2022.
58. No further steps have been taken by the claimant in the courts of the Netherlands to enforce the award.
59. The present English proceedings were commenced by the claimant on 12 January 2022.
60. On 10 February 2022 the defendant commenced proceedings in the Netherlands seeking to set aside the second award under section 1064 of the DCCP. The application is to the Amsterdam Court of Appeal. An application under section 1064 must be made within one of two applicable time limits. The first expires three months from the day the award was dispatched or deposited. The second expires three months from the date when an order for enforcement of the award is served on the other party. The enforcement order of the District Court of Amsterdam was served on 4 January 2022 so that the defendant had three months from then to commence its challenge. The challenge proceedings, dated 10 February 2022, were therefore brought in time. But about four months had elapsed between the date of the award and the challenge proceedings.
61. The defendant did not know about the English enforcement proceedings when it launched the Dutch challenge proceedings.
62. It is common ground that under Dutch law challenge proceedings under section 1064 DCCP do not automatically suspend the enforcement of the award. A party may apply for the suspension of an award pending a challenge. The defendant has not made such an application. The defendant explains that it did not know of the English enforcement proceedings when it commenced its challenge proceedings in Amsterdam; and considered that no meaningful enforcement steps could be taken by the claimant in the Dutch courts.
63. Under section 1065 DCCP an arbitral award may be set aside on a number of grounds, including the absence of a valid arbitration agreement; that the tribunal has not complied with its mandate; and that the award violates public policy or good morals. The defendant's challenge proceedings are brought on the basis of the Dutch law of res judicata. The defendant contends that res judicata is a fundamental principle of Dutch law. So far as concerns arbitration it is embodied in section 1059(1) DCCP which provides that decisions concerning a legal relationship in dispute and contained in an arbitral award in relation to which ordinary means of recourse are no longer available shall have res judicata effect in other proceedings rendered between the same parties from the day on which they have been given.
64. The defendant contends in the challenge proceedings that the decisions of the first tribunal concerned the same legal relationship as is in dispute in the second arbitration. It argues that the res judicata doctrine prohibits a claimant from seeking new remedies in respect of the same legal relationship (in this case the breaches of contract of the CA found to be established by the first tribunal) and that the doctrine requires a claimant in a set of proceedings to advance all of its claims at the same time. The defendant says that the claimant should have brought all of its claims based on the old breaches of the CA in the first arbitration and that it cannot bring a second claim seeking different and inconsistent relief (termination of the contract rather than specific enforcement of the contract) for the same breaches.

65. The claimant contended before the second tribunal and continues to contend that the doctrine of res judicata did not preclude it from seeking different relief from the second tribunal based on the same breaches of the CA. It says that the first tribunal was never concerned with the termination rights under clause 19.5 and therefore did not rule on them. The claimant says that it had a legitimate interest in seeking to establish the breaches of contract in the first arbitration and that it was entitled subsequently to invoke its termination rights under clause 19.5.
66. The claimant notes that the second tribunal considered the res judicata arguments in detail and preferred the position of the claimant.
67. The defendant accepts of course that the second tribunal rejected its arguments but it contends in the challenge proceedings that the tribunal took an unduly restrictive view of the Dutch principles of res judicata and specifically that it adopted an unduly narrow interpretation of the concept of the legal relationship in dispute.
68. The defendant contends that if it is right in its contentions about res judicata, the second award should be set aside on the grounds that the second tribunal violated its mandate; or that the arbitration agreement in respect of the relevant legal relationship (the historical breaches of the CA); or that the second tribunal made an award which violated the public policy of the Netherlands.
69. It was common ground before me that there is a high hurdle before a Dutch court will set aside an arbitral award. The Supreme Court has said that the courts will only set aside arbitral awards in “striking” cases. The defendant says that this is such a case.
70. It was also common ground that there is likely to be a judgment of the Court of Appeal (the first instance tribunal) within about 12-15 months. There was no evidence before me as to the likely timescale for a further appeal to the Dutch Supreme Court. The defendant did not however seek any adjournment beyond a judgment of the Court of Appeal.

### **Legal principles**

71. Section 101 of the 1996 Act provides (as material) that:
  - “(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.
  - (2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
  - (3) Where leave is so given, judgment may be entered in terms of the award.”
72. Section 103 provides that:
  - “(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 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.”

73. There appeared at one point in the application before me to be a suggestion that the defendant was relying on section 103(3) on the basis that enforcement of the award would be contrary to public policy. That was not easy to follow as the public policy referred to in that subsection is that of England and Wales and it is hard to see how Dutch principles of *res judicata* could fall within that rubric. However the defendant clarified that its only basis for opposition was the existence of the Dutch challenge

proceedings within subsection (2)(f), which in turn led to the possibility of an adjournment under subsection (5).

74. There have many cases about the discretion in section 103(5). These include the well-known decisions of the Court of Appeal in Soleh Boneh v Government of the Republic of Uganda [1993] 2 Lloyd's Reports 208, and Gross J in IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp [2005] EWHC 726 (Comm).
75. The authorities were helpfully summarised by Ms Buehrlen QC sitting as a deputy High Court judge in AIC Ltd v Federal Airports Authority of Nigeria [2019] EWHC 2122 (TCC).
76. At [22] she said this:

“A helpful summary of the Court's role at a hearing of a section 103(5) application was provided by Gross J (as he then was) in IPCO (Nigeria) v Nigerian National Petroleum Corporation [2005] 1 CLC 613 (in turn citing the judgment of Staughton LJ in Soleh Boneh v Uganda Government [1993] 2 Ll Rep 208 at [15] and [16]):-

“The Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court's discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a sliding scale, in any event embodied in the decision of the Court of Appeal in Soleh Boneh v Uganda Government [1993] 2 Ll Rep 208 in the context of the question of security:

“... two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.”

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult...if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened' per Staughton L.J., at p.212”.

77. At [35] to [36] Ms Buehrlen QC provided this helpful summary of the caselaw:

“[35] I have set out above the key guidance provided by Gross J (as he then was) in the IPCO (Nigeria) Ltd case at first instance. Certain propositions may be drawn from Gross J's judgment:-

- (i) Firstly, the court's discretion to adjourn the decision on enforcement under section 103(5) is wide and unfettered.
- (ii) Secondly, ordinarily the following matters are relevant: (a) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (b) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in England & Wales for resisting summary judgment); and (c) the extent of the delay resulting from an adjournment, whether enforcement will be rendered more difficult if it is delayed and any resulting prejudice to the claimant. However, the factors that may be relevant will depend on the individual circumstances of the case and are not limited to the above.
- (iii) Thirdly, in considering the merits of the set aside application before a foreign court, this court is to undertake a “brief consideration” of the position rather than a detailed examination of the foreign proceedings, and determine where on a “sliding scale” the particular facts fall as between an award that is “manifestly invalid” and one that is “manifestly valid”.
- (iv) The stronger the merits of the application before a foreign court appear, the stronger the case for an adjournment and the weaker any corresponding application for security.
- (v) The weaker the merits of the application before the foreign court, the weaker the case for an adjournment and the stronger the application for substantial security. All the same, in Travis Coal Restructured Holdings LLC v Essar Global Fund Limited [2014] EWHC 2510 (Comm) the Court ordered an adjournment even though it found that there was “no realistic prospect of [the resisting party] establishing any of its grounds of challenge to the award” and that its “application is at the bottom of the 'sliding scale' in terms of prospects of success”. However, whilst it granted the application for an adjournment, the Court also made an order for substantial security to be provided.
- (vi) Where enforcement will be rendered more difficult as a result of delay, the stronger the case for security.

- (vii) The weaker the risk of prejudice to the enforcing party caused by an adjournment, the weaker the corresponding application for security.

[36] The following additional points arise from the applicable case law and were relied upon by [the defendant]:-

- (i) Soleh Boneh is not authority for the proposition that security should always be ordered: reasoning to that effect was directly criticised by the Court of Appeal in Yukos Oil v Dardana [2002] CLC 1120 at [52(iv)]. It is possible for there to be an adjournment without any security (which was what the Court of Appeal ordered in Yukos Oil itself: see [53]–[54]).
- (ii) When considering the risk of prejudice to the enforcing party caused by an adjournment, the comparison is between the position of the would-be enforcing party if he were allowed to enforce immediately, and his position if any steps by way of enforcement are delayed as a result of the grant of an adjournment: see Dowans Holdings v Tanzania Electric Supply Co Ltd [2011] EWHC 1957 (Comm) at [49]. Further, the amount of security to be ordered ought to reflect the degree of prejudice as may result from the delay. In Dowans v Tanzania, the extent of prejudice was not “likely to relate to anywhere near the full amount of the award”, and so the Court ordered security of US\$5 million as a condition for the grant of an adjournment where the relevant award was for US\$36.7 million plus interest: see [4] and [53].”

78. The claimant also referred me to an earlier helpful passage in IPCO where Gross J said this:

“11. For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that section 103 of the Act embodies a predisposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: Mustill & Boyd, *Commercial Arbitration*, 2nd edn, 2001 Companion, at page 87.

12. Secondly, section 103(2)(f) is only applicable when there has been an order or decision suspending the award by the court in the country of origin of the award (“the country of origin”). Section 103(2)(f) is not triggered automatically by a challenge brought before the court in the country of origin. This conclusion flows from the wording of section 103(2)(f) itself, it is supported by leading commentators (Van den Berg, *The New York Convention of 1958* (1981), at page 352, Fouchard, Gaillard, *Goldman on International Commercial Arbitration* (1999), at pages 980–981) and it is consistent with the provisions of sections 103(5) of the Act — which would be otiose, or at least curious, if an application to the court in the country of origin automatically resulted in the award being suspended.”

79. It was common ground that the defendant, as the party seeking an adjournment, has the burden of persuasion. This is an aspect of the pro-enforcement policy of the relevant part of the 1996 Act.

80. Under section 101 the award creditor does not need to show that it has a legitimate interest in enforcing the award as a judgment of the court. The purpose of the NYC is to facilitate the ready enforcement of awards in NYC states. The process is comparatively simple and mechanical.
81. The claimant contended that the recent decision of the Supreme Court in Kebab-Ji SAL v Kout Food Group (“Kout”) [2021] UKSC 48 showed that there was likely to be far more force in an application to adjourn enforcement proceedings pending a set aside application where the ground of challenge in the foreign court was also a ground for challenging the enforcement of the award under one of the grounds set out in section 103(2)(a)-(e) of the 1996 Act. The claimant relied on a passage in Kout at [87]–[91]. The claimant argued that Kout showed that where there was no such overlapping ground of challenge the English court as the enforcing court was less likely to grant an adjournment. Indeed counsel contended that in [90] the Supreme Court held that since there was no risk of contradictory judgments on the section 103(2)(b) challenge there was no basis for an adjournment pending the French annulment case. The claimant contended that where there is no prospect of conflicting decisions on one of the substantive heads under section 103(2)(a) to (e), the grounds for an adjournment under section 103(5) are all the weaker.
82. I do not think that Kout assists in the present case. In that case there were disputes under an English law governed franchise contract between the claimant and H, with a clause requiring disputes to be determined by arbitration in Paris under the rules of the ICC. The claimant brought arbitration proceedings against the parent company of H (P). P took part in the arbitration under protest. The majority arbitrators, applying French law as the law of the seat of the arbitration, concluded that P was a party to the arbitration agreement and, applying English law, was a party by novation to the franchise contract. The tribunal found for the claimant and ordered P to pay damages. The claimant brought enforcement proceedings against P in England under section 101 of the 1996 Act. P contested enforcement under section 103(2)(b) on the basis that it was not a party to an arbitration agreement under the law to which the parties had subjected it. After a three day trial of preliminary issues the judge held that the arbitration agreement was governed by English law but did not reach a final determination on whether P was party to it, holding that it was possible that evidence might establish that there was consent in writing to the addition of P to the agreement. He therefore adjourned the enforcement proceedings. The Court of Appeal upheld the judge’s findings but made a final determination that P was not a party to the arbitration agreement under English law and granted summary judgment in its favour. The Supreme Court dismissed the appeal.
83. The reasoning of the Supreme Court at [87]-[91] concerning section 103(5) came to this. The challenge to enforcement under section 103(2)(b) was that P was not a party to the arbitration agreement under English law, which was the applicable law. After a preliminary hearing it was clear to the summary judgment standard that, applying English law, the defendant to the English enforcement proceedings was not a party to the arbitration agreement. There was no point in awaiting the outcome of the set aside proceedings in France as it was common ground that the French courts would apply French law to the issue and therefore their decision would not bind the English courts. The defendant therefore had a complete defence to the enforcement action whatever the outcome of the French annulment proceedings. The only other possible reason for the English court to await the decision of the French courts was that those courts might

annul the award altogether. But that suggestion came from the claimant (as the award creditor) and not the defendant, which sought immediate summary judgment.

84. The simple point was that the defendant had a complete defence under section 103(2)(b) and it did not need to rely on the annulment of the award to resist enforcement here. This is the point made by the Supreme Court in [91]. The way section 103(5) was sought to be deployed in Kout was therefore hopeless. I do not therefore think it has any bearing on orthodox cases where the defendant has brought an annulment proceedings in the curial court and it is seeking an adjournment of the enforcement action under section 103(5). The Supreme Court saw no reason to review the existing authorities concerning section 103(5).
85. The claimant submitted there was no reported case where the court had exercised its discretion to grant an adjournment where the award had required mandatory steps to take place, rather than the payment of money. There is no case where an adjournment has been granted where the award is for specific performance of obligations. The claimant suggested that this showed that where the award was in mandatory terms it was going to be hard for the award debtor to justify an adjournment.
86. I did not find this persuasive. As to the argument from novelty it might equally be observed that there is no reported case where an adjournment has been refused because the award was mandatory in nature. Moreover most arbitration awards are monetary awards and it is unsurprising that the reported cases concern such awards. I do not see that there is any difference in principle between the various kinds of possible award when it comes to the discretion to adjourn. Cases turn on their facts. The discretion remains unfettered and needs to be exercised against the particular facts of each case. I shall of course have to consider the mandatory steps required under the award in this case as part the particular factual context. But no more general lesson can be drawn from the differences between mandatory and monetary awards.

### **Application of the principles to the present case**

87. The claimant initially raised some procedural objections to the defendant being able to rely on section 103(5) at all. The claimant complained that the defendant had not issued a formal application for an adjournment and that this had deprived it of the ability properly to set out the security that ought to be provided as the price of any adjournment. The claimant also contended that a proper application to adjourn would require the service of expert evidence of foreign law and that the defendant had not sought permission to serve such evidence. These objections were not pressed during the hearing but I should briefly address them.
88. I do not consider that a defendant to enforcement proceedings under section 101 is required to serve a formal application for an adjournment. The power to adjourn is set out in section 103(5), which does not suggest that a formal application is required. Indeed the court may adjourn under the section of its own motion even where both parties oppose this course: see Stati v Republic of Kazakhstan [2015] EWHC 2542 (Comm). There may of course be the separate question whether the point has been fairly raised in advance of the hearing by the defendant. On this point I am satisfied that defendant's position on adjournment was raised in the witness statement of Mr Taylor of the defendant's solicitors in his first statement of 8 April 2022, albeit he used the language of a stay pending the Dutch challenge. It was plain that the defendant would



be arguing that the court should not permit enforcement until the Dutch proceedings were resolved. This also explains why there was a witness statement from the defendant's Dutch lawyer, Ms Verhoeven-De Vries Lentsch explaining the nature of the annulment proceedings in the courts of Amsterdam and the likely time it would take to obtain a judgment. That evidence would have been irrelevant if the defendant had not been seeking an adjournment pending the Dutch challenge proceedings. I also consider that the claimant has had ample time to make submissions about any security to be given by the defendant.

89. The second preliminary challenge is that the defendant has failed to serve expert evidence of Dutch law. This is not itself a bar to the court considering an adjournment. There are a number of cases where the court has granted an adjournment without expert evidence of foreign law: see e.g. AIC, Stati, Continental Transfert Technique Ltd v Federal Government of Nigeria [2010] EWHC 780 (Comm); Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd [2014] EWHC 2510 (Comm). In some of those cases the court reached a decision on evidence provided by the lawyers acting for the parties in the foreign annulment proceedings. There is no threshold requirement for expert evidence. The weight to be given to the evidence is a matter for the court depending on the particular facts. Here the challenge is a legal one, based on principles of res judicata. The basis of the challenge has been articulated in the documents filed in the Dutch case and this court is able to read and understand the nature of the challenge.
90. The claimant also raised a jurisdictional point about section 103(5). The subsection applies only where there is an application to set aside the relevant award. It submits that even if the Dutch court were to decide that the tribunal had misapplied the principles of res judicata it would remit the matter to the second tribunal rather than set it aside. This is because the claimant relied before the second tribunal, as a ground for terminating the CA, on breaches of contract (which the parties called the "new breaches") as well as the old breaches covered by the first arbitral award. The claimant points out that the second tribunal said in its award that, in light of its decision on res judicata, it was unnecessary to determine whether these breaches would have justified the early termination of the CA. The claimant says that the Dutch court would therefore remit the matter to the second tribunal and would not set the award aside.
91. The defendant argues that the statutory gateway is satisfied as it has applied in the courts of Amsterdam to set aside the second award. It also notes that the second tribunal not only said that it was unnecessary to decide whether the new breaches would justify early termination of the CA. It went further and decided that the claimant had failed to establish a case for damages for the alleged new breaches.
92. I prefer the defendant's submissions on this point. There is a number of possible outcomes in the event that the res judicata challenge succeeds. These include setting aside the award altogether or remitting the matter for further consideration of the impact of any of the new breaches. I do not think that this court can say with confidence that an order setting aside the award is out of the question as the claimant suggested. There is therefore no knock-down, threshold, objection. But the existence of a range of possible outcomes even if the challenge succeeds is something I should and shall take into account in the exercise of the court's discretion under section 103(5), to which I now turn.

93. I start by repeating that the court's discretion under section 103(5) is wide and unfettered. The court must therefore consider all the circumstances.
94. The first consideration is whether the application before the courts of Amsterdam has been brought in bad faith or as a delaying tactic.
95. The claimant submitted that the court should conclude that the defendant has behaved tactically and is not acting in good faith. It notes that the defendant waited for around four months before bringing the annulment case and only launched it after it knew of the Dutch enforcement proceedings.
96. The claimant submitted that the defendant had commercial motives to delay things. The defendant intends to compete with the claimant in the UK and Ireland markets for oral contraceptives when it is contractually allowed to do so. By delaying the transfer of the TMs and related business know-how, it is stalling to prepare itself to compete with the claimant in those markets.
97. The claimant also contended that the defendant was using these proceedings to seek to force the claimant to relinquish its rights and instead to agree to transfer the assets to the defendant. The claimant points to the fact that it is a comparatively small company and that the defendant (which is listed has far greater resources. The dispute has been rumbling on for years and the first tribunal found that the defendant had deliberately ignored its obligations. The claimant also contended that it was in the interests of the defendant to carry on supplying the claimant with products at the price agreed between the parties for as long as possible.
98. I do not consider on the evidence before me that there are proper grounds for regarding the Dutch proceedings as tactical or as anything other than bona fide:
  - i) The legal challenge in the curial courts raises essentially the same detailed and complex arguments about res judicata as were taken before the arbitrators. The arbitrators did not consider that the defendant had raised res judicata unreasonably or abusively, though it found against the defendant.
  - ii) The challenge was brought within the procedural time limits under Dutch law.
  - iii) The defendant has written to the Amsterdam Court of Appeal and requested that the appeal be heard as soon as possible; this is a departure from the normal procedure under which the court will not schedule a hearing until all written submissions are received.
  - iv) The defendant accepts that it intends to compete with the claimants in the UK and Irish markets when it is contractually permitted. But its evidence is that it has already taken the preparatory steps needed to enable it to compete. The dispute has been going on for years and the defendant has been getting ready to compete once it is contractually permitted to do so. It says it has taken the necessary commercial and business steps and is ready to press the button to start competing once this is allowed. I do not consider that there is a proper basis on this application for doubting this evidence (which has not been subject to cross-examination and is not inherently improbable).

- v) Similarly I do not think that the court is in a position properly to doubt the evidence of the defendant that it is seeking to overturn the award on the basis of its legal rights and is not using the proceedings as leverage to seek to force the claimant into submission. The court cannot under this summary procedure disbelieve the evidence of the defendant and reach a conclusion in favour of the claimant in this point. I have concluded that the challenge is a genuine one.
  - vi) Nor do it is evident that the agreed arrangements for fixing the price or continuing supplies are particularly favourable to the defendant or amount to a material commercial incentive for it to seek to delay the outcome. In any event, as explained below, the defendant has agreed to compensate the claimant for any proved overcharging. This supports the defendant's case that it is not seeking to use the delay to profit at the expense of the claimant.
  - vii) While it is true that in the first award the tribunal was highly critical of the defendant's conduct under the CA, the second tribunal decided that the defendant's position was neither unreasonable nor abusive. The tribunal also considered that the parties were capable of negotiating in good faith under clause 19.10 of the CA and would do so as rational commercial parties.
99. A further factor I should consider is the conduct of the parties since the delivery of the award. This potentially throws light on the bona fides of the defendant in challenging the award in the Netherlands and on the claimant's allegation that the defendant is playing for time. Each party contends that the other has been unreasonable to a high degree in relation to the negotiation of confidentiality terms. The claimant contends of course that it is not required to provide any further protection in relation to the provision of the Registration Dossiers (as interpreted in section X of the award). But it says in the alternative that its suggested terms (as embodied in the 3 December 2021 draft) are commercially reasonable.
100. The defendant for its part contends that the claimant has been unreasonable in rejecting its suggested confidentiality terms. It says that the claimant and its lawyers refused on occasion to agree to meetings and says that its own proposed terms were reasonable.
101. Each side has therefore advanced evidence accusing the other of failing to negotiate in good faith. I am unable to resolve these allegations and counter-allegations. It is to be remembered that this application has been brought under the summary procedure for arbitration claims; enforcement of NYC awards is supposed to be comparatively mechanical. The hearing has taken place on the basis of written statements over a day and a half. There has been no cross-examination of the witnesses on their statements. The statements are not inherently improbable; nor are they undermined by other evidence.
102. Moreover any obligations of the parties to negotiate in good faith are governed by the Dutch law about which there has been no evidence.
103. The court is therefore unable to decide on the reasonableness or otherwise of the parties' conduct of the negotiations or draw any inference that either of them has been behaving tactically.

104. I turn next to consider whether the challenge proceedings before the court in Amsterdam have at least a realistic prospect of success (the test for resisting summary judgment). It is convenient under this head also to consider where the merits fall on the sliding scale referred to in the earlier caselaw. I repeat that the application before me is a summary procedure and there has been no cross examination or expert evidence. I am able only to consider the merits in a broad-brush way on a brief consideration of the materials.
105. I have concluded that the challenge proceedings have (at least) a realistic prospect of success. The res judicata argument was entertained and treated as a serious one by the arbitral tribunal. On a brief consideration of the materials filed in the annulment proceedings it can be seen that the defendant has been able to articulate what appears to be a rational argument (I put it no higher) for the application of the doctrine. Neither counsel at the hearing sought to persuade me that the challenge to the award was either clearly right or plainly wrong.
106. Where does the case come on the sliding scale? I start by recognising that an experienced and expert arbitral tribunal has considered the defendant's arguments and rejected them. The reasoning of the tribunal is careful and comprehensive. This gives the court a reasonable empirical basis for thinking (on the materials available) that the claimants probably have the better of the argument. But tribunals sometimes nod and I cannot do more than conclude on a brief consideration that the challenge has reasonable prospects even if they are less than even. I also reiterate that neither counsel sought to argue that the challenge was clearly going to succeed or clearly going to fail. I also reiterate that at least one possible outcome is remittal rather than the setting aside of the award.
107. I should address here an argument advanced by counsel for the defendant that the evidence given by Mr Crosbie in the arbitration showed that the claimant wanted to have things both ways: the claimant wanted to continue to receive profits from the collaboration and prevent the defendant from competing and then, at the last possible time, obtain the TMs at a discount to their fair value. I was not persuaded that the passages of evidence I was taken to by the defendant established that the claimant acted duplicitously. It seems to me that Mr Crosbie was simply agreeing with some conclusory questions but was not accepting the dual motivation now alleged by the defendant. The defendant's arguments on this point did not assist me in my brief consideration of the overall merits of the challenge.
108. This is not therefore a case where the second award is either manifestly valid or manifestly invalid. I think that on the sliding scale the claimants are on balance more likely to succeed, since they have a carefully reasoned award on the very point raised on the challenge. But it is not possible or realistic to reach a firmer view than that on the merits.
109. I turn next to consider the extent of the delay resulting from any adjournment. As already explained, it is common ground that a reasoned decision on the first instance will be given within about 12-15 months.
110. I turn next to consider the prejudice that will be result to the claimant from the delay in enforcement.

111. The claimant's evidence in this regard is principally found in two witness statements of Mr Crosbie, its Executive Vice Chairman. He explains that a delay in enforcement will be detrimental to the claimant in a number of ways. I shall summarise his evidence but should record that I have considered his evidence fully and this is no more than a brief account.
112. The first form of prejudice is that the longer the transfer of the business is delayed the better the defendant will be able to prepare to launch its own products when it is contractually entitled to compete. I have already explained this point.
113. Mr Crosbie says, second, that any delay favours the defendant financially as the parties have agreed that the claimant will have to pay the defendant at prices representing the costs of the defendant assessed under international financial reporting standards (IFRS) plus 20%. He says that the initial prices quoted by alternative suppliers indicate that the claimant would be able to get supplies more cheaply. He estimates the annual difference in cost at about €1.5m.
114. Mr Crosbie says, third, that there is continuing disruption to the business. The dispute has already been going on for six years. The claimant is a small business. The assets to be transferred by the defendant represent a large part of the business. The defendant has used the dispute to apply maximum pressure to the claimant and sought to force it to transfer the TMs and associated rights to the defendant. The funding of the arbitration costs has been a substantial costs drain on the claimant. The uncertainty surrounding the transfer has prevented the claimant from raising capital or entering into other corporate transactions over the last six years and if enforcement is delayed this will continue.
115. Mr Crosbie says, fourth, that the delay prevents the claimant from entering firm contracts with potential third party suppliers and this uncertainty is damaging to its relationships with them.
116. The claimant says, fifth, that the longer the delay the greater the risk that the Fair Value of the TMs (which fell to be ascertained as at December 2019) will turn out to be wrong in the sense that their value may now be different from the agreed value of £24m.
117. The defendant's response included the following points (again set out by way of summary).
118. First, Mr Neubauer explains that the defendant does indeed intend to compete with the claimant in the UK and Irish markets for oral contraceptives when it is contractually able to do so. He says that the defendant has been preparing for this for some time. He says that it has the manufacturing ability and that it will devote the necessary capacity to competing goods when it is able to do so. It also has in place marketing resources. It will spend money on branding and promotion at that time. There is therefore no prejudice to the claimant from any delay: the defendant is ready to press the button and has no need for more time.
119. Second, the defendant does not accept that the IFRS + 20% pricing is high. The defendant points out that the claimant's evidence that it will lose money is not based on any firm offers from third party suppliers. The defendant is willing to offer a right to audit the defendant's IFRS pricing. It has also offered an undertaking to reimburse the

claimant for any additional costs it is able to prove it has had to pay by reason of the delay in enforcement; and to provide cash or a bank guarantee of €1.5m per annum by way of security.

120. Third, as to the disruption to the business and the uncertainty over ownership of the assets, the defendant observes that the dispute has already been going on for several years. It says that any prejudice caused by a further delay of 12 or 15 months is not material in that context. It also says that there is no concrete evidence of any actual fundraising or corporate transactions which the claimant has been unable to carry out.
121. Fourth, the defendant denies that it is seeking a delay in order to exert pressure on the claimant. It says that it has genuine grounds for seeking to set aside the award and that the challenge is bought in good faith. It says that it is not pressuring the claimant but is protecting its own commercial interests. The defendant also notes that the costs of the arbitration have been paid in full so that the claimant has recovered its outgoings.
122. Fifth, while the Fair Value of the TMs may turn out to be wrong (in the sense of no longer reflecting their actual value) this may just as well work in favour of the claimant.
123. Sixth, as well as offering (a) security for any additional costs of procuring supply caused by the delay (described above) the defendant offered (b) to transfer the TMs to the claimant (with reversal in the event the challenge succeeds) (c) to undertake not to transfer away MAs before the challenge proceedings are resolved, (d) to continue to negotiate in good faith over confidentiality safeguards, and (e) to continue to supply the claimant with the Collaboration Products at IFRS plus 20% and give the claimant the right to audit those prices.
124. My conclusions about potential prejudice to the claimant of further delay are as follows. First, for reasons already given I do not think that there are proper grounds for doubting or discounting the evidence in the witness statements of the defendant that it is already well prepared to launch and market its own competing products when it becomes contractually entitled to compete. The defendant has accepted that it is indeed preparing to do this but says that it has been getting ready for some time. I do not think on the materials before me that there is any evidential basis for concluding that the defendant will be in a better position to compete in (say) a year's time than it is now.
125. Second, there may be immediate financial costs for the claimant in the form of higher prices. However the evidence on this on this is not concrete: it appears that the claimant has not obtained firm, precise or binding quotes from alternative suppliers. In any event this form of prejudice appears to me to be substantially mitigated by the defendant's offer to compensate the claimant for any losses sustained by reason of the delay and the lodging of security; and by the offer to allow an audit of the defendant's IFRS costs.
126. Third, I consider there is some force in the claimant's case that a delay would cause it commercial prejudice which cannot readily be measured or compensated. A delay in the transfer of the assets will mean more uncertainty and this will prevent the claimant from entering proper negotiations with third party suppliers. It will also interfere with any attempts to raise capital or other corporate transactions to expand its business. Against this, I consider there is some force in the defendant's observations that the additional delay must be seen in the context of the period of the dispute between the parties. The parties have been at loggerheads since 2015. The first arbitration was

started in August 2016. It took more than two years to complete. The second arbitration, in which the claimant sought to establish its termination rights and purchase option was only commenced in May 2019. It then took more than two years before the second award was issued in October 2021. In this context, the further proposed delay of about fifteen months, though significant, is comparatively short. I also consider that there is some force in the defendant's submission that there is no concrete evidence of any fundraising or other corporate transactions which will be hindered by this period of delay.

127. Fourth, I do not consider that I can properly conclude on the basis of the contested evidence that the defendant is seeking to use the additional delay to place pressure on the claimant. I do accept that the uncertainty caused by the continuing delay makes it more difficult for the claimant to plan and expand its business (see the second point above). I also accept that the costs of dealing with the arbitration have had a disproportionate impact on the claimant. On the other hand the costs to date have been paid by the defendant pursuant to the second award.
128. Fifth, there is inevitably some risk that as more time passes the current value of the TMs will deviate from the True Value assessed as a December 2019. On the other hand, as the defendant observed, any movement may work in favour of the claimant and there is no evidence pointing either way on this issue.
129. Sixth, the additional undertakings offered by the defendant provide the claimant with some further protection against prejudice.
130. Overall, I consider that delay in enforcement would cause some prejudice to the claimant. But this have to be kept in reasonable perspective and measured against the length of the delay. The defendant does not seek an adjournment extending beyond the first instance decision of the Amsterdam Court of Appeal, i.e. for 15 months. As I have said the period of any adjournment needs to be seen in the context of a dispute that has been running for six years and where the two arbitrations which have taken place lasted more than two years each. It also needs to be kept in mind that the claimant did not raise its rights of termination of the CA in the first arbitration and only invoked the provisions of clause 19.5 in April 2019. It then took more than two years from then to obtain the second arbitration award.
131. I turn to consider the prejudice to the defendant if an adjournment is refused and the court allows immediate enforcement.
132. If the award is set aside and the claimant is not entitled to acquire the TMs and associated rights under clause 19.5, the defendant claims it is entitled to acquire those TMs and rights itself. So the question arises whether in those events it could be restored to the position it would have been in had the award not been made and enforced.
133. There is no conceptual difficulty about the reversal of the transfer of the TMs and the MAs. That could be done by straightforward reassignments.
134. Far more problematic is reversing the transfer or provision of the defendant's proprietary information and know-how. In this regard Mr Kovacs, the head of the technological affairs department of the defendant, explains that information contained in the Registration Dossiers includes valuable proprietary manufacturing know-how

that the defendant has developed over four decades concerning oral contraceptive products. While the defendant is not required under the terms of the award to provide information about the active ingredients used in the manufacture of the products, the remaining information is highly confidential and valuable. Alternative suppliers armed with the defendant's information would be in a position to understand how the defendant manufactures the drugs - they would understand how 99.9% of the ingredients are combined in the manufacturing and packaging processes. The defendant says that other manufacturers would effectively be able to use the defendant's recipe and manufacturing procedures to produce competing oral contraceptives which could then be sold anywhere (and not merely to the claimant).

135. The defendant also says that manufacturers would be able to make other products, such as heart disease medication or hormone replacement therapies, by adding a different active ingredient to the same overall recipe.
136. The defendant points out that the third parties manufacturers could be located in countries with comparatively low wages such as China, Taiwan or India.
137. The defendant also submits that even if there were confidentiality agreements in place once the information has been provided it will be very difficult to establish whether there has been a misuse of the defendant's information. If a rival manufacturer were to use the information to produce its own products for sale in overseas markets it would be very hard for the defendant to prove this or to enforce any contractual confidentiality undertakings given by the claimant.
138. The claimant submitted (in outline), first, that the defendant had already lost the battle over confidentiality, as reflected in the award. It is effectively seeking to rerun battles it had already lost. Second, the claimant has been and remains willing to offer confidentiality terms (in the form of the 3 December 2021 draft agreement) which would provide the defendant with reasonable protection. The claimant has also offered to destroy any confidential information provided to it by the defendant in the event that the challenge to the arbitration succeeds (and such challenge is upheld on appeal). The confidentiality terms proffered in the 3 December 2021 include obligations on the claimant to ensure that, before providing the information to third parties, it will enter into agreements on at least as stringent terms with those third parties, including imposing on them restrictions as to the use of the information. The claimant contended that this represented a commercially reasonable set of terms which would remove or at least substantially mitigate any possible prejudice to the defendant.
139. The claimant sought to rely on a further version of the confidentiality protections in a document given to the court after the hearing. The defendant objected to this on the grounds that it had not had an opportunity to address it at the hearing. The defendant contended that the court should therefore not refer to this further version and I agree. I do not by saying this prejudice any costs arguments concerning the sequence of events before and during the hearing. I simply decide at this stage that I should not take into account the further draft confidentiality terms when exercising my discretion. I also record the overarching position of the defendant that, whatever the precise wording of the proposed terms, the defendants would be likely to struggle practically in detecting any misuse of their information, or in enforcing any such contractual protections around the world. I shall return to this.



140. The claimant also submitted that it was telling that during the negotiations of the draft ATA being discussed between the parties in December 2021 there was a clause stating the defendant had not agreed to waive any rights to challenge the award. Similarly the draft TSA agreement being discussed between the parties provided for termination in the event that the award was set aside. The claimant submitted that these drafts, containing the defendant's proposed terms showed that the defendant was prepared to provide the information on terms which would give it only fairly limited protection in the event that the award was annulled. This is to be contrasted with the position it has since taken.
141. I have concluded that there is a real and serious risk of prejudice to the defendants which cannot be fully met by the contractual confidential undertakings and offer to destroy the information.
142. First, there is real force in the defendant's point that it may well be extremely hard to detect whether there has been any misuse by competing manufacturers of the defendant's know-how. Such a third party manufacturer, having replicated the defendant's manufacturing recipe may then seek to use it in the manufacture of generic products, including things other than oral contraceptives. It may well prove impracticable to police any confidentiality terms. It also seems to me that this is a general consideration, which does not turn on the precise wording of any proposed confidentiality terms.
143. Second, the manufacturers may be anywhere in the world and may have no assets within this or other reasonable accessible jurisdictions that it would be possible to enforce against, which would render any confidentiality undertakings of little practical benefit. Again this point applies irrespective of the precise wording offered.
144. Third, the suggested contractual protection is in the form of an agreement between the claimant and the defendant, with the claimant to enter back-to-back contracts with third party suppliers. This means that any enforcement of the terms will be for the claimant. There is some force in the claimant's observation that it has its own interest in enforcing those terms since the information will (once provided) be its own confidential information. But there would be no such inherent commercial incentive for the claimant in the event that the second award were to be undone.
145. Fourth, even if the claimant took all reasonable steps available to it to enforce any such agreements, it is not clear that the claimant would be able to detect whether there had been breaches of contract by the suppliers (for reasons already given); or that there would be effective means of enforcement against such suppliers in overseas jurisdictions.
146. For these various reasons there are real risks that the information could be used to enable third parties to compete with the defendant in a range of products throughout the world and the protections offered by the claimant will only offer partial practical protection. I also accept the defendant's evidence that the information consists of valuable proprietary know-how which it has taken many years in accumulating.
147. Fifth, I do not consider that there is much force in the points made by the claimant about the terms of the draft ATA and TSA being discussed in December 2021. At the same time as those were being negotiated the parties were considering confidentiality

safeguards (though the claimant was also maintaining its position that the defendant was not entitled to them as a pre-condition of providing the Registration Dossiers). It seems to me that the position of the defendant has been consistent – that it requires further safeguards for its know-how. That the draft ATA and TSA had fairly limited provisions about what would happen in the event that the award was annulled seems to me to be beside the point.

148. In short, there are strong reasons for concluding that it would be very difficult to reverse or undo the impact on the defendant of handing over its know-how. The claimant did not ultimately take issue with the defendant's contention that this information is likely to be valuable. Indeed part of the claimant's case is that it needed the information urgently in order to enable third party manufacturers to produce the products covered by the trade marks. In the arbitration it described the provision of the defendant's know-how (the details of its manufacturing formulae, ingredients and processes) as critical to enable third party suppliers to make the products.
149. For the avoidance of any doubt, in reaching this conclusion, I am making no findings or observations about the parties' rival cases about the meaning of the second arbitration award and whether it requires the defendant to provide the Registration Dossiers unconditionally. Nor am I making any finding or observation about the reasonableness of the confidentiality terms offered by the claimant on 3 December 2021. That is to be determined under Dutch law and, for reasons already given, the court is not in a position to determine that issue at this summary hearing. The issue I am addressing here is a different one: i.e. the risks of prejudice to the defendant if it is required to provide the Registration Dossiers to the claimant now but the second award later comes to be set aside.
150. I come then to the overall exercise of the court's discretion. I have taken all of the above factors into account. To reprise:
  - i) I have concluded that there is no evidential basis for seeing the challenge as being brought in bad faith or being a delaying tactic designed to buy more time to allow the defendant to gear up to compete. I consider overall that it is bona fide challenge on properly arguable grounds with reasonable prospects of success.
  - ii) On a brief consideration of the merits it seems to me that the award is neither manifestly invalid nor manifestly valid. The claimant has of course succeeded on the res judicata issues before an impressive tribunal and it probably has better than even chances of maintaining its award. But I do not think the court can properly go further than that on the merits.
  - iii) The delay may be up to fifteen months but may also be less than that.
  - iv) Any further delay in enforcement is likely to cause prejudice to the claimant. Some of this can be mitigated by the undertakings proffered by the defendant, including by lodging monies by way of security. There will also be continuing uncertainty to the claimant's business, including its ability to expand or raise money. On the other hand, there is no concrete evidence of any such steps. And the anticipated delay is comparatively short in the context of the long-running dispute between the parties which has been going on since 2015. The claimant

did not invoke any early termination rights until April 2019. It was then more than two years after that the second award was produced.

- v) There is serious and irremediable potential prejudice to the defendant in the event that it is required to provide access to the Registration Dossiers at this stage but ultimately succeeds in its challenge. The TMs and MAs could be transferred back to the defendant. But once the confidential information and proprietary know-how has been handed over it will be out of the bag. The risks of damage are mitigated but not removed by the confidentiality terms offered by the claimant. The know-how is valuable and has been built up by the defendant over decades. If it is disclosed to third party manufacturers it will be difficult for the defendant to detect any misuse even if contractual safeguards are given. There may also be difficulties of enforcement of any such terms.

151. I have decided on balance that I should adjourn the enforcement application pending the challenge before the Court of Appeal in Amsterdam on terms that the defendant shall provide the security to protect the claimant against the financial losses it may suffer in the form of paying higher prices for the products. The defendant has also offered further protection to the claimant (detailed above) which shall be required as a condition of the adjournment.
152. It has been very important to my exercise weighing these factors that the defendant has not sought any adjournment beyond the first instance decision in Amsterdam. I would not have been prepared to countenance a longer adjournment: it seems to me that the delay of fifteen months is towards the outer limits of acceptable delay.
153. The order should also give the claimant liberty to return for further orders (including to lift or truncate the adjournment) if there are changed circumstances, including in the event that it appears that the decision of the Amsterdam Court of Appeal will not be delivered within the expected period of fifteen months.

### **Disposition**

154. Pursuant to section 103(5) of the 1996 Act, I have decided to adjourn these enforcement proceedings until judgment by the Amsterdam Court of Appeal in the proceedings challenging the second award. The defendant shall give the undertakings and security referred to above. The claimant shall have liberty to apply including to cater for unanticipated changes in the timetable in the Dutch proceedings.