



1 March 2017

PRESS SUMMARY

IPCO (Nigeria) Limited (Respondent) v Nigerian National Petroleum Corporation (Appellant) [2017] UKSC 16
On appeal from [2015] EWCA Civ 1144 and 1145

JUSTICES: Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge, Lord Toulson

BACKGROUND TO THE APPEAL

This appeal concerns the enforcement in England of a Nigerian arbitration award dated 28 October 2004 for USD 152,195,971 plus 5m Nigerian Naira in respect of a contract by which IPCO (Nigeria) Limited (“IPCO”) undertook to design and construct a petroleum export terminal for Nigerian National Petroleum Corporation (“NNPC”). The award is subject to still outstanding challenges by NNPC in Nigeria, initially for what have been called “non-fraud reasons” and, from 27 March 2009, for alleged fraud in relation to IPCO’s presentation of its claim. The issue before the Court is whether the appellant, NNPC, should have to put up a further USD 100m security in the English enforcement proceedings.

An *ex parte* order for enforcement made by Steel J on 29 November 2004 led to an application by NNPC to set aside under ss.103(2)(f) and 103(3) or, alternatively, for enforcement to be adjourned under s.103(5), of the Arbitration Act 1996 (“the 1996 Act”). On 27 April 2005, Gross J ordered that enforcement be adjourned pending resolution in Nigeria of the non-fraud challenges, conditional on NNPC (i) paying IPCO USD 13.1m and (ii) putting up security of USD 50m under s.103(5). Following a further application for enforcement based on the delay in the Nigerian proceedings, and further orders including one under which a further USD 30m was provided by way of security, NNPC applied in Nigeria to raise the fraud challenge. A consent order dated 17 June 2009 was then made in the English proceedings whereby the decision on enforcement was further adjourned under s.103(5), upon NNPC undertaking to maintain the security of USD 80m thus far provided until further order.

On 24 July 2012, IPCO renewed its application to enforce on the ground of the further delay in the Nigerian proceedings. This application was dismissed by Field J but allowed on appeal by the Court of Appeal, which decided to cut the Gordian knot caused by the “sclerotic” process of the Nigerian proceedings.

The Court of Appeal ordered that (i) the proceedings be remitted to the Commercial Court for it to determine pursuant to s.103(3) whether the award should be enforced in light of the alleged fraud and (ii) any further enforcement of the award be “adjourned” in the meanwhile under s.103(5), such order being made conditional on NNPC providing a further USD 100m security (in addition to the USD 80m already provided). NNPC appeals against the order for security on the basis that it was made without jurisdiction or wrong in principle and/or was illegitimate in circumstances where both Field J and the Court of Appeal had concluded that NNPC had a good *prima facie* case of fraud entitling it to resist enforcement of the whole award.

JUDGMENT

The Supreme Court unanimously allows NNPC’s appeal. Lord Mance gives the lead judgment, with which all the Justices agree.

REASONS FOR THE JUDGMENT

Section 103(5) of the 1996 Act

The Court of Appeal's order was not justified by reference to s.103(5). Nothing in s.103(2) or (3) (or in the underlying provisions of article V of the New York Convention) provides a power to make an enforcing court's decision on an issue raised under these provisions conditional on an award debtor providing security in respect of the award. This is in marked contrast to s.103(5), which specifically provides that security may be ordered where there is an adjournment within its terms [24].

The Court also erred in treating its order that the English Commercial Court should decide the fraud issue as involving an "adjournment" of the decision on that issue within the terms of s.103(5). Section 103(5) concerns the situation where an enforcing court adjourns its decision on enforcement under s.103(2) or (3) while an application for setting aside or suspension of the award is pending before the court of the country in, or under the law of which, the award was made. It does not extend to delays in the decision-making process occurring while a decision of an issue under s.103(2) or (3) is made [25-26]. Further, s.103(5) contemplates an order for security being made "on the application of the party claiming recognition or enforcement of the award". The reasoning in *Dardana v Yukos* [2002] confirms that security pending the outcome of foreign proceedings is, in effect, the price of an adjournment which an award debtor is seeking; it is not to be imposed on an award debtor who is resisting adjournment on properly arguable grounds [27-29]. In the present case, there was no adjournment under s.103(5) onto which to hang, as the price, a requirement of further security [30-32]. The Court of Appeal's further reasons for imposing the security, including as an incentive to securing finality in the context of lengthy delays, do not go to the jurisdiction or power to order security under s.103 [32].

General English procedural rules

The requirement to provide security could not be justified by reference to general English procedural rules. Reliance was placed on CPR 3.1(3) and, indirectly, s.70(7) of the 1996 Act [16-21]. However, the conditions for recognition and enforcement set out in articles V and VI of the New York Convention (to which s.103(2), (3) and (5) give effect) constitute a complete code intended to establish a common international approach. Had it been contemplated that the right to have a decision of a properly arguable challenge, on a ground mentioned in article V (i.e. s.103(2) and (3)), might also be made conditional on provision of security in the amount of the award, that could and would have been said. The Convention reflects a balancing of interests. Its provisions were not aimed at improving award creditors' prospects of laying hands on assets to satisfy awards. Courts have other means of assisting award creditors which do not impinge on award debtors' rights of challenge, such as disclosure and freezing orders [41].

Section 70(7) provides that the court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal. It only applies, however, to arbitrations that (unlike the present) have their seat in England, Wales or Northern Ireland. The 1996 Act contains no equivalent in relation to Convention awards. Further, the power will only be exercised if the challenge appears flimsy or otherwise lacks substance, which cannot be said of NNPC's fraud challenge [43]. Finally, CPR 3.1(3) has no relevance on this appeal. It is a power, expressed in general terms, to impose conditions on orders. Its focus is the imposition of a condition as the price of relief sought as a matter of discretion or concession, and not the imposition of a fetter on a person exercising its right to raise a properly arguable challenge to recognition or enforcement [44].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>