English Court Adjourns Enforcement of Nigerian Arbitral Award

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In the recent judgment of *AIC Limited v The Federal Airports Authority of Nigeria* [2019] EWHC 2212, the English High Court adjourned the decision to enforce a Nigerian arbitral award in exercise of its discretion pursuant to section 103(5) of the Arbitration Act 1996 (which gives effect to Article VI of the New York Convention) on the basis that an application to set aside the award is still pending before the Nigerian courts. This decision is one of several English judicial cases involving Nigerian parties in which the court used its discretion to adjourn the enforcement of an arbitral award under section 103(5) of the Arbitration Act 1996. Such cases include *Continental Transfert Technique Ltd v The Federal Government of Nigeria et al.* [2010] EWHC 780 (Comm) and *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005]1 CLC 613.

The original dispute arose between AIC Limited ("**AIC**"), a Nigerian construction and property development company, and the Federal Airports Authority of Nigeria ("**FAAN**") in relation to a lease of land at the Murtala Mohammed Airport in Lagos, Nigeria for the construction of a flightpath hotel and resort complex. The dispute was referred to arbitration seated in Nigeria and the award was issued in favour of AIC on 1 June 2010 in the sum of US$48,124,000 plus interest at 18% per annum from the date of the Award until payment.

As a condition for the stay of enforcement, the Judge ordered FAAN to provide a substantial sum of security to AIC of approximately US$24 million – equivalent to half of the award or just fewer than three years' worth of accrued interest on the award. In considering whether to adjourn AIC's enforcement application under section 103(5) of the Arbitration Act 1996, the Judge applied the following criteria established in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2005]1 CLC 613 (at paragraph 15):

- whether the application before the court in the country of origin is *bona fide* and not a delay tactic;
- whether the application before the court in the country of origin has at least a realistic prospect of success (equivalent to the test in England & Wales for resisting summary judgment); and
- the extent of the delay occasioned by an adjournment and any resulting prejudice.

When deciding on whether to make an order for the provision of security pending the outcome of the set-aside application, the Judge relied on the "sliding scale" test established by the Court of Appeal in *Soleh Boneh v Uganda Government* [1993] 2 Ll Rep 208 (at page 212), which provides that the Court should determine, upon a "brief consideration" of the merits, where on a sliding scale the facts fall as between an award that is "manifestly invalid" and one that is "manifestly valid". 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. The Court should then consider the ease or difficulty of enforcement of the award and whether it would be rendered more difficult if enforcement is delayed. The amount of security to be ordered should reflect the degree of prejudice as may result from the delay.

Applying the above principles to the facts, the Judge noted that AIC would suffer some prejudice by being kept out of its money as a result of a potentially considerable further delay to enforcement; there was evidence that the various appeals made to the Nigerian Supreme Court would not be heard until 2023 or 2024. However, this had to be balanced against the other factors in the case, particularly the fact that the award was set aside on the only occasion on which the merits of the set-aside application were considered by a Nigerian court. The Judge considered that the factors pointing to a decision of enforcement could be

addressed appropriately by way of security.

This decision serves as a useful illustration of the English courts' application of Article VI of the New York Convention (implemented by section 103(5) of the Arbitration Act 1996). Generally, the English courts will adopt a pro-enforcement approach with respect to New York Convention arbitral awards, in line with the fundamental objective of the New York Convention, which is to provide a homogenous, efficient approach for the recognition and enforcement of foreign arbitral agreements and awards. While it generally encourages the *prima facie* right to enforce awards, the New York Convention also provides important safeguards, enshrined in Articles V and VI (reflected in section 103 of the Arbitration Act), to protect award debtors from awards that are improper or procedurally incorrect and to protect their rights of challenge. Article V lists seven discretionary and exhaustive grounds for refusing recognition or enforcement of an award, such as public policy concerns or the fact that the award has not yet become binding on the parties or has been set aside or suspended at the seat of arbitration. Article VI allows the court to adjourn recognition or enforcement of an award and to order security as a condition for the adjournment in only a very limited circumstance, as illustrated by this case.

Significantly, this case highlights the balance to be struck between giving proper deference to the enforcement of a New York Convention arbitration award and avoiding conflicting judgments in circumstances where set-aside proceedings are pending at the seat of arbitration. The fact that an arbitration is domestic in the country of origin and that all parties are domiciled or incorporated there is likely to enhance the deference of the courts of England and Wales to the court exercising supervisory jurisdiction in that country. They are more likely to give credence to the doctrine of comity than to pre-empt the decision on a challenge to an award before the foreign court of the seat of the arbitration. Section 103(5) of the Arbitration Act 1996 thus provides a compromise between two equally legitimate concerns as articulated by Gross J in the *IPCO* case (at paragraph 14): "*on the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction.*"

This preferred approach of the courts of England and Wales means that an award creditor applying for enforcement of the arbitral award is likely to face difficulties

in securing immediate enforcement in circumstances where proceedings relating to the validity of the award at the seat of arbitration are not yet concluded. However, as this case demonstrates, the courts are often willing to order the provision of substantial security as a condition for the stay of enforcement, which confers some benefit on the award creditor and recognises the element of prejudice it will suffer as a result of the continuing delays in enforcement. In reality, an award debtor that has made a set-aside application in the courts at the seat of arbitration has little incentive to pursue that application timeously because the award cannot be enforced in that country while those proceedings are still pending. For example, in the *Soleh Boneh* case, the second defendants challenged the validity of an arbitral award in Swedish court proceedings that carried on for fourteen years. Staughton LJ observed that "*although they are nominally plaintiffs and presumably have the carriage of the application*, *in reality they are defendants and have no reason to see that it is decided promptly*" (at paragraph 212). An order making the stay of enforcement conditional on the provision of substantial security is likely to counter this effect and encourage the award debtor to pursue more expeditiously its challenge to the award in the country of origin.