# If at first you don't succeed...

*James Hargrove explains the limits of using foreign court challenges to frustrate the enforcement of international arbitral awards*

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After three applications in four years relating to the enforcement of an international arbitral award issued in Nigeria, Tomlinson J, sitting in the Commercial Court in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2008], recently ordered the immediate enforcement of part of the award, despite ongoing wholesale challenges in the High Court and Court of Appeal in Nigeria.

This judgment is the first time an English court has ordered partial enforcement of an award, and demonstrates both the courts' continued willingness to play a pragmatic supporting role in relation to the international arbitral process and, following the Court of Appeal's judgment in *Soleh Boneh v Republic of Uganda* [1993], their refusal to allow enforcement of international awards to be scuppered by meritless local court challenges. For those tempted to over-egg the validity of a local court challenge, the judgment also contains a salutary warning that such action may ultimately prove counter-productive.

## Background

The arbitration underlying the Commercial Court proceedings concerned a dispute over the design and construction of a petroleum export terminal in Port Harcourt, Nigeria. The claimant, IPCO, was a Nigerian contractor company owned by principals based in Hong Kong. The defendant, Nigerian National Petroleum Corporation (NNPC), which referred to itself in the arbitration as the 'State Oil Corporation of Nigeria', was the owner and principal employer in relation to the project, and is one of the most valuable companies in Nigeria.

Unfortunately, the project was subject to various delays and alterations, and a dispute arose between IPCO and NNPC regarding liability for the resulting costs. A lengthy arbitration followed, held in Lagos under the Nigerian Arbitration and Conciliation Act 1990, and applying Nigerian law as the substantive law of the contract between the parties. Eventually, on 28 October 2004, the arbitral tribunal issued an award in favour of IPCO of $152m, plus NGN5m.

On 15 November 2004 NNPC filed proceedings in the Federal High Court of Nigeria challenging the award on various grounds, including alleged misconduct of the tribunal, errors of law, duplication in IPCO's claims and violation of public policy.

At around the same time, IPCO issued an *ex parte* application in the English Commercial Court for recognition and enforcement of the award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), as incorporated into English law by s101 of the Arbitration Act 1996 (the Act). On 29 November 2004 Steel J ordered enforcement of the award.

## English proceedings

While NNPC's substantive challenge in the Nigerian court continued, NNPC applied for an adjournment of Steel J's order, claiming that enforcement ought to be stayed pursuant to s103(5) of the Act, pending the outcome of the substantive challenge in the Nigerian court.

Gross J heard NNPC's application in April 2005, during which NNPC's English counsel submitted that the Nigerian proceedings were likely to be concluded within a matter of months and, along with Nigerian counsel (by way of written evidence), made submissions on the nature and strength of NNPC's challenge in the Nigerian court.

> 'For those tempted to over-egg the validity of a local court challenge, *IPCO v NNPC* contains a salutary warning that such action may ultimately prove counter-productive.'

In accordance with the principles set out by the Court of Appeal in *Soleh Boneh*, Gross J briefly considered the strength of the Nigerian challenge and weighed up the requirement that enforcement ought not to be unduly frustrated by a meritless challenge in the local court with the countervailing consideration that the judgment of the local court ought not to be pre-empted by rapid enforcement in England (see p87 *Commercial Arbitration*, Mustill and Boyd, 2nd ed, 2001).

In summary, the detailed questions the court must consider are:

- whether the award is 'manifestly valid';
- whether enforcement will become more difficult if it is delayed;
- whether the proceedings in the country of origin are *bona fide* or a delaying tactic;
- whether there is a realistic prospect of success in the court of the country of origin; and
- the extent of the likely delay.

Having carried out this analysis, on 27 April 2005 Gross J ordered the adjournment. However, he also held that the Nigerian court would, in any event, be likely to uphold at least $58.5m of the award, and therefore ordered that, pursuant to s103(5) of the Act, NNPC must provide security for $50m.

In giving his judgment, Gross J stated that he had endeavoured to give 'proper deference, going beyond lip-service' to the Nigerian court proceedings, but took into account the fact that, if security was not provided, IPCO's chances of enforcement may be prejudiced. NNPC subsequently complied with the security requirement by providing a guarantee.

Unfortunately, despite the submissions on the likely speedy resolution of the Nigerian proceedings, what followed in Nigeria was precisely the opposite. Various applications and appeals were filed and, by 2008, finality in the Nigerian proceedings was very much further away than it had been when the matter was heard by Gross J – perhaps decades from conclusion.

*If in the country of challenge there has been a 'significant event' that may remove the justification for the stay, the English court has jurisdiction to reconsider the order.*

**Court review**

IPCO subsequently applied for a review of Gross J's order of adjournment, on the basis of the extreme delays to the Nigerian proceedings and claiming that


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*Soleh Boneh v Uganda*
[1993] 2 LLR 208

*3 Ob 221/04b*
Austrian Supreme Court, 26 January 2005

Gross J had been materially misled as to the nature and strength of parts of NNPC's defence.

Tomlinson J heard the application in February and delivered a very detailed judgment on 17 April 2008, in which he reviewed Steel J's and Gross J's judgments, which he wholly supported, and considered:

- whether he had jurisdiction to reconsider Gross J's order at all;
- if so, whether he also had jurisdiction to reconsider Gross J's review of the merits of the Nigerian proceedings;
- if so, whether he should, applying the principles of *Soleh Boneh*, vary the order; and
- whether he had the power to permit immediate partial enforcement of the award.

As to the question of reconsideration of Gross J's interlocutory order, Tomlinson J observed that since a section 103(5) adjournment is intended, under both the CPR and the New York Convention (from which s103(5) emanates), as a holding measure, an order made thereunder must be subject to supervision by the court of enforcement (England) of the events in the challenging court (Nigeria).

This means that, if in the country of challenge there has been a 'significant event' that may remove the justification for the stay, the English court has jurisdiction to reconsider the order. In this case, a recent appeal in the Nigerian court, which would probably cause the Nigerian proceedings to continue for many years, was just such an event.

Tomlinson J added that although in the ordinary course of events he would not have jurisdiction to reconsider a previous judge's review of the strength of a foreign court challenge to an award, under CPR 3.1(7) a previous review can be reconsidered if the original judge was misled, for example by non-disclosure.

In this case, Tomlinson J held, in several very strongly worded passages in his judgment, that NNPC's English counsel had 'innocently misled' Gross J as to the nature of certain of IPCO's claims in the arbitration and NNPC's defences in the Nigerian proceedings. He considered that the evidence put forward by NNPC's Nigerian counsel, in particular for the alleged duplication of claims by IPCO, was 'disingenuous' and sought to 'take advantage of [counsel's] flawed analysis'.

by IPCO, the judge agreed with Gross J that NNPC had put forward some challenges which, on brief review, it would not be proper for the English court to pre-empt by allowing immediate enforcement.

Lastly, the judge considered whether the section 103(5) stay should continue and whether he had the power to order partial enforcement of the award. He noted that it was:

> ... obvious that any company would be prejudiced by the continued non-receipt of such a large sum of money.

*The court will have to balance competing interests – the enforcement of the award against the possibility of a successful local challenge. This is a concept with which the English judiciary are perfectly familiar.*

## Analysis

The upshot of the judge's analysis, which considered detailed fresh submissions on the nature and strength of IPCO's claims and NNPC's pleaded case in the court proceedings, was that a large part of NNPC's defence, which purported to reduce the potential award by $88m on the (misconceived) ground of duplication, carried no prospect of success at all in the Nigerian courts.

Unfortunately, Gross J had been misled into a conclusion that the defence bore some prospect of success. Tomlinson J therefore concluded that there was no realistic prospect, even if they were successful on their other grounds, that NNPC would be able to reduce the award below $58.5m. Concerning the remaining sum claimed by IPCO, the judge agreed with Gross J that NNPC had put forward some challenges which, on brief review, it would not be proper for the English court to pre-empt by allowing immediate enforcement.

After considering the wording of CPR s101(3), articles III and V1(c) of the New York Convention, and various cases, including the judgment of the Austrian Supreme Court in *3 Ob 221/04b [2005]*, in which the court permitted partial enforcement of an award, the judge held that the English court did have the power to permit partial enforcement of an international arbitration award and that justice would be served by doing so in this case. The judge therefore ordered that $50m, plus interest thereon, should be paid to IPCO immediately, under the guarantee provided by NNPC, and enforcement of the remainder of the award should be adjourned, pending the outcome of (or further 'significant events' in) the Nigerian proceedings. ■

## Key issues

- There is no longer uncertainty about whether the court has the power to make a partial enforcement order of an arbitration award. It has.
- However, if it would not be proper for the English court to pre-empt a local challenge by allowing immediate enforcement, then it will not do so.
- *IPCO* reinforces the trend that the English court will continue to support international arbitration in a sensible and practical way.
- The court will have to balance competing interests – the enforcement of the award against the possibility of successful local challenge. This is a concept with which the English judiciary are perfectly familiar.
- Over-stressing the chances of success in a local challenge may be counter-productive.