Enforcing an arbitral award – the long haul

A London Commercial Court hearing on a long-running tussle in the Nigerian energy sector has thrown light on the limits of using foreign court challenges to frustrate the enforcement of international arbitral awards in England. JAMES HARGROVE reports

Mr Justice Tomlinson, sitting in London's Commercial Court in the case of *IPCO v NNPC*, recently ordered immediate enforcement of part of an international arbitral award issued in Nigeria, despite ongoing challenges to it in Nigeria's High Court and Court of Appeal. It comes after three applications on the award in four years.

The judgment is the first time the English court has ordered partial enforcement of an award and demonstrates its continued willingness to play a pragmatic supporting role in the international arbitral process. Following the Court of Appeal's judgment in *Soleh Boneh v Uganda Government (*1993), it also shows its refusal to allow enforcement of such awards to be scuppered by meritless local court challenges. The judgment also warns those tempted to over-egg the validity of a local court challenge that it may prove counter-productive.

The underlying arbitration in this case is a dispute over the design and construction of a petroleum export terminal at Port Harcourt in Nigeria.

The claimant – referred to as IPCO in the arbitration and the court proceedings – is a Nigerian contractor company owned by Hong Kong-based principals. The defendant, known as NNPC, which referred to itself in the arbitration as the "Nigerian State Oil Corporation", is the project's owner and principal employer and one of the country's most valuable companies.

Lengthy arbitration

The project suffered delays and alterations and a dispute arose between IPCO and NNPC over liability for the resulting costs. A lengthy arbitration followed in Lagos under the Nigerian Arbitration and Conciliation Act 1990, which applied Nigerian law as the substantive law for the contract between the parties. On 28 October 2004 the arbitral tribunal issued an award in favour of IPCO for US$152,195,971.66, plus ancillary expenses.

NNPC filed a challenge in the Federal High Court of Nigeria on 15 November 2004. This included allegations of misconduct by 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 Arbitral Awards (1958), as incorporated into English law by section 101 of the Arbitration Act 1996. On 29 November 2004, Mr Justice David Steel ordered enforcement of the award.

While NNPC's challenge in the Nigerian Court continued, NNPC applied for an adjournment of Mr Justice Steel's order, claiming that enforcement ought be stayed pursuant to section 103(5) of the 1996 act, pending the outcome of the challenge in Nigeria. Mr Justice Gross heard NNPC's application in April 2005, during which NNPC's English counsel submitted that the Nigerian proceedings were likely to be concluded within months, and along with Nigerian counsel (via written evidence) made submissions on the nature and strength of NNPC's challenge.

Following the principles set out by the Court of Appeal in the *Soleh Boneh* case, Mr Justice Gross considered the strength of the Nigerian challenge, and weighed the requirement that enforcement should not be unduly frustrated by a meritless local court challenge against the consideration that the local court ought not to be pre-empted by rapid enforcement in England (see Mustill & Boyd, *Commercial Arbitration*, 2nd ed, 2001 Companion, p. 87).

In summary, the points the court must consider are: whether the award is "manifestly valid"; whether enforcement will be made 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 latter country's court; and the likely extent of the delay.

Having carried out this analysis, on 27 April 2005, Mr Justice Gross ordered the adjournment. However, he also held that the Nigerian Court would in any event be likely to uphold at least US$58.5 million of the award. He therefore ordered that, pursuant to section 103(5) of the 1996 act, NNPC must provide security for US$50 million. Mr Justice Gross stated that he had endeavoured to give "proper deference, going beyond lip service" to the Nigeria proceedings, but considered the fact that if security were not provided, IPCO's chances of enforcement may be prejudiced. NNPC subsequently complied by providing a guarantee.

But despite the submissions on the likely speedy resolution of the Nigerian proceedings, what followed was precisely the opposite. Various applications and appeals were filed, and by 2008 a result in the Nigerian proceedings was much further away than it had been when the matter was heard by Mr Justice Gross – indeed, it was perhaps decades from a conclusion.

IPCO subsequently applied for a review of Mr Justice Gross's order of adjournment on the basis of the extreme delays to the Nigerian proceedings and that the judge had been materially misled as to the nature and strength of parts of NNPC's defence. Mr Justice Tomlinson heard the application in February and

delivered a detailed judgment on 17 April 2008, in which he reviewed the judgments of Mr Justice Steel and Mr Justice Gross, which he wholly supported. He also considered: whether he had jurisdiction to reconsider the latter's order at all; if so, whether he also had jurisdiction to reconsider Mr Justice Gross's review of the merits of the Nigerian proceedings; if so, whether he should, applying the principles on *Soleh Boneh*, vary the order; and whether he had the power to permit immediate partial enforcement of the award.

As to reconsidering Mr Justice Gross's interlocutory order, Mr Justice Tomlinson observed that a section 103(5) adjournment was intended as a holding measure, both under England's civil procedure rules (CPR) and the New York Convention (from which it emanates). This means an order must be made subject to supervision by the court of enforcement (England) of the events in the challenging court (Nigeria). As such, if there has been a "significant event" in the country of challenge 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 proceedings to continue for many years, was just such an event.

However, Mr Justice Tomlinson added that while the court may have jurisdiction to review a previous adjournment order after a "significant event", it only has the power to review the previous judge's ruling on the strength of the foreign court challenge in exceptional circumstances, including, for example, under the CPR 3.1(7), where the previous judge was misled by material non-disclosure.

Innocently misled

In this case, Mr Justice Tomlinson held that NNPC's English counsel had "innocently misled" Mr Justice Gross on the nature of some of IPCO's claims in the arbitration and NNPC's defences in the Nigerian proceedings. In addition, the judge held that the evidence put forward by NNPC's Nigerian counsel – in particular that which alleged duplication of claims by IPCO – was "disingenuous" and sought to "take advantage of [counsel's] flawed analysis".

Having completed a fresh analysis of the strength of the challenge in the Nigerian Court, the judge concluded that NNPC's defence against some US$88 million of IPCO's claims, which was based on alleged duplication of these claims, carried no prospect of success at all.

Mr Justice Gross was misled into concluding the defence had some prospect of success. But Mr Justice Tomlinson decided this was not the case, even if the defendents were successful on their other grounds, and that NNPC would be unable to reduce the award below US$58.5 million. On the remaining sum claimed by IPCO, the judge agreed with Mr Justice Gross that NNPC had put forward some challenges that, 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". He then held that the English court had the power to permit partial enforcement of an international arbitration award and that justice would be served by doing so in this case. Therefore, the judge ordered that some US$50 million (plus interest) should be paid to IPCO immediately, under the guarantee provided by NNPC, and that enforcement of the remainder of the award should be adjourned, pending the outcome of (or further "significant events" in) the Nigerian proceedings. ■

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unwilling to intervene in high-tech markets. Nonetheless, the fact that this is a relatively young and fast-moving market seems to have engendered a reluctance to step in.

In practice, the Commission may have been faced with an unenviable choice. While there were several factors strongly pointing to the transaction having an anti-competitive outcome, it was faced with either blocking the transaction entirely or clearing it unconditionally, as there were no obvious remedies available. It may be that because this choice was even more stark than usual it focused the Commission's mind on the desirability or otherwise of intervening.

Therefore, those considering vertical mergers in fast-moving markets can probably take comfort from the decision. Beyond that, the case may also be seen as a further retreat from intervention in vertical deals. ■

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