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BRIEFING

SUPREME COURT REMOVES "SECURITY BLANKET"

MARCH 2017

- SUPREME COURT HANDS DOWN MILESTONE DECISION ON INTERNATIONAL ARBITRATION
- ENGLISH COURTS DO NOT HAVE JURISDICTION TO ORDER PAYMENT OF SECURITY AS A CONDITION TO CHALLENGING ENFORCEMENT OF A NEW YORK CONVENTION ARBITRATION AWARD

Earlier this month, in a milestone decision concerning international arbitration, the Supreme Court unanimously held that the Court of Appeal had no jurisdiction under either the Arbitration Act 1996 or general rules of English procedure to order payment of security as a condition to challenging the recognition and enforcement of a New York Convention award in England.[1]

"THIS IS ONLY THE SECOND TIME IN RECENT YEARS THAT THE SUPREME COURT HAS DIRECTLY CONSIDERED THE NEW YORK CONVENTION."

This is only the second time in recent years that the Supreme Court has directly considered the New York Convention, with the previous occasion being *Dallah v Pakistan*,[2] in which WFW were instructed by the successful respondent, the Government of Pakistan.

Background

The genesis of these proceedings, now spanning 14 years, was IPCO's application for recognition and enforcement under the Arbitration Act 1996 (the "**1996 Act**") of a 2004 Nigerian-seated arbitration award in respect of a contract by which IPCO undertook to design and construct a petroleum export terminal for NNPC. The award was, and remains, subject to outstanding challenges by NNPC in Nigeria and England, initially for "non-fraud reasons" and, from 2009, for alleged fraud in relation to IPCO's presentation of its claim to the tribunal.

[1] *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16, [2017] 1 WLR 970.
[2] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763.

"THE COMMERCIAL COURT ORDERED THAT ENFORCEMENT BE ADJOURNED PENDING RESOLUTION OF THE NIGERIAN PROCEEDINGS, CONDITIONAL ON NNPC PUTTING UP SECURITY OF US$50M UNDER SECTION 103(5), IT BEING ENVISAGED THAT THE NIGERIAN PROCEEDINGS MIGHT BE RESOLVED WITH RELATIVE DESPATCH. BUT THAT WAS NOT TO BE."

In November 2004, the Commercial Court granted recognition and enforcement of the award, following which NNPC applied to set that order aside under sections 103(2) and (3) of the 1996 Act or, in the alternative, for enforcement to be adjourned under section 103(5) pending resolution of non-fraud challenges raised in its application to set aside the award in the Nigerian courts.

The relevant parts of section 103 of the 1996 Act – which replicate and give effect to articles V and VI of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**Convention**") – provide as follows:

"(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves – … (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. …

(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."

Article VI of the Convention states as follows:

> "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

In 2005, the Commercial Court ordered that enforcement be adjourned pending determination of the Nigerian proceedings, conditional on NNPC putting up security of US$50m under section 103(5), it being envisaged that the Nigerian proceedings might be resolved with relative despatch. But that was not to be. In 2008 (with delays ongoing in Nigeria), the Commercial Court concluded that NNPC should pay further substantial sums as security under section 103(5). However, following NNPC's discovery of IPCO's alleged fraud and subsequent raising of the fraud challenge in the Nigerian proceedings in 2009, a consent order was agreed setting aside the 2008 order and further adjourning enforcement in England under section 103(5) upon NNPC undertaking to maintain security of, by that stage, US$80m.

In 2012, IPCO renewed its application to enforce the award in England, again on the ground that there had been a sufficient change of circumstances in light of the ongoing delays in the Nigerian proceedings. That application was dismissed at first

"THE QUESTION AT THE HEART OF THIS APPEAL WAS WHETHER THE RIGHT TO CHALLENGE RECOGNITION AND ENFORCEMENT OF AN AWARD WAS CONDITIONED INCONSISTENTLY WITH THE CONVENTION."

instance but allowed on appeal.[3] As Lord Mance put it, the Court of Appeal decided to "cut the Gordian knot caused by the 'sclerotic' process of the Nigerian proceedings" by holding that the fraud challenge, which engages the public policy ground of section 103(3), should be determined in the English, rather than the Nigerian, proceedings. To this end, it ordered that:

(a) the proceedings be remitted to the Commercial Court for it to determine pursuant to section 103(3) whether the award should be enforced in light of the alleged fraud; and

(b) any further enforcement of the award be "adjourned" in the meanwhile under section 103(5), conditional on NNPC providing further security of US$100m (in addition to the US$80m already provided).

NNPC appealed against the order for further security on the basis that it was made without jurisdiction, was wrong in principle, and/or was illegitimate in circumstances where, as the Court of Appeal concluded, the fraud challenge was bona fide and NNPC had a realistic prospect of proving that the award should be set aside.

The Supreme Court's Judgment

In the course of oral argument, Lord Sumption intimated that the question at the heart of this appeal was whether the right to challenge recognition and enforcement of an award was conditioned inconsistently with the Convention. In the event, the Supreme Court unanimously answered that question in the affirmative, and accordingly allowed NNPC's appeal. Lord Mance gave the only reasoned judgment, which focused on two distinct issues, namely whether the order for security could be justified either by reference to: (a) section 103(5) of the 1996 Act; or (b) general English procedural rules, in both cases read in light of the Convention.

Section 103(5) of the 1996 Act

First, Lord Mance held that nothing in sections 103(2) or (3) (or in the underlying article V) provides a power to make an enforcing court's decision on a challenge under those provisions conditional on an award debtor providing security in respect of the award. That was in marked contrast to section 103(5), which specifically provides that security may be ordered where there is an "adjournment" within its terms.

Second, the Court of Appeal had erred in treating its order that the Commercial Court decide the fraud challenge as involving an "adjournment" of the decision on that issue justified by reference to section 103(5). Lord Mance explained that section 103(5) concerns situations where an enforcing court adjourns its decision on enforcement under sections 103(2) or (3) pending the outcome of an application for setting aside or suspension of the award before the court of the country in, or under the law of which, the award was made. There is no power under section 103(5) to order security except in connection with such an "adjournment", which ceased to be applicable when the Court of Appeal held that the fraud challenge should be decided by the Commercial Court. Thus, in purporting to order that further enforcement of the award should be "adjourned" under section 103(5) pending

[3] *IPCO (Nigeria) Limited Ltd v Nigerian National Petroleum Corporation* [2015] EWCA Civ 1144 and [2015] EWCA Civ 1145.

determination of the section 103(3) proceedings, the Court of Appeal was misusing that word in the context of section 103(5).

Moreover, section 103(5) contemplates an order for security being made "on the application of the party claiming recognition or enforcement". Lord Mance noted that, in *Dardana v Yukos*, the Court of Appeal had confirmed that security pending the outcome of foreign proceedings is, in effect, the price of the adjournment an award debtor is seeking and is not to be imposed on an award debtor resisting recognition and enforcement on properly arguable grounds.[4] In this case, since the Court of Appeal had concluded that the fraud challenge should be resolved in England, it erred by requiring security "not as the price of a further adjournment falling within section 103(5), but as the price of the decision of an issue under section 103(3)".

General English procedural rules

IPCO also sought to defend the Court of Appeal's order on the separate ground that the Convention, and the corresponding 1996 Act provisions, did not affect the ordinary procedural powers of the English courts, including as to security.

"THE CONDITIONS FOR RECOGNITION AND ENFORCEMENT SET OUT IN ARTICLES V AND VI CONSTITUTE 'A CODE' INTENDED TO ESTABLISH A 'COMMON INTERNATIONAL APPROACH'."

First, IPCO argued that sections 100-104 of the 1996 Act only occupy the field of procedural matters to a limited extent, and it did not follow from the Convention that States could not attach procedural conditions to article V (and thus section 103) challenges. In response, Lord Mance held that the conditions for recognition and enforcement set out in articles V and VI constitute "a code" intended to establish a "common international approach". A properly arguable challenge under article V may therefore only be made conditional upon the provision of security in the one situation falling within the scope of article VI (an "adjournment", which was in this instance inapplicable for the reasons outlined above). In this respect, the Convention "reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge".

Second, IPCO argued that if English law did not enable an award creditor under a Nigerian award to seek security for the award from an award debtor challenging enforcement, then it was imposing "substantially more onerous conditions" (i.e. procedural rules) on the award creditor than those applicable to English awards, which was inconsistent with article III of the Convention. IPCO relied, in particular, on section 70(7) of the 1996 Act, which provides, in relation to domestic awards, 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 also pointed to the English courts' general power under the Civil Procedure Rules (the "**CPR**") to make certain orders conditional on payment of a sum of money into court.

Lord Mance, however, concluded that domestic analogies were "unlikely to illuminate the operation of the internationally-based provisions". In any event, he held that IPCO's arguments did not have force:

(a) First, article III is subject to "the conditions laid down in" subsequent articles, including articles V and VI.

[4] *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] All ER (Comm) 819, [27]–[29].

(b) Second, it was doubtful whether an inability to order security on such a challenge could constitute a “substantially more onerous” rule of procedure in relation to recognition or enforcement than a rule allowing such security in the case of English awards.

(c) Third, the 1996 Act contains no equivalent to section 70(7) in relation to Convention awards and, in any event, such power would be exercised only if the challenge appears “flimsy or otherwise lacks substance”. That could not be said of NNPC’s fraud challenge.

(d) Last, Lord Mance also rejected any suggestion that the CPR could be applied to assist IPCO. Although the court has the 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 a right to raise a properly arguable challenge to recognition or enforcement.

For these reasons, the Supreme Court held that the order for security was not within the scope of any jurisdiction or power conferred on the Court of Appeal by section 103 of the 1996 Act. And nor could it be justified by reference to general English procedural rules.

Comment

Lord Mance’s erudite judgment is noteworthy for two reasons. First, it has reoriented the interpretation of the 1996 Act to accord with the international principles laid down in the Convention. Second, it has provided pragmatic guidance concerning recognition and enforcement of Convention awards in England.

“LORD MANCE’S JUDGMENT DISPLAYS A SENSITIVE REGARD TO THE VIRTUES OF HARMONISING THE RECOGNITION AND ENFORCEMENT REGIMES ACROSS CONVENTION STATES.”

In terms of the former, Lord Mance’s judgment displays a sensitive regard to the virtues of harmonising the recognition and enforcement regimes across Convention States, and thus provides a salutary reminder of the importance, in England, of reading (wherever possible) the international provisions of the 1996 Act consistently with the Convention. To this end, it is now clear that the grounds and conditions for recognition and enforcement of foreign awards in articles V and VI of the Convention (replicated in section 103 of the 1996 Act) constitute a complete “code” intended to establish a “common international approach”. That conclusion is significant because, apart from the second paragraph of article VI, the Convention’s provisions were, in principle, not aimed at improving award creditors’ prospects of laying hands on assets to satisfy awards, and domestic rules should not be used to undermine that concordat. It follows from this that security is not to be imposed on an award debtor resisting recognition and enforcement of an award on properly arguable grounds and, instead, can only be the price of an adjournment an award debtor is seeking pending the outcome of proceedings to set aside the award at the seat.

As for pragmatic guidance:

(a) First, the Supreme Court has now unambiguously decided that English courts have no jurisdiction to order award debtors to provide security on the tacit basis that, if they do not do this, immediate enforcement shall be ordered against them without determination of an otherwise properly arguable challenge under section 103. The critical questions in relation to ordering security against an

award debtor under section 103(5) are whether an "adjournment" is to be granted and, if it is, whether it is effectively at the award debtor's instance pending the outcome of the relevant challenge in the overseas court of the country in which, or under the law of which, the award was made.

(b) Second, courts have various other means of assisting award creditors at their disposal that do not impinge on award debtors' rights of challenge (e.g. disclosure and freezing orders). These can still be pursued by award creditors.

(c) Third, the courts' general procedural powers, e.g. under the CPR, may become relevant where a court makes procedural orders and determines to back them with necessary sanctions. A prime instance of that may be circumstances in which an award debtor has in some way defaulted, or misconducted itself, in the pursuit of a challenge under section 103.

"THE COURT UNDERSCORED THE ENGLISH COURTS' COMMITMENT TO GIVING EFFECT TO THE PRINCIPLES OF THE CONVENTION."

Standing back, as Lord Mance said, the Convention ultimately reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge. The Court of Appeal, for its part, had concluded that IPCO should be entitled, in principle, to enforce its award in England given the egregious delays that had transpired at the seat, Nigeria, notwithstanding the pendency of bona fide challenges in that jurisdiction. That was an entirely principled decision, and was consistent with the fundamentals of the Convention. Indeed, the Court underscored the English courts' commitment to giving effect to the principles of the Convention, which, in its words, "was intended to foster international trade by ensuring a relatively swift enforcement of awards and a degree of insulation from the vagaries of local legal systems".

However, the Court of Appeal erred by ordering (as a "goad to progress") that NNPC's public policy challenges should not only be decided by the Commercial Court, but that their determination should be conditional upon provision of further security of US$100m, failing which IPCO would have permission to enforce the award. That order undermined the careful balancing of the interests of award creditors and debtors achieved by the Convention.

The Court of Appeal and Supreme Court decisions, read together, now reflect an appropriate balance between the need to avoid commercially absurd outcomes for award creditors consequent upon inordinate delay in resolving challenges by award debtors at the seat, and the need to avoid injustice to award debtors by enabling bona fide challenges to recognition and enforcement to be properly and fairly determined, if not at the seat, then at the place where recognition and enforcement is sought.

FOR MORE INFORMATION

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