

UK SUPREME COURT OVERTURNS REQUIREMENT OF SECURITY IN PURSUIT OF SUBSTANTIVE APPEAL IN NIGERIAN OIL CASE

IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2017]

UKSC 16

Introduction

In *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] UKSC 16, handed down on 1 March 2017, the UK Supreme Court held that the Court of Appeal erred in requiring security from the appellant as it pursued an appeal against an arbitral award on the grounds of public policy and fraud.

Background

In 1994, IPCO and NNPC signed a contract whereby IPCO undertook to design and construct a petroleum export terminal for NNPC, subject to Nigerian law and containing an agreement to arbitrate disputes in accordance the Nigerian Arbitration and Conciliation Act 1988. In 2004, an arbitration award was granted by the relevant tribunal, and IPCO sought to have this award enforced in England under the Arbitration Act 1996 (“the 1996 Act”); an ex parte order was granted to this effect.

Subsequently, orders were handed down staying enforcement of the award, provided that NNPC provided security (in total, USD80 million).

In 2008, NNPC alleged it had discovered evidence of fraud, and leave was granted in Nigeria for NNPC to amend its pleadings (which were never determined). In addition, a consent order was made in the English proceedings under which NNPC undertook to maintain the USD80 million provided in security.

In 2012, due to continuing delays in Nigeria, IPCO made another application to enforce the arbitral award in England. The High Court declined to do so on the basis that it was not proper to reconsider the enforcement issue afresh, and that even so, it would not enforce an award given the allegations of fraud that had arisen.

In 2015, the Court of Appeal decided that material circumstances had changed due to the inability of the court in Nigeria to address NNPC's application. The Court of Appeal decided to remit the issue to the Commercial Court for a determination under s103(3) as to whether the 2004 Award should be enforced in whole or in part given the issues raised regarding the fraud alleged to have affected this award. The Court of Appeal adjourned pending the determination by the Commercial Court, and made this adjournment conditional upon the provision by NNPC of further security of USD100 million.

It was this final order for security that NNPC challenged in the UK Supreme Court, in essence on the ground that the order was made without jurisdiction or wrong in principle and/or was illegitimate in circumstances where NNPC has a good prima facie case of fraud entitling it to resist enforcement of the whole award.

Judgment

The UK Supreme Court allowed the appeal, with Lord Mance (with whom Lord Clarke, Lord Sumption, Lord Hodge and Lord Toulson agreed) delivering the judgment).

The issue for the Supreme Court was whether the Court of Appeal's order was justified by reference to section 103(5) of the 1996 Act; or general English procedural rules (in particular, Civil Procedure Rule 31.3).

Section 103 of the 1996 Act

The Supreme Court held that the Court of Appeal erred in its interpretation of the provisions of the 1996 Act, and its order for security was not within the scope of any jurisdiction or power conferred by that Act (or the underlying provisions of the New York Convention).

There was nothing in the language of section 103(2) (refusal to recognise or enforce an arbitration award on identified procedural grounds) or 103(3) (refusal to recognise an award based on non-arbitrability or public policy) that allows an enforcing court to make the decision of an issue under either subsection conditional upon the provision of security in respect of the award. This stands in contrast to section 103(5), which allows for security to be ordered where there is an adjournment within its terms.

As to Section 103(5), Lord Mance found that the Court of Appeal had erred in two respects:

- Section 103(5) allows the court to require security when it has adjourned under 103(2)(f), as it awaits the decision of a foreign body, which in turn adjourns its consideration of issues under section 103(2) and 103(3), which are substantive questions involving the propriety of an arbitral award. Although there was an adjournment in place at the time of making the original orders for security and the consent order, that ceased to be the case when the Court of Appeal decided that the issue of whether fraud was an answer to enforcement should no longer await the outcome of the Nigerian proceedings, but should be decided by the English courts. Once there is no such adjournment, there is no basis for order further security under section 103(5).
- The Court of Appeal, by its order for further security, had required security not in respect of an adjournment under section 103(5) but as the price of the decision of an issue under section 103(3). It had no power to do so – security was not a price to be paid to have a substantive claim adjudicated.

The Supreme Court also rejected arguments based on general English procedural rules. CPR 3.1(3) was held not to give the court a general power to impose conditions on one or other party whenever it happens to be making an order. It may be relevant where the court only permits the pursuit on terms of a claim or defence which in some respect is problematic.

Concluding Remarks

This is the first time the Supreme Court has considered the interpretation of section 103 in detail in the context of the provision of security and adjournment, and will be of interest to parties engaged in or contemplating enforcement proceedings particularly where the underlying award is subject to challenge outside England and Wales.

This case forms part of a continuing saga that spans thirteen years and two continents. While the issue of security and adjournments may have been resolved by the Supreme Court, the underlying case and IPCO's attempts to enforce the arbitration award continue. As has been repeatedly pointed out in the English litigation, such delays are extremely unfortunate and are to be avoided in the interests of efficient international dispute resolution.