International arbitration: The Supreme Court has a rare opportunity to comment on the New York Convention

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IPCO v Nigerian National Petroleum Corporation: A recent UK Supreme Court decision on security for costs orders when seeking enforcement of arbitral awards in England

The Supreme Court has recently had a rare opportunity to comment on the provisions in the Arbitration Act 1996 by which Articles V and VI of the New York Convention were enacted. In particular it has looked at the appropriate circumstances for making an order of security for costs when there is an application for enforcement of an arbitral award.

This case relates to an arbitration award dated 28 October 2004 issued following an arbitration seated in Nigeria in favour of IPCO for USD 152,195,971 plus 5 million Nigerian Naira plus interest at 14% pa.

The arbitration proceedings related to a contract dated 14 March 1994 by which IPCO undertook to design and construct a petroleum export terminal for NNPC.

NNPC has been challenging the award since 2004. Initially it challenged the award for 'non-fraud' reasons in the Nigerian Courts. Then from March 2009 NNPC challenged the award on the basis that there was a fraudulent inflation of the quantum of IPCO’s claim using fraudulently created documentation on the basis of evidence of ex IPCO employee Mr Wogu.

IPCO has been trying to enforce the award in England since 2004. In numerous hearings before an array of High court judges, enforcement has been refused but security eventually totalling USD 80 million has been ordered to be paid whilst the Nigerian challenges continued. By 2014, the value of the award, including interest accrued was USD 340 million.

Most recently the case was before Mr Justice Field who dismissed in April 2014 yet another application for enforcement made by IPCO and said that NNPC had a good prima facie case that IPCO had practised a fraud on the arbitral tribunal and that NNPC had a realistic prospect of proving that the whole award should be set aside. Field J ordered that this case should continue to trial in Nigeria (the Nigerian pleading had been amended as of 2009 to raise the fraud allegations). The security of USD 80 million ordered previously was maintained by consent.

The Court of Appeal agreed that NNPC had a good prima facie case of fraud but overturned Field J on his direction that the case should go to trial in Nigeria, instead deciding ‘to cut the Gordian knot caused by the sclerotic process of the proceedings in Nigeria’. It remitted the proceedings and in particular the fraud issue to the English Commercial Court for determination as part of an issue of public policy per s103(3) of the Arbitration Act (the ‘Act’).

At the same time, it adjourned enforcement under s103(5) of the Act pending the above s103(3) determination and ordered a further security of USD 100,000,000. Failing this payment the Court of Appeal gave leave to enforce without any decision on the fraud issue. Alternatively if security were to be paid any further enforcement was to be adjourned.

It is the latter part of the Court of Appeal Order, for further security, which was under appeal to the Supreme Court. The Supreme Court overturned the Court of Appeal’s order of further security though it held that the previous security of USD 80 million should be maintained ‘until further order of the Court’.

The Supreme Court found 2 errors in the Court of Appeal’s approach to s103(5) of the Act:

1. It said that ss103(2) and (3) do not allow an enforcing court to make the decision of an issue raised under either subsection conditional on the
provision of security in respect of the award. This is in contrast with s103(5) of the Act which expressly provides that security can be ordered where there is an adjournment of enforcement within its terms. The Court of Appeal’s decision to remit the case to the English Commercial Court is not an adjournment within the terms of s103(5) of the Act because that section requires the courts of the country in which the award was made to reach a decision.

2. The order for security has to be given on the application of the party claiming recognition or enforcement of the award. Security pending the outcome of foreign proceedings is, in effect, the price of an adjournment which an award debtor is seeking. It is not to be imposed on an award debtor who is resisting enforcement on properly arguable grounds. There is no power under s103(5) of the Act to order security except in connection with an adjournment of enforcement. The words ‘adjourn the decision’ in s 103(5) of the Act do not extend to delays in the decision making process while a decision per ss103(2) and (3) is made. The provision for security by the Court of Appeal was made a condition not of any adjournment but of avoiding immediate and final enforcement.

The Supreme Court also dismissed IPCO’s claim that the order for security for costs was properly made in accordance with discretion given to the Court by the English procedural rules. It found that there was no justification within the English procedural rules to order security for costs when dealing with enforcement of arbitral awards in accordance with the New York Convention. The English procedural rules have other methods which award creditors can use. The Supreme Court said: ‘The conditions for recognition and enforcement in the NY Convention constitute a complete code intended to establish a common international approach. The Convention reflects a balancing of interests. Its provisions were not aimed at improving award creditors’ prospects of laying hands on assets to satisfy awards.’

General comment

It is a rare occasion when the Supreme Court has had opportunity to analyse the parts of the Arbitration Act which relate to enforcement of arbitral awards and so this analysis of section 103 of the Act will be helpful in future as arbitration continues to grow. But the decision whether to order security for costs will turn on the facts of each case and the facts of this case are quite unique. Perhaps the Court would have gone a different way if the fraud allegations had not been found to be bona fide by Field J and by the Court of Appeal. It will be interesting to see what the Commercial Court finally decides; one thing is for sure, this case deserves finality!
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