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Cross-border disputes

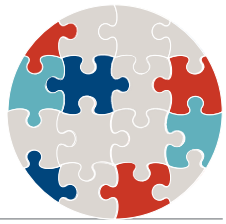
Forum/jurisdiction and parallel proceedings
International interim/protective relief
International asset recovery/ enforcement

English High Court adjourns application to enforce Nigerian arbitral award pending outcome of "set aside" application in Nigerian courts, but makes substantial interim security order

A. Summary

1. In *AIC Limited v The Federal Airports Authority of Nigeria* [2019] EWHC 2212, the English High Court adjourned an application made by AIC Limited ("**AIC**"), a Nigerian construction and property development company, to enforce a Nigerian arbitral award pursuant to the New York Convention worth approximately US$123 million (including accrued interest) made in its favour against the Federal Airports Authority of Nigeria ("**FAAN**"). The reason for the stay in enforcement was to allow the outcome of long-running court proceedings in Nigeria, concerning the validity of the original arbitral award.

2. Veronique Buehrlen QC (sitting as a Deputy High Court Judge) said that although the award lay "*towards the 'manifestly valid' i.e. top end of the scale, in which significant further delay* [was] *likely to ensue and in which some element of prejudice to AIC will result from a continuing delay in enforcement*", that had to be balanced against other factors. They included, in particular, the fact that the award had been set aside on the only occasion that the Nigerian application had been considered on its merits by the Nigerian courts (albeit that such order no longer stood), and the fact that it was "*important to avoid conflicting judgments*". Further, she considered that the factors militating against such an adjournment could be addressed by the provision of security, which she awarded in the sum of approximately US$24 million (equivalent to half of the original award, or just under three years' worth of accrued interest on it).



B. The arbitration award

3. The original award, dating back to 2010, relates to a dispute between the parties over the lease of land at Murtala Mohammed Airport, Lagos. AIC leased the land from FAAN in 1998 in order to develop a hotel and resort complex. In 2000, FAAN directed AIC to refrain from work on the development, AIC promptly complied with this but was then prevented by FAAN from any further construction as planned. The dispute was referred to arbitration seated in Nigeria. After a lengthy dispute, in June 2010, the arbitrator awarded AIC approximately US$48 million plus interest of 18% per annum.

4. Following publication of the award, both parties commenced proceedings before the Nigerian courts. FAAN filed a motion to set aside the award, whilst the AIC requested the Nigerian High Court in Lagos to remit the award to the arbitrator on the ground he ought to have ordered specific performance. At the same time, the AIC asked the Court to enforce the monetary judgement element of the award.

5. The Nigerian High Court rejected AIC's claim, and set aside the award. The Nigerian Court of Appeal however allowed AIC's appeal. It held that the issue and service of FAAN's originating process seeking to set aside the award was invalid because leave for service out of the Lagos State had not been obtained at the appropriate time. It therefore remitted the matters back to the Federal High Court for trial by a different judge. Neither party had since pursued its motions in the Federal High Court. Instead, both parties filed appeals to the Nigerian Supreme Court – AIC arguing that the Nigerian Court of Appeal should have dismissed FAAN's set aside application and determined AIC's applications for specific performance and enforcement of the monetary award, and FAAN seeking to overturn the Court of Appeal's decision that the originating motion on the set aside application was defective.

C. The English arbitration claim to enforce the arbitral award

6. In January 2019 AIC commenced an arbitration claim in London and obtained, without notice, an order for enforcement of the award.

7. FAAN applied to set aside the order and asked the Court to adjourn judgment pending the completion of proceedings in Nigeria. In the alternative, AIC applied for the English High Court to order that FAAN provide substantial sums by way of security (approximately US$162 million – the amount of the original award plus interested accrued by July 2023, being around the time that, on AIC's evidence, the appeals before the Nigerian Supreme Court would likely be heard) in the event that the enforcement claim was adjourned. AIC argued that, pursuant to Section 103(5) of the Arbitration Act 1996 (which contains the grounds on which the enforcement of a New York Convention awards may be refused or adjourned) and in view of a passage from the judgment of Lord Mance in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] UKSC 16, the English courts had no jurisdiction to adjourn the enforcement application unless an application to set aside the award was "*pending*" before the Nigerian court. It asserted that, following the decision of the Nigerian Court of Appeal, that was no longer the case.

D. The decision of the Judge

8. The English High Court found that it did have jurisdiction to adjourn the enforcement application pursuant to Section 103(5) of the Arbitration Act 1996 and the New York Convention. Deputy Judge Buehrlen determined that looking at whether the set aside application itself was "*pending*" was too narrow. Instead the question was whether the outcome of the application was pending, and on the facts that was the case.

9. The Judge also decided that such an adjournment should be ordered in this case. In making that decision, the Judge noted that the Court's discretion to do so was wide and unfettered, and involved consideration of a number of factors in the circumstances which would ordinarily include (at least) the following:

    - whether the application in the country of origin to set aside the award was brought bona fide and not simply by way of delaying tactics;
    - whether that application had at least a real (i.e. realistic) prospect of success (equivalent to the test in England & Wales for resisting summary judgment); and
    - the extent of the delay resulting from an adjournment, whether enforcement would be rendered more difficult if it is delayed and any resulting prejudice to the claimant.

10. The Judge further said that, in considering the merits of the set aside application before the foreign court, the English court was to undertake a "*brief consideration*" of the position and not a detailed examination of the foreign proceedings and determine where on a "*sliding scale*" the facts fell as between an award that was 'manifestly invalid' and one that was 'manifestly valid'.

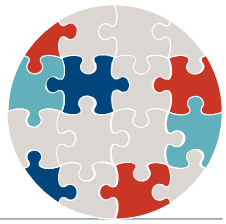
11. Thus, the stronger the merits of the set aside application, the stronger the case would be for an adjournment and the weaker any corresponding application for security would be. By contrast, the weaker the merits of the set aside application, the weaker the case would be for an adjournment and the stronger the application for security would be.

12. Further, where enforcement would be rendered more difficult as a result of delay, the case for security would be stronger; in contrast, the weaker the risk of prejudice to the enforcing party caused by an adjournment, the weaker the application for security would be.

13. On the facts, the Judge said that she had not seen anything to suggest that the set aside application was not brought bona fide.

14. Further, whilst she considered that the award lay "*towards the 'manifestly valid' i.e. top end of the scale, in which significant further delay* [was] *likely to ensue and in which some element of prejudice to AIC will result from a continuing delay in enforcement*", that had to be balanced against the other factors in the case. In particular, they included the fact that "*on the one occasion on which the Set Aside Application* [had] *come before the Nigerian Courts (that is before a Nigerian Federal High Court Judge applying Nigerian law) for consideration on the merits, the application was allowed and the Award was set aside*", but also the fact that:

    - *"if FAAN's appeal on the Preliminary Objection [succeeded] the immediate consequence [would] be to reinstate the decision … setting aside the Award"; and*



- *"it [was] not only FAAN that [had] challenged the validity of the Award. AIC [had] also taken issue with the Award since it [had] sought to challenge the Arbitrator's refusal to order specific performance of the Deed of Lease".*

15. Importantly, the Judge also said that she was mindful of the fact that it was "*important to avoid conflicting judgments*".

16. Accordingly, the Judge concluded in the circumstances at hand that an adjournment was appropriate, and that the factors militating against such an adjournment could be addressed by the provision of security.

17. As regards security, the Judge awarded approximately US$24 million be provided (rather than the US$162 million sought by AIC). She indicated that this was equivalent to half of the original award, or just under three years' worth of interest accrued upon it.

E. The effect of the decision and its practical and commercial implications

18. The case demonstrates that the courts of England & Wales will consider the merits of a pending set aside application before the foreign courts of the seat of an arbitration when determining:

    - whether to adjourn the enforcement of an award; and/or
    - whether, and what, security might be ordered pending its outcome,

    although that this would constitute only one of the factors of which they will take account when exercising their wide and unfettered discretion.

19. At the same time, however, their view on the merits would only be given on a "*brief consideration*" of the position and, when expressing that view and deciding what order to make, they will be mindful of the importance of avoiding conflicting judgments.

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