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IPCO v Nigerian National Petroleum Corporation – Another African Legal Saga with International Implications, by Solomon Ebere, Esq.*

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The Supreme Court of the United Kingdom (the "Supreme Court") has recently handed down a landmark decision in the protracted legal saga between Nigeria's national oil corporation and one of its foreign contractors. This decision not only provides welcome guidance on the relationship between the New York Convention (the "NYC") and English law that is of much significance to parties seeking to enforce, or resist enforcement of awards in the U.K, it also carries global significance.

On 14 March 1994, IPCO (Nigeria) Limited ("IPCO"), a Hong Kong-owned contractor, entered into a contract to design and construct a petroleum expert terminal for the Nigerian National Petroleum Corporation ("NNPC") in the oil-rich city of Port Harcourt. The contract was governed by Nigerian law and contained a dispute resolution clause pursuant to which disputes would be resolved in accordance with the Nigerian Arbitration and Conciliation Act of 1988.

The project was completed 22 months late. It was IPCO's position that the delay was in part caused by NNPC's requested variations to the original specifications and sought damages through arbitration, as provided for in the contract.

On 28 October 2004, an ad' hoc panel of three Nigerian arbitrators issued a final decision in favour of IPCO, awarding it over US$ 150 million, plus Naira 5 million, plus interest at 14% per annum.

Shortly thereafter, NNPC challenged the award before the Nigerian Federal High Court. It initially did so on "non-fraud" reasons (errors of law and procedural irregularity), but, from March 2009 onwards, relying on evidence supplied by a former IPCO employee, NNPC also challenged the award for fraud, contending that IPCO had inflated the quantum of its claim using fraudulently created documentation.

In parallel to the Nigerian proceedings, IPCO started enforcement proceedings in England in 2004, which NNPC challenged, relying on section 103 of the Arbitration Act of 1996 that gives effect to the United Kingdom's obligations under the NYC. Section 103 reads in relevant parts as follows:

> "103. Refusal of recognition or enforcement
>
> [….]

(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." (emphasis added)

NNPC argued that (i) because of the pending Nigerian appeals the award had not yet become binding on the parties (section 103(2)(f)); and/or (ii) recognition or enforcement of the award would be contrary to public policy (section 103(3)); and/or (iii) the enforcement of the award should be adjourned (section 103(5)) pending the resolution of the non-fraud challenges in the Nigerian courts.

On 27 April 2005, the English Commercial court ordered NNPC to pay IPCO just over US$13 million (which, at that stage, when only the non-fraud challenge had been raised, appeared indisputably due). Yet, it granted an adjournment subject to NNPC providing security in the sum of US$50 million under section 103(5). NNPC duly paid the US$13 million and provided the security.

In 2007, IPCO made another application to enforce the original award on the basis that the challenge before the Nigerian courts was unlikely to be determined for years. On 17 April 2008, the English Commercial court found that the change of circumstances was insufficient to justify re-opening the case but ordered NNPC to pay a further US$ 52 million plus US$ 26 million in interest. It also ordered a stay pending appeal, provided that NNPC paid additional security in

the amount of US$ 30 million, which NNPC did. Security, therefore, totalled US$ 80 million at this stage.

Then, new evidence came to light, suggesting that IPCO employees forged documents relied on in the arbitration to inflate the quantum of its claim. On 17 June 2009, the parties agreed to further adjourn the enforcement of the award and set aside those parts of the 17 April 2008's decision ordering payment of sums upon NNPC undertaking to maintain the security of US$ 80 million thus far provided until further order (the "**Consent Order"**).

In July 2012, IPCO made a further application to enforce the award in England contending that the continued delays in the Nigerian proceedings amounted to a change of circumstances. In April 2014, the English Commercial court dismissed IPCO's application. It added that NNPC had a good prima facie case of fraud, and that this case should continue to trial in Nigeria. However, the Court of Appeal disagreed, predicting that the 'sclerotic' proceedings in the Nigerian courts could take a further 30 years to resolve. On 10 November 2015, it ordered that (i) the proceedings be remitted to the Commercial Court to determine the fraud issue (section103(3)); and (ii) further enforcement should be adjourned pending the decision of the Commercial court; and (iii) NNPC should provide, under section 103(5), further security of US$100 million in addition the US$ 80 million it had already paid, failing which IPCO was entitled to enforce the whole award.

NNPC challenged the Court of Appeal's order for security, primarily arguing 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.

On 1 March 2017, the Supreme Court ruled that the Court of Appeal's order regarding the additional US$ 100 million security was flawed. There had been no real adjournment of enforcement covered by section 103(5), which specifically provides that security may be ordered if, and only if, there is an adjournment within its terms. The Court of Appeal had simply decided that the fraud allegations brought by NNPC ought to be resolved in the English courts in lieu of the Nigerian ones. It had no power under section 103 to require security as the price of advancing a properly arguable challenge (fraud) to enforcement. The Supreme Court, therefore, allowed the appeal, set aside the Court of Appeal's decision regarding the additional security of US$ 100 million, leaving intact the previous security of US$ 80 million, and remitted NNPC's fraud and non-fraud challenges to the Commercial court for decision.

The Supreme Court's March 2016 decision will likely be highly influential. First, it gives legal clarity and precedent in the U.K. regarding the attaching of conditions to the raising of a good *prima facie* defence that enforcement should be refused. Second, it may have implications worldwide for the relationship between the NYC and national laws. Indeed, neither party could find appellate authority in any other jurisdiction on this topic. Given that judges around the world have long looked to the decisions of the Supreme Court for guidance, this decision will be cited if not adopted.

The Supreme Court's decision also aptly demonstrates the severe impact (in both time and costs) that a protracted court challenge can have on the enforcement of an award – this legal saga has been ongoing for 13 years! In addition, this case highlights the risks of choosing a seat of arbitration in a jurisdiction where severe judicial delay is not out of the ordinary. In this

case, it exposes the shortcomings of the Nigerian judicial system. Yet, in practice, a foreign investor may not have a choice. Choosing a 'safe' seat of arbitration is not necessarily available when contracting with state-owned entities, especially in the extractive sector.

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