Partial Enforcement of Arbitral Awards

By

HEW R. DUNDAS

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1. INTRODUCTION
A long-running dispute between two Nigerian parties in respect of a contract for works in Nigeria under Nigerian substantive law and with the ensuing arbitration seated in Nigeria under Nigeria’s Arbitration and Conciliation Act 1990 (the ACA) has twice come before the English courts in respect of enforcement; the fact that the relevant awards are purely Nigerian is irrelevant under the New York Convention 1958 (the Convention) and under Pt III of the Arbitration Act 1996.

Tomlinson J. (re)stated a fundamental point:

“Being an award rendered in Nigeria by Nigerian arbitrators in a dispute governed by Nigerian law between two Nigerian entities, this is in every sense a Nigerian domestic award. However, since Nigeria is a state specified by Order in Council under [s.100(3)], the award is also a [Convention] award. Accordingly it may be recognised and enforced in this jurisdiction pursuant to [s.101].”

2. THE 2005 CASE
The case had focused on: (i) the enforceability in England of a Nigerian domestic award; (ii) whether application to the Nigerian Courts to set aside the award constituted suspension (s.103(2)(f) refers); (iii) sovereign immunity; and (iv) security in respect of adjournment.

IPCO and NNPC are both Nigerian entities and IPCO had contracted with NNPC to carry out works for the design and construction of the Bonny Export Terminal Project near Port Harcourt. The substantive law of the contract was Nigerian law and cl.65 provided for arbitration in Lagos under the ACA. Disputes arose and an arbitration took place, an award being rendered on October 28, 2004. On November 15, 2004, NNPC applied to the Federal High Court in Lagos to set aside the award or stay its execution, to which IPCO responded with a notice of objection, alleging that NNPC’s proceedings were frivolous, vexatious, an abuse of process, etc.

On November 29, 2004 the English Court had ordered, ex parte, that NNPC pay IPCO US $152 million plus Naira 5 million plus interest awarded in the arbitration. NNPC applied: (i) to set aside that order pursuant to the Arbitration Act 1996 s.103(2)(f) and (3); and (ii) in the alternative, pursuant to s.103(5), to adjourn enforcement. IPCO applied pursuant to s.103(5) that, in the event of NNPC failing on (i) but succeeding on (ii) above, NNPC should provide security in the sum of US $50 million (or such other sum as the Court thought fit), failing which IPCO should be permitted to enforce the award (s.101(2)).

Gross J. summarised the authorities concerning enforcement in six key principles:

(1) Reflecting the Convention, s.103 embodied a pro-enforcement disposition; even when a ground for refusing enforcement has been established, the court retains a discretion to enforce the award.

(2) Section 103(2)(f) applied when there had been an order or decision by the court at the seat suspending the award and it was not triggered automatically merely by a

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*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp [2008] EWHC 797 (Comm), Tomlinson J.

1IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp [2005] EWHC 726, Gross J.

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challenge brought before that court; s.103(5) would be otiose, or at least curious, if a mere application to that court automatically resulted in suspension.

(3) Public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution, since the reference thereto in s.103(3) was not intended to furnish an open-ended escape route for refusing enforcement but, instead, was confined to the public policy of England (as the enforcement country) in maintaining the fair and orderly administration of justice.

(4) Section 103(5) achieved a compromise between two equally legitimate concerns: (i) enforcement should not be frustrated merely by the making of an application to the courts at the seat; (ii) pending proceedings in the courts at the seat should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction.

Pro-enforcement assumptions were sometimes outweighed by the respect due to the courts exercising jurisdiction at the seat, i.e. that venue chosen by the parties for their arbitration.

(5) The 1996 Act did not furnish any threshold test in respect of the grant of an adjournment and the power to order the provision of security was in the exercise of the court’s discretion under s.103(5) but it would be wrong to read a fetter into this understandably wide discretion (see Art.VI). Ordinarily, a number of considerations were likely to be relevant: (i) whether the application before the courts at the seat had been brought bona fide and not simply by way of delaying tactics; (ii) whether that application had at least a realistic prospect of success (the test in England for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice to the award creditor.

(6) The Convention contained no nationality condition (unlike the Geneva Convention 1927) and was thus applicable, as here, when an award had been made abroad in an arbitration between parties of the same nationality: it would be wrong to introduce a nationality condition into the Convention by the backdoor. However, the fact that the arbitration was domestic must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country.

The set-aside application

NNPC argued on three grounds: (i) the order was defective in that it failed to comply with the requirements of CPR r.62.18(10); (ii) the award had been suspended in Nigeria by virtue of the application before the Nigerian courts to set it aside; (iii) the enforcement of the award in England would be contrary to public policy.

Gross J. was succinct in dismissing all three arguments as lacking substance: (i) the CPR defects were minor and could be proportionately dealt with by way of costs; (ii) s.103(2)(f) was not engaged; (iii) NNPC relied on a restriction on enforcement against NNPC in the NNPC Act 1977 but this did not engage English public policy and, in any event, to accede to NNPC’s argument would be to grant it an immunity not conferred upon it by the State Immunity Act 1978.

Adjournment/security applications

Gross J. considered the grounds given under the ACA for challenge to awards and found that there were prima facie grounds of challenge which stood a realistic chance of success, including an apparent duplication of damages in the sum of US $88 million. Inter alia, he had considered that: (i) there was no suggestion that NNPC’s application to the Nigerian Court was other than bona fide or had involved delay; (ii) the application did have a realistic prospect of success even if it faced formidable hurdles, not least in converting criticism of the tribunal into a case of misconduct within s.30 ACA; (iii) in all the circumstances, proper deference must be shown to the pending Nigerian proceedings; (iv) even if NNPC’s application in Nigeria was successful, it was common ground that an amount of some US
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$13m was indisputably due to IPCO and, in addition, even if NNPC succeeded on the duplication point, that would be likely to leave IPCO with an award exceeding US $50 million; (v) given the size of the award, any delay in enforcement was likely to prejudice IPCO and it must be right to seek to minimise any such prejudice, so far as it was practicable and appropriate to do so; (vi) factors affecting the nature and enforceability of security in Nigeria or England.

Gross J. concluded by rejecting both: (i) proceeding with the immediate enforcement of the order (even if accompanied by IPCO providing cross-security), thereby pre-empting the decision of the Nigerian court; and (ii) merely adjourning the enforcement of the order, thus giving too little weight to the importance of enforcement and the arithmetical realities in the Nigerian proceedings. Practical justice would best be done by adjourning the enforcement of the order on terms, inter alia, requiring NNPC to pay the agreed US $13 million and to provide appropriate security in London (and thus free of any domestic constraints) in an amount of US $50 million.

3. THE 2008 CASE—INTRODUCTION

The basic facts are as stated above. On the present application the Court had to consider its power of enforcement of a Convention award in circumstances where a challenge to the validity of the award was pending before the supervisory court. The Court had previously adjourned enforcement on terms with which NNPC had complied but IPCO now sought a different order, in part because the Nigerian proceedings were taking very much longer than was first expected and in part because the previous English court had been, so it was alleged, inadvertently misled in a manner material to its evaluation of the strength of the challenge. In these circumstances the question arose whether the Court should revisit its earlier decision. Given the possibly substantial delay before resolution of the Nigerian proceedings, there arose also the question as to whether the Court could and should permit enforcement of such part of the award, if any, as was, in the opinion of the Court, incapable of serious challenge.

In one sense, the judge was being asked to revisit Gross J.’s judgment but a more appropriate analysis is that he was being asked to consider whether the continuation of Gross J.’s order now met the justice of the case in the different circumstances which now prevailed.

4. THE NIGERIAN PROCEEDINGS

During the 2005 hearing, it had been expected that the Nigerian proceedings would be concluded with reasonable despatch but this did not in fact occur.2 In November 2005 NNPC issued a motion seeking the reassignment of the case to another judge of the Federal High Court for hearing since, inter alia, it alleged that the judge had:

“[O]bserved that the case was too confusing and complicated for her and [NNPC was] apprehensive that this may undermine a just and fair determination of this case.”

IPCO vigorously rebutted this allegation. Much procedural wrangling and manoeuvring and appeals and cross-appeals ensued.3 IPCO’s expert witness, a retired Supreme Court judge, stated:

“The mill of justice can grind very slowly in Nigeria. In particular, Nigeria is not yet geared towards arbitration in a manner which meets with the international standards it agreed to when adopting the New York Convention.”

2 Tomlinson J. gives a summary of the litigation to-ings and fro-ings stretching to 3,500 words.
3 I am not familiar with the Nigerian courts or Nigerian litigation practices and express no view thereon; my comment above is to be taken as wholly neutral.
But the IPCO expert witness also stated that steps were being taken to deal with this situation. NNPC’s expert witness, also a retired Supreme Court judge, stated:

“It is proper to bear in mind, against the background of knowledge of legal practice in Nigeria, that in some cases the delay may well have been occasioned by a party indulging in appealing interlocutory orders, which would surely have the effect of further delaying the hearing of proceedings for the challenge to an award. The parties who have chosen Nigeria as the venue of the arbitral proceedings will be presumed to be familiar with the state of the Court system and the length of time it may take proceedings to be heard and disposed of up to the appellate level. Their legal advisers are also presumed to understand the nature and cause of the apparent lethargic nature of the Nigerian judicial system as compared, probably, with some other countries.”

5. THE “REVISITING” OF GROSS J.’S JUDGMENT

Tomlinson J. began by considering (at length) Nigerian law. In brief, the jurisprudence shows that an error of law on the face of the award amounted to misconduct. However, it was unclear to what extent it was permissible to challenge a conclusion of the tribunal as to a question of construction of a term in a contract. Nigerian law accepted that a question of construction was generally speaking a question of law. However the tribunal’s decision on such a point could not be set aside simply because the court would itself have come to a different view. If however the tribunal had adopted principles of construction which the law did not countenance, that was an error of law which might be a ground for setting aside the award, or some part of it.

Further, a failure to give adequate reasons for an award could also constitute misconduct but that left open the more difficult question of what constituted adequate reasons. The Nigerian court would be likely to regard as persuasive on this question the decision of the Privy Council in *Bay Hotel and Resort v Cavalier Construction*.4 However Lord Cooke of Thorndon, in giving the Opinion of the Board in that case, had not purported to set out the content of the common law on this question, such being unnecessary to the Board’s decision. The arbitration in that case had been conducted in Miami, in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and it was held that the question whether the award was “reasoned” had to be judged by reference to the understanding of those versed in working with that particular code; this was a question of fact, analogous to a trade usage or custom. What was required could not vary according to the seat of the arbitration. Lord Cooke did refer in passing to what English common lawyers might regard as a reasoned award, i.e. one which would conform to the requirements enunciated by Donaldson L.J. in *Bremer Handels v Westzucker (No.2)*5:

“All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is meant by a ‘reasoned award’.”

Following detailed review of massive amounts of evidence not before Gross J., Tomlinson J. concluded that the suggestion that NNPC could, in all the circumstances, after publication of the award seek to challenge the jurisdiction of the tribunal on the ground of some failure to comply with the requirements of cl.65 of the contract was not seriously arguable. He did not, however, consider that NNPC had a realistic prospect of reducing the award by up to some US $88 million on the ground of duplication alone. Gross J. had been misled into reaching

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that conclusion. Further, having examined in some detail the manner in which IPCO’s claim under the heading “Variations” had been both advanced and dealt with, and leaving on one side the argument as to the inadequacy of the tribunal’s reasons, he could discern no plausible challenge to the tribunal’s award under that head. He therefore concluded that NNPC had no realistic prospect of reducing the award below US $58.5 million (plus interest and costs). There were grounds of challenge to the award in respect of which, like Gross J., he would draw back from pre-empting the decision of the Nigerian court. Those grounds of challenge could lead to a reduction in the amount of the award in the order of at least US $10 million. Furthermore NNPC’s points as to the lack of adequate reasoning, and the causative impact of individual variations on the overall time for completion of the project, were not easy to quantify, assuming that they could be translated into grounds of challenge which could then be upheld by the Nigerian court. However the plausible grounds of challenge did not include duplication in the formulation of the heads of claim. NNPC had not identified a clear-cut and arguable head of challenge which, if successful, could result in the reduction of the award by an amount of the order of US $88 million.

There therefore arose the question as to whether the English court had the power to permit partial enforcement of the award. Although Gross J. had imposed, without challenge from NNPC, as one of the terms upon which he adjourned the decision on enforcement, payment of the sum indisputably due, before Tomlinson J. the court’s power in that regard was indeed challenged. The requirement of payment of an amount indisputably due is tantamount to partial enforcement of the award and, before hearing argument on the point, he himself had been dubious as to the court’s jurisdiction to permit partial enforcement of the award, simply on the basis of the wording of s.101(3), which talks of judgment being entered “in terms of the award”. Could entering judgment in respect of part of the award amount to entering judgment in terms of the award?

The language of s.101(3) is not derived from the Convention itself of which Art.III provided that:

“Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”

The language of s.101(2) and (3) was the same, mutatis mutandis, as that used in ss.66(1) and (2). Article III referred to the rules of procedure of the territory where the award is relied upon. To that extent, therefore, the court was not directly concerned to ensure that the English approach was the same as that adopted in other Convention states. On the other hand, the substantive provisions in s.103 were derived directly from Arts V and VI and, in particular, ss.103(4) and 103(2)(d) derive from Art.V(1)(c). In s.103(4) and Art.V(1)(c) one finds a clear reference to the possibility of partial enforcement of the award, albeit in a limited jurisdictional context. That of course might lead to the conclusion, either under the Convention or under the Act, that since an express power of partial enforcement is given in that limited circumstance, it cannot be regarded as intended to be available in other circumstances. Gross J. had raised this very point and counsel for IPCO had accepted that he had found no examples of partial enforcement and the point was not further argued.

However IPCO’s present counsel referred the judge to a decision of the Austrian Supreme Court,6 in which partial enforcement of a Convention award had been permitted and directed, the significance being that that court had permitted partial enforcement in a context other than Art.V(1)(c). The reasoning of the Supreme Court was instructive; under the rubric “Partial Enforcement” it said:

6 The Oberster Gerichtshof. The case (dated January 26, 2005) is reported anonymously under No.3Ob221/046 in (2005) Yearbook Commercial Arbitration 421.
44. The Court of Appeal deemed in principle that a foreign arbitral award may be enforced only in part... However, partial enforcement can only be considered when there are sufficient grounds in the foreign arbitral award, whose overall legal effect is at least partly in violation of public policy, for a clear division between acceptable and totally unacceptable legal consequences for the domestic legal system.

45. In the present case, it is possible to grant enforcement on the main sum and deny enforcement of the awarded interest. However, this divisibility does not apply to the awarded rate of interest itself, since the award does not so provide. The domestic enforcement court may not make an apportionment according to its discretion. Hence, the Court of Appeal may not determine which de facto annual rate of interest, lower than 107.35%, could be acceptable, in the sense that it would not result in a violation of domestic public policy.

While it was unclear whether that conclusion derived from Austrian domestic law or was rooted in the Convention, it did, however, introduce divisibility into the public policy context dealt with by Art.V(2)(b), wherein is found no express reference to divisibility or separability as is found in Art.V(1)(c). Parity of reasoning in the present case would lead to enforcement of the sums awarded for Variations and Non-Payment together with the interest awarded thereon. "Uniformity is the purpose to be served by most international conventions", per Lord Wilberforce in Fothergill v Monarch Airlines. Counsel also referred to TTMI Ltd v ASM Shipping, a decision of Christopher Clarke J. which had arisen in the context of s.66. It was unclear to what extent if at all the point had been argued, but both Aikens J. and Christopher Clarke J. seem to have assumed that s.66 gave the court a power of partial enforcement of an award. Counsel urged the judge to follow the same approach.

Counsel for NNPC referred to the decision of Gross J. in Norsk Hydro A/S v State Property Fund of Ukraine in which, on an ex parte application, Morison J. had permitted an award made against a single party to be enforced as a judgment against two distinct parties. In holding that the court had exceeded its jurisdiction to enter judgment in terms of the award, Gross J. said:

17. Section 100 and following of the Arbitration Act 1996... provide for the recognition and enforcement of New York Convention Awards. There is an important policy interest, reflected in the country’s treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as 'mechanistic' as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (ss.102, 103 of the 1996 Act), the enforcing court is neither entitled nor bound to go beyond the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that issue (1) falls to be considered.

18. Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt, true ‘slips’ and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award, made against a single party, against two separate and distinct parties. To proceed in such a fashion necessarily required the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions is sought in terms other than those of the award. Still further, though I do not rest my decision on it, such an approach raises the spectre of unintended consequences should a false step be taken; for example, English domestic law rules as to election and the enforcement of judgments against principals and agents would need to be considered: see, for example, Morel v Westmorland [1904] AC 11, [1900–03] All ER Rep. 397; Moore v Flannagan and Wife [1920] 1 KB 919, [1920] All ER Rep. 254. In my judgment, this is all

8 TTMI Ltd v ASM Shipping [2006] 1 Lloyd’s Rep. 401.

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inappropriate territory for the enforcing court. The right approach is to seek enforcement of
an award in the terms of that award.”

However, Tomlinson J. did not consider that, in reaching the conclusions which he had, he
had acted in a manner inconsistent with these strictures. Furthermore, the identification of two
discrete parts of the award as capable of immediate enforcement was not an exercise which
contravened the spirit of Gross J.’s remarks. Immediate enforcement of discrete parts of the
award would go with the grain of the award, not undermine it or second guess it. Further,
it was not in dispute that the Nigerian court had power on the substantive challenge to the
award to sever it, so as to preserve the good part or parts of the award whilst setting aside
that part or those parts which is or are in the opinion of the Nigerian court unsupportable.
Relying on the decision of Belgore C.J. in Baker Marine Nigeria Ltd v Danos & Curoly
Marine Contractors Inc,10 counsel for NNPC nonetheless submitted that the judge should
not countenance partial enforcement because the Nigerian court might, whilst concluding
that certain parts of the award were incapable of challenge, nonetheless regard the award as
a whole as such a poor piece of work that in consequence it must be set aside in its entirety.
In Baker Marine there had been ten heads of claim, four being rejected by the tribunal.
On appeal Belgore C.J. held that the award under four further heads of claim had to be
set aside for lack of evidence, acceptance of the claims in such circumstances amounting to

“On the whole I found that the award has been so battered that only two out of five (sic)
awards were approved, that is award 7 and 10, that I do not consider whatever is left can be
called the award. This is so in view of the fact that there was no Appeal on the Counterclaim
and no opportunity was made available to examine it. In the interests of justice, it is my
view that the best conclusion that can be reached is to set aside the whole award. And I so
do.”

In a subsequent case, Baker Marine (NIG) Ltd v Chevron (NIG) Ltd,11 the Nigerian Court
of Appeal questioned this reasoning and the conclusion derived from it. On the substantive
appeal from Belgore C.J. in Baker Marine v Danos,12 the Court of Appeal, differently
constituted, had castigated the Chief Justice as having made two “very contradictory”
findings. The Court of Appeal expressly concluded that the Nigerian courts had no jurisdiction
to set aside an award or any part thereof on the basis of reasons extraneous to the ACA and
in particular not on the ground that “the award has been battered”. It is true that, in any
event, the Court of Appeal went on to set aside the entirety of the Chief Justice’s judgment
on the ground that:

“[L]ack of evidence can never be a ground for setting aside an award nor can that be
tantamount to a misconduct on the part of the arbitrator.”

The court’s conclusion on the first point was therefore strictly unnecessary to its decision.
Nonetheless, in the light of the clear conclusion of the Nigerian Court of Appeal, it seemed
to Tomlinson J. most unlikely that the Nigerian court would, on hearing the substantive
challenge to this award, countenance the possibility that even parts of the award which were
in themselves incapable of challenge should nonetheless be struck down in consequence of
the successful challenge to other parts of the award.


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Conclusions
Tomlinson J. concluded that the appropriate course now meeting the justice of the case was that he should vary the order of David Steel J. by substituting therefor an order which would allow judgment to be entered in terms of the awards made under Head of Claim No.2 (Non-Payment) and Head of Claim No.3 (Variations). In so doing credit had obviously to be given for the appropriate amounts referable to these heads already paid.

6. COMMENT AND CONCLUDING REMARKS
We are perhaps fortunate in that two learned judges have addressed the same issues and have reached the same conclusions which, with respect, must be correct. Absent Gross J.’s “strictures”, I might have felt uncomfortable with partial enforcement but, with those caveats, the way towards that is clear. That said, given that CIArb award writing teaching is to combine all the amounts payable into one total (for simplicity), care will be have to be taken (in appropriate circumstances) with the way this is expressed. Good/best practice is to have, immediately before “I hereby Award and Direct” a summary of all the individual amounts awarded with paragraph references to where those amounts can be ascertained. Such practice facilitates partial enforcement in Tomlinson J.’s approach.