Hilary Term
[2017] UKSC 16
On appeals from: [2015] EWCA Civ 1144 and 1145

JUDGMENT

IPCO (Nigeria) Limited (Respondent) *v* Nigerian National Petroleum Corporation (Appellant)

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge
Lord Toulson

JUDGMENT GIVEN ON

1 March 2017

Heard on 2 February 2017

Appellant
Toby Landau QC
James Willan
(Instructed by Stephenson Harwood LLP)

Respondent
Michael Black QC
Edward Knight
(Instructed by Goodman Derrick LLP)

LORD MANCE: (with whom Lord Clarke, Lord Sumption, Lord Hodge and Lord Toulson agree)

1. This appeal is about whether the appellant, Nigerian National Petroleum Corporation ("NNPC"), should have to put up a further USD 100m security (in addition to USD 80m already provided) in respect of a Nigerian arbitration award which the respondent, IPCO (Nigeria) Ltd ("IPCO"), has been seeking since November 2004 to enforce in this jurisdiction. The enforcement proceedings have, therefore, a long history and it is necessary to set some of it out, to understand the context.

2. The arbitration award has an even longer history. It is dated 28 October 2004 and is for USD152,195,971 plus Naira 5m plus interest at 14% per annum. The arbitration took place under a contract dated 14 March 1994 whereby IPCO undertook to design and construct a petroleum export terminal for NNPC. The contract was subject to Nigerian law and contained an agreement to arbitrate disputes in accordance with the Nigerian Arbitration and Conciliation Act 1988.

3. The award once made was challenged by NNPC before the Nigerian Federal High Court. Initially, the challenge was for what have been called "non-fraud" reasons. As from 27 March 2009, NNPC, relying on evidence supplied by a former IPCO employee, Mr Wogu, has also challenged the whole award on the basis that NNPC procured it in substantial part by fraudulent inflation of the quantum of its claim using fraudulently created documentation. Both Field J [2014] EWHC 576 (Comm) and the Court of Appeal (Christopher Clarke, Burnett and Sales LJJ) [2015] EWCA Civ 1144 concluded that the fraud challenge was made bona fide, that NNPC has a good prima facie case that IPCO practised a fraud on the tribunal and that NNPC has a realistic prospect on that basis of proving that the whole award should be set aside.

4. It is unnecessary to describe the vicissitudes which befell the challenges before the Nigerian courts. Suffice it to say that they have been closely examined in the English courts on more than one occasion; and that the Court of Appeal has concluded (para 164, per Christopher Clarke LJ) that it would not be "profitable to seek to determine which party (if either) is more to blame for the delay, which appears, to me in large measure, to result from the workings of the Nigerian legal system". At the outset of the English proceedings, Steel J made an ex parte order for enforcement dated 29 November 2004. This led in turn to an application by NNPC for the ex parte order to be set aside under sections 103(2)(f) and 103(3) of the Arbitration Act 1996 (the "1996 Act"), or alternatively for its enforcement to be

adjourned under section 103(5), pending the resolution of the non-fraud challenges in the Nigerian courts. After an inter partes hearing, Gross J held on 27 April 2005 [2005] EWHC 726 (Comm) that NNPC should pay IPCO a sum of just over USD 13m (which, at that stage, when only the non-fraud challenge had been raised, appeared indisputably due), and that NNPC should provide security in the sum of USD 50m in respect of the adjournment. The USD 13m ordered was duly paid, and the security was also provided.

5. At that stage, it was envisaged that the non-fraud challenge in Nigeria might be resolved with relative despatch. This was not to be, and on 17 July 2007 IPCO applied to have Gross J's order reconsidered on the basis that the Nigerian challenge appeared now to be unlikely to be determined for several years. Tomlinson J in a judgment dated 17 April 2008 concluded that "the change of circumstances, catastrophic though it is" did not justify a complete re-opening of the exercise undertaken by Gross J. Nevertheless, he ordered NNPC to pay a further net sum of around USD 52m (after taking account of USD 7.7m already paid), plus USD 26m by way of interest. He gave permission to appeal and ordered a stay pending appeal, conditional upon NNPC providing additional security to the value of USD 30m. This additional security was also provided. Tomlinson J adjourned any decision regarding enforcement of the balance of the award under section 103(5). The Court of Appeal upheld Tomlinson J's order, but it was further stayed pending the outcome of a petition to appeal to the House of Lords.

6. Before this petition was determined (by refusal of leave), NNPC on 2 December 2008 moved to stay Tomlinson J's order on the ground that it had now obtained evidence of fraud. Flaux J on 16 December 2008 stayed Tomlinson J's order to enable NNPC to make an application under section 103(3) based on this new evidence and/or under section 103(5) for a further adjournment of enforcement. He ordered that NNPC maintain the security totalling USD 80m which had been ordered by Gross J and Tomlinson J. By application dated 18 December 2008 NNPC applied to vary Tomlinson J's order

> "so as to provide that recognition or enforcement of the Award dated 28 October 2004 be refused pursuant to section 103(3) of the Arbitration Act 1996 because it would be contrary to public policy to do so; alternatively, the decision on whether to enforce the Award be adjourned pursuant to section 103(5) of the Arbitration Act 1996 with liberty to apply."

The grounds given for refusal of recognition or enforcement were that there had been a material change of circumstances and/or Tomlinson J had been misled into believing that the Award had been properly obtained and/or public policy. The

ground given for the alternative of adjournment was that the Nigerian courts would or might set aside the Award for fraud, false evidence or forgery.

7. On 27 March 2009 NNPC applied to amend its pleadings in the Nigerian proceedings to raise the fraud challenge (an application adjourned by consent and never determined). In this light, a consent order dated 17 June 2009 was made in the English proceedings, whereby inter alia, upon NNPC undertaking to maintain the USD 80m security until further order of the court, those parts of Tomlinson J's order dated 17 April 2008 ordering payment of sums were set aside (para 1), and "the decision on enforcement of the Award" was "adjourned pursuant to section 103(5) of the Arbitration Act 1996" (para 2).

8. Delay continued to dog the Nigerian proceedings, and on 24 July 2012 IPCO renewed its application to enforce the Award in England, again on the ground that there had been a sufficient change of circumstances to justify this. By order dated 1 April 2014 made after a six day hearing in October 2013 Field J dismissed this application, but added that, even if it had been appropriate to reconsider enforcement in England afresh, he would have refused it, on the ground that NNPC had a good prima facie case of fraud, and that this case should continue to trial in Nigeria. The security, which NNPC had undertaken by the consent order to maintain, in these circumstances continued.

9. The Court of Appeal took a different view. It held that there had been a material change of circumstances, and decided to cut the Gordian knot caused by the "sclerotic" process of the proceedings in Nigeria (paras 172-173). By order dated 10 November 2015 it therefore allowed IPCO's appeal, set aside Field J's order (by para 1) and ordered as follows (by paras 2 and 3):

> "2. Upon condition that the respondent provides security as set out at paragraph 5 below:
>
> > (a) the proceedings shall be remitted to the Commercial Court for determination, pursuant to section 103(3) of the Act, as to whether the arbitral award dated 28 October 2004 ('the Award') should not be enforced in whole or in part because it would be against English public policy so to do ('the Section 103(3) Proceedings');
> >
> > (b) any further enforcement of the Award shall be adjourned, pursuant to section 103(5) of the Arbitration

> Act 1996, pending determination of the Section 103(3) Proceedings.
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> 3. Upon any failure of the respondent to comply with the said condition the adjournment shall lapse and the appellant may enforce the Award in the same manner as a judgment or order of the court to the same effect and the appellant shall immediately be entitled to demand payment under the Guarantee and Further Guarantee (as defined in the Order of Mr Justice Tomlinson dated 17 April 2008) *[ie the two existing guarantees totalling USD 80m]*.
>
> …
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> 5. The security to be provided by the respondent must be provided by 4 pm on 4 December 2015 by way of first class bank guarantee issued in London in similar form to the Guarantee and the Further Guarantee in the sum of US$ 100,000,000. **This security is to be in addition to that provided by those Guarantees**."

The parties have subsequently agreed that not only the fraud issue, but also the non-fraud issues should be decided should be decided in the English enforcement proceedings.

10. The order dated 10 November 2015 did not reflect the Court of Appeal's initial conclusions as to the appropriate disposition. They were set out in a draft, circulated on 4 September 2015 in the usual way, by para 175 of which the Court proposed to require NNPC to provide security for the whole of the principal and interest then claimed, around USD 300m. This led to a request by NNPC to the Court for it, exceptionally, to reconsider the position, on the ground that the order for security was made without jurisdiction or was alternatively wrong in principle and/or manifestly wrong. On the former point, NNPC referred to *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 and *Dardana Ltd v Yukos Oil Co* ("*Dardana v Yukos*") [2002] EWCA Civ 543; [2002] 2 Lloyd's Rep 326. After receiving submissions from both parties, the Court of Appeal issued two judgments, neither in precisely the same terms as the original draft. It rejected the submission of lack of jurisdiction, but acceded to the request that it reconsider the quantum of security, which it reduced to a requirement for a further USD 100m.

11. In the Court's first, main judgment, Christopher Clarke LJ, said:

> "Decision
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> 174. In my judgment the appropriate course to take is as follows. First, we should order that IPCO's application to enforce should be adjourned pending the determination by the Commercial Court pursuant to section 103(3) of the Act as to whether the Award should not be enforced in whole or in part because it would be against English public policy so to do.
>
> 175. Second, we should make that order conditional upon the provision by NNPC of further security in a form and within a time period to be agreed, or if not agreed, to be determined by this Court, in the sum of $ 100m.
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> 176. Third, we should order that, if such security is not provided within a period which we shall specify from the time when the form of security is agreed or determined, IPCO shall have permission to enforce the Award.
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> 177. Fourth, we should order that, if such security is provided, then, if and to the extent that it is determined by a final order of the courts of England and Wales that the enforcement of the Award is not contrary to the public policy of England & Wales, IPCO may enforce it.
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> 178. Fifth, there shall be Permission to apply to the Commercial Court."

12. In the Court's shorter supplementary judgment [2015] EWCA Civ 1145 dealing more extensively with the issue of jurisdiction, Christopher Clarke LJ said:

> "Discussion
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> 18. In the present case it seems to us that in reality it is NNPC, the Award debtor, which sought the continuance of the adjournment in the face of IPCO's attempt to enforce the Award and bring the adjournment to an end. In its respondent's

notice NNPC said that, if the judge's contingent exercise of his discretion was in error, he was nevertheless correct to conclude that it was appropriate to adjourn under section 103(5) so that the challenge could proceed in Nigeria inter alia because, if the court were minded to enforce the Award, it would still have to decide whether the enforcement of the award was contrary to English public policy. In other words it was relying on the possibility of a later English public policy challenge as a reason to uphold the continuance of the adjournment, ordered by consent on 17 June 2009, pending resolution of the fraud challenge in Nigeria, rather than suggesting that enforcement should only abide a section 103(3) determination.

19. So far as the ability of IPCO to enforce any judgment is concerned, much will depend on whether NNPC has sufficient assets in this country, or any other country in which an English judgment may be enforced, to ensure that it can swiftly receive the fruits of any judgment in its favour.

20. Although NNPC is a large business we have no details of its assets within such countries, or the form in which they are held, how long they have been held there, or how readily any trading arrangements might be changed so as to render enforcement difficult or impossible. …

21. … where there is a very large award, delay without security is inherently likely to prejudice the award creditor and certainly risks doing so. We regard that as a factor which should incline us towards providing some security to ensure that if the fraud challenge fails, IPCO will not be faced with a further round of attempts to avoid payment of the Award or a situation in which its prospects of recovery have worsened.

22. Another material factor is the need in a case involving such extraordinary delay, extending over a decade, to provide a strong incentive to securing finality. NNPL *[sic]* says that, now that the fraud challenge is to be heard in London, the prospects of excessive delay are much reduced. Hopefully so. But the history of these proceedings, and their inordinate delay, persuades us of the need to provide an incentive, indeed something of a goad, to progress.

> 23. Lastly we bear in mind that the delay which has already taken place has meant that the ratio between the amount of security in place and the amount due has greatly decreased. Interest under the award is running at 14% per annum. Gross J ordered that security of $ 50m be provided 10½ years ago. $ 50m x 14% x 10 = $ 70m. The same exercise applied to the $ 30m security provided in 2008 produces about another $ 31.5m ($ 30m x 14% x 7.5)."

13. NNPC now appeals, by permission of this Court, against the Court of Appeal's order for security, 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.

14. Sections 100 to 104 of Part III of the 1996 Act address the recognition and enforcement of foreign awards. They give effect to the United Kingdom's obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Section 103 is central to the resolution of this appeal. It reads:

> "103. Refusal of recognition or enforcement.
>
> (1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
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> (2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves -
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> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
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> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;

(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.

(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(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."

15. Section 103(2) and (3) give effect to article V, while section 103(5) gives effect to article VI, of the New York Convention. Articles V(1) specifies as a ground on which recognition and enforcement "may be refused" that:

> "(e) 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, that award was made."

Article VI reads:

> "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

In this light it was common ground, and it is in any event clear, that sections 103(2)(f) and (5) are both addressing a situation where an award sought to be recognised or enforced in this jurisdiction has been or is under challenge in an overseas jurisdiction where, or under the law of which, it was made.

16. The issue on this appeal falls under two heads: first, whether the Court of Appeal's order was justified by reference to section 103(5) of the 1996 Act; and, second, whether it was justified by reference to general English procedural rules. In the latter connection, reliance is placed on CPR 3.1(3) as well as, indirectly, on section 70(7) of the 1996 Act. CPR 3.1(3) provides that:

> "Where the court makes an order, it may -
>
> > a) make it subject to conditions, including a condition to pay a sum of money into court; and

b) specify the consequences of failure to comply with the order or a condition."

17. Section 70(7) is one of a group of sections appearing under the heading *Powers of the court in relation to award* in Part I of the 1996 Act. Part I concerns arbitrations that (unlike the present) have their seat in England, Wales or Northern Ireland: see section 2(1). The group starts with section 66, addressing enforcement generally:

"Enforcement of the award

(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."

18. Section 66 must be read with section 81(1), providing that:

"Saving for certain matters governed by common law.

> (1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to -
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> > (a) matters which are not capable of settlement by arbitration;
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> > (b) the effect of an oral arbitration agreement; or
> >
> > (c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy."

19. Sections 67, 68 and 69 concern challenges to awards for lack of substantive jurisdiction (section 67), serious irregularity (section 68) or by way of appeal on a point of law (section 69), in each case in proceedings initiated before the court by the award debtor. They therefore contrast with section 66(3), which, read with section 81, enables an award debtor to challenge enforcement on grounds there indicated by resisting enforcement proceedings initiated by the award creditor.

20. Section 70(1) provides that the following provisions, inter alia, apply to an application or appeal under sections 67, 68 or 69 of the Act:

> "(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with. …
>
> (7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with."

21. CPR 62.18(9) provides that, within 14 days of service of an ex parte order giving permission to enforce under section 66, the defendant may apply to set aside the order and "the award must not be enforced until after … any application made by the defendant within that [14 day] period has been finally disposed of".

22. I start with the relationship between the Court of Appeal's order and the scheme of section 103 of the Act. The order was that the fraud issue, raised as an issue of public policy under section 103(3), should, for the purposes of determining whether enforcement should be ordered, be decided in the English, rather than Nigerian, proceedings. But the decision of the fraud issue was made conditional upon the provision by NNPC of a further USD 100m security, failing which the Court gave leave to enforce without any decision of the fraud issue. Upon provision of such security, on the other hand, the Court's order provided that any further enforcement of the award should be "adjourned" under section 103(5) pending decision of the fraud issue.

23. The position is therefore that the Court held that an enforcing court's decision upon an issue, raised by an award debtor under section 103(3) or, as must follow, section 103(2) could (and in the instant case should) be made conditional upon the award debtor's provision of security in respect of the award. Further, it regarded the delay which would follow while that decision was being reached by the enforcing court as involving an "adjournment" within the meaning of the words "the court … may … adjourn the decision on the recognition or enforcement of the award" in section 103(5).

24. In both these respects, the Court of Appeal fell in my opinion into error. First, nothing in section 103(2) or (3) (or in the underlying provisions of article V of the New York Convention) provides that an enforcing court may make the decision of an issue raised under either subsection conditional upon the provision of security in respect of the award. In this respect, there is a marked contrast with section 103(5), which specifically provides that security may be ordered where there is an adjournment within its terms.

25. Second, the Court erred in regarding its order that the English court should as the enforcing court decide the fraud issue as involving "adjournment" of the decision on that issue within the terms of section 103(5). This error has two aspects. First, as stated in para 15 above, section 103(5) concerns the situation where an enforcing court adjourns its decision on enforcement under section 103(2) or (3), while an application for setting aside or suspension of the award is pending before the court of the country in, or under the law of which, the award was made. This was the situation when orders were made by Gross J on 12 April 2005, by Flaux J on 16 December 2008 and by consent on 17 June 2009. But it ceased to be the situation for the future, once the Court of Appeal held that the issue 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. Although the literal trigger to the application of section 103(5) is that "an application … has been made to" the courts of the country where, or under the law of which, the award was made, the adjournment which it contemplates is *pending* the outcome of that application. Once

it is held that there should be no such further adjournment, there is no basis for ordering further security under section 103(5).

26. The Court of Appeal, in ordering that any further enforcement of the award should be "adjourned" under section 103(5) pending determination of the section 103(3) proceedings, was, therefore, misusing the word in the context of section 103(5). Of course, any decision of an issue raised under section 103(2) or (3) may take a court a little time, even if it is only while reading the papers, or adjourning overnight or for a number of weeks, in order to consider and take the decision. But that does not mean that "the decision" was being adjourned within section 103(5). On the contrary, delays of this nature are all part of the decision-making process.

27. The second aspect is that section 103(5) contemplates an order for security being made "on the application of the party claiming recognition or enforcement of the award". It is true that in *Dardana v Yukos*, when giving the reasons of all members of the court, I said, at para 31:

> "I am fully prepared to proceed on the basis that section 103(5) provides the court with jurisdiction to make such an order, in a case where it, either of its own motion (cf *Soleh Boneh*) or at the instance of the party seeking *[sic]* recognition or enforcement, decides to adjourn, pending a foreign application to set aside by the party resisting recognition or enforcement."

Christopher Clarke LJ in his supplementary judgment, para 6, questioned "how section 103(5) was thought to provide jurisdiction to the court to act of its own motion". It is unnecessary to consider that question here, although I shall return to para 6. What is however important to note is an evident error in the passage cited, which no one appears to have spotted. The word "seeking" after which I have inserted "*sic*" should clearly have read "resisting", to reflect the actual language of section 103(5). That is also evident from the actual decision in *Dardana v Yukos* and its supporting reasoning.

28. In *Dardana v Yukos*, the award debtor (Yukos) was challenging a Swedish award in Stockholm, but its primary response to an application to enforce in England was that the English courts should themselves decide whether the award should be recognised or enforced under section 103(2)(b) and/or (d). (Only in the alternative, did Yukos apply for an adjournment under section 103(5).) For a considerable time, the award creditor (Dardana) shared the award debtor's stance, that the issues should be decided under section 103(2)(b) and/or (d). But, during the hearing, Dardana appreciated that its case was less strong than it had thought. It then changed direction, and rather than risk losing in England, resisted determination of Yukos's

case in England, and itself in reality sought an adjournment pending the outcome of the Swedish proceedings (see judgment, para 23). In these circumstances, the Court of Appeal held in *Dardana v Yukos* that the English courts had no power under section 103(5) to order Yukos to provide security on the tacit basis that, if Yukos did not do this, immediate enforcement would be ordered against it (paras 26-31). Security pending the outcome of foreign proceedings is, in effect, the price of an adjournment which an award debtor is seeking, not to be imposed on an award debtor who is resisting enforcement on properly arguable grounds.

29. The reasoning in *Dardana v Yukos* underlines both these aspects. I have added italics for emphasis:

> "27. … In most cases … it would be the party resisting recognition or enforcement, who had already begun proceedings to set aside in the foreign state, who would be seeking an adjournment of the recognition or enforcement proceedings, pending resolution of the foreign application. *An order for security, on the application of the party seeking recognition or enforcement, would be the price of the adjournment sought by the other party, and would protect the party seeking recognition or enforcement during the adjournment. There is no power under section 103(5) to order security except in connection with an adjournment.* If no foreign application had been made to set aside, the domestic proceedings under section 103(2) would have had to be fought out to a conclusion; and there would be no power under section 103(5) to order security during the period which that took. There could of course, in an appropriate case be an application for freezing relief …
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> 28. In a case where a party resisting enforcement applies under section 103(2), but later seeks an adjournment of its application pending resolution of foreign proceedings in which it is also challenging the award, adjournment may as a matter of general principle be ordered on condition that security be provided (*failing which the order for adjournment will be vacated and the issues under section 103(2) will be determined*). …
>
> 29. The reality in the present case … is that the appellants were obliged to provide the security, on the tacit basis that, if they did not do so, then enforcement would be ordered unconditionally against them, despite their outstanding

> application under section 103(2). *The provision for security was, in other words, made a condition not of any adjournment sought by the appellants, but of avoiding immediate and final enforcement; and, failing its provision, the appellants' outstanding application under section 103(2) would have been liable to be struck out or dismissed, without determination of its merits. I do not consider that as a legitimate sanction to attach to any order made for the provision of security in the present circumstances.* It would involve overriding or fettering an outstanding application under section 103(2), in a way for which sections 100-104 provide no warrant. It is inconsistent with paragraph 31.9 of the Arbitration Practice Direction, and the concluding words of Mr Justice Steel's order, whereby the award was not to be enforced, if the appellants applied (as they did) to set aside his order, until the application was finally disposed of. …"

Paragraph 31.9 of the Arbitration Practice Direction has now become CPR 62.18, set out in para 21 above.

30. In the present case, the Court of Appeal's order involves the same error as that identified in the first and third italicised passages. It required security, not as the price of a further adjournment falling within section 103(5), but as the price of the decision of an issue under section 103(3). The Court was lifting the adjournments previously ordered pending the outcome of the Nigerian proceedings, not ordering an adjournment. It had no power under section 103 to make a decision of the properly arguable case raised by NNPC under section 103(3) conditional on NNPC providing further security.

31. The Court of Appeal's reasoning at paras 174-177 of its main judgment and para 18 of its supplementary judgment demonstrates the same errors that are evident in its order. Para 18 by focusing on NNPC's (alternative) submission that, if Field J's contingent exercise of his discretion (to refuse enforcement) was wrong, there should be an adjournment under section 103(5) case misses the point. What is critical here is not what submissions were advanced (contingently), but whether there was in the event an adjournment (and, if there was, whether it was effectively at the award debtor's instance as well as pending the outcome of the relevant challenge in the overseas court of the country in which, or under the law of which, the award was made). Here, no such adjournment was ordered by the Court of Appeal, which on the contrary decided that the fraud issue should be resolved in the English proceedings. There was therefore no adjournment under section 103(5) onto which to hang, as the price, a requirement of further security.

32. The Court of Appeal's further reasons at paras 19-23 in its supplementary judgment do not go to the jurisdiction or power to order security under section 103, though they might have gone to the exercise of any discretion, if (contrary to my conclusion) any such discretion had existed under section 103. The perceived inadequacy by the time of the Court of Appeal's order of the security of USD 80m validly ordered as a condition of past adjournments under section 103(5) was no basis for ordering further security when further adjournment was being refused.

33. Mr Michael Black QC suggested that, when the matter came before Field J and the Court of Appeal, there was no outstanding challenge by NNPC under section 103(3). If that were so, it is difficult to understand what either court was doing in considering and deciding, at some length, whether NNPC had shown a good prima facie case of fraud, and, in the case of the Court of Appeal, making an order for its decision by the English courts. Further, NNPC had made a formal challenge by its application dated 18 December 2008; the decision on that challenge was adjourned, pending the outcome of the Nigerian proceedings, by the consent order dated 17 June 2009; and the whole purpose and effect of the Court of Appeal's decision that there had been a change of circumstances justifying the reopening of the consent order was to lift the adjournment and to order that the challenge be decided in the English proceedings.

34. For these reasons, the Court of Appeal's order for security was not within the scope of any jurisdiction or power conferred by section 103 of the 1996 Act. Mr Black has, however, submitted that the order can be and was justified on grounds not directly considered in *Dardana v Yukos*, and touched on, if at all, then only very tangentially by the Court of Appeal. At the basis of this submission is the proposition that the New York Convention, and sections 100-104 of the 1996 Act, leave untouched the ordinary procedural powers of the English courts in respect of proceedings before them. I have no difficulty accepting the general correctness of that in relation to the conduct of a challenge to recognition or enforcement being decided under section 103(2) and/or (3): see further para 45 below. But it provides no basis for making the raising for decision of a properly arguable challenge under these sections conditional upon the provision of security for the award.

35. In support of his submission, Mr Black points to article III of the Convention, providing:

> "Each Contracting State shall recognize 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. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral

> awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

Although article III is not itself part of English law, Mr Black submits that we can and should, on familiar principles, view sections 100-104 of the 1996 Act in its light. I also have little difficulty with that as a general proposition, although the possible differences between the meaning of the word "conditions" used twice in article III have given rise to much discussion. I am prepared for present purposes to proceed on the basis, without deciding, that the second reference to "conditions" refers in effect to principles or rules of procedure (as Mr Black submits with the weighty support of Professor Albert van den Berg's commentary on *The New York Arbitration Convention of 1958* (1981), p 239).

36. Mr Black's submission is that sections 100-104 only occupy the field of procedural matters to a limited extent. The second paragraph of article VI (which led domestically to the second paragraph of section 103(5)) was, according to the Summary Record of the Seventeenth Meeting of the United Nations Conference on International Commercial Arbitration held on 3 June 1958, inserted to address the risk of "abuse" of what became article VI by proceedings started in the country where, or under whose law, the award was issued "without a valid reason purely to delay or frustrate the enforcement of the award"; it may, he submits, have been necessary to regulate this limited procedural aspect at an international level, because individual states might not have their own procedural mechanisms to do so; but it did not follow that states could not attach procedural conditions to challenges made under article V (ie domestically, under section 103(2) and (3)).

37. The submission continues by pointing to the English courts' general power to make conditional orders, including orders on its own motion under CPR 3.1(3)(a) and 3.3. In this connection, Mr Black is able to submit that this is in fact what the Court of Appeal must, or must also, have had in mind when it made its order. In para 6 of his supplementary judgment, commenting on the passage from *Dardana v Yukos* set out in para 27 above, Christopher Clarke LJ said this:

> "It is not wholly clear to us how section 103(5) was thought to provide jurisdiction to the Court to act of its own motion but, in any event, a court which is asked to adjourn, or continue an adjournment of, enforcement is entitled to impose conditions on the exercise of its discretion to do so: CPR 3.1(3)(a); and may do so of its own initiative: CPR 3.3. Section 103(5) cannot be treated as precluding the exercise of that right."

38. Finally, Mr Black argues that the English courts would, contrary to article III, be discriminating procedurally against foreign awards compared with awards in arbitrations where the seat is English, if they could not order security against a party who was merely mounting a challenge under section 103(2) or (3). It is in this connection that he deploys section 70(7) of the 1996 Act. He relies on reasoning of Rix LJ (supported to some extent by that of Moses LJ, but opposed by that of Buxton LJ) in *Gater Assets Ltd v NAK Naftogaz Ukrainiy* ("*Gater*") [2007] EWCA Civ 988; [2007] 2 Lloyd's Rep 588; [2008] Bus LR 388. Rix LJ considered that an award debtor resisting enforcement "by destroying the formal validity of the award, either as a matter of substantive jurisdiction or serious irregularity or as a matter of public policy" is in substance in a position of a claimant analogous to that of an award debtor under an English award seeking to challenge an award under sections 66 to 69 of the Act, and is liable accordingly to be made subject to an order for security for costs: see paras 77-80 (see also per Moses LJ para 93, and, to the contrary effect, per Buxton LJ paras 101-104).

39. On Mr Black's case, therefore, if English procedural law does not enable an award creditor under a Nigerian arbitration award to apply and, if the court thinks fit, to obtain security for the award from an award debtor who is challenging enforcement under section 103(2) or (3), then it is imposing on the award creditor "substantially more onerous conditions", in the sense of procedural rules, than those applicable to English awards under section 70(7) of the Act.

40. Mr Black's case on these points fails, in my opinion, at a number of levels. First, the Court of Appeal in *Gater* was addressing an issue of security for the future costs of a challenge under section 103(3), which raises very different considerations to an issue of security for the past award itself. Even then, although Rix LJ did not make this the ground of decision because it had not been argued, he noted that the Convention might be regarded as a "complete code", precluding the making of a decision under section 103(2) or (3) conditional upon the provision of security for costs: para 82. More importantly, in relation to the provision of security for the award itself, he said this, at para 81:

> "Field J, however, was prepared to refuse enforcement, on the ground of failure to provide the security for costs ordered. That was the order that Field J made, setting aside the enforcement order if the security was not provided, and doing so on a ground not expressly within the Convention. There is no express basis in the New York Convention for that condition. Enforcement may be refused 'only if' one of the exceptions within article V is made good. Security is discussed in the Convention, but only security for the award itself and only in the context of an adjournment of enforcement proceedings pending an application to set aside or suspend the award to the competent authority of

> the country in which, or under the law of which, that award was made: article VI, reproduced in section 103(5) of the 1996 Act. That is not just an example of a circumstance in which such security might be ordered, but is the only circumstance in which it might be: see the decision of this court in *Dardana Ltd v Yukos Oil Co* [2002] All ER (Comm) 819, para 27."

41. In my opinion, the conditions for recognition and enforcement set out in articles V and VI of the Convention do constitute a code. Just as article V codifies the grounds of challenge (see Dicey, Morris & Collins on *The Conflict of Laws*, 15th ed (2012), para 16-137), so the combination of articles V and VI must have been intended to establish a common international approach, within the field which they cover. They contemplate that a challenge under article V may only be made conditional upon the provision of security in one situation falling within their scope. Had it been contemplated that the right to have a decision of a properly arguable challenge, on a ground mentioned in article V (domestically, section 103(2) and (3)), might be made conditional upon provision of security in the amount of the award, that could and would have been said. The Convention reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge. Apart from the second paragraph of article VI, its provisions were not aimed at improving award creditors' prospects of laying hands on assets to satisfy awards. Courts have, as noted in *Dardana v Yukos*, other means of assisting award creditors, which do not impinge on award debtors' rights of challenge, eg disclosure and freezing orders.

42. It is unnecessary in this context to address the issue which divided the Court of Appeal in *Gater*, whether or how far an award debtor challenging an award should or may be regarded as being in the position of a claimant, rather than a defendant. Suffice it to say that I would leave open the correctness of Rix LJ's view (*Gater*, paras 77-79) that there is no material difference at a domestic level between challenges falling within the scope of section 66 of the Act, read with section 81(1), and challenges falling within sections 67, 68 or 69. The fact that section 70(6) and (7) only apply to the latter, and not to challenges under section 66, highlights this point. If it were appropriate or relevant to have regard to the position regarding an English award, the true domestic analogy with, at any rate, the present fraud challenge under section 103(3) would be a challenge under section 66 read with section 81(1)(c). On that section 70(7) cannot on any view offer any direct assistance to Mr Black's submission. In fact, however, the challenges permissible under section 103(2) and (3) embrace, but do not distinguish between, matters which could in some cases be raised both under section 66 and under either section 67 or 68 and in other cases only under one of the latter two sections. Domestic analogies are in these circumstances unlikely to illuminate the operation of the internationally-based provisions of sections 100-104.

43. In any event, I do not regard the argument based on article III and section 70(7) as having any force. First, article III may serve as a caution against interpreting or applying English procedural provisions in a sense which discriminates against Convention awards by imposing substantially more onerous rules of procedure. But this is only so long as "the conditions laid down in" the following articles of the Convention do not otherwise provide. As I have indicated, I consider that articles V and VI constitute a code relating to security for an award when the issue is enforcement or adjournment; and that the code excludes requiring security for an award in the face of a properly arguable challenge under article V, except in so far as article VI provides. Second, even if that were not so, I would have some doubt whether an inability to order security on a challenge to an overseas award could constitute a "substantially more onerous" rule of procedure in relation to recognition or enforcement than a rule allowing such security in the case of an English award. Third, be that as it may, the fact is that the 1996 Act contains in relation to Convention awards no equivalent to section 70(7) in relation to English awards. Whatever article III might require in that respect (if anything), it is not found in the 1996 Act, and no amount of consistent interpretation can alter the Act in that respect. Fourth, there is first instance authority, which in my opinion accurately reflects what would be expected as a matter of principle in relation to the provision of security for the amount of an award in issue, that the power under section 70(7) will only be exercised if the challenge appears "flimsy or otherwise lacks substance": *A v B (Arbitration: Security)* [2010] EWHC 3302 (Comm); [2011] 1 Lloyd's Rep 363; [2011] Bus LR 1020, para 32 per Flaux J; *Y v S* [2015] EWHC 612 (Comm); [2015] 1 Lloyd's Rep 703, para 33 per Eder J. That cannot by any stretch be said of NNPC's fraud challenge in the light of the evidential material set out in the Court of Appeal's judgment.

44. Finally, I turn to CPR 3.1(3). In my opinion, this takes IPCO nowhere. It is a power, expressed in general terms, to impose conditions on orders. It cannot authorise the imposition, on a person exercising its right to raise a properly arguable challenge to recognition or enforcement, of a condition requiring security for all or any part of the amount of the award in issue. Its obvious subject matter is the imposition of a condition as the price of relief sought as a matter of discretion or concession, not the imposition of a fetter on a person exercising an entirely properly arguable right. The Court of Appeal was right to underline in *Huscroft v P & O Ferries Ltd (Practice Note)* [2010] EWCA Civ 1483; [2011] 1 WLR 939, paras 18-19 that "rule 3.1(3) does not give the court a general power to impose conditions on one or other party whenever it happens to be making an order", and that its purpose is "to enable the court to grant relief on terms" and that the court should "focus attention on whether the condition (and any supporting sanction) is a proper price for the party to pay for the relief being granted", satisfying itself also that "the condition it has in mind represents a proportionate and effective means of achieving that purpose". CPR 3.1(3) may be relevant where the court only permits the pursuit on terms of a claim or defence which in some respect is problematic: see *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119, paras 72-81 (to which the

appellant's solicitors very properly drew the Supreme Court's attention after the handing down in draft of this judgment). But it is entirely clear that CPR 3.1(3) has no relevance on this appeal.

45. That is not to say that CPR 3.1(3) or the court's other general procedural powers may never become relevant in the context of an issue being decided under section 103(2) or (3). I have noted that the court's power to make disclosure and freezing orders is one means by which an award may indirectly be secured, without impinging on a defendant's right to raise challenges under section 103. The court may in the course of such a challenge make all sorts of other procedural orders, and back them where necessary with sanctions. But none of this has anything to do with this appeal. NNPC here had not misconducted themselves or given any sort of cause for the exercise of any procedural discretion to make an order against them or to condition it in any way. Some of the factors to which the Court of Appeal alluded in paras 19 to 23 of its supplementary judgment might have had some possible relevance had NNPC in some way defaulted in the pursuit of a challenge under section 103. As it is, paras 19-21 amount to no more than concern that the award might be difficult to enforce in practice, while para 23 links this to a perception that the previously ordered security now appears insufficient. These were not admissible bases for attaching a condition to the future exercise in this jurisdiction of a right of challenge under section 103(3). The wish in para 22 to provide a "goad to progress" was also an inadmissible basis for securing the award, particularly in the absence of any finding of any relevant prior default by NNPC from which it needed relief, and is (one might add, if it had had any potential relevance) difficult to understand as a matter of fact in circumstances where the fraud issue will from now be case-managed by the Commercial Court.

46. I should not finish without addressing a point made by NNPC in a footnote - doubtless to avoid too obvious a hostage to fortune on the main issue - on the last page of its written case. The footnote records that

> "NNPC also considers that … it follows that NNPC can allow the guarantees given previously (in a total sum of US$ 80m) to lapse without affecting its right to have its defence under section 103(3) of the 1996 Act determined prior to IPCO being permitted to enforce the Award."

I do not accept that. The security of USD 80m was the agreed price of adjournments in 2005 and 2008-2009 which have lasted in total nearly 12 years. NNPC undertook by the consent order dated 17 June 2009 to maintain the guarantees "until further order of the Court". That the adjournment will now lapse is no reason for the Court to permit the existing security to lapse, still less for any argument that NNPC is

entitled to allow it to lapse. The guarantees should continue in place until further order, pursuant to NNPC's undertaking.

47. For the reasons I have given, the appeal must in my opinion be allowed, the Court of Appeal's order attaching conditions (in particular, the requirement to provide further security of USD 100m) in relation to the challenges raised by NNPC must be set aside and NNPC's fraud and non-fraud challenges must be remitted to the Commercial Court for decision free of any such further conditions. The parties will have 21 days to make submissions as to the precise form of order and as to costs.