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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
17 April 2008

B e f o r e :

THE HON. MR JUSTICE TOMLINSON

Between:

IPCO (NIGERIA) LIMITED
Claimant
- and -

NIGERIAN NATIONAL PETROLEUM CORPORATION
Defendant

Michael Lyndon-Stanford QC and Ciaran Keller
(instructed by Messrs Lovells) for the Claimant
Jonathan Nash QC and James Willan
(instructed by Messrs Stephenson Harwood) for the Defendant
Hearing dates: 21-22, 25 February 2008

HTML VERSION OF JUDGMENT

Mr Justice Tomlinson :

Introduction

1. On this application the court has to consider its power of enforcement of a New York Convention award in circumstances where a challenge to the validity of the award is pending before the supervisory

court. An unusual feature of the application is that the court has already once before had to consider whether to adjourn a decision on enforcement of the award, and has adjourned enforcement on terms. There has been compliance by the Defendant with those terms. Now the Claimant returns to court and asks it to make a different order. It does so in part because the resolution of the challenge to the validity of the award of which the supervisory, Nigerian, court is seised is taking very much longer than was first expected and in part because this court was, it is alleged, on the earlier occasion inadvertently misled in a manner material to its evaluation of the strength of the challenge. In these circumstances the question arises whether the court should, as the Defendant would put it, revisit its earlier decision. In view of the further time which may elapse before resolution of the proceedings in Nigeria, there arises also in rather stark relief the question whether the court can and should permit enforcement of such part of the award, if any, as is, in the opinion of the court, incapable of serious challenge.

2. The Claimant company, to which I shall refer as "IPCO", is a Nigerian company. It is a subsidiary of a Hong Kong registered company. It is a contractor specialising in the construction of on-shore and off-shore oil and gas facilities. It was incorporated in Nigeria in 1990 in order, as I infer, to exploit the opportunities for business in that country.

3. The Defendant, to which I shall refer as "NNPC", is a Nigerian Federal Government corporation. It is and describes itself as the State Oil Corporation of Nigeria. It is one of the principal contributors to the economy of Nigeria, with a turnover in 2005 equivalent to over £5,000,000,000.00. In terms of volume and revenue it is the most important oil and gas producer in Africa.

4. By a contract dated 14 March 1994 IPCO agreed for a lump sum price to undertake the design and construction for NNPC of a petroleum export terminal in the Port Harcourt area of Nigeria to be known as the Bonny Export Terminal. Completion of the project took some 22 months longer than was envisaged in the contract. IPCO contended that that was in part a result of NNPC requiring variations to the agreed specification.

5. The contract was governed by Nigerian law and in the event of disputes which could not otherwise be resolved provided for arbitration in Lagos in accordance with the Nigerian Arbitration and Conciliation Act 1990.

6. Completion of the contract was followed by a lengthy arbitration between the parties. The arbitration tribunal comprised a former Attorney General and Minister of Justice of Nigeria, a former Director of the International and Comparative Law Division of the Federal Ministry of Justice of Nigeria, also the Nigerian representative of UNCITRAL and Honorary Vice President of the International Council for Commercial Arbitration and, thirdly, a retired Chief Judge, the co-author of the leading Nigerian textbook on arbitration.

7. On 28 October 2004 the tribunal issued its award, an expression which I use without prejudice to IPCO's argument that what was issued was a series of divisible awards. After setting off an amount of US$1,348,015.00 found due from IPCO to NNPC on NNPC's counterclaim, the award in favour of IPCO against NNPC was US$152,195,971.55, and Naira 5 million. The latter sum related to costs of the arbitration awarded to IPCO. The Dollar sum included a further US$815,000 on account of the costs of the arbitration. The arbitrators also directed that the sums awarded should bear interest at 14% per annum until payment.

8. 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 section 100(3) of the Arbitration Act 1996, the award is also a New York Convention award. Accordingly it may be recognised and enforced in this jurisdiction pursuant to section 101 of the Arbitration Act.

9. By an apparently undated Arbitration Claim Form issued in this court IPCO sought "enforcement of the terms of the arbitral award" in accordance with a draft order of enforcement attached thereto. On 29 November 2004 on an ex parte application on paper David Steel J ordered enforcement in the terms requested. The order in consequence made failed properly to comply with CPR 62.18(10) in that it failed properly to set out the restrictions on enforcement under Rule 62.18(9)(b). Nothing now turns on this. However the order which David Steel J was invited to and did make was an order for the payment of the sterling equivalent of the Dollar and Naira sums awarded converted at rates of exchange said to be prevailing as at 23 November 2004. Interest for 26 days, 28 October 2004 to 23 November 2004 on those sterling sums was then calculated at £811,098.88, this too was directed to be paid and interest was said to be continuing at a daily rate of £31,196.11.

10. It was common ground before me that the conversion of the award into sterling for the purposes of recognition and enforcement was inappropriate. The power given under section 101(3) of the Arbitration Act is to enter judgment "in terms of the award". Mr Michael Lyndon-Stanford QC, for IPCO, invited me to amend the order made and to substitute an order for enforcement in terms of the award. I did not understand Mr Jonathan Nash QC, for NNPC, to contend that I lacked the power so to do. In the circumstances I do not need to consider whether the parties are correct in their view that the court lacks the power, absent consent, to direct that judgment be entered in a currency other than that of the award. Mr Nash pointed out that the application currently before the court is for enforcement of the order of David Steel J, and he suggested that that order did not readily lend itself to partial enforcement, even assuming that to be available in principle. He also suggested that the making of this order was the first of two occasions upon which the court, at the instance of and misled by the parties, had approached its jurisdiction under sections 101-103 of the Arbitration Act in an inappropriate manner.

11. The second such occasion was, submitted Mr Nash, when the matter came before Gross J on 7 and 12 April 2005. Having announced his decision at the conclusion of the hearing Gross J delivered a reserved judgment on 27 April 2005. It is reported at [2005] 2 Lloyd's Rep 326. It is this decision which in one sense I am asked to revisit, although a more appropriate analysis is I think that I am asked to consider whether the continuation of Gross J's order meets the justice of the case in the different circumstances which now prevail.

12. As Gross J recorded at paragraph 2 of his judgment, there were before the court on that occasion three applications:

i) an application by NNPC to set aside the order, pursuant to sections 103(2)(f) and 103(3) of the Arbitration Act 1996;

ii) in the alternative, an application by NNPC that the enforcement of the order be adjourned, pursuant to section 103(5) of the Arbitration Act 1996;

iii) an application by IPCO, pursuant to section 103(5) of the Arbitration Act, in substance that in the event of NNPC failing on (i) but succeeding on (ii) above, then NNPC should provide security in the sum of US$50 million (or such other sum as the Court thinks fit), failing which IPCO be permitted to enforce the award as a judgment of the court.

13. In order to put the matter into context I set out below the relevant sections of the Arbitration Act 1996.

"100(1) In this Part a 'New York Convention award' means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention. …

(3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.

(4) In this section 'the New York Convention' means the convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

101(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

…

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

…

103(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

(2) Recognition or enforcement of the award may be refused if the party 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.

(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."

14. Gross J dismissed NNPC's application, pursuant to section 103(2)(f) and 103(3), to set aside the order of David Steel J.

15. Gross J granted the application of NNPC, pursuant to section 103(5), that enforcement of the order, strictly the decision on enforcement, be adjourned and the cross-application of IPCO that such adjournment, if ordered, should be on terms. During the course of the hearing before him NNPC accepted that a sum of US$13,102,361.72 would remain indisputably due to IPCO even if NNPC's challenge to the award proved wholly successful. Gross J imposed as a term of the adjournment of enforcement, in the event the first of two terms, a requirement that NNPC pay this amount to IPCO within 28 days. NNPC did not contend before Gross J that the court lacked jurisdiction to make such order, and NNPC has complied with it. Gross J then briefly considered the strength of the various grounds of challenge to the award, as enjoined so to do by the decision of the Court of Appeal in Soleh Boneh v. Uganda Government [1993] 2 Lloyd's Rep 208. He concluded that some of the grounds of challenge had a real prospect of success but that, even making allowance therefor, the award would be likely to be upheld at least as to US$58.5 million, this being a discrete amount awarded under the heading of "Variations". Having balanced the factors relevant to the exercise of his discretion Gross J concluded that practical justice would best be done by imposing as a second term of the adjournment of enforcement of the order a requirement on NNPC to provide appropriate security in London in the sum of US$50 million, again within 28 days. NNPC duly complied with this part of the order too. There can be no question but that the court had jurisdiction, pursuant to section 103(5), to make adjournment of the decision on the enforcement of the award conditional upon the giving of security.

16. NNPC did not, so far as I can ascertain, seek permission to appeal against the requirement that it pay to IPCO the amount indisputably due. Had it done so, it would of course have had to overcome the hurdle that it had not suggested to Gross J either that the court lacked the power to impose as a term of adjournment of the decision on enforcement a requirement to pay an amount indisputably due or that it was in all the circumstances inappropriate so to do. Likewise, NNPC did not seek permission to appeal against the requirement that it give security, although no doubt on this point it took the view that an appeal would have been utterly hopeless. IPCO so far as I can ascertain did not seek permission to appeal against the decision to adjourn the decision on the enforcement of the award.

17. Gross J gave "liberty generally to apply to both parties". It is plain that Gross J would have been likely on an application of the sort which was before him to have done this in any event, but it is also plain that in doing so he had particularly in mind the then likely progress in the Nigerian proceedings as he had been

informed.

18. On 15 November 2004 NNPC applied by Originating Motion to the Federal High Court of Nigeria to set aside the awards. In fact the document referred indiscriminately to "the awards" and "the award". The grounds of challenge were stated with some economy of language at a high level of generality, thus:

"(a) the Arbitration Award has been improperly procured as the condition precedent to the constitution of the Arbitration was not complied with;

(b) the Arbitral Tribunal misconducted itself in the interpretation of clauses 79.0 and 79.3 of the General Conditions of Contract;

(c) there are several apparent errors of law on the face of the Arbitral Award;

(d) the Arbitral Award is against public policy;

(e) the Arbitral Tribunal did not properly evaluate/review the evidence of the parties."

Subsequently NNPC has amended and amplified these grounds, first by an Amended Motion, then in a proposed Re-Amended Motion which was never formalised and which was superseded by a Re-Re-Amended Motion, referred to at the hearing before me as the "RRAM". This document was available in draft form before Gross J – leave to amend in terms of the draft was subsequently given by consent in the Nigerian court.

19. On 22 November 2004 IPCO filed a Notice of Preliminary Objection to NNPC's Original Motion. In effect, IPCO sought to strike it out. The Originating Motion was said to be frivolous, vexatious, calculated to delay enforcement of an arbitral award, calculated to interfere with or delay the due administration of justice and, accordingly, an abuse of process. The Preliminary Objection was successively amended so as to respond to NNPC's various amendments to the Original Motion.

20. At the hearing before Gross J counsel for NNPC, then Mr Wordsworth, drew to the attention of the court "the speed with which the Nigerian proceedings are being pursued by NNPC". He went on to observe that on the basis of IPCO's evidence a decision on IPCO's Preliminary Objection could be expected in the second half of 2005. That, he said, did "not seem to be in doubt at all". Of course what was meant by this was that there would be a ruling at first instance on IPCO's Preliminary Objection. No-one can have been under any illusion that there might not be an appeal. What however is plain is that Gross J took the view that resolution at first instance of IPCO's Preliminary Objection might well prove to be something of a watershed. A decision at first instance of the Nigerian High Court that NNPC's grounds of challenge to the award should be struck out would or might change the landscape against the backdrop of which the English court was called upon to decide whether to permit enforcement of the award. As Gross J himself put it in the course of argument before him, "if IPCO succeeds in its Notice of Preliminary Objection one can anticipate a return to court" i.e. a return to this court by IPCO seeking immediate enforcement of the award.

21. I should mention as part of the chronology that on 19 November 2004 NNPC filed an application in the Nigerian High Court to restrain IPCO from enforcing the award. So far as I am aware no order has been made on that application which was as I have already described followed within three days by IPCO's

Preliminary Objection. On 25 May 2005 IPCO filed proceedings in the Nigerian High Court, Action 505/2005, seeking an order that it be at liberty to enforce the award in the same manner as a judgment. The riposte to that from NNPC was a Preliminary Objection in those enforcement proceedings. So far as I am aware no substantive order has been made on either of these two related applications. There is therefore in force no order of the Nigerian court either permitting enforcement of the award as a judgment of the court or restraining IPCO from enforcing the award. It seems to be accepted on all sides that the next substantive step which must be achieved in the Nigerian proceedings is resolution of IPCO's Preliminary Objection to NNPC's RRAM.

22. As to the latter, on 12 July 2005, Okeke J granted IPCO's application for accelerated hearing of the Preliminary Objection and ordered written addresses by each side, limited to four pages each, with a reply on points of law for adoption at a hearing on 31 October 2005. On 29 July 2005 IPCO filed its written address in accordance with the order of Okeke J. On 12 September 2005 NNPC filed its written address in accordance with that order. On 19 September 2005 IPCO filed a reply on points of law to NNPC's written address again in accordance with the order. On 26 October 2005 IPCO filed a bundle of authorities relied upon in its written address and reply on points of law. On 28 October 2005 NNPC filed a Preliminary Objection to IPCO's reply on points of law and bundle of authorities. On 31 October 2005 at the scheduled resumed hearing before Okeke J IPCO applied for the court's permission to withdraw the reply on points of law in order to avoid delay in the proceedings. The parties adopted their written addresses. In terms of the record of the proceedings the court then announced that the "case is adjourned to 12/12/05 for Ruling". As I understand that, the learned Judge was reserving her judgment. The hearing of the Preliminary Objection was concluded, barring unforeseen developments. It seemed therefore that there would indeed be achieved before the end of 2005 resolution at first instance of IPCO's Preliminary Objection to NNPC's RRAM.

23. It was at this point that matters took an unexpected turn, which IPCO attributes to a change in legal representation on the NNPC side which had taken place in August. On 29 November 2005 NNPC issued a Motion seeking the following relief:

"An order of this Honourable Court transferring this case to the Honourable Chief Judge for re-assignment to another Judge of the Federal High Court for hearing.

2. An order suspending the delivery of the ruling on the Respondent's Preliminary Objection, reserved for 12th December 2005, pending the re-assignment of this matter and the re-hearing of the objection before another Judge of this Honourable Court.

3. An Order of this Honourable Court adjourning further proceedings in this suit sine die pending the transfer of the suit before another Judge of the Federal High Court."

The grounds for the application were set out in the Motion as follows:

"1. His Lordship has observed that the case is too confusing and complicated for her and the Applicant is apprehensive that this may undermine a just and fair determination of this case.

2. The order of this Honourable Court limiting the Written Address to just 4 (four) pages made it impossible for the Applicant to adequately canvass arguments in opposition to the Respondent's Written

Address and thereby curtailed the right of the Applicant to fair hearing.

3. The refusal of the Court to allow the applicant to address the Court orally on 31 October 2005, when the Written Address was adopted especially in view of His Lordship's admission that the matter was confusing and complicated and the order limiting the written address to four pages, adversely affected and prejudiced the interests of the Applicant and its right to a fair hearing.

4. The refusal of His Lordship during the proceedings on 31 October 2005, to allow the Applicant's Counsel to respond to the extensive prejudicial submissions of the Respondent's Counsel contending that the Applicant was deliberately delaying the matter is capable of prejudicing the mind of the Court against the Applicant and thereby leads to a miscarriage of justice."

I should mention that Okeke J is as I understand it a lady judge but that it remains the tradition in Nigeria to refer to such a judge as "His Lordship".

24. This application was supported by an affidavit sworn by Mr Ganiyu Bosuro, a lawyer in the Corporate Secretariat and Legal Division of NNPC which contained the following paragraphs:

"I know as a fact that:

...

(vi) on the last adjourned date being Monday 31 October 2005, the Registrar called the matter and His Lordship complained in open court to the hearing of everybody present, about the several applications filed in the matter and declared inter alia: '... this case is too complicated ... that is the plain truth!' even before Counsel announced their appearance.

...

(ix) His Lordship also stated in open court that the applications filed in this matter were rather confusing and that she was minded to return the case-file to the Chief Judge for re-assignment to another judge of the Federal High Court.

(6) With particular reference to the statement of His Lordship in paragraph 4(vi) above I also know as a fact that, the Applicant has lost confidence in and become apprehensive about the ability and capacity of His Lordship to thoroughly and judiciously consider the rather intricate facts and circumstances of the instant suit.

(7) I verily believe that from the foregoing facts His Lordship ought to disqualify herself from further hearing the instant suit and to suspend delivery of her ruling on the Respondent's preliminary objection dated 29 July 2005.

(8) I know as a fact that this Honourable Court ought to take cognizance of the quantum of the Arbitral Award against the Applicant in the sum of US$154 million which it seeks to set aside, and in the light of paragraphs 5, 6 and 7 above, the Applicant instructed its counsel, Messrs Babalakin & Co, to seek a transfer of the instant suit from His Lordship to another Judge of the Federal High Court."

25. Pursuant to an application for expedition, this application was listed for hearing before Okeke J on 2 December 2005. On 1 December 2005 IPCO put in counter evidence in the form of an affidavit from Mr Mutiu Ganiyu. He is a lawyer employed by IPCO's legal practitioners, Messrs Aluko & Oyebode. This affidavit included the following:

"2. I have read the affidavit deposed to by Mr Ganiyu Bosuro in support of the Applicant's motion on notice dated 29th November 2005. This my affidavit is sworn in opposition to certain allegations made in the said affidavit of Mr Ganiyu Bosuro.

3. First, the Applicant has alleged in its affidavit aforesaid that during the proceedings of 31st October 2005, this Honourable Court pronounced that the issues involved in this case are 'complex' and therefore the court was inclined to return the case file to the Chief Judge of the Federal High Court.

4. I was present in court during the proceedings of 31st October 2005, and I know as a fact that the above allegation is false. The court did not at any time pronounce that this matter was 'too confusing and complicated' for it to resolve, as alleged by the Applicant, or at all.

5. Secondly, as regards the Applicant's allegation that its right to a fair hearing has been infringed by the court's directive that the written addresses be limited to four pages, I wish to make the following observations;

(i) the court made the aforesaid directive during the proceedings of 12th July 2005; the Applicant did not at that time give any indication that it considered that it would be constrained from fully presenting its case by the aforesaid directive.

(ii) after the proceedings of 12th July 2005, the Applicant changed its legal representation. The Applicant's new counsel (Messrs Babalakin & Co) had sufficient time to study the proceedings that had transpired prior to their engagement. At no time did they indicate that they considered that the Applicant would be constrained from fully presenting its case by the directive limiting Written Addresses to four pages. On the contrary, they proceeded to file their four-page written address.

(iii) the Applicant itself has, in the course of these proceedings, strenuously urged the court to strictly enforce the four page limit. Thus, when the Respondent filed an Extract of Authorities (a compilation of verbatim extracts from legal authorities cited in the Respondent's Written Address), the Applicant objected to the Extracts of Authorities on the ground that it amounted to 'an extension' beyond the four pages directed by the court.

(iv) finally, the Applicant never requested the court to review the four page limit. On 31st October 2005, its legal practitioner, Mr Bayo Adaralegbe 'adopted' the Applicant's Written Submissions."

26. The matter came before Okeke J on 2 December 2005. There was discussion as to the need for oral evidence and the application was adjourned to 1 February 2006 so as to allow for the giving of oral evidence and cross-examination thereof.

27. All parties again assembled before Okeke J on 12 December 2005, the date appointed for the delivery of judgment on IPCO's Preliminary Objection to NNPC's RRAM. The official note of the ruling of the

judge on this occasion reads as follows:

"Today is slated for the ruly (sic) on this suit but because of the application by the Applicant which touched on the intergrity (sic) of this court this ruling cannot be read. The matter will be transferred to the Chief Judge for assignment to another judge to handle the motion because I cannot be a judge in my court where I am tried. However, if at the end the court is exonerated the court may proceed to read his ruling which as I stated earlier is ready, this suit is therefore returned to the Chief Judge for necessary action, please."

28. On 15 December 2005 Okeke J wrote to the Chief Judge of the Federal High Court. I must set out her letter in full. It is headed with the action title of NNPC's RRAM together with the case number 1060/2004. The letter reads:

"My Lord,

The above mentioned suit was adjourned for ruling on 12/12/05 but on 29/11/05 the Applicant herein (i.e. NNPC) filed a Motion on Notice praying for the transfer of the matter to Your Lordship for reassignment to another judge of the Federal High Court for hearing.

(ii) suspending the delivery of the ruling on the Respondent's (i.e. IPCO) Preliminary Objection slated for 12/12/05 pending the reassignment of this matter and

(iii) an order of this Court adjourning further proceedings in the suit sine die pending the transfer of the suit before another judge of the Federal High Court.

My Lord I am the accused in the said Motion and since I cannot be a judge in my own case I respectfully return the files for reassignment to another judge to deal with the said motion dated 29/22/05 (sic – obviously an error for 29/11/05)

It is pertinent to inform My Lordship that ruling on the preliminary objection has been written by me but since I have become aware of Babalakin's motion it will be foolhardy to deliver the said ruling until Babalakin's motion is determined.

In addition, the sister case suit No. FHC/L/CS/505/05 between IPCO v. NNPC that was adjourned sine die pending the outcome of suit No. FHC/L/CS/1060/04 is also forwarded herein for your directive please."

"Babalakin" is of course a reference to NNPC's new lawyers Messrs Babalakin & Co. The "sister case" to which reference is made is IPCO's own proceedings issued on 25 May 2005 seeking an order that IPCO be at liberty to enforce the award as a judgment of the court. It seems plain both from this letter and from the record of the ruling of the court on 12 December 2005 that what Okeke J was requesting was reassignment of NNPC's 2004 action simply for the purpose of enabling Babalakin's motion of 29 November 2005 to be dealt with by another judge. As I read both the letter and the earlier ruling the learned Judge contemplated that she might, in the event of dismissal of the application, deliver the judgment on the Preliminary Objection which she had already prepared. I am a little puzzled as to why in those circumstances she sought the direction of the Chief Judge as regards the 2005 action, but perhaps that

was out of an abundance of caution.

29. The matter was then placed before the Chief Judge. His decision is apparently recorded on a document headed "Record of Fees". There is some manuscript on this document which is illegible in the photocopy before me. The Suit No. at the top of the page is that of NNPC's 2004 action. Under the rubric "Execution of Judgment" is written, I think, "Reassign to Auta J" which is then signed and dated by the Chief Judge on 16/12/05. Underneath that order under the rubric "Appeals" is written, apparently in the same hand, "Okeke J" again apparently signed and dated by the Chief Judge on what looks like 17/11/04. It is quite possible that this is the date on which NNPC's action, issued on 15 November 2004, was first assigned to Okeke J, and that the Chief Judge's later reassignment is simply recorded on the same piece of paper on which his original assignment was recorded. The parties are not agreed as to what it was that was reassigned by the Chief Judge to Auta J. It appears to me that the procedure of the court probably necessarily involved reassignment of the whole action to Auta J, and that without such a reassignment he would have had no authority to proceed. That however still leaves a dispute as to whether the Chief Judge reassigned the action to Auta J for all purposes or whether the transfer was simply for the limited purpose, in the first instance, of hearing and determining the motion directed to securing a re-hearing of the Preliminary Objection before a different judge.

30. The court scheduled a further hearing for 20 February 2006, requiring any witnesses to be present on that day. There followed correspondence between the parties with IPCO pressing for details of the witnesses whom NNPC intended to call – according to IPCO NNPC had indicated at the hearing of 2 December 2005 that it intended to call a number of witnesses to buttress Mr Bosuro's affidavit evidence. Messrs Babalakin & Co, for NNPC, responded as follows on 16 February 2006:

"… As you must be aware, this matter is coming up before a new Judge for the very first time. There is no indication on the Hearing Notice regarding what the matter is coming up for. It is therefore our considered opinion that it would be in the interest of all the parties not to pre-empt the Court in its adjudication of this matter."

31. What was not foreshadowed in the correspondence was the positive stance which NNPC in the event adopted when the matter came before Auta J for the first time on 20 February 2006. NNPC through counsel asked for a date for the hearing of IPCO's Preliminary Objection, contending that the whole suit had been transferred with the effect that there had to be a re-hearing of the matters upon which Okeke J had already heard argument and had prepared her judgment. IPCO for its part protested that it was only the NNPC motion of 29 November 2005 which had been transferred, not the whole case. IPCO suggested that the matter might again be referred to the Chief Judge for clarification. The ruling of Auta J is recorded as follows:

"I have no doubt that the Honourable Chief Judge of this court transferred the whole case to this case (sic – presumably an error for 'court') to be heard de novo. I am therefore not ready to hear a motion that was not filed against this court. I cannot decide whether Justice Okeke is competent to handle this case or not. I am therefore not going to sent (sic) back to the Chief Judge, this file, unless Mr Tunde Fagbohunlu has any objection to the hearing of this case. The case is adjourned to 16/03/05 (sic) for hearing of the preliminary objection."

32. On 23 February the "sister case" Action 505/2005 came before Auta J. The ruling is recorded in this way:

"There is a sister case before this court. I am in agreement with the Ruling of Justice G.C. Okeke, that this case be adjourned sine die, until the outcome of the first case. The two cases cannot go on simultaneously."

From this I infer that this action must already have been adjourned or stayed on an earlier occasion although I have seen no record of it.

33. I derive the following I hope uncontroversial account of subsequent proceedings very largely from the third Witness Statement of Mr Fagbohunlu, taking account where relevant of Mr Akoni's comments in his first Witness Statement which are largely on matters of emphasis or detail.

34. On 2 March 2006 IPCO applied to Auta J for permission to appeal, on grounds of fact, his decision made at the hearing on 20 February 2006. That application was required by the rules of procedure to be heard within 14 days of the 20 February hearing. On 6 March 2006, the last date within that 14 day period, Auta J declined to hear the application for permission to appeal as an urgent application as it was not listed for hearing that day.

35. On 16 March 2006 NNPC filed a Preliminary Objection to the hearing of IPCO's application for permission to appeal on the grounds that:

i) The court lacked jurisdiction to entertain the application;

ii) The application was grossly incompetent and defective;

iii) The application was spent and otiose.

36. On 6 March 2006 IPCO filed a notice of appeal to the Nigerian Court of Appeal on grounds of law, as of right, also against Auta J's decision on 20 February 2006. As described at paragraph 39 below, IPCO's application for permission to appeal on grounds of fact was withdrawn on 22 June 2006. IPCO then applied directly to the Court of Appeal for permission to appeal on grounds of fact. This permission was granted and, on 27 February 2007, IPCO filed a fresh notice of appeal to the Court of Appeal on grounds of fact. IPCO's appeals on grounds of law and of fact will in due course be heard by the Court of Appeal at the same time.

37. On 16 March 2006 IPCO filed an application for a stay of the proceedings before Auta J pending determination of its appeal. That application was initially fixed for a hearing on 20 April 2006, but had to be adjourned to 30 May 2006 as 20 April fell within the court's annual Easter vacation.

38. On 30 May 2006 IPCO's counsel informed Auta J of IPCO's pending stay application and requested permission to argue that application. The application was predicated on the appeal, as of right, to the Court of Appeal on grounds of law. However the court noted that NNPC's Preliminary Objection to IPCO's application for permission to appeal on grounds of fact was still pending. Auta J had of course declined on 6 March 2006 to hear IPCO's application for permission to appeal. Under the applicable rules of procedure, Auta J no longer had jurisdiction to hear the application after that date and only the Court of Appeal could then grant leave to appeal. NNPC presented its arguments on why the court no longer had jurisdiction to entertain the application. Upon the conclusion of NNPC's arguments, IPCO's counsel requested a short adjournment to prepare IPCO's response. The hearing was then adjourned to 22 June 2006 with costs in the sum of Nigerian Naira 10,000 awarded against IPCO.

39. On 22 June 2006 IPCO formally withdrew its application to the first instance court for permission to appeal on grounds of fact and sought leave to move the stay application. The hearing was adjourned to 27 July 2006 to allow NNPC to file an affidavit in response to the renewed stay application.

40. On 27 July 2006 IPCO's stay application was adjourned to 25 October 2006. NNPC's counter-affidavit had been filed only that day. Costs of Nigerian Naira 20,000 were awarded against NNPC "for wasting time of the court".

41. At the hearing of the stay application on 25 October 2006 NNPC opposed the grant of a stay on five grounds:

i) There was no decision or ruling of the Federal Court that could be appealed against: at the hearing on 20 February 2006 Auta J merely informed the parties of an administrative action by the Chief Judge;

ii) Assuming that there was a decision, there was no competent appeal because leave of the court or of the Court of Appeal was required before the question of the appeal could validly be before the court;

iii) The notice of appeal was filed out of time;

iv) As a matter of discretion, the court should refuse a stay on the basis that the affidavit of IPCO did not disclose any reason for such a stay;

v) A stay of proceedings should only be granted where it would terminate the proceedings, and the court should exercise extreme restraint in granting the order.

42. Having reserved judgment, on 4 December 2006 Auta J granted the stay application, and the matter was subsequently adjourned to 27 March 2007 for mention. On 27 March 2007 it was again adjourned to 17 May 2007 and there was a yet further adjournment in due course to 19 July 2007.

43. On 19 April 2007 IPCO filed its brief of argument in support of the appeal. NNPC was required to file its brief of argument by 11 June 2007. NNPC did not file its brief of argument within the time allowed.

44. On 17 July 2007 IPCO issued its application before this court that it be permitted to enforce the order of David Steel J.

45. On 9 August 2007, in the absence of NNPC's brief of argument on the appeal, IPCO applied to the Nigerian Court of Appeal for the appeal to be determined upon IPCO's brief of argument alone.

46. On 19 October 2007 NNPC lodged its brief of argument in the appeal.

47. I have already mentioned at paragraph 32 above that on 23 February 2006 IPCO's application for liberty to enforce the award as a judgment of the Nigerian court was adjourned sine die. On 4 January 2007 NNPC filed a motion on notice to set aside the adjournment of that enforcement application and to strike out the application on the ground that IPCO had not served a pre-action notice. On 5 February 2007 IPCO filed a notice of Preliminary Objection to this motion on notice. On 19 July 2007 IPCO was granted leave to withdraw the application to enforce the award as a judgment of the Nigerian court. The reason given for that withdrawal was that although IPCO did not accept the position of NNPC that a pre-action

notice was required before a suit of that nature was brought, IPCO nevertheless opted to withdraw the suit and to serve a pre-action notice on NNPC so as to avoid the delay that might be occasioned by litigating that technical point, potentially to the Supreme Court.

48. The foregoing is not intended as an exhaustive account of the course taken by the various Nigerian proceedings since the matter was before Gross J now some three years ago. However what is clear is that resolution of IPCO's Preliminary Objection to NNPC's RRAM is in fact no closer now than it was then – indeed it is very much further away. Before the Preliminary Objection can be ruled upon there must first be a resolution of IPCO's appeal against the order of Auta J to the effect that there be a re-hearing of the same.

49. It seems that the Nigerian Court of Appeal has not yet ruled on the question whether it should determine the appeal on IPCO's brief of argument alone or whether it should permit NNPC to serve its brief out of time. IPCO's advocate Mr Fagbohunlu gives it as his opinion that on the assumption that the second course of action is followed the substantive appeal will not be listed for hearing before the second or third quarter of 2008. However as at the date of the hearing before me, in late February 2008, there was apparently no date fixed for the hearing of the appeal, or at any rate if there was I was not told of it. IPCO's expert witness, retired Supreme Court Judge Justice Eso, gives it as his opinion that it is likely to take at least four years for the appeal from Auta J's decision in the Federal High Court to be determined by the Court of Appeal. That would mean a determination in early 2010. NNPC's expert witness, also a retired Supreme Court Judge, Justice Ayoola, thinks that Mr Fagbohunlu's estimate of the time of disposal is more realistic, talking in terms of disposal of the appeal by October 2008. However in view of the apparent lack of further progress as at February of this year, I fear that to hope for disposal of the appeal in the course of 2008 may be optimistic.

50. There are of course a number of possible outcomes of the appeal when finally it is determined. The Court of Appeal might uphold Auta J's decision in which case it will be necessary for the Preliminary Objection to be re-heard before that judge. The Court of Appeal might decide that Auta J should proceed to hear the substance of NNPC's motion that the case should be transferred from Okeke J, i.e. effectively to rule upon the propriety of her remaining seised of the case and delivering her ruling. According to Mr Fagbohunlu a yet further outcome is that the Court of Appeal might decide that Auta J should not re-hear IPCO's Preliminary Objection and that Okeke J should therefore deliver her prepared ruling. However it appears that the parties are not ad idem as to the extent to which the substance of the transfer application is in fact before the Court of Appeal. It is certainly the case of NNPC that what is before the Court of Appeal is simply the propriety of Auta J's ruling that the whole action had been reassigned to him with the result that he was bound to re-hear the Preliminary Objection de novo. It is common ground that whatever the decision of the Court of Appeal the dissatisfied party may appeal to the Supreme Court on point of law as of right and may appeal with permission on matters of fact. It seems to be agreed that a realistic time estimate for such an appeal is that it may take up to five years to be resolved. If it were decided that Auta J should hear and determine the transfer application, his subsequent decision on that point alone could trigger another appeal to the Court of Appeal and thence to the Supreme Court.

51. In the light of all this it is apparent that even a decision at first instance on the Preliminary Objection may now be very many years away. The potential delay involved in any of the possible outcomes of the appeal is five years together with however long it takes for the matter first to be resolved in the Court of Appeal. On a best case analysis at the conclusion of that period either Okeke J would deliver her ruling,

assuming she is still available to do so, or Auta J or another judge would proceed to re-hear the Preliminary Objection de novo. However if the decision of the Court of Appeal is that Auta J should hear and determine the merits of the transfer application, the timescale for achieving resolution at first instance of the Preliminary Objection might be more than twice five years, since Auta J's decision on the merits of the transfer application, when reached, would itself be susceptible to two further appeals.

52. I have of course been dealing only with the timescale for achievement of a ruling at first instance on the Preliminary Objection. The prospects as to what might occur after such a determination are equally dismaying. The appeal process might take of the order of eight to nine years.

53. Justice Eso concludes his report to this court in this way:

"Conclusion

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. In this regard, the Government of the Federal Republic of Nigeria has very recently set up a committee to examine the existing system and make recommendations towards the modernisation of the arbitration law and practice in Nigeria in an attempt to make it meet with those international standards. The recommendations of the committee are yet to be published or implemented."

I do not read Justice Ayoola as taking serious issue with this appraisal. He points out that there has been no proper statistical analysis of the length of time taken to resolve disputes relating to arbitral awards in Nigeria, and makes the point that it is difficult to generalise on the basis of individual cases in isolation without considering what was responsible for the delay which may have occurred in any given case. He continues:

"148. 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."

54. In a slightly earlier passage in his report Justice Ayoola says this:

"144. The fact of possibility of delay in hearing appeals means that it is strange that IPCO, with the knowledge of the congestion in the Courts and the possibility of delay, chose to appeal instead of leaving the Preliminary Objection with Justice Auta who would have disposed of it much earlier than an appeal would have been heard."

Indeed it was argued before me by NNPC that IPCO really had only itself to blame for the fact that the Preliminary Objection has not already been determined. There could have been such a determination, it argued, in the first half of 2006 (perhaps 6-8 months later than had been anticipated at the time of the

hearing before Gross J) "if IPCO had accepted the decision of Auta J given on 20 February 2006 that he should re-hear the Preliminary Objection". Mr Nash continued, in his skeleton argument:

"The only reason why there has not been a determination of the Preliminary Objection is that IPCO chose to appeal Auta J's decision and to seek a stay of the proceedings in the meantime, no doubt because it saw a tactical advantage for itself in doing so. IPCO cannot be heard to complain about the delay in the determination of the Preliminary Objection where it is responsible for the delay."

It is true that IPCO has stated its belief that the judgment of Okeke J, if delivered, would have effectively struck out NNPC's challenge to the award. To that extent it is no doubt correct to characterise IPCO's conduct as seeking a tactical advantage. I do not however find this argument attractive. Whilst I express no view on the matters of which the Nigerian Court of Appeal is seised, or arguably seised, it must be obvious that any legal system must be astute to avoid the possibility of re-hearings occurring except where absolutely necessary. There must be an end to litigation. I am sure that the Nigerian legal system recognises this principle. IPCO was entitled to attempt to secure the outcome that the judgment prepared following completed argument on its application was duly delivered. Even assuming that the words said to have been uttered by Okeke J were in fact said, IPCO was entitled to put forward the argument that such matters need to be put into perspective and do not necessarily lead to the conclusion that the judge is incompetent or compromised. Some judges would no doubt have taken the robust line that they would simply proceed to deliver their judgment and leave NNPC, assuming it had indeed lost, to raise such matters by way of or as part of a substantive appeal against the decision rather than in pursuit of satellite litigation. Furthermore it is apparent from the evidence of Justice Eso that the Nigerian Government recognises the desirability of putting in place procedures which will assist arbitration in Nigeria in providing a quick and efficient process of adjudication, supported with unobtrusive efficiency by the local supervisory law – see per Lord Hoffmann in Fiona Trust v. Privalov [2007] Bus LR 1719 at 1723. IPCO might of course be open to criticism if something egregious had occurred so as to render it unreasonable to seek to oppose NNPC's application for a re-hearing, but the present is not such a case. Whatever the outcome of IPCO's appeal to the Nigerian Court of Appeal, any disinterested observer can only reflect with some dismay upon the time being taken to achieve finality in the resolution of the underlying contractual dispute between IPCO and NNPC.

55. It is against this background that I am asked to revisit the decision of Gross J, now three years after he made it. Far from the envisaged watershed being reached in a matter of months, the date of resolution of the Preliminary Objection is now a matter simply of conjecture where the only confident conclusion can be that it is unlikely to be resolved at first instance before the elapse of at least another five years or so and that the delay could now be very significantly longer than that.

The judgment of Gross J

56. Having first set out the provisions of section 103 of the Arbitration Act Gross J proceeded to summarise the principles relevant to the application before him. I reproduce below those parts of this section of his judgment which are relevant to the application before me:

"11. For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that s.103 of the Act embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: Mustill & Boyd, Commercial Arbitration, 2nd edition, 2001 Companion, at p.87.

...

14. Fourthly, s.103(5) "achieves a compromise between two equally legitimate concerns": Fouchard, at p.981. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin – the venue chosen by the parties for their arbitration: Mustill & Boyd, at p.90. "

15. Fifthly, the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court's discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a sliding scale, in any event embodied in the decision of the Court of Appeal in Soleh Boneh v Uganda Govt. [1993] 2 Lloyd's Rep. 208 in the context of the question of security:

'....two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult...if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.'

Per Staughton LJ, at p.212. See too: Fouchard, at p.982; Dardana v Yukos [2002] EWCA Civ 543; [2003] 2 Lloyd's Rep. 326 (CA).

16. Sixthly, it is pertinent to underline that the New York Convention contains no nationality condition (unlike the Geneva Convention of 1927) and is thus applicable, as here, when an award is made abroad in an arbitration between parties of the same nationality: Van den Berg, at pp. 15-19. While primarily the New York Convention was undoubtedly intended to facilitate international arbitration rather than the enforcement in a foreign country of a domestic arbitration award, the benefits of the New York Convention are available to a party seeking enforcement in the latter case also. Such cases are necessarily rare but it would be wrong to introduce a nationality condition into the New York Convention by the backdoor. So, for example, the fact of a party's nationality would (by itself) be irrelevant to the availability

of a ground for resisting enforcement under s.103(2) or (3) of the Act. All that said, in the exercise of the discretion under s.103(5) of the Act, the fact that the arbitration was domestic in the country of origin, must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country. Comity and common sense are likely to require no less; pre-empting the decision on a challenge to an award before the court exercising supervisory jurisdiction in the country of origin would be a strong thing in a case where all parties were domiciled or incorporated in that country."

57. I respectfully agree with and adopt those conclusions of Gross J and I propose to direct myself in the same way.

58. Having considered and rejected NNPC's application to set aside the order of David Steel J, Gross J turned to consider the relevant bases of challenge to Nigerian arbitration awards under Nigerian law. The evidence before me on this aspect was more extensive than was the evidence before Gross J, however I do not think that it was materially to different effect.

Nigerian Law

59. For present purposes it suffices to say that the permissible grounds of challenge are to be found in sections 29 and 30 of the Arbitration and Conciliation Act 1990. Section 26 (3) provides that, unless the parties have agreed otherwise, an arbitral tribunal must state on the award, by which is meant I think on the face of the award, the reasons upon which it is based. Section 29(2) gives power to set aside an award upon proof that the award contains decisions on matters which are beyond the scope of the submission to arbitration. Section 30(1) gives a like power upon proof of misconduct on the part of the tribunal.

60. According to the Nigerian jurisprudence error of law on the face of the award amounts to misconduct. To what extent it is permissible to challenge a conclusion of the tribunal as to a question of construction of a term in a contract may be a little elusive. Nigerian law accepts that a question of construction is generally speaking a question of law. However the tribunal's decision on such a point cannot be set aside simply because the court would itself have come to a different view. If however the tribunal has adopted principles of construction which the law does not countenance, there is an error of law which may be a ground for setting aside the award, or some part of it. See Orojo & Ajomo, The Law and Practice of Arbitration and Conciliation in Nigeria, at pages 281 to 282.

61. Justices Eso and Ayoola agree that a failure to give adequate reasons for an award could also constitute misconduct. This was a point on which Gross J had no evidence as to the law of Nigeria. The more difficult question is of course, as the experts acknowledge, what constitutes adequate reasons for this purpose. Justices Eso and Ayoola are again in agreement that 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 [2001] UKPC 34. They both refer to what was there said about the common law standard. However Lord Cooke of Thorndon, in giving the Opinion of the Board, did not purport to set out the content of the common law on this question. It was unnecessary to the Board's decision. The arbitration in that case was conducted in Miami, Florida in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. 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. Such an award would at the least conform to the requirements

enunciated by Donaldson LJ in Bremer Handels v. Westzucker (2) [1981] 2 Lloyd's Rep. 130 at 132-133:

"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'."

In summary, I think it is clear that Justices Eso and Ayoola agree that the standard required is not exacting. Where precisely the line is to be drawn is a matter peculiarly within the province of the Nigerian court, likely to be informed by local practice.

62. Like Gross J, I would underline that the jurisdiction of the Nigerian court to entertain a challenge to an award is limited and supervisory rather than appellate. It is a jurisdiction which is not lightly to be exercised – see again Orojo & Ajomo at page 281.

The Nigerian Award

63. The award was made under six broad heads:

Head of Claim No. 2 – Non-payment US$1,641,234.00

Head of Claim No. 3 – Variations US$58,521,249.55

Head of Claim No. 4 – Phase II Prolongation US$53,563,352.00

Head of Claim No. 5 – Standby US$3,870,679.00

Head of Claim No. 6 – Escalation of Contract Price US$ 618,116.00

Head of Claim No. 7 – Financing Charges US$34,514,356.00

Total: US$152,728,986.55

Before me it was NNPC's case that it has at least a properly arguable challenge to each Head of Claim within the award. It was also NNPC's case that the award is defective in toto because the tribunal lacked jurisdiction and because the award is inadequately reasoned. Before me there was deployed very much more evidence relating to the conduct of the arbitration than had been deployed before Gross J. In particular, I was shown the voluminous written submissions exchanged in the course of the arbitration. Furthermore, for the purposes of the hearing before me lengthy witness statements were prepared by the advocates involved in the arbitration describing the course taken by it. I defer consideration of the question whether this was an appropriate exercise. Since one ground on which it is said to be appropriate is the suggestion that Gross J was inadvertently misled, I must next reproduce those parts of his judgment which record his conclusions as to the strength of the challenge to the award as it was developed before him and without which my judgment would be incomprehensible. Gross J plainly did not think it likely that NNPC would make good a challenge to the entirety of the award, and nor do I. Before turning to the conclusions of Gross J I will however first deal with the challenge to the jurisdiction of the tribunal, a challenge which formed no part of the case as it was developed by NNPC before Gross J.

The challenge to the jurisdiction of the tribunal

64. This challenge is set out in Ground A of the RRAM, although it was introduced only by way of re-re-amendment. Ground A reads:

"A. The Arbitration Award was improperly procured as the Arbitral Tribunal lacked jurisdiction to hear and/or determine the Arbitral Proceedings as the condition precedent to its assumption of jurisdiction was not complied with.

PARTICULARS

(i) By the provisions of Clause 65.0 of the General Conditions of Contract which is the binding terms of contract between the parties, it was stated that;

(a) 'if any dispute or difference of any kind whatsoever shall arise between the Owner and Contractor or the Engineer and the Contractor, in connection with or arising out of contract or the execution of the works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the contract, it shall in the first place be referred to and settled by the Engineer who shall within a period of 90 (ninety) days after being requested by either party to do so, give written notice of his decision to the Owner or Contract.

(ii) The condition was not complied with and there was no notice in writing by the Engineer resolving the dispute that later culminated into the Arbitral Proceedings."

It is of course unclear from this formulation what precisely is the complaint. Is it said that the difference was never referred to the Engineer, or is the complaint that he gave no written notice of his decision? If it is the latter, this is irrelevant given the manner in which Clause 65 continues, not set out in the RRAM, as follows:

"… If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of ninety (90) days after being requested as aforesaid, or if either the Owner or the Contractor be dissatisfied with any such decision, then and in any such case either the Owner or Contract may within ninety (90) days after receiving notice of decision or within ninety (90) days after the expiration of the first named period of ninety (90) days, as the case may be, serve on the other a demand for arbitration.

Within thirty (30) days of such demand being served, each party shall appoint an arbitrator and the two arbitrators thus appointed shall within thirty (30) days appoint a third arbitrator who shall preside over the arbitral proceedings."

65. The point is developed further, and for the first time, at paragraphs 77 to 82 of the second witness statement of Mr Akoni, a litigation partner in the firm of Messrs Babalakin. It is perhaps worth noting that that witness statement is dated 31 October 2007, i.e. just three days past the third anniversary of the making of the award. Broadly what is said in those paragraphs is that there was no request by IPCO for a determination by the Engineer and that in the course of the arbitration NNPC made clear its objection to the jurisdiction. In the alternative it is suggested that the arbitration was simply commenced outside the permissible time window.

66. The critical letter is before the court. Dated 4 September 2002 it is addressed to the Managing

Director, Pipelines and Products Marketing Company Limited at an address in Abuja, marked for the attention of "Engineer D.M.N. Nzelu – Managing Director". Despite Mr Akoni's assertion that this was sent to the wrong person at the wrong address, there is subsequent and uncontroverted evidence before me to the effect that (a) this gentleman was indeed the Engineer nominated under the contract and (b) this is indeed the address which he had notified pursuant to Clause 66.3 of the contract. The letter is stamped as having been received in the CEO's office at NNPC on 6 September 2002. The first and the final paragraphs of the letter read:

"Following our Phase 2 Claim submission dated 24th April 2002 and the submissions of the Variations numbers 2-23 inclusive, we have yet to receive the Engineer's written decision on these matters. …

We have pursued these matters with all due process for several years, without any tangible evidence that any conclusion is imminent. Please advise us as to when we may receive the Engineer's written decisions on the Variations and Phase 2 Claims."

67. It is common ground that the Engineer did not answer that letter and that at no stage did he give any of the requested decisions, either orally or in writing. The request for arbitration was served on 26 February 2003, i.e. within 180 days of 4 September 2002.

68. Mr Akoni in his witness statement says that by the letter of 4 September IPCO did not refer the dispute to the Engineer, but rather reminded the Engineer that the dispute had already been referred and that a response was still outstanding. He suggests therefore that the time for commencement of the arbitration runs not from 4 September 2002 " as IPCO suggested to the tribunal" but from the date of the reference to the Engineer which, he says, appears to have been 24 April 2002. He goes on to say "accordingly, the 180 day period ended on 23 July 2002", which is obviously incorrect but it would follow that 26 February 2003 was more than 180 days from 24 April 2002.

69. NNPC appointed its arbitrator without any reservation as to the jurisdiction of the tribunal. A preliminary meeting of the arbitral tribunal and the parties' representatives was held on 15 April 2003. Present at this meeting on behalf of NNPC was, amongst others, Mr Otu Medo, the General Manager, Litigation and Property Law Department. Minute 4.1(a) of the meeting records the following:

"4. Production of the Notice of Arbitration and of Contract

4.1 At the request of the Arbitral Tribunal, the Claimant produced a copy of the following:

(a) The Notice of Arbitration. At this stage, Mr Gadzama (counsel for NNPC) drew attention to clause 65 of the Contract which requires the Engineer to make a report or fail to make a report before reference to arbitration. He said that the Respondent was not aware that the provision had been complied with.

Mr Fagbohunlu, (counsel for IPCO), in response, produced a letter dated 4th September 2002 addressed to Respondent which shows that the clause had been complied with.

In the light of this development, Mr Gadzama agreed to investigate the letter and it was agreed

that the proceedings should continue."

The proceedings in the arbitration thereafter continued intensively for some eighteen months. Pleadings were exchanged. Voluminous written submissions were exchanged. Lengthy procedural and substantive hearings took place. Witnesses were called, including on behalf of NNPC. NNPC cross-examined IPCO's witnesses. In all of this NNPC participated without protest. NNPC used the arbitration as a forum in which to pursue its counterclaim, which was partially successful. The point as to jurisdiction arising out of alleged non-compliance with the provisions of clause 65 was never again mentioned until the Delphic reference to it in the RRAM, and the more full development of it in the second Witness Statement of Mr Akoni, three years after the issue of the award. Before Gross J NNPC conceded that there were amounts indisputably due under that award.

70. The Nigerian Arbitration and Conciliation Act 1990 relevantly provides:

"Jurisdiction of arbitral tribunal

12(1) An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with regard to the existence or validity of an arbitration agreement.

…

12(3) In any arbitral proceedings a plea that the arbitral tribunal

(a) does not have jurisdiction may be raised not later than the time of submission of the points of defence and a party is not precluded from raising such plea by reason that he has appointed or participated in the appointment of an arbitrator;

(b) is exceeding the scope of its authority may be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings,

and the arbitral tribunal may, in either case, admit a later plea if it considers that the delay was justified.

12(4) The arbitral tribunal may rule on any plea referred to it under subsection (3) of this section either as a preliminary question or in an award on the merits; and such ruling shall be final and binding.

…

33. A party who knows—

…

(b) that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to non-compliance within the time limit provided therefore (sic) shall be deemed to have waived his right to object to the non-compliance."

It is obviously correct that NNPC at the preliminary meeting raised a point as to compliance with clause

65 of the contract. It is not entirely clear what the point was. On any view the Engineer had failed to make a report before reference to arbitration. Whatever the point was, the letter of 4 September 2002 was plainly regarded by all present as on the face of it an answer to it. Mr Gadzama agreed to "investigate" the letter and it was agreed that the proceedings should continue. The point was never again mentioned. Under section 12(4) of the Nigerian Arbitration and Conciliation Act the tribunal could have been asked to rule on the plea either as a preliminary issue or in its award on the merits. It was not asked to do either. The suggestion that NNPC can in these 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 clause 65 is not seriously arguable.

The challenge to the award as developed before Gross J

71. I turn next therefore to the points which were argued before Gross J and the manner in which he dealt with them. For ease of reference I reproduce the relevant paragraphs of his judgment:

"(4) Finance Charges: Under this heading, the tribunal awarded IPCO some US$34.5 million, the amount claimed. As its title suggests, the claim related to the funding charges said to have been incurred by IPCO arising out of variations, delay and the increased costs of materials and services occasioned by inflation and exchange rate fluctuations over the delay period ("variations", "prolongation" and "escalation" respectively). The treatment of this claim in the award has given rise to a number of allegations of misconduct. First, in calculating finance charges in respect of escalation as a percentage of US$22,998,113 – the sum claimed for escalation – given that the tribunal only ultimately awarded US$618,116 in respect of escalation. Secondly, in awarding finance charges on prolongation costs, which already included a 25% mark up. Thirdly, in ignoring cl.67.3 of the contract, to which I shall return. Fourthly, in that the finance charges are too remote as a matter of Nigerian law. Fifthly, by reason of duplication of damages. Sixthly, in that the tribunal failed to give any or adequate reasons for its decision.

I take the final two charges (duplication and inadequate reasons) first. These form part and parcel of two separate complaints and I defer dealing with them until I come to those complaints.

As to the first charge, wrongly calculating the finance charges on the basis of the claimed rather than the awarded figure for escalation, it appears soundly based as a matter of fact. It is worth something in the order of a $6 million reduction in the award. To my mind, NNPC has at least a real prospect of success in alleging "misconduct" in this regard; it appears to be a simple case of procedural error, calling for redress. There is at least an arguable case that the Nigerian doctrine of misconduct extends thus far.

Next, I think that there is likewise factual mileage in respect of NNPC's second charge. As it seems to me, IPCO is seeking to recover its additional financing costs; at least at first blush, it did not incur financing costs in respect of the 25% profit mark up. While there may well be argument here as to whether the tribunal has gone wrong in a manner which permits redress under the ACA, I could not say that this complaint does not have at least a real prospect of success. From the award's approach to the figures, it is not easy to say what a reduction in this regard would be worth; but on no view would it be de minimis and it would not be unrealistic to contemplate a reduction of up to US$4 million.

I am less impressed, with respect, with the third and fourth charges. So far as concerns cl. 67.3 of the contract, it provides as follows:

'67.0 Default of owner

67.3 In the event of such termination [i.e. termination by IPCO of its employment under the contract by reason of NNPC's default] the OWNER [i.e., NNPC] shall be liable to pay the CONTRACTOR [i.e., IPCO] the payments specified in clause 86 hereof. In no case shall the OWNER be liable for indirect and consequential damage.'

To begin with, it must be questionable whether cl. 67.3 is applicable in a situation where it is common ground that there has been no termination of the contract. In any event, it is to be recollected that NNPC complains of misconduct. If regard is had to para. 20 of the award, it does not appear that NNPC advanced any argument in respect of cl. 67.3 of the contract or remoteness as a matter of Nigerian law. If so, it is difficult to see how it could be misconduct for the tribunal to fail to take into account points of this nature, which were not argued.

In all the circumstances, it seems to me that NNPC has a real prospect of success in attacking the tribunal's conclusions on financing charges in an amount of (very roughly) between US$6 and 10 million. Unless account is taken of the broader issues of duplication and reasons (to which I return), NNPC does not have a real prospect of success of reducing the tribunal's award by the full amount of the finance charges awarded.

(5) Force Majeure: Cl. 79 of the contract provided:

'79.0 Force Majeure

Neither party shall be considered in default in performance of his obligations under the CONTRACT to the extent that performance of such obligations is delayed by Force Majeure…

79.3 …in the event of termination of the CONTRACT or part thereof under this Clause,……..The OWNER shall pay all payments due to the CONTRACTOR arising from FORCE Majeure…'

In three instances (award, paras. 17.13, 17.15 and 17.16), the tribunal, basing itself on cl.79 of the contract, held that IPCO was entitled to damages for prolongation of the completion date. NNPC submits that the payment provisions under cl.79.3 were only applicable if there had been a termination of the contract. Supported by the evidence of Justice Wusu, NNPC contends that in reaching its conclusion, the tribunal fell into error, constituting material misconstruction of the contract and/or error of law and, in either event, amounting to misconduct. In a nutshell, IPCO retorts that the tribunal was correct in its approach to the issue of force majeure but, even if it was wrong, the award does not disclose any basis for challenge within s.30, ACA. The mere fact, if it be the fact, that the court would have reached a different conclusion on the true construction of cl.79, does not give rise to a ground for setting aside the award: Baker Marina (supra).

In my judgment, NNPC has at least a real prospect of success in submitting that the tribunal erred in its construction of cl.79.3. It does seem curious that, without termination of the contract, an event of force majeure gives rise to an obligation on the part of NNPC to pay IPCO. If NNPC is right so far, then, without underestimating the difficulties which may remain, I would be reluctant to conclude that it has no

real prospect of demonstrating an error of law on the face of the award. The tribunal's approach to the construction of cl. 79.3 is apparent from the award; all that needs to be looked at (outside the award) are the terms of cl. 79.3 itself.

In my judgment, therefore, NNPC has a real prospect of success on this issue. More difficult is assessing its impact in terms of quantum. As is apparent from the award, the tribunal did not quantify the impact of each period of delay attributable to force majeure; nor did the tribunal address the overall causative consequences (if any) of the force majeure events it found. I return to considerations of this nature when considering the argument as to the tribunal's reasons.

(6) Duplication of damages: This is a topic of the first importance; if NNPC has a realistic prospect of success here, then it is arguably worth something in the order of US$88 million.

The matter arises in this way. Much of the US$152 million odd awarded by the tribunal to IPCO was comprised as follows: US$58.5 million in respect of variations; US$53.5 million in respect of prolongation; US$34.5 million in respect of financing charges. The battle lines here are clearly drawn. NNPC's complaint may be simply stated: the tribunal has duplicated the award of damages. That is apparent on the face of the award and amounts to misconduct. IPCO was not entitled to be paid for the additional works and for the delay and for the financing. Even assuming that IPCO may have been entitled to recover in respect of one of these matters, it was not entitled to recover in respect of all three. It was being paid twice or three times over for the same thing. IPCO's response was equally simple. The variations amounted to the additional works done; the award for prolongation compensated IPCO for the time it took; the finance charges reflected the increased financing cost. There was no duplication; but even if there was, there has been no error of law on the face of the award entitling NNPC to have the award set aside.

As a matter of first impression, I confess to having had considerable sympathy with IPCO's stance. There is no necessary duplication in awarding separately the cost of the works, compensation for the additional time and recovery of the additional financing costs. Moreover, even if the tribunal did err in these respects, there is undoubted scope for IPCO to argue that the error was not one of law and, if it was, that it was not misconduct as alleged or at all. But on closer reflection, there is or may be rather more force in the NNPC complaint than first met the eye.

As appears from the award (para. 11.2.3), IPCO claimed the cost of the variations at the rates specified in cl. 52 of the contract. Cl.52 necessarily leads on to cl. 55, where the contract price is dealt with. Sub-clauses 55.1 and 55.16 make it plain that the contract price included administration, supervision, payment for contractor's equipment, overhead costs and profit. Putting the matter shortly, if that be right, then it is difficult to see the room for awarding on top of such recovery further compensation for prolongation, let alone prolongation plus a 25% mark up and finance charges. In essence, the width of the terms dealing with contract price, suggests that there is or might be duplication if additional sums are awarded for prolongation and financing costs. By way of example, the award (in para. 17.17.1 (3)) shows that some US$12.8 million of IPCO's prolongation claim related to equipment; yet if cl.55 of the contract was applied to price the variations, it would appear already to have been paid for the equipment involved in undertaking the works.

Accordingly, in the light of the definitions in the contract, there is a puzzle as to how the tribunal came to award IPCO cumulative amounts in respect of variations, prolongation and finance charges. In my

judgment, there is a sufficient puzzle for NNPC to have a real prospect of success in arguing duplication. There remains of course the formidable hurdle of moving from establishing a factual error (if such can be made good) to establishing misconduct within s.30. But I do not think that NNPC's case is so weak in that regard that it would be right to discount it or to pre-empt its consideration before the Nigerian court. If this be right, then NNPC has a realistic prospect of reducing the award by up to some US$88 million on the ground of duplication alone: i.e., the award would stand in respect of the US$58.5 million for variations but would be set aside in respect of the additional US$88 million for prolongation costs and finance charges. Of course, intermediate solutions are likewise possible.

(7) Inadequate reasons: As it seemed to me, the nub of this complaint was twofold. First, that the tribunal in respect of the many individual but substantial items with which it dealt comprising the variations, while summarising the rival arguments, gave very little by way of reasons for preferring IPCO's case to that of NNPC. Secondly, that the tribunal did not address how each of the variations had an impact on the overall time for completion of the project. Such criticisms require close scrutiny. All too easily, they can be exploited in an attempt to re-open the tribunal's findings of fact. No arbitration tribunal should be criticised for succinctness; nor is any tribunal required to set out every point raised before it, still less at length.

Had this matter stood alone, I am inclined to think that I would have been largely unsympathetic. It does not, however, do so; this criticism of the award is linked to the argument as to duplication of damages. I also accept that there may be force in the second of the principal criticisms; it is not easy on the face of the award to assess the causative impact of individual variations on the overall time for completion of the project. By way of example, this is a matter to which reference has already been made when dealing with the argument on force majeure. In all the circumstances, this too is an aspect of the case on which I would draw back from seeking to pre-empt the decision of the Nigerian court.

(8) Public policy: I can take this point summarily. The NNPC argument was that the tribunal's errors (amounting to misconduct) led to an award so exaggerated in size that its enforcement, against a state company, would be contrary to public policy. With respect, this complaint appears to lack substance. Were it soundly based, a mere error of fact, if sufficiently large, could result in the setting aside of an award. That cannot be right and I say no more of this topic.

(9) Decision: Pulling the threads together:

There was no suggestion that NNPC's application to the Nigerian Court was other than bona fide. Nor had there been any delay in the initiation of that application; as already remarked, it preceded the applications in this court.

In the various respects already outlined, the NNPC application does have a realistic prospect of success. In particular, there is a measure of concern as to whether IPCO's recovery has been very substantially duplicated. However, as also underlined, the NNPC application faces formidable hurdles, not least in moving from well-founded criticism of the tribunal (if such is established) to making good a case of misconduct within s.30 of the ACA. Employing the terminology of Soleh Boneh, the award is, at least to the extent discussed, neither manifestly valid nor manifestly invalid.

In all the circumstances, proper deference, going beyond lip service, must be shown to the pending

Nigerian proceedings.

Even if NNPC's application in Nigeria is successful, it is common ground that an amount of some US$13 million is indisputably due to IPCO. Moreover, as it seems to me (see above), success for NNPC on the duplication point is, by its nature, likely to leave IPCO with an award of in excess of US$50 million.

Given the size of the award, it may be inferred that any delay in enforcement is likely to prejudice IPCO. Very few commercial entities would not be prejudiced by delay in the availability of US$152 million. It must be right to seek to minimise any such prejudice, so far as it is practicable and appropriate to do so.

With specific regard to security, I accept on the evidence both that there is provision in Nigerian legal proceedings for ordering NNPC to furnish security and that NNPC, given its trading activities, is likely to have assets in London. On the other hand, there is in my judgment, a risk of enforcement in Nigeria becoming more complex by reason of the domestic application of s.14 of the NNPC Act (on one view as to its true construction and scope).

So far as concerns IPCO and on the evidence of its financial status, were immediate enforcement ordered without the provision of cross-security, there would be a very substantial risk that the moneys thus paid out would be irrecoverable – even if NNPC succeeded in setting the award aside before the Nigerian court.

Balancing all these factors in the exercise of my discretion, I was neither attracted (i) to proceeding with the immediate enforcement of the order (even if accompanied by a condition that IPCO provide cross-security), thereby pre-empting the decision of the Nigerian court, nor (ii) to 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. Instead, I was amply satisfied that practical justice would best be done by adjourning the enforcement of the order on terms, inter alia, requiring NNPC to pay the US$13 million indisputably due to IPCO and to provide appropriate security in London (and thus free of any domestic constraints) in an amount of US$50 million. The detail of those terms and the consequence that IPCO should have permission to enforce the order in the event of NNPC failing to satisfy them, have already been set out in the order drawn up following the conclusion of the hearing."

Argument and discussion

72. Mr Nash accepts that there is no formal issue estoppel arising out of the decision of Gross J but he contends that it is an abuse of process, indeed the paradigm example of abuse of process, for a party to seek to re-argue points before a court of co-ordinate jurisdiction. He contends that there has been no change of circumstances sufficient to justify a reconsideration of the decision of Gross J to adjourn the enforcement decision. The prospects of success of the challenge to the award must be the same as they were when the matter was before Gross J. There was no suggestion before Gross J that NNPC's application to the Nigerian court challenging the award was other than bona fide. IPCO ought not to be allowed now to make allegations of bad faith which could have been made before Gross J. Insofar as concerns events subsequent to that hearing, the allegations of bad faith were, he suggested, groundless. The procedural delay is IPCO's own fault because it chose to appeal against Auta J's decision to conduct a re-hearing of the Preliminary Objection. The prejudice to IPCO arising out the delay in receipt of the money allegedly due to it had already very largely accrued and crystallised before even the matter was considered by Gross J.

73. Both sides cited authority on the question in what circumstances the court should reconsider an interlocutory decision. In particular I was referred to Chanel v. Woolworth [1981] 1 WLR 485; Butt v. Butt [1987] 3 All ER 657; Barrow v. Bankside Agency Ltd [1996] 1WLR 257; Rosling v. Pinnegar C.A., October 1998, unreported; Ryan v. Friction Dynamics Ltd [2001] C.P.R. Rep 75; The Leadmill Ltd v. Omare [2002] EWHC 1226 (Ch); Lloyds v. Ager-Hanssen [2003] EWHC 1740 (Ch); Collier v. Williams [2006] 1 WLR 1945; Edwards v. Golding [2007] EWCA Civ 416 and Kensington International Ltd v. Republic of Congo [2008] 1 Lloyd's Rep. 161. In none of those cases of course were the circumstances really analogous. Furthermore Mr Nash rightly pointed out that the court is not here concerned with its power under the Civil Procedure Rules to make orders which, by reason of CPR 3.1(7), includes a power to vary or revoke those orders. The court is here concerned with the exercise of a jurisdiction derived from an international convention and given domestic effect by statute in the same terms as in other subscribing states. The approach to be adopted is not necessarily the same as that to be adopted in the domestic context. Nonetheless it is helpful to be reminded of the limited circumstances in which the court will in that context countenance the revisiting of an earlier decision by a court of co-ordinate jurisdiction. I would derive from those cases at least the following principles which should guide the court in a case such as the present. Plainly a judge of parallel jurisdiction cannot entertain what is in effect an appeal. Similarly a change of circumstances cannot ordinarily justify a variation of an earlier order unless at the least the change in circumstances impinges on or relates to the reason for seeking the variation. There must be some causative link between the change in circumstances and the variation sought.

74. An adjournment granted pursuant to section 103(5) of the Arbitration Act 1996 is by its nature a temporary holding measure. The appropriateness of maintaining such a measure in place will be dependent, crucially, on developments before the supervisory court. Gross J expressly approached his task upon the footing that a critical development would or might occur within months. There would be a first instance determination of IPCO's Preliminary Objection. If the Preliminary Objection succeeded in full measure the case either for immediate enforcement or for the provision of greater security would be significantly enhanced. It would certainly bring about a wholly new and different situation, since the supervisory court, at any rate at first instance, would have declared the challenge to the award to be groundless. The emphasis before Gross J was on the speed with which the challenge to the award was being pursued by NNPC, and the early decision which could be expected on the question whether the challenge enjoyed a worthwhile prospect of success. Gross J gave a general liberty to apply. A paradigm situation in which the court, exercising its jurisdiction under section 103(5), must reconsider its earlier decision by embarking on a consideration whether the adjournment of the decision on enforcement remains appropriate is where there has been a significant relevant development in the proceedings before the supervisory court, the pendency of which is the prerequisite to the court having jurisdiction even to consider adjourning the decision to enforce an award. NNPC's application for a re-hearing shortly before the assigned judge was due to deliver her reasoned judgment on the Preliminary Objection and the subsequent effect that that has had on the likely timescale within which there will be a determination of the Preliminary Objection is in my judgment a development of sufficient significance to justify, indeed to require, the court to consider afresh whether the decision on enforcement of the award should be further adjourned. This is in no sense a disguised appeal against Gross J's decision. By definition it is a consideration which Gross J could not have undertaken. Gross J had to consider what was "proper" in the circumstances as they then obtained. Those circumstances have changed. It is my duty to consider what is proper in the new circumstances which now obtain.

75. I would however emphasise that the court will not lightly entertain a suggestion that the discretion

under section 103(5) must be considered for a second or subsequent time. Because the jurisdiction is responsive to developments before the supervisory court it would be unwise and it is probably in any event impossible to attempt to fashion some threshold test as to what will be required in order to justify this course. It will certainly require significant change in circumstances. What has occurred in the Nigerian proceedings can I think properly and uncontroversially be described as catastrophic. However the test is stated, the court is in my judgment in these dismaying circumstances entitled to consider whether in the light thereof a decision on enforcement should be further adjourned.

76. I do not consider that the change in circumstances, catastrophic though it is, should of itself be the occasion for a complete re-run of the exercise which has already been conducted before Gross J. Ordinarily a party should not in these circumstances be permitted to develop arguments or to deploy evidence which could equally well have been developed or deployed on the earlier occasion. Ordinarily a change in circumstances should most emphatically not be an excuse for a second bite at the cherry. Ordinarily, the court will simply be concerned to consider whether the exercise of discretion which appeared proper in the circumstances which obtained earlier remains proper in the, ex-hypothesi, significantly different circumstances. That ought not ordinarily to require any revisiting of the court's earlier decision as to the strength of the challenge to the award. That decision should have been reached on a brief consideration – see per Staughton LJ in the Soleh Boneh case at page 212. The need to reconsider the discretion must not ordinarily be regarded as an opportunity to re-run the argument on the strength of the challenge.

77. There is however here present an additional consideration. In the domestic context it is now well established that the power under CPR 3.1(7) is exercisable where the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. Misleading includes material non-disclosure. See Collier v. Williams cited above, at paragraphs 39 and 40 of the judgment of the Court of Appeal. In my judgment Gross J was innocently misled as to the structure of the contract, the nature of IPCO's claim for the cost of carrying out variations to the agreed work and as to the manner in which that claim had been approached at the arbitration. An argument deployed before him by Mr Wordsworth for NNPC was recognised to be Mr Wordsworth "flying solo", i.e. without assistance or input from those who had participated in the arbitration. Mr Wordsworth was doing his best to make bricks without straw. Unfortunately in so doing he inadvertently misled the judge. In the present context that in my judgment justifies the court in looking afresh at the relevant point. Here the relevant point is quite far-reaching.

78. At paragraph 47 of his judgment Gross J records that "as appears from the award (para 11.2.3), IPCO claimed the cost of the variations at rates specified in the contract." That is in fact not quite what paragraph 11.2.3 of the award says. Paragraph 11.2.3 refers to Appendix D2 being "Cost Summary for each Variation on the principles set out in clause 52 of GCC" (General Conditions of Contract). I set out below the relevant parts of clause 52 of the contract:

> "Valuation of Variations
>
> 52.1 All extra or additional work done or work omitted by order of the Engineer shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the extra or additional work, then suitable rates or prices shall be mutually agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as shall, in his opinion, be reasonable and proper."

There are no rates and prices set out in the contract relevant to extras or additional work. There is a lump sum contract price and clause 55 explains what that includes. Clause 55 also makes clear that IPCO is entitled to recover direct costs, overhead/indirect costs and profit. There are therefore no rates for variations specified in clause 52 or indeed anywhere in the contract. The "principles" set out in clause 52 relevant to the rates or prices applicable to extra or additional work are that they shall be "suitable" and mutually agreed upon or, if not agreed, such as in the opinion of the Engineer shall be reasonable and proper. Gross J was entirely correct to observe at the end of paragraph 47 that if clause 55 of the contract was applied to price the variations, such price would include all the matters there set out including therefore overhead costs such as the cost of equipment and financing. However no rates or prices were agreed whether by reference to clause 55 or at all, the Engineer did not fix any rates or prices and IPCO, in presenting its claim in arbitration for the costs of the variations, made no attempt to present a claim for lump sum prices which included indirect costs and profit.

79. This erroneous approach first appears in paragraph 42 of Mr Wordsworth's skeleton argument of 4 April 2005 prepared for the hearing before Gross J. One finds there the very wording which the Judge not unnaturally adopted. That paragraph reads:

"It is NNPC's case (Re-Re-Amended Motion, paras c(xxvii)-(xxix)) that there was a duplication in IPCO's recovery of damages under all these heads, i.e. it was misconduct to order damages for the price of the variation work, but also alleged expenses of staying on site to carry out the variations and alleged financing costs. This resulted in recovery that was grossly exaggerated. In this respect:

(a) as appears from para 11.2.3 of the award, IPCO claimed the cost of variations at the rates specified by clause 52 of the Contract, i.e. at contracts rates and prices in so far as applicable, otherwise as agreed, otherwise as reasonable and proper.

(b) the Contract price included overhead costs and profits – see clause 55.16 of the Contract.

(c) the Contract price also included administration, supervision, and Contractor's equipment – see clause 55.1 of the Contract.

(d) in receiving Contract rates and prices for the variation works, IPCO received fair compensation and should not then have been awarded the prolongation costs, i.e. costs of administration, supervision, and Contractor's equipment, plus a further 25% profit mark-up.

(e) it should not then have been awarded financing costs of the variation and prolongation claims, i.e. including the 'costs' of financing its own profits and profit mark-up."

At the risk of repetition IPCO did not under the award receive contract rates and prices for the variation works, not least because there were no such contract rates and prices. Mr Wordsworth's argument as adumbrated in his skeleton was developed in his oral argument as recorded in the transcript for 7 April 2005 at pages 43 to 48. At page 44 one finds the judge asking Mr Wordsworth whether anyone other than himself had grappled with the suggestion that there was duplication. It was not a matter dealt with by the then Nigerian law expert for NNPC, Justice Wusu. It was Mr Wordsworth's reply in the negative that led to the judge's observation at page 45 of the transcript that this was "Wordsworth flying solo". There was at that stage no evidence before the court from any person who had actually been involved in the conduct of the arbitration for NNPC. There were two witness statements from Mr

Fagbohunlu for IPCO but obviously he did not anticipate Mr Wordsworth's argument. Furthermore NNPC's Amended Originating Motion of 4 February 2005 by reference to which Mr Fagbohunlu prepared his evidence made no reference to duplication. The RRAM, available in draft before Gross J, does refer to duplication but is hardly clear as to the nature of the allegation. The relevant passages, which curiously enough appear as Particulars of an allegation of misconduct as to the interpretation of the force majeure clause, read:

"c(xxviii) There has been a duplication in claims made by the Respondent/Claimant in respect of the claims made for escalation, prolongation and finance charges in that variations being a separate head of claim for which the Claimant claimed US$58,521,250 ... was also included as an element or constituent part of escalation, prolongation and finance charges.

c(xxix) The Respondent/Claimant claims were grossly exaggerated as a result of double counting, which the Tribunal also failed to subsequently address in the Award. This resulted in NNPC suffering a gross miscarriage of justice."

The argument in the hands of Mr Wordsworth assumed a more structured appearance but unfortunately it was a construct which bore no relationship either to the contract or to the manner in which the claim was pleaded and dealt with at the arbitration.

80. In that regard it is perhaps sufficient if I record the unequivocal acceptance by Mr Nash that it was not argued at the arbitration by NNPC that IPCO's presentation of its claims under Head No. 3, Variations, Head No. 4, Phase II Prolongation and Head No. 7, Financing Charges, involved duplication. In its claim for the extra and additional work IPCO expressly claimed the direct costs of those works, and the profit on them, under the claim heading "Variations". IPCO separately claimed overheads/indirect costs, and the profit on them, under the claim heading "Prolongation". "Financing Charges" were claimed under a yet further separate heading. As was well understood in the arbitration and never challenged, a claim under the heading "Variations" is a claim in respect of the direct costs, and profit, referable to the extra work, not all of the costs referable thereto which IPCO was entitled to claim. The claim for the direct costs of the variations was not therefore priced on a lump sum basis. The claim for profit on the direct costs was in some places described as "Group Contribution" although always calculated at exactly 25%. It did not include any element for overheads or indirect costs, which is why it was indeed always exactly 25%. It was profit or "mark-up" as it was sometimes called. No objection was taken to the 25% Group Contribution at any stage of the arbitration. It was never suggested that it included some allowance for the costs of administration, support, equipment etc. incurred in respect of the variations, as it is now claimed by Mr Akoni in his second Witness Statement must in fact be the case.

81. There are other instances where Mr Akoni's analysis in his second Witness Statement bears no relation to the actual position. Thus at paragraph 16(1) he asserts that "the tribunal awards damages under clause 52 GCC in respect of the variation claim (which included all indirect costs and profit in respect of the variation) but then proceeded to award damages again for indirect costs through the prolongation claim". This is doubly wrong. The claim under the heading "variation" included no element of indirect costs. More fundamentally however the tribunal did not award damages under clause 52. It held that IPCO was entitled to payment for additional work done at the request of NNPC on the ground of an implied promise to pay – see paragraph 11.2.24 of the award. In doing so it relied upon a passage in Hudson's Building and Engineering Contracts and on a decision of the Privy Council, Molloy v. Liebe (1910) 102 L.T. 616. It might equally have relied upon the decision of the House of Lords in Brodie v. Corporation of Cardiff

[1919] A.C. 337 which was cited to it and is exactly in point.

82. Mr Akoni goes on to say that since IPCO's claim was for damages for breach of clause 52 and since clause 52 requires the Engineer to value the work at the rates and prices set out in the contract, the rates for variations were therefore to be assessed on the same basis as the rates for other work under the contract. He then concludes at paragraph 19:

"In this case, referring only to the award and the contract the only conclusion that can be reached is that:

(i) the award of damages for breach of clause 52 GCC includes all indirect costs of the variations;

(ii) the tribunal also awarded indirect costs in respect of variations pursuant to the prolongation head;

(iii) there was therefore clear duplication on the face of the award which amounts to a patent error of law and, therefore, misconduct on the part of the tribunal."

This is simply recycling and seeking to take advantage of Mr Wordsworth's flawed analysis. It may be telling that in the previous paragraph of his Witness Statement Mr Akoni had asserted that "as the award is being challenged in this regard for errors of law on the face of the record, it is not legitimate to refer to other materials (e.g. underlying documents) to attempt to 'explain away' an error of law, viz duplication, which appears on the face of the award". Finally at paragraph 20(2) Mr Akoni says this:

"IPCO expressly pleaded that its costs were 'valued according to the principles set out in clauses 52.1 and 52.2 GCC', i.e. on the basis of the Contract Price."

This is I am afraid disingenuous. IPCO's Appendix D2 did indeed assert that it was a Costs Summary for each variation on the principles set out in clause 52 but that did not mean that it was done on the basis of the Contract Price, as everyone involved in the arbitration well understood. It meant that the rates or prices claimed were alleged to be reasonable and proper. If the rates or prices claimed for the variations had been thought to include overheads, indirect costs and profit, why did NNPC fail to point out the consequent obvious duplication in any of its pleadings, written submissions or oral argument? Whilst NNPC denied any liability to pay in respect of the variations, sometimes alleging that the work done was in any event included within the lump sum contract price, it never suggested that the rates or prices claimed were in themselves unreasonable, and never put forward any counter figure. The tribunal dealt with each head of the variation claim individually at paragraph 16 of the award.

83. The upshot is that I do not consider that NNPC has a realistic prospect of reducing the award by up to some US$88 million on the ground of duplication alone. Gross J was misled into reaching that conclusion which he expressed at paragraph 48 of his judgment. It is true that IPCO has now identified that there might, as a result of an accounting error, be a small element of double counting between the variation and the escalation claim, although that is not a point which was raised at the arbitration. The maximum amount possibly involved is thought to be of the order of US$91,000 which in the context of this award is de minimis – less than 0.06% of the principal Dollar sum awarded.

84. I see no justification however for revisiting the rest of Gross J's conclusions as to the strength of the challenge to the award. As I suggested at paragraph 73 above, the change in circumstances must impinge on

or relate to the reasons for seeking the variation. There must be some causative link. Mr Lyndon-Stanford sought to persuade me that the tribunal's arguably erroneous approach to force majeure was not causative of any error in the overall amount awarded. The relevant three force majeure events – storm damage, fuel scarcity and community disturbances, were all originally relied upon by IPCO as events which contributed to the delay and thus to the prolongation costs. It is true that by the time of IPCO's Written Address these three events were not included in the list of "events causing delay". Mr Lyndon-Stanford can also rightly point to paragraph 38 of Mr Akoni's second Witness Statement in which he says "it appears that IPCO had abandoned its claim for an extension in respect of the final three items (storm damage, fuel scarcity and community disturbances). Those events are not said to be 'events causing delay' in IPCO's written address and no submissions were made in support of those items (or to counter NNPC's arguments, e.g. that no payment was due and no notification had been received)." Nonetheless, as Mr Akoni goes on to point out, the tribunal at paragraphs 17.13, 17.15 and 17.16 of the award proceeded to make findings in respect of these events. At paragraph 17.13.5, dealing with storm damage, the tribunal held "that the Claimant is entitled to payment for loss suffered as a result of the event of force majeure". At paragraph 17.15.5 the tribunal finds that the fuel scarcity had caused a prolongation of the completion time. At paragraph 17.16.4 the tribunal finds that the community disturbances amount to force majeure "and there is evidence that this has prolonged the completion time". As Gross J observed, it is not easy on the face of the award to assess the causative impact of individual variations on the overall time for completion of the project. Mr Lyndon-Stanford asserts that the tribunal placed no reliance upon the force majeure events either in assessing the prolongation of time in respect of which IPCO was entitled to be compensated or in relation to the award of any other damages, and he relies upon paragraph 17.17.3 of the award. In my judgment that is a matter for the Nigerian court to determine in the context of the wider attack on the award that it lacks adequate reasons.

85. Mr Lyndon-Stanford also sought to persuade me that it is not open to NNPC to advance many of the grounds set out in the RRAM because they were first advanced outside the applicable statutory time limit. This is a reference to section 29(1) of the Arbitration and Conciliation Act which provides:

"29(1) A party who is aggrieved by an arbitral award may within three months—

(a) from the date of the award; or

(b) in a case falling within section 28 of this Act, from the date of the request for additional award is disposed of by the arbitral tribunal,

by way of an application for setting aside, request the court to set aside the award in accordance with subsection (2) of this section."

The parties' Nigerian law experts are not agreed as to the effect of this provision. I cannot say that it is obvious that on this point IPCO will prevail. The decision of the Supreme Court in Araka v. Ejeagwu 15 NWLR (pt 692) 684 does not deal with the question of amendment to an application brought within time, still less amendments to which there have been no objection and the making of which have been effected by what are effectively orders by consent. I also note that section 36 of the Arbitration and Conciliation Act, which is the concluding section of that Part of the Act which deals with "Recourse Against Award" provides:

"Notwithstanding the provisions of this Act the arbitral tribunal may, if it considers it necessary, extend the time specified for the performance of any act under this Act."

It would to my mind be an odd result if, as contended by IPCO, the court lacked jurisdiction to allow amendments outside the three month time limit in circumstances where the arbitral tribunal itself would have the power to extend the time for the making of an application. Neither expert addresses the point. It will be for the Nigerian court to determine whether NNPC may pursue all of the grounds which now appear in its RRAM.

86. The outcome of this exercise is that, having examined in some detail the manner in which IPCO's claim under the heading "Variations" was both advanced and dealt with, leaving on one side the argument as to the inadequacy of the tribunal's reasons, I can discern no plausible challenge to the tribunal's award under that head. That was essentially the conclusion of Gross J at paragraph 48 of his judgment. Like Gross J, I regard the argument as to inadequacy of reasons as bound up with the argument on force majeure and as to prolongation of time. However I do not consider that NNPC has any realistic prospect of successfully challenging the award under the heading "Variations" on the ground of inadequacy of reasons. The tribunal's conclusions are set out in paragraph 11.2 of the award, including the tribunal's analysis of the circumstances in which there arose an implied promise to pay. The tribunal pointed out that each sub-head of the claim under this rubric would have to be considered separately as to the circumstances of the direction and execution of the variation in the light of the basic principles which the arbitrators had enunciated. The tribunal dealt with each sub-head of claim individually in paragraph 16 of the award. Not all of the individual sub-heads of claim succeeded. I note in passing that NNPC's defence to the second largest individual variation claim, Variation No. 18, Change to Product Pipelines Route and Additional Right of Way Cost, US$13,662,216.00, was rejected by the tribunal as "not only simplistic but border(ing) on the ludicrous". Equally trenchant is the tribunal's conclusion on Variation No. 19, the largest claim, in respect of Increase in Fuel Pipeline Diameter and Wall Thickness, a claim for US$16,093,170.60. At paragraph 16.21.4 the tribunal records its view that "the defence of the Respondent that the Claimant requested for the changes and therefore should bear the cost and that the changes were consequences of detailed engineering are totally unacceptable. They do not answer the points raised in the claim and we, therefore, reject them." As the arbitrators also found at paragraph 16.21.1 "the CDP (Conceptual Design Package) provided for the length, diameter and thickness of the wall of the pipelines. However the "as built" drawings show that these have been significantly changed at the instance of the Respondent and these changes were incorporated to the design." In those circumstances, there being as the tribunal recorded at paragraph 16.21.4, "consensus that the changes were made on the instructions of the Respondent" it is understandable that the defence of the Respondent to the effect that it was the Claimant who requested the changes and should therefore bear the cost should be regarded as "totally unacceptable". In the light of these conclusions of the tribunal I cannot regard it as plausible that the Nigerian court will set aside for lack of adequate reasoning the tribunal's findings that the individual pieces of work claimed as Variations were not as claimed by NNPC included within the lump sum contract price. That leaves only a challenge to the amounts awarded. I have already recorded that there was in the course of the arbitration no challenge to the rates or prices claimed on the basis that they were unreasonable. NNPC put forward no counter-figures. In these circumstances, it is not in my judgment plausible that the Nigerian court will set aside the tribunal's allowance of the individual amounts claimed on the basis that the tribunal has given inadequate reasons for its acceptance that the amounts claimed were reasonable and proper.

87. I therefore conclude that NNPC has no realistic prospect of reducing the award below US$58.5 million together with interest thereon and of course some proportion of the costs. There are grounds of

challenge to the award in respect of which, like Gross J, I 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 or so as explained by Gross J in paragraphs 34 to 39 of his judgment. Furthermore the points as to the lack of adequate reasons and the causative impact of individual variations on the overall time for completion of the project are not easy to quantify, assuming that they can be translated into grounds of challenge which will be upheld by the Nigerian court. However the plausible grounds of challenge do not include duplication in the formulation of the heads of claim. NNPC has 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.

The admission as to an amount indisputably due

88. On 16 August 2007 NNPC was pressed for a breakdown of the sum of US$13,102,361.72 which it had accepted before Gross J was indisputably due to IPCO under the award. At the hearing that sum was said to be reached by reference to the sum of US$20,418,636.55, to which NNPC admitted IPCO was entitled in respect of its claim, less the sum of US$7,316,274.81, to which NNPC asserted that it was entitled from IPCO in respect of its counterclaim, notwithstanding that the tribunal had in fact only awarded to NNPC the sum of US$1,348,015 in respect of the counterclaim. NNPC has not in its RRAM challenged the dismissal of the balance of its counterclaim over and above the amount awarded. In the absence of a response to its solicitors' letter of 16 August 2007 IPCO applied for and obtained from this court an order directing NNPC to provide the relevant information. That was done by letter from NNPC's solicitors Messrs Stephenson Harwood dated 12 October 2007. I must set it out in full.

"We write further to your fax dated 16 August 2007, as required by the Order of Andrew Smith J dated 8 October 2007.

We have obtained our client's instructions in relation to your queries and the responses are set out below. This is not intended to waive privilege in any way whatsoever.

At the very start of the hearing on 7 April 2005, Mr Justice Gross asked NNPC's counsel to provide, by 2 p.m. the same day, a figure which NNPC considered that it owed to IPCO. NNPC's then solicitors, Messrs Hunton & Williams, obtained urgent instructions from NNPC and reported back to Mr Justice Gross shortly after 2 p.m. on the same day. The figures produced to the Court were the only analysis available in the limited time given to those representing NNPC. The figures had been produced internally within NNPC in 2003. We understand that Hunton & Williams were given the headline figures of US$20,418,636.55 and US$7,316,274.81 but not any underlying analysis. However, we believe that those headline figures reflected various amounts that, as part of the internal process referred to above, had been notionally allocated to various of the heads and sub-heads of IPCO's claim as set out below. This was of course, and remains, without prejudice to NNPC's contention that the Award should be set aside in its entirety by the Nigerian courts; and NNPC did not then and does not now concede that any part of the balance of US$13.1m is referable to any particular head or sub-head of IPCO's claims (including those to which the parts were notionally allocated in 2003 as set out below).

1. The figure of US$20,418,636.55 was broken down as follows:

(a) US$11,991,111.55 in respect of IPCO's variations claims:

var. no	title of variation	amount
08	Changes to PPMC site buildings	885,247.88
09	Changes to oily water disposal system	1,687,961.00
010	Sea island miscellaneous items	208,067.00
011	Changes to fire water piping	871,476.60
012	Changes to paints specification	Nil
013	Upgrade of emergency generator	41,768.00
014	Fire protection system in terminal	Nil
015	Changes to the metering system	Nil
016	Increase in scope of instrumentation	455,970.00
017	Site location changes in site layout	1,614,429.59
018	Increase in complexity pipelay	4,784,768.00
019	Increase in fuel pipeline diameter	2,061,145.00
020	Changes to tank foundation	484,270.58
021	Changes to the tank farm bund walls	468,200.90
022	Other miscellaneous changes	120,669.00
	sub-total	13,683,973.55
06a & 06b	Deletion of fibre optic cable	(1,086,717.00)
07	Deletion of the dye injection facility	(124,895.00)
023	Delete 500m 4" diameter HDPE line	(481,250.00)
	total	11,991,111.55

(b) US$5,043,236.58 in respect of IPCO's prolongation claims, broken down as follows:

	description of claim	amount
1	Personnel costs	2,417,280.00
2	Site indirect costs	241,278.00
3	Lagos office costs	236,850.38
4	Kuala Lumpur facilities	368,949.47
5	Head Office support	52,500.00
6	Claims outstanding (third party)	0.00
7	Clients costs	35,688.73
8	Equipment	1,690,240.00
9	Insurance	0.00
10	Sub-total (for items 1 to 9)	5,043,236.58
11	Add 25% group distribution	0.00
12	total (for items 1 to 9 plus mark up)	5,043,236.58

(c) US$3,384,288.40 in respect of IPCO's claim for escalation.

2. In respect of the figure of US$7,316,274.81 in respect of the counterclaim, this was broken down as follows:

(a) Outstanding works – heat tracing and insulation: US$450,000.00

(b) 2-year operating spare parts: US$814,069.00

(c) 1 unreturned Toyota Corolla car: US$20,000.00

(d) Unsupplied boats: US$506,894.11

(e) Unaccounted provisional sum drawn down: US$3,129,000.00

(f) Deletion of fibre optic cable and communication link: US$1,797,666.70

(g) Deletion of dye injection facilities: US$124,895.00

(h) Provision of 5 kilometres pipeline: US$473,750.00"

89. As at 22 February 2008 the total sum unpaid and owing to IPCO under the Dollar award, giving credit for US$13,102,361.72 paid in May 2005, is US$204,757,175.52, with interest accruing thereon at US$53,359.42 per day.

90. Leaving aside the general challenges to the integrity of the entire award, NNPC has not in its RRAM challenged the award of US$1,641,234 under Head of Claim No. 2 "Non-payment" which relates to late payment of approved invoices. Interest on that sum to 22 February 2008 is US$762,971.47, giving a total due of US$2,404,205.47.

91. Furthermore as I indicated above NNPC has not in its RRAM challenged the dismissal of the balance of its counterclaim over and above the sum awarded, US$1,348,015. Save in so far as the award is challenged in its entirety, no evidence or argument has been directed towards seeking to challenge that part of the award which dismisses the balance of the counterclaim. It follows that the amount "indisputably due" must be taken to have been understated by US$5,968,259.81. Interest on that sum to 22 February 2008 is US$2,774,505.

92. The amount attributed to the Variations claim in Stephenson Harwood's letter of 12 October 2007 is US$11,991,111.55, which is 58.7% of the larger sum US$20,418,636.55 admitted to be due before set-off of the counterclaim. Applying the same percentage to the actual payment of US$13,102,361.72, the outstanding unpaid principal sum in respect of the amount awarded under the heading "Variations" is thus US$50,830,163.22. Interest on that sum from 12 May 2005 to 22 February 2008 is US$19,827,941.48, giving a total due of US$70,658,104.70.

93. The amount paid, US$13,102,361.72, contained no element of interest. Interest on that sum from the date of the award to the earlier of the two dates of payment, 9 May 2005, payment having been made in two tranches, is US$985,010.43.

94. It follows from the above that as at 22 February 2008 there was due and owing from NNPC to IPCO under the award a total of at least US$82,790,084 in respect of which there is no credible challenge.

95. Before turning to the exercise of discretion under section 103(5) I must finally draw attention to one further feature of the award. Gross J noted at paragraph 34 of his judgment that in calculating finance charges in respect of escalation the tribunal applied what it found to be the appropriate percentage to the amount claimed for escalation, US$22,998,113, rather than to the amount ultimately awarded under the

escalation head, which was US$618,116. It seems possible if not likely on a fair reading of paragraphs 19.1-19.6 of the award that when the tribunal came, in paragraph 29 thereof, to summarise the amounts awarded a simple error was made in transposing the figure of US$618,116 which appears at the end of paragraph 19.5 as if it were the amount intended to be awarded at paragraph 19.6. Paragraph 19.6 itself includes no figure. The figure in paragraph 19.5 is simply one constituent part of the overall claim under this head which, it seems likely, the tribunal intended to allow in its entirety. Certainly no reasoning emerges on the basis of which one part of the claim under this head succeeds but the rest fails. However that may be, IPCO has made no application in Nigeria with a view to the award being corrected, assuming that to be possible. In view of that, an award of financing charges referable to the full amount claimed cannot be regarded as consistent and must as explained by Gross J be regarded as arguably open to challenge.

Prejudice to IPCO

96. I propose to deal with this aspect quite shortly. It is obvious that any company is seriously prejudiced by the continued non-receipt of a sum of the order of US$82 million the principal (as opposed to interest) component of which has been due and owing to it for many years. The non-receipt of an even greater sum is an a fortiori case. In the light of that, I find it unnecessary to make detailed findings as to the manner in which that prejudice currently manifests itself. It is unnecessary to consider to what extent IPCO could or would have undertaken further work in Nigeria or West Africa following the completion of the Bonny Export Terminal Project. I would find it difficult to reach any reliable conclusion as to IPCO's relationship with its parent and other group companies. There is no evidence as to the beneficial ownership of 95% of IPCO's parent, IPCO (WA) Holdings Limited of Hong Kong. I make no findings therefore as to IPCO's indebtedness to other group companies. I do however accept that there is credible evidence to the effect that IPCO has incurred substantial indebtedness to third party creditors arising out of this project. That is as one would expect. The indebtedness is of the order of US$60 million.

97. I accept that were NNPC now to pay IPCO a sum of the order of US$80 million, or were IPCO permitted to enforce the award up to that amount, it is likely that 75% thereof would immediately be utilised in paying off third party creditors. I am in any event prepared to proceed upon the basis that whatever sum is now paid by NNPC to IPCO, or recovered by IPCO from NNPC, NNPC would have no realistic prospect of any recovery from IPCO in the event that it ultimately transpires that IPCO had received payment of sums to which it is not entitled.

Partial enforcement

98. There thus arises the question whether the court has power to permit partial enforcement of the award. Although Gross J 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 me 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. Before hearing argument on the point I was myself dubious as to the court's jurisdiction to permit partial enforcement of the award, simply on the basis of the wording of section 101(3) of the Act which talks of judgment being entered "in terms of the award". My concern was whether entering judgment in respect of part of the award amounts to entering judgment in terms of the award.

99. The wording in section 101(3) is not derived from the New York Convention itself. Article III thereof provides:

"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. 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."

The wording used in sections 101(2) and (3) of the Act is the same, mutatis mutandis, as that used in sections 66(1) and (2) wherein is to be found the court's general power to enforce an award made by a tribunal in England and Wales in the same manner as a judgment or order of the court to the same effect. Article III of the Convention in terms refers to the rules of procedure of the territory where the award is relied upon. To that extent therefore the court is not directly concerned to ensure that the English approach is the same as that adopted in other Convention states. On the other hand the substantive provisions in section 103 of the Act are derived directly from Articles V and VI of the Convention. Sections 103(4) and 103(2)(d) of the Act derive from Article V.1(c) of the Convention which reads:

"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

...

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced..."

In section 103(4) of the Act and Article V.1(c) of the Convention 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 raised this very point in argument before him – see the Transcript for 12 April 2005 at page 168. Mr Diwan, then Counsel for IPCO, accepted that he had found no examples of partial enforcement and the point was not further argued. Mr Wordsworth for his part did not suggest that the assumed unavailability of partial enforcement militated against the imposition of a requirement of payment of the undisputed part of the award as a term of the adjournment of the decision on enforcement.
100. However Mr Lyndon-Stanford referred me to a decision of the Austrian Supreme Court, the Oberster Gerichtshof, of 26 January 2005 in which partial enforcement of a Convention Award was permitted and directed. The case is reported anonymously under No. 3Ob221/046 at Yearbook Commercial Arbitration XXX (2005) page 421. The significance of this case is that the Austrian court permitted partial enforcement in a context other than Article V.1(c). The case concerned the sale of mushrooms by a Yugoslav seller to an Austrian buyer. The contract contained an arbitration clause. The buyer failed to pay part of the sale price for a delivery of mushrooms. The seller commenced arbitration at the Foreign Trade Arbitration at the Chamber of Commerce and Industry of Serbia in Belgrade. On 3 April 2002 the tribunal rendered an award in favour of the seller in the sum of DM22,500. Interest for late payment at 0.2% per day, capitalised daily, was ordered from 15 March 2000 until 29 December 2000,

amounting to DM18,625.47, together with further interest of 0.2% per day, capitalised daily, on the main sum plus interest, i.e. on DM41,125.47 from 29 December 2000 until the day of final payment. The seller sought enforcement of the award in Austria. Amongst other challenges the buyer objected that an annual rate of interest of 73% violated Austrian public policy. The Feldkirchen District Court granted enforcement of the award only with regard to the main sum, holding that an annual rate of interest of 73% did indeed violate Austrian public policy and could not be enforced. Although that decision was reversed by the Court of Appeal of Klagenfurt, finding that a rate of interest of 73% per annum resulting from a daily capitalisation of interest, was "usual practice" among merchants, it was reinstated by the Supreme Court. The reasoning of the Supreme Court is instructive. At paragraphs 44 and 45 under the rubric "Partial Enforcement" the following was said:

"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."

It is unclear whether that conclusion derives from Austrian domestic law or is rooted in the Convention. As a result however it introduces divisibility into the public policy context dealt with by Article V.2(b) of the Convention wherein is found no express reference to divisibility or separability as is found in Article V.1(c).

101. 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" – see per Lord Wilberforce in Fothergill v. Monarch Airlines [1981] AC 251 at 293. As Lord Wilberforce also said:

"The broad approach of our courts to the interpretation of an international convention incorporated into our law is well settled. The international currency of the convention must be respected, as also its international purpose. The convention should be construed 'on broad principles of general acceptation.' The approach was formulated by Lord MacMillan in Stag Line Limited v. Foscolo, Mango & Co. Limited [1932] AC328, 350; it was adopted by this House in the recent case of James Buchanan & Co. Limited v. Babco Forwarding & Shipping (UK) Limited [1978] AC 141."

Staughton LJ in the Soleh Boneh case also referred at page 211 to the importance of uniformity in the interpretation of international conventions.

102. Finally Mr Lyndon-Stanford referred me to TTMI Limited v. ASM Shipping [2006] 1 Lloyd's Rep. 401, a decision of Christopher Clarke J which arose in the context of section 66 of the Arbitration Act. As appears from the report, the matter had at an earlier stage been before Aikens J. It is unclear to what extent if at all the point may have been argued, but both Aikens J and Christopher Clarke J seem to have assumed that section 66 gives to the court a power of partial enforcement of an award. Mr Lyndon-Stanford

naturally urged me to follow the same approach.

103. Mr Nash for his part first reminded me of the decision of Gross J in Norsk Hydro A/S v. State Property Fund of Ukraine [2002] EWHC 2120 (Comm). That was a case in which on the 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, at paragraphs 17 and 18:

"17. Section 100 and following of the Arbitration Act 1996 ('the 1996 Act') 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 enfoircing 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 behind 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 inappropriate territory for the enforcing court. The right approach is to seek enforcement of an award in the terms of that award."

Mr Nash not unnaturally relied upon this passage in the context of the entire exercise which was conducted before me. However I do not consider that in reaching the conclusions which I have thus far I have acted in a manner inconsistent with these strictures. Furthermore, the identification of two discrete parts of the award as capable of immediate enforcement is not an exercise which contravenes 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.

104. It was not in dispute before me that the Nigerian court has 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 CJ in Baker Marine Nigeria Limited v. Danos & Curoly Marine Contractors Inc. [1997] 1 FHCLR 734 Mr Nash nonetheless submitted that I should not countenance partial enforcement because the Nigerian court might, whilst concluding that certain parts of the award are 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 the Baker Marine case relied upon by Mr Nash there were ten heads of claim. Four were rejected by the

tribunal. On appeal Belgore CJ held that the award under four further heads of claim must be set aside for lack of evidence, acceptance of the claims in such circumstances amounting to misconduct. Belgore CJ then said this, at page 748:

"On the whole I found that the award has been so battered that only two out of five (sic) award 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 Counter-claim 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."

105. In a subsequent case, Baker Marine (NIG) Limited v. Chevron (NIG) Limited [2000] 12 NWLR (Pt 681) 393 the Nigerian Court of Appeal questioned this reasoning and the conclusion derived from it. On the substantive appeal from Belgore CJ in Baker Marine v. Danos [2001] 78 NWLR (Pt 712) 337 the Court of Appeal, differently constituted, castigated the Chief Justice as having made two "very contradictory" findings. The Court of Appeal expressly concluded that the Nigerian court has no jurisdiction to set aside an award or any part thereof on the basis of reasons extraneous to the Arbitration and Conciliation Act and in particular not on the ground that "the award has been battered". It is true that the Court of Appeal went on to set aside the entirety of the Chief Justice's judgment in any event on the ground that "lack of evidence can never be a ground for setting aside an award nor can that 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 seems to me 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 are in themselves incapable of challenge should nonetheless be struck down in consequence of the successful challenge to other parts of the award.

106. I have already recorded my conclusion at paragraph 86 above that the challenge to the adequacy of the reasoning in the award is most unlikely to lead to the setting aside of the award under the heading "Variations", and the same must be true of the award under the heading "Non-payment" which is not specifically challenged in the RRAM.

Final conclusion and decision

107. My conclusion overall is that the appropriate course now meeting the justice of the case is that I should vary the order of David Steel J by substituting therefor an order which will 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 must obviously be given for the amounts referable to these heads already paid on 12 May 2005. No amount was paid referable to Head of Claim No. 2. As set out in Paragraph 92 above, the amount referable to Head of Claim No. 3 should be regarded as US$7,691,086.33.

108. I do not consider it appropriate to give credit for the balance of the payment made by NNPC on 12 May 2005. That was made in respect of different parts of the award reflecting amounts indisputably due thereunder. However just as I shall not permit that amount to be credited against the amount for which judgment is entered, so too I draw back from following through the logic of NNPC's admission and requiring the payment of a further amount representing the unpursued counterclaim, which is obviously incapable of set-off, and, yet further, requiring the payment of interest on the sum paid referable to heads of claim other than No's 2 and 3.

109. At paragraphs 90 and 92 above I recorded the interest directed to be paid under the award as accrued as at 22 February 2008. There is however no reason why judgment should not be entered in an amount inclusive of interest accrued as at the date of judgment, and I so order.

110. I will of course hear counsel further on the form of the order but I believe that the effect of the foregoing is that there must be judgment for:

i) US$1,641,234, together with interest thereon as directed by the award until the date of judgment;

ii) Interest on US$58,521,249.55 as directed by the award until 12 May 2005;

iii) US$50,830,163.22, together with interest thereon as directed by the award from 12 May 2005 until the date of judgment.

111. Subject to any further argument which either party may wish to present I am currently minded to order and confirm (in accordance with paragraph 1 of the guarantee) that the money secured by the guarantee provided pursuant to paragraph 2(2) of the order of Gross J dated 19 April 2005 be paid out to IPCO in partial satisfaction of the judgment.

112. Save as set out above, I propose to adjourn the decision on the enforcement of the award. Although it is inherent, I will give liberty to apply.

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