Neutral Citation Number: [2019] EWHC 2212 (TCC)

Case No: HT-2019-000060

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

The Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 13/08/2019

Before:

VERONIQUE BUEHRLEN QC
(Sitting as a Deputy High Court Judge)

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Between:

AIC LIMITED	**Claimant**
- and –	
THE FEDERAL AIRPORTS AUTHORITY OF NIGERIA	**Defendant**

- -
- -

Michael Collett Q.C. (instructed by **Westbrook Law**) for the **Claimant**
Hermann Boeddinghaus and Edward Crossley (instructed by **Joseph Hage Aaronson LLP**) for the **Respondent**

Hearing date: 25 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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VERONIQUE BUEHRLEN QC
(Sitting as a Deputy High Court Judge)

Veronique Buehrlen QC:

Introduction

1. There are 2 applications before me. They arise in connection with a Nigerian arbitration award made on 1 June 2010 awarding the Claimant a principal sum of US$48,124,000 plus interest at 18% per annum from the date of the Award until payment (***the Award***).

2. The first application is the Defendant's application dated 27 March 2019 (i) to set aside the order of O'Farrell J dated 28 February 2019 giving the Claimant permission to enforce the Award; and (ii) for the Claimant's application dated 10 January 2019 for judgment in terms of the Award to be adjourned pursuant to section 103(5) of the Arbitration Act 1996 (***the 1996 Act***). The second application is the Claimant's application dated 28 June 2019 for an order that the Defendant give suitable security for the Award pursuant to section 103(5) of the 1996 Act in the event that the Claimant's application to enforce the Award is adjourned.

3. The questions for the Court are whether it has the requisite jurisdiction in the circumstances of this particular case and, if so, whether to adjourn enforcement of the Award and on what (if any) terms.

The Parties

4. The Claimant, AIC Limited (***AIC***) is a construction and property development company incorporated in Nigeria in 1971. Its principal place of business is in Ibadan, Oyo State, Nigeria. The Defendant is The Federal Airports Authority of Nigeria or "FAAN" (formerly known as the Nigerian Airports Authority). FAAN is an entity incorporated by a Nigerian governmental decree in 1976. It oversees the operations and maintenance of Nigeria's several federal airports.

The Factual Background

5. By a Deed of Lease dated 17 February 1998 (***the Deed of Lease***) FAAN leased parcels of land at Murtala Mohammed Airport, Ikeja, Lagos to AIC for a term of 50 years (with the possibility of renewal of the lease for a further term of 25 years) for the sole purpose of developing a flightpath hotel and resort complex. The Deed of Lease contained an arbitration agreement at clause D1(ii) to (vii) which provided for disputes to be arbitrated in accordance with the Nigerian Arbitration and Conciliation Act 1990.

6. Work on the hotel and resort complex commenced. However, by letter dated 16 May 2000, FAAN directed AIC to refrain from work on the hotel development. Following that letter, all further work on the hotel site was stopped and AIC was never permitted to continue with the construction of the hotel and resort as planned.

7. The resulting dispute was referred to arbitration pursuant to the arbitration agreement in the Deed of Lease. The late Hon. Justice Kayode Eso was appointed as arbitrator (***the Arbitrator***). The seat of the arbitration was Nigeria. As already explained, the Award was issued on 1 June 2010. The disposition is at paragraphs 34 to 36 of the Award. The Arbitrator awarded AIC a principal sum of US$48,124,000 (together with Administrative Costs in the sum of N3,700,000, that is approximately US$10,000 at current exchange

rates) plus interest at 18% per annum from the date of the Award until it was fully liquidated.

The Nigerian Legal Proceedings

8. Following publication of the Award, both parties commenced proceedings before the Nigerian courts. Those proceedings have been lengthy and convoluted in their history. A high level summary of them is set out in the second witness statement of Professor Alfred Bandele Kasunmu SAN served on behalf of AIC. I summarise them below.

9. At the outset there were three sets of proceedings brought:

   (i) An originating motion filed by FAAN on 23 July 2010 to set aside the Award (***the Set Aside Application***). That suit was filed within the required statutory 3 month time limit following issue of the Award. It was followed by an application by FAAN for leave to serve the Set Aside Application on AIC in Oyo State on 29 July 2010 and leave was granted on 5 August 2010;

   (ii) An originating motion filed by AIC on 30 August 2010 to remit the Award on a point of law (namely that the Arbitrator ought to have ordered specific performance of the Deed of Lease thus enabling the project to be completed); and

   (iii) An originating summons, also filed by AIC on 30 August 2010, to enforce the monetary judgment element of the Award.

10. In addition to those proceedings, AIC filed a preliminary objection challenging the validity of the originating motion filed by FAAN to set aside the Award (***the Preliminary Objection***), AIC's case being that the Set Aside Application was a nullity because FAAN failed to obtain leave (what we would call permission) to serve the originating motion out of Lagos State prior to the issue of the motion. As already noted, the originating motion was issued on 23 July 2010 but the application for leave to serve in Oyo State was not filed by FAAN until 29 July 2010, six days later.

11. The various motions and summonses were all heard together by the Honourable Justice Buba. He rejected AIC's Preliminary Objection. He went on to set aside the Award and declared it to be null and void and of no effect whatsoever. He also dismissed AIC's applications. He gave judgment on 19 June 2013.

12. AIC then filed 3 appeals in relation to its applications with the Nigerian Court of Appeal. On 16 June 2015 that Court allowed AIC's appeal on its preliminary objection case, holding that the issuance and service of FAAN's originating process seeking to set aside the Award was invalid because leave of the court for service on AIC outside Lagos State had not been obtained at the appropriate time. On all three of AIC's appeals, the matters were remitted to the Federal High Court. In other words, the question of whether the Award should be set aside or enforced was remitted by the Court of Appeal back to the Federal High Court of Lagos State to be tried by a different first instance judge. I understand it to be common ground that the effect of the decisions of the Nigerian Court of Appeal is that Justice Buba's order setting aside the Award no longer stands. However, the Nigerian Court of Appeal did not address the motion to set aside the Award or the summons to enforce the Award on their merits remitting these matters to the Federal High Court of Lagos State instead.

13. Neither party has pursued its motions in the Federal High Court to date. Instead, the judgments of the Court of Appeal were then appealed by FAAN and cross appealed by AIC to the Nigerian Supreme Court. FAAN has appealed the Court of Appeal's decision that its originating motion on the Set Aside Application was defective. That appeal was commenced by the issue of a Notice of Appeal dated 8 July 2015. In turn, on 4 November 2015, AIC appealed the decision to remit the motions, including the application to set aside the Award, to the Federal High Court. The gist of the cross appeals is that the Court of Appeal should have dismissed FAAN's Set Aside Application rather than remitted it to the Federal High Court and should have determined AIC's applications for specific enforcement of the Lease and enforcement of the Award in its favour rather than remitted them. Those cross appeals were made by AIC out of time but I understand that it is anticipated that an extension of time for issuing those cross appeals will be granted by the Supreme Court of Nigeria in due course.

14. There is then a dispute between the parties as to when the various appeals are likely to be heard by the Nigerian Supreme Court. AIC's evidence is that the appeals will not be heard before 2023 or even 2024. FAAN's evidence is that the appeals will be listed for hearing in 2020. There have been delays in the preparation of the Record of Appeal required to be compiled and transmitted to the Nigerian Supreme Court before the appeals can be heard. In the event, FAAN did not file its Appellant Brief until 6 May 2019. That is nearly 4 years after issuing its Notice of Appeal. In turn, AIC has yet to file its Appellant Brief as well as its Respondent's Brief in response to FAAN's appeal.

15. It goes without saying that there has already been considerable delay between the issue of the Award in June 2010 and resolution of the proceedings as to the validity and enforceability of the Award before the Nigerian Courts, not to mention the earlier delay between the appointment of the Arbitrator by the Chief Judge of Lagos State on 22 February 2002 and the date of the Award i.e. 1 June 2010.

The English Legal Proceedings

16. AIC issued an arbitration claim form in this Court on 10 January 2019 seeking an order for the enforcement of the Award without notice pursuant to the procedure set out in CPR Part 62.18. O'Farrell J made the Order on 28 February 2019. By paragraph 4 of the Order, FAAN was entitled to apply to set aside the Order within 22 days of service of the Order upon it.

17. By application notice dated 27 March 2019, FAAN applied to set aside the Order and for an adjournment of AIC's application for judgment in terms of the Award pursuant to s.103(5) of the 1996 Act. By application notice dated 28 June 2019, AIC applied for an order that FAAN give suitable security for the Award pursuant to s.103(5) of the 1996 Act, in the event that AIC's application to enforce the Award is adjourned.

18. In support of their various applications and respective cases, the Parties have filed some 10 witness statements. I will not list them all, but they included three witness statements prepared by Olumide Akande, a director of AIC together with two witness statements prepared by Professor Alfred Kasunmu, the senior lawyer with the conduct of AIC's case before the Nigerian Courts, all served on behalf of AIC, together with two witness statements prepared by Dr Clifford Omozeghian (Company Secretary and Legal Adviser to FAAN) and two witness statements prepared by Mr Aanu Ogunro a managing associate in the firm of Kola Awodein & Co. with the conduct of FAAN's case in the

Nigerian Courts. In addition, FAAN served a witness statement from Oluseyi Sodimu Sowemimo SAN, a Senior Advocate of Nigeria in relation to certain issues of Nigerian law.

19. Several of those witness statements include extensive expert evidence as to Nigerian law relied upon by both parties. No permission to adduce expert evidence has been sought or given. As FAAN points out, save possibly for the evidence of Mr Sowemimo SAN filed on behalf of FAAN none of those giving evidence on Nigerian law are independent since they are involved in the conduct of the Nigerian proceedings for AIC or FAAN respectively as legal counsel. That said, neither party has objected to the admissibility of the evidence produced and it is the best evidence on Nigerian law that is available to assist, where appropriate, on the determination of the applications before me.

The relevant legal principles

20. Nigeria is a party to the New York Convention and it is common ground that the Award is a New York Convention Award. Section 103 of the 1996 Act contains the grounds on which enforcement of a New York Convention Award may be refused. For the purposes of the present applications, the relevant sub-sections of s. 103 provide as follows:-

> "(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 person against whom it is invoked proves –
> …
> (f) that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
> …
> (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 (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."

21. Section 103(5) is in almost identical terms to Article VI of the New York Convention.

22. A helpful summary of the Court's role at a hearing of a section 103(5) application was provided by Gross J (as he then was) in *IPCO (Nigeria) v Nigerian National Petroleum Corporation* [2005] 1 CLC 613 (in turn citing the judgment of Staughton LJ in *Soleh Boneh v Uganda Government* [1993] 2 Ll Rep 208 at [15] and [16]):-

> "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 Government [1993] 2 Ll 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 L.J., at p.212".

23. These authorities were rightly relied upon by both parties before me and I will return to them in due course.

Does this Court have the requisite jurisdiction to adjourn the enforcement application?

24. AIC also relied on a passage from the judgment of Lord Mance in *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation* [2017] UKSC 16, [2017] 1 WLR 970 at [25], in which Lord Mance said:

> "Although the literal trigger to the application of section 103(5) is that "an application … has been made to" the courts of the country where, or under the law of which, the award was made, the adjournment which it contemplates is pending the outcome of that application. Once it is held that there should be no such further adjournment, there is no basis for ordering further security under section 103(5)."

25. That manifestly makes sense. If an application was made, dismissed and not appealed it could not continue to support an application for an adjournment under section 103(5) of

the 1996 Act. It leads to the first issue before me which is whether this Court has jurisdiction to adjourn AIC's enforcement application pursuant to section 103(5).

26. Having cited the passage from Lord Mance's judgment in ***IPCO (Nigeria) Ltd*** set out above, Mr Collett QC went on to submit that:

(i) An application to adjourn under s.103(5) can only be made while an application for setting aside or suspension of the award is pending before the foreign court;

(ii) The question whether an application for setting aside or suspension of the award is pending is a question for the English court; and

(iii) There is no application for setting aside or suspension of the Award pending before the Nigerian Courts in the present case because:

(a) The Nigerian Court of Appeal has held that the Federal High Court did not have jurisdiction to hear and determine FAAN's set aside application and whilst that application has now been remitted to the Federal High Court it cannot be served on AIC within the jurisdiction of that court (i.e. in Lagos State) and even if it could the validity of the originating motion has lapsed and in any event FAAN has elected not to pursue the Set Aside Application appealing the judgment of the Court of Appeal to the Supreme Court instead; and

(b) The decision of the Court of Appeal as to the validity of FAAN's originating motion gives rise to an issue estoppel under English law even though it is subject to appeal and is therefore binding on AIC and FAAN for the purposes of FAAN's application.

27. In short, it is AIC's case that this Court does not have the necessary jurisdiction under s. 103(5) to adjourn AIC's application to enforce the Award.

28. Mr Boeddinghaus submits on behalf of FAAN in response that Mr Collett's interpretation of what Lord Mance meant by "pending" i.e. that an application to set aside is "pending" is too narrow. I agree. The question is not whether the application to set aside itself is pending but whether the outcome of the application is still pending before the Nigerian Court. It is quite clear from the passage of Lord Mance's judgment in ***IPCO (Nigeria) Ltd***, relied upon by AIC, that it was the outcome of the application that Lord Mance was referring to.

29. On the facts of the present case the outcome of the Set Aside Application is still pending before the Nigerian Courts. Most notably, the Court of Appeal's ruling to the effect that the Federal High Court of Lagos State did not have the requisite jurisdiction to decide the Set Aside Application is the subject of an appeal to the Supreme Court. There is very persuasive evidence before me that that appeal will succeed. This is because:

(i) The decision of the Court of Appeal was based on a case known as ***MV Arabella v NAIC*** itself based on the Federal High Court Civil Procedural Rules 1976. However, these rules were repealed and revoked by the Federal High Court (Civil Procedure Rules) Decree 1999 and the rule relied upon in the ***MV Arabella*** case imposing a requirement for leave to issue an originating process outside the

territory of a particular state is not included in the subsequent 2009 Procedural Rules; those rules being the rules in force at the time FAAN issued its originating motion to set aside the Award i.e. on 23 July 2010. In other words, there is clear evidence that the key case relied upon by AIC may well no longer be good law in Nigeria.

(ii) In *SPDC v Adizua* (2018) LPELR-44437 Oredola JCA held in the Nigerian Court of Appeal that:

> "It is instructively and significantly noteworthy to once again point out that the decision of the Supreme Court in the MV Arabella v NAIC (supra) was decided based on Order 10 Rule 14 of the Federal High Court (Civil Procedure) Rules, 1976. Again it is pertinent to mention, that the provisions of the 2000 Rules, did not impose any obligation on the respondent therein, to obtain prior "leave to issue" the originating summons which in the instant case, is a writ of summons. Thus I am of the firm viewpoint that it is rather unnecessary to continually adhere or observe that requirement."

The same is the case for the 2009 Procedure Rules.

(iii) More recently, there have been several authorities including two in the Nigerian Supreme Court to the effect that there is no longer any need for leave to serve out so long as the proceedings are being served within Nigeria. This has been confirmed in a number of recent decisions, including *Abraham v Akeredolu* (2018) NWLR (Part 1628) (519) (Supreme Court), *John Hingah Biem v SDP* (unreported, 14 May 2019) (Supreme Court) and *SPDV v Adizua* (2018) LPELR-44437 (Court of Appeal). Mr Sowemimo's evidence is that the decision in the *MV Arabella* has been overturned in the *Biem* case. In that case, the Supreme Court said this:

> "The submissions of learned counsel for the appellant are well founded. Section 10(1) of the Federal High Court Act provides that the Court shall have and exercise jurisdiction throughout the Federation, and that for that purpose the whole area of the Federation shall be divided into Judicial Divisions. This is for administrative convenience and for dispatch of business as the Chief Judge may direct any of the Judges to sit in any judicial Division in the country. This is unlike the State High Court where the Chief Judge of the State can exercise a similar power only within the State."

30. Mr Boeddinghaus succinctly encapsulated the point when submitting that the Federal High Court in Lagos is a federal court and not a state court.

31. Secondly, the fact that the decision of the Court of Appeal on the Preliminary Objection gives rise to an issue estoppel is not relevant. FAAN's application is not concerned with enforcing the judgment of the Nigerian Court of Appeal and FAAN are not applying to have the application to enforce the Award struck out. Rather the question is whether the outcome of FAAN's set aside application is still pending. Quite clearly FAAN's appeal of the Court of Appeal's decision on AIC's preliminary objection means that the application to set aside the Award has yet to be finally resolved. Indeed, as matters currently stand the Set Aside Application has been remitted by the Court of Appeal to the Federal High Court for rehearing. It plainly has yet to be finally resolved.

32. Thirdly, in asking the Court to find that there is no set aside application pending in the Nigerian Courts AIC is in effect asking this Court to determine the outcome of the applications that have been remitted by the Nigerian Court of Appeal to the Federal High Court and to ignore the fact that the Court of Appeal's decision on AIC's preliminary objection is the subject of an appeal. In my view it would not be appropriate for this Court to take that approach as opposed to considering the merits of the Set Aside Application in the context of whether this Court should exercise its discretion under section 103(5) of the 1996 Act.

33. Mr Boeddinghaus made an additional point, which I deal with for the sake of completeness. He submitted that as a matter of Nigerian law, an appeal is a continuation of the proceedings. He relied on paragraph 9 of Mr Ogunro's first witness statement that "[u]nder Nigerian law the appeals are treated as a continuation of the [Federal High Court] proceedings". I do not regard that as relevant. The question whether an application for setting aside or suspension of the Award is pending is (as Mr Collett QC submitted) a question for the English court. It is for the English Court to construe the provisions of section 103(5) of the 1996 Act and to give an autonomous interpretation to the provisions of the New York Convention.

34. Accordingly, I am of the view that the outcome of FAAN's application to set aside the Award remains pending in the Nigerian Courts, and that this Court therefore has jurisdiction to adjourn AIC's application to enforce the Award pursuant to section 103(5) of the 1996 Act.

Should this Court exercise its discretion under section 103(5) of the 1996 Act to adjourn AIC's enforcement application?

35. I have set out above the key guidance provided by Gross J (as he then was) in the *IPCO (Nigeria) Ltd* case at first instance. Certain propositions may be drawn from Gross J's judgment:-

    (i) Firstly, the court's discretion to adjourn the decision on enforcement under section 103(5) is wide and unfettered.

    (ii) Secondly, ordinarily the following matters are relevant:

        (a) Whether the application before the court in the country of origin is brought *bona fide* and not simply by way of delaying tactics;

        (b) 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 England & Wales for resisting summary judgment); and

        (c) The extent of the delay resulting from an adjournment, whether enforcement will be rendered more difficult if it is delayed and any resulting prejudice to the claimant.

    However, the factors that may be relevant will depend on the individual circumstances of the case and are not limited to the above.

(iii) Thirdly, in considering the merits of the set aside application before a foreign court, this court is to undertake a "brief consideration" of the position rather than a detailed examination of the foreign proceedings, and determine where on a "sliding scale" the particular facts fall as between an award that is "manifestly invalid" and one that is "manifestly valid".

(iv) The stronger the merits of the application before a foreign court appear, the stronger the case for an adjournment and the weaker any corresponding application for security.

(v) The weaker the merits of the application before the foreign court, the weaker the case for an adjournment and the stronger the application for substantial security. All the same, in *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm) the Court ordered an adjournment even though it found that there was *"no realistic prospect of [the resisting party] establishing any of its grounds of challenge to the award"* and that its *"application is at the bottom of the 'sliding scale' in terms of prospects of success"*. However, whilst it granted the application for an adjournment, the Court also made an order for substantial security to be provided.

(vi) Where enforcement will be rendered more difficult as a result of delay, the stronger the case for security.

(vii) The weaker the risk of prejudice to the enforcing party caused by an adjournment, the weaker the corresponding application for security.

36. The following additional points arise from the applicable case law and were relied upon by FAAN:-

(i) *Soleh Boneh* is not authority for the proposition that security should always be ordered: reasoning to that effect was directly criticised by the Court of Appeal in *Yukos Oil v Dardana* [2002] CLC 1120 at [52(iv)]. It is possible for there to be an adjournment without any security (which was what the Court of Appeal ordered in *Yukos Oil* itself: see [53]–[54]).

(ii) When considering the risk of prejudice to the enforcing party caused by an adjournment, the comparison is between the position of the would-be enforcing party if he were allowed to enforce immediately, and his position if any steps by way of enforcement are delayed as a result of the grant of an adjournment: see *Dowans Holdings v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm) at [49]. Further, the amount of security to be ordered ought to reflect the degree of prejudice as may result from the delay. In *Dowans v Tanzania*, the extent of prejudice was not *"likely to relate to anywhere near the full amount of the award"*, and so the Court ordered security of US$5 million as a condition for the grant of an adjournment where the relevant award was for US$36.7 million plus interest: see [4] and [53].

37. Applying the key principles arising out of the relevant and applicable case law:

38. I have not seen anything to suggest that the Set Aside Application was not brought by FAAN *bona fide*. The application was brought promptly within the 3 month statutory

time limit and was thereafter pursued to a hearing before Justice Buba in June 2013. FAAN continues to maintain its case that the Award was invalid and whilst there has clearly been delay such as in relation to the filling of FAAN's appeal brief before the Supreme Court, FAAN has and continues to pursue its case that the Award was invalid.

39. Whether the Set Aside Application has at least a real prospect of success is a more complex issue. As matters currently stand, Justice Buba's judgment setting aside the Award has been successfully appealed by AIC albeit on the basis of the Preliminary Objection. As already noted, the evidence before me suggests that FAAN has good prospects of overturning the judgment of the Court of Appeal on the Preliminary Objection.

40. At the hearing of the applications the subject of this judgment, Mr Boeddinghaus submitted that this Court need not go any further. He submitted that AIC had not appealed the Court of Appeal's judgment on the various motions on the merits and that it was no longer open for them to do so. In other words, FAAN's case was that the merits of the Set Aside Application were irrelevant because if the Nigerian Supreme Court allowed FAAN's appeal on the Preliminary Objection, the effect would be to reinstate Justice Buba's first instance judgment setting aside the Award without more.

41. I do not accept that submission. In none of FAAN's evidence is it stated that AIC has somehow lost the right to appeal Justice Buba's judgment on the merits should FAAN succeed on the Preliminary Objection in the Supreme Court. If that was FAAN's case it should have been made clear in its evidence so that AIC might have a proper opportunity to respond to it. It was not. Further, AIC have appealed the Court of Appeal's decision to remit the Set Aside Application, as well as its motion to enforce the Award, to the Federal High Court. It seems to me inherent in those appeals that AIC's case is that the Court of Appeal ought to have decided the applications on the merits and that if the Supreme Court allows those appeals it will either remit the applications to be dealt with by the Court of Appeal on the merits or deal with the applications on the merits itself. Indeed, in appeal no. CA/L/539/2013 the relief sought by AIC expressly includes a rehearing of its enforcement application on the merits. That is in line with Prof Kasunmu's evidence that if FAAN succeeds on its Preliminary Objection appeal, then the matter will be decided on the merits either by the Supreme Court or the Federal High Court.

42. Accordingly, it is necessary for me to give brief consideration to the merits of the Set Aside Application and the judgment of Justice Buba.

43. In my judgment the grounds set out in Justice Buba's judgment in support of his decision to set aside the Award are not at all well founded. Notably, Mr Boeddinghaus did not seek to persuade me that they were. As to the four principal grounds relied upon to justify the set aside:

    (i) It is difficult to see how the Arbitrator can be said to have exceeded his jurisdiction, and thereby misconducted himself, by awarding AIC damages in the form of loss of profit for breach of the terms of the Deed of Lease calculated by reference to the hotel development contract and profit projections for the project. One would expect the Arbitrator to quantify the losses arising out of FAAN's breach by reference to the profit projections on which the planned development was based and financed and for which the land had been leased. The Deed of Lease itself

expressly provided that the sole purpose of the demise was for the development and management of the hotel (clause B(v)).

(ii) Contrary to Justice Buba's findings, I do not see how the Arbitrator could be said to have made a fundamental error of law by holding that AIC were entitled to "*unmitigated damages*". This is because it is perfectly clear when one reads the Award that the Arbitrator made a finding of fact on the issue of mitigation and that it was only because he found that it was not reasonable to expect AIC to develop a different site some 1.5 miles from the airport terminal, and in that context, that he went on to state that AIC was entitled to "*unmitigated damages*". He was not suggesting that there was no duty on the part of AIC to mitigate its loss.

(iii) Thirdly, Justice Buba considered that since the Nigerian Government had statutory powers of compulsory purchase, based on the principle of *volenti non fit injuria*, AIC had voluntarily waived the risk of all claims arising from that risk. However, the Nigerian Government had not exercised any such right of compulsory purchase over the land the subject of the Deed of Lease. It is therefore extremely difficult to see any proper legal basis for Justice Buba's conclusion.

(iv) Lastly, Justice Buba held that enforcement of the Award would be contrary to public policy because AIC had commenced construction without the requisite mandatory building regulation approval. However, this amounted to reversing one of the Arbitrator's findings of fact, namely that the project had the requisite government approvals.

44. Based on my review of the Award and the reasons set out in the judgment of Justice Buba to justify the setting aside of the Award, I would not consider the Set Aside Application to have a real prospect of success on appeal. However, the fact remains that on the one occasion on which the Set Aside Application has come before the Nigerian Courts (that is before a Nigerian Federal High Court Judge applying Nigerian law) for consideration on the merits, the application was allowed and the Award was set aside. Similarly, the fact also remains that if FAAN's appeal on the Preliminary Objection succeeds the immediate consequence will be to reinstate the decision of Justice Buba setting aside the Award. I am also mindful of the fact that it is not only FAAN that has challenged the validity of the Award. AIC has also taken issue with the Award since it has sought to challenge the Arbitrator's refusal to order specific performance of the Deed of Lease.

45. The next question is what delay will ensue from any adjournment and will enforcement be rendered more difficult if delayed and result in prejudice to AIC? Clearly delay will ensue from an adjournment. AIC's evidence is that the appeals will not be heard by the Supreme Court until 2023 if not 2024. FAAN say the appeals will be listed in 2020. In my judgment, AIC's evidence on this issue is the more credible. FAAN have already been over optimistic in their predictions. That is illustrated by the fact that Mr Ogunro anticipated that the Supreme Court would fix a hearing date for the appeals at a hearing on 2 May 2019. That hearing was for FAAN's application to transmit the appeal records out of time. It did not take place. Instead, Mr Omozeghian now states that a hearing of that application "is likely at some point between October and November 2019". In other words, that application alone has yet to take place and the estimate in relation to that application alone is a further delay of 6 months. Further, the appeals have yet to be consolidated, AIC has yet to serve its briefs and counter-briefs may also be required. All this suggests to me that the matter is in fact most unlikely to be listed for a substantive

hearing before a very busy Supreme Court in 2020. Further, I also accept Mr Collett's submission that the hearing in the Supreme Court may well not be the end of the matter should that Court remit the substantive applications for a hearing on the merits be it to the Court of Appeal or the Federal High Court. Everything therefore points to the fact that potentially considerable further delay to enforcement may ensue.

46. There is also a dispute between the parties as to whether or not FAAN has any assets within the jurisdiction of this Court against which AIC could enforce the Award. If there are no assets then obviously delay will not prejudice AIC. AIC submits that it intends to enforce by way of third party debt orders under CPR Part 72 against passenger service charges and other sums paid by passengers and airlines i.e. by debtors present within the jurisdiction. FAAN's evidence is that such revenues are revenues of the Federal Government of Nigeria and not FAAN.

47. I do not consider FAAN's evidence on this issue to be persuasive. Section 1(2) of the Federal Airports Authority of Nigeria Act provides that FAAN is a body corporate that may "sue or be sued in its corporate name and own, hold or dispose of property (whether movable or immovable)". Section 3(d) goes on to provide that the functions of FAAN include "to charge for services provide by the Authority at airports". Further, by Part IV section 12 of the Act entitled "Sources of Revenue" FAAN is to maintain a fund which shall include:

> "(a) such monies as may, from time to time, be allocated to it by the Federal Government;
> (b) fees in respect of services provided by [FAAN], including:
> (i) landing fees;
> (ii) parking fees;
> (iii) Passenger service charge (local and international)
> …
> (c) all other sums that may accrue to or as may be received by [FAAN] in the exercise of its functions and activities under this Act …"

48. Lastly, by section 13(2) of the Act, FAAN's financial objective is "to recover the whole of its costs and to achieve a reasonable return on capital."

49. These express legislative provisions clearly identify FAAN as a body corporate and separate legal entity – separate from the Federal Government. They confer the right of FAAN to charge for its services and identify FAAN's sources of revenue as including sums such as landing fees and passenger service charges. Contrary to FAAN's evidence, the revenues in question clearly are FAAN's and not those of the Federal Government of Nigeria. There is also evidence of charges being paid to FAAN through a payment process known as the Remita Payment Process and Procedure exhibited at Akande 3 at OA3 pages 4-10. Further, FAAN has not exhibited a single document such as an invoice identifying the party to whom charges such as landing and parking fees are due when clearly such documentation must be available to FAAN. The obvious inference I draw from this lack of documentary evidence is that bare assertions to the effect that the revenues in question do not belong to FAAN cannot be relied upon.

50. FAAN also submits that ordering passenger and other service charges to be paid to AIC would contravene section 80 of the Constitution of the Federal Republic of Nigeria. However, I agree with AIC that there is nothing in section 80 to suggest that it would be

unlawful for the airlines to comply with third party debt orders requiring them to pay service and other charges to AIC.

51. Accordingly, I am not satisfied that for present purposes there are no assets within the jurisdiction against which AIC could enforce the Award. In my judgment it is more than likely that there are debtors of FAAN, that is airlines who pay fees and other dues to FANN, present within the jurisdiction of this Court against which AIC may well be able to enforce. Lastly, whilst the available evidence on the issue is very limited, and only takes the form of a budget document whose provenance is unclear, the suggestion is that the revenues in question are considerable.

52. On the other hand, I am not convinced that in the event of further delay in enforcement of the Award, it would be relatively easy for FAAN to revise its arrangements with the airlines to avoid the possibility of enforcement as submitted on behalf of AIC. There must be many airlines involved and all sorts of existing arrangements and contracts that would need revision. Further, it is then not immediately obvious as to what arrangements could be made with debtors within this jurisdiction that could side step the proposed method of enforcement. That said there is always some risk of steps being taken as FAAN may be keen to avoid payment of the Award should the Set Aside Application be finally resolved in AIC's favour.

53. FAAN also submitted that there could be no prejudice to AIC because of the 18% interest rate applicable to the Award per annum. They submitted that 18% per annum is a very significant rate of interest on an Award denominated in US dollars and has been since the 2008 financial crisis. However, whilst that is no doubt correct, the fact of the matter is that AIC will continue to be kept out of its money. The Award was in the sum of US$48,124,000 and interest totalling some US$74,590,881 had already accrued by 10 January 2019. These are significant sums by any standards and represent money that AIC would otherwise have available for use in its business. In my judgment that alone is sufficient to give rise to prejudice. I also accept Mr Collett's submission that the Court may also have regard to the commercial pressure that an attempt to enforce may have even if ultimately unsuccessful as was accepted by Blair J in *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm) at [69].

54. Bringing the various factors together, in my judgment this is a case where the Award lies towards the "manifestly valid" i.e. top end of the scale, in which significant further delay is likely to ensue and in which some element of prejudice to AIC will result from a continuing delay in enforcement. However, those factors must be balanced against the matters set out in paragraph 44 of my judgment and in particular the fact that on the only occasion on which the Set Aside Application did come before the Nigerian Courts on its merits the Award was set aside. I am mindful of the fact that it is important to avoid conflicting judgments. Accordingly, I have concluded that this is a case in which an adjournment is appropriate and in which the factors militating against an adjournment fall to be addressed further in the context of AIC's application for security.

Should the adjournment be conditional on the provision of security?

55. AIC submits that the adjournment should be made conditional upon the provision of substantial security. It asks for the sum of US161,978,132 that it is said will be outstanding by July 2023.

56. In my view, despite the judgment of Justice Buba, the Award falls at the "manifestly valid" end of the sliding scale meaning that any adjournment should be conditional on

the provision of security. Further, AIC's claim is a sizeable one. The Award is in the principal sum of US$48,124,000 and simple interest on that sum already amounted to US$74,590,881 as at 10 January 2019. Those are large sums of money for AIC to continue to be deprived of. AIC should also have some protection against any deterioration in their prospects of enforcement in this jurisdiction and recognition should be given to the importance of the enforcement of New York Convention Awards.

57. There is a further factor that needs in my judgment to be taken into account when considering the issue of whether the adjournment should be conditional on FAAN providing security. There has already been very considerable delay in relation to enforcement of the Award to date as well as prior to that. FAAN submits that it is not responsible for the delays. However, the evidence suggests otherwise. For instance, the Arbitrator was appointed on 22 February 2002 but that appointment was objected to by FAAN until 4 March 2008. That alone accounts for six years of the pre-Award delay. In turn there have clearly been considerable delays in the compilation and filing of the appeal record required to advance the appeals before the Supreme Court of Nigeria. At paragraph 10 of his first witness statement, Prof Kasunmu explains that whilst it is the responsibility of the Registrar of the Court of Appeal to compile and transmit the record, it is for the appellant to fulfil certain conditions including payment of the costs attendant on processing the record. It also appears that it is only because AIC agreed to perform this task and paid for the record (albeit with a promise of repayment from FAAN) that the matter advanced. I also note that FAAN's appeal brief was not filed until May 2019 i.e. some 4 years after the Court of Appeal's judgment and not until after these proceedings were commenced.

58. FAAN are the primary appellant and one would therefore expect them to take the lead in diligently pursuing their appeal. However, the indications are that FAAN are not pursuing their appeal timeously which may not be surprising in circumstances in which the Award cannot be enforced in Nigeria pending resolution of the various appeals. As Staughton LJ observed in *Soleh Boneh* in relation to the employers in that case, "in reality they are defendants and have no reason to see that it is decided promptly" (at 212). The same applies in the present case. An order making the adjournment conditional on FAAN providing some security should have the added bonus of encouraging FAAN to get on with pursuing the Nigerian proceedings more diligently.

59. FAAN submits that if security is ordered that will put AIC in a better position than it would have been in had FAAN not sought an adjournment and would confer a tactical windfall on AIC. That submission depends on a finding that FAAN has no assets against which AIC can enforce within this jurisdiction which I have not accepted for the reasons already given. It is inevitable that an order for security provides some advantage but it is designed to recognise the element of prejudice that AIC will suffer from the continuing delays in enforcement, the strength of AIC's case on the validity of the Award and the proper deference that should be given to enforcement of a New York Convention arbitration award.

60. That said, I do not consider AIC's request for security in the sum of US$161,978,132 to be appropriate, based as it is on the full amount of the Award plus interest until 2023. Taking into account where this case lies on the sliding scale and all the above factors, in the exercise of my discretion I am satisfied that there should be security as a condition of the grant of the adjournment and that it would be reasonable for this to be in the sum of

US$24,062,000 representing 50% of the Award or, put another way, just under three years' worth of interest on the Award.

61. I would be grateful if the Claimant could draw up the Order in the appropriate terms and I will hear the parties on any consequential matters, such as the form the security should take, if required.