

Case No: A3/2014/1282

Neutral Citation Number: [2015] EWCA Civ 1144
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION COMMERCIAL COURT
MR JUSTICE FIELD
[2014] EWHC 576 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2015

Before :

LORD JUSTICE CHRISTOPHER CLARKE
LORD JUSTICE BURNETT
and
LORD JUSTICE SALES

Between :

IPCO (Nigeria) Limited	<u>Appellant</u>
- and -	
Nigerian National Petroleum Corporation	<u>Respondent</u>

Michael Black QC and Edward Knight (instructed by **Weightmans LLP**) for the
Appellant
Jonathan Nash QC and James Willan (instructed by **Stephenson Harwood LLP**) for the
Respondent

Hearing dates: 23rd, 24th and 25th June 2015
(Supplementary written material 24 September – 12 October)

Judgment

See also Supplementary Judgment [2015] EWCA Civ 1145

Lord Justice Christopher Clarke:

1. The question at issue in this appeal is whether Field J was right to decline to enforce an arbitration award made in Nigeria in October 2004 and, instead, to continue an adjournment of the enforcement proceedings begun subsequently in this jurisdiction.
2. The background to this case extends over some 11 years. For reasons which will become apparent it is necessary to record rather a lot of it.

The parties

3. IPCO (Nigeria) Ltd (“IPCO”) is a Nigerian corporation. It is a member of a Hong Kong group of companies. It was incorporated in 1990 to carry on business as a turnkey contractor specialising in the construction of on-shore and offshore oil and gas facilities. Apart from its claim to enforce the award it has no assets to speak of. The Nigerian National Petroleum Corporation (“NNPC”) is, as its name suggests, a State owned corporation possessing extensive petroleum and petroleum related assets.

The history

The contract and the Award

4. On **14 March 1994** IPCO entered into a contract with NNPC for the design and construction, for a lump sum, of a petroleum export terminal, which came to be called the Bonny Export Terminal (“the Terminal”), in the Port Harcourt area of Nigeria. The contract was governed by Nigerian law and contained an arbitration clause under which disputes between the parties were to be referred to arbitration in accordance with the Nigerian Arbitration and Conciliation Act 1990 (“the Nigerian Act”).
5. Mechanical completion occurred on **16 November 1998** and on **1 December 2000** the Terminal was commissioned.
6. IPCO had claims under the contract in respect of which it gave notice of arbitration on **26 February 2003**. The dispute was referred to a distinguished arbitration panel consisting of the Hon Dr J Ola Orojo, Chief Richard Akinjide and Chief (Mrs) Tinuade Oyekunle.
7. By an award dated **28 October 2004** (“the Award”), following a 10 day oral hearing with witnesses, a 2 day site visit and a final 1 day hearing, the Panel awarded IPCO US \$ 152,195,171, which included costs, plus N 5,000,000, also for costs, together with interest at 14 % per annum. The current value of the award (with interest) is over \$ 340 million. Save as to the rate charged by IPCO there was no challenge by NNPC to quantum at the hearing. This may have been because the claim had previously been considered by an NNPC management team (OPCT) and a special review committee (the Obialo Committee), a fact which is

relied on by IPCO in challenging the allegations of fraud. Disclosure has not been given of the workings of these bodies.

8. The award was broken down into the following component items:

1	Non-payment of invoices	\$ 1,641,234
2	17 Variations	\$ 58,521,249.55
3	Phase II Prolongation	\$ 53,563.354
4	Standby	\$ 3,870,679
5	Escalation of Price	\$ 618,116
6	Financing Charges	\$ 34,514,356

From these amounts there fell to be deducted a sum due by IPCO to NNPC.

The challenge to the Award in Nigeria

9. By an Originating Motion of **15 November 2004** NNPC sought to have the Award set aside under the Nigerian Act on the ground that the arbitral tribunal lacked jurisdiction and had misconducted itself. The principal grounds of challenge (“the non-fraud challenge”) were that there was an error of law on the face of the Award and an inadequacy of reasoning. Under Nigerian law an error on the face of an award can amount to “misconduct”.
10. On **19 November 2004** IPCO filed a notice of Preliminary Objection to NNPC’s challenge to the Award seeking to strike the challenge out on the ground that it was frivolous, vexatious and an abuse of process in that it was calculated to delay enforcement of the Award and to interfere with or delay the due administration of justice. NNPC’s originating motion appears to have been amended on 4 February 2004 and again on 18 March 2005 and IPCO filed an objection to the further amended Originating Motion on 25 May 2005.

The first attempt to enforce the Award in England & Wales

11. Nigeria is a New York Convention State. On **29 November 2004** Steel J made an *ex parte* order pursuant to s 101 (2) and (3) of the Arbitration Act 1996 (“the Act”) for the payment by NNPC to IPCO of the sterling equivalent of the total sums due under the Award. On **13 December 2004** NNPC applied to set that order aside. On **10 March 2005** NNPC amended its application notice so as to seek either the setting aside of the order of Steel J or the adjournment of the question of enforcement. IPCO cross applied for security in the sum of \$ 50 million.
12. Sections 100 and 101 of the Act provide as follows:

“S.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. ...*

(2) ...

(3) ...

(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.*

S.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.*

...

S.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.”

13. On **7 April 2005** NNPC’s application and IPCO’s cross-application came before Gross J (as he then was). His judgment is reported at [2005] EWHC 726 (Comm). On **27 April 2005** he ordered that there should be an adjournment of the enforcement of the Award on condition of (i) payment of \$ 13,102,361.72 (which NNPC then accepted to be due on the basis of the non-fraud challenge); and (ii) the provision of \$ 50 million by way of security. Both parties were given liberty to apply. The \$ 13.1 million was paid and the \$ 50 million security was provided.

14. Field J helpfully summarised the basis of the decision of Gross J as follows:

“9 *In coming to his decision, Gross J adopted the approach of the Court of Appeal in Soleh Boneh v Uganda Government [1993] 2 Lloyd's Rep 208 and considered the strength of NNPC's challenges in the Lagos Federal Court to various of the sums awarded by the Tribunal. (NNPC's Motion to set the Award aside and IPCO's Preliminary Objection thereto had yet to be heard).*

10 *In respect of the Financing Charges award, Gross J held that NNPC had at least an arguable case that the Tribunal had been guilty of misconduct in: (i) wrongly calculating these charges on the basis of the claimed figure for escalation rather than on the awarded figure; and (ii) failing to appreciate that IPCO did not incur financing charges in respect of the 25% profit mark-up. The sums involved here were respectively US\$6 million (approx) and US\$4 million (approx).*

11 *Gross J also held that NNPC had an arguable case that in awarding the sums they did for Variations, Prolongation and Financing Charges, the Tribunal was guilty of duplication and of failing to give adequate reasons for preferring IPCO's case to that of NNPC. IPCO had claimed the cost of Variations in accordance with the costs provisions in clauses 52 and 55 of the contract and it was arguable that the costs therein defined already took into account the sums claimed separately for prolongation. NNPC therefore had a realistic prospect of reducing the awarded sums by US \$ 88 million, leaving US \$58.5 million for Variations for which the Award would stand. NNPC also had an arguable case that the Tribunal had wrongly construed the force majeure clause by applying its payment provision in accepting IPCO's claims when that provision only applied if the contract had been terminated, which was not the case. However, it was difficult to assess the impact of this challenge on the sums awarded because the Tribunal did not quantify the impact of each period of delay.*

12 In paragraphs 52 (i) and 53 of his judgement, Gross J said:

“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 Nigerian Act]. Employing the terminology of Soleh Boneh, the award is, at least to the extent discussed, neither manifestly valid nor manifestly invalid.

... 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.”

15. Field J also recorded that it was common ground that Gross J expected that IPCO's Preliminary Objection would be decided at first instance relatively quickly and, if upheld, would mean that there was no basis on which the enforcement of David Steel J's order could be suspended.

Developments in Nigeria

Okeke J

16. On **12 July 2005** Okeke J, sitting in the Federal High Court of Nigeria, granted IPCO's application for expedition in relation to the challenge to the Award. Okeke J is a female judge, in respect of whom the custom in Nigeria is that she is referred to as “my Lord” and “he”. I shall use the English nomenclature.
17. On **31 October 2005** Okeke J reserved judgment on IPCO's preliminary objection without hearing oral argument, the parties having adopted their written submissions previously served on the court. She reserved judgment which was due to be handed down on 12 December 2005.

18. There was then an unexpected development. On **29 November 2005** NNPC's new lawyers issued a motion for transfer of the case "*to the Chief Judge for re-assignment to another Judge of the Federal High Court for hearing*". They did so on the basis that Okeke J was said to have made some observations at the hearing of 31 October 2005 to the effect that the job was too complicated for her. There is a dispute as to whether she said that or anything to that effect.
19. On **2 December 2005** Okeke J adjourned to 1 February 2006 NNPC's Motion to have the case transferred and on **12 December 2005** she decided that "*[she] would transfer the case back to the Chief Judge for reassignment of the file to another judge for determination of [NNPC's] application for re-assignment since the ... application touched on the integrity of [her] court and [she] could not be a judge in [her] own cause*". She said that if she was "*exonerated*" she would read her ruling on the Preliminary Objection which was ready to be delivered.
20. On **16 December 2005** the Chief Judge transferred the case file to Auta J with the endorsement "*Reassign to Auta J*". These terms generated a dispute as to whether, as IPCO claimed, what the Chief Judge meant was that Auta J should determine whether the preliminary objection should be determined by another judge or whether he should himself determine it. Astonishingly (as the Federal Appeal Court was to observe 10 years later) neither IPCO nor NNPC then saw fit to ask the Chief Judge what he meant.

Auta J

21. On **20 February 2006** Auta J decided at a hearing that he had no doubt that the Preliminary Objection had been referred to him. He did not, however, determine the Preliminary Objection but adjourned the determination of it to 16 March 2006.

The Federal Court of Appeal

22. On **2 March 2006** IPCO applied to Auta J for permission to appeal his decision of 20 February 2006 on grounds of fact alone. In Nigeria an appeal on fact from a decision which is not a final one needs leave; but an appeal on law lies, as of right both to the Court of Appeal and to the Supreme Court. A decision setting aside the Award in whole or in part would be a final one and an aggrieved party can appeal on grounds both of fact and law without the need to obtain leave to appeal. On **6 March 2006** Auta J declined to hear IPCO's application to appeal on grounds of fact, which under the rules was required to be heard by that day, as an urgent application because the application had not been listed for that day. Under the rules the application on the same day IPCO filed an appeal to the Court of Appeal on grounds of law alone. On **16 March 2006** NNPC filed a Preliminary Objection to the hearing of IPCO's application for permission to appeal. On **22 June 2006** IPCO withdrew its application to Auta J to appeal on grounds of fact and issued a fresh application for permission directly to the Court of Appeal. On **4 December 2006** Auta J granted IPCO a stay of proceedings pending the hearing of IPCO's appeal.
23. On **20 February 2007** the Court of Appeal (a) extended IPCO's time for applying for permission to appeal on fact; (b) granted IPCO permission to appeal on fact; and (c) extended time for filing the second Notice of Appeal. The application for

this came to be referred to as the “Trinity Prayer”. On **24 February 2007** IPCO filed a Notice of Appeal on grounds of fact.

A second attempt to enforce in England

24. On **19 July 2007** IPCO applied in England for further consideration of the question of enforcement of the Award. It did so in the light of the fact that the Preliminary Objection had still not been heard and was unlikely to be determined for several years. The hearing took place before Tomlinson J (as he then was) on **21-22 and 25 February 2008**.
25. Judgment was delivered on **17 April 2008**. Field J cited the relevant paragraphs of his judgment as follows:

“73. ... 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.”

26. In addition, as Field J recorded:

“19 Tomlinson J also held that Gross J had been innocently misled by Counsel for NNPC when dealing with the "duplication" challenge to the Variations award and that this too was a ground for reconsidering the order made by Gross J. In Tomlinson J's view, Gross J had been allowed to proceed on the basis that IPCO had priced the variations on a lump

sum basis in accordance with clause 55 of the contract, when this was not the case. Instead, in its claim headed "Variations" for the extra and additional work, IPCO had expressly claimed the direct costs of these works and the profit thereon, and had not claimed all the costs which it was entitled to claim. Tomlinson J also held that whilst an argument as to inadequacy of reasons in respect of force majeure and prolongation was plausible, this was not so in respect of the Variations award. NNPC therefore had no realistic prospect of reducing the Award below US\$58.5 million together with interest thereon and some proportion of the costs.

20 As to the other challenges to the Award that Gross J had found to be arguable, Tomlinson J found that IPCO had failed to establish a justification for reviewing those conclusions because no causative link had been demonstrated between them and the Preliminary Objection delay and the misleading of Gross J as to how IPCO had advanced its Variations claim”.

27. By his order of **17 April 2008** Tomlinson J ordered:

- (i) Payment of the non-payment head of claim of US \$ 1,641,234
- (ii) Payment of the variations head of US \$ 58,521,249.55 less US \$ 7.7 m by way of credit for the corresponding part of the US \$ 13m paid;
- (iii) Payment of US \$ 26 million in interest;
- (iv) Permission to appeal;
- (v) Upon NNPC undertaking not to oppose expedition, a stay pending appeal conditional on the provision of US \$ 30 million by way of further security;
- (vi) Adjournment of the decision to enforce the Award with liberty to apply.

The \$ 30 million security was duly provided.

28. The hearing of NNPC’s appeal and IPCO’s cross-appeal from the judgment and order of Tomlinson J took place on **7 and 8 October 2008**. By its judgment and order of **21 October 2008** this Court (i) dismissed both appeals; (ii) dismissed NNPC’s application for a stay pending counter-security; and (iii) refused permission to appeal; but (iv) stayed Tomlinson J’s order pending disposal of NNPC’s petition, which was later issued, for leave to appeal to the House of Lords. On **11 December 2008** the House refused permission.

New evidence in Nigeria

29. Meanwhile evidence emerged in Nigeria which suggested that the Award had been obtained by fraud. Field J described the position in paragraph 24 of his judgment:

“24 The evidence relied on by NNPC was a first witness statement of Engineer Mohammed Mabai Bello, a Senior Engineer with NNPC who was first involved in the BET Project when a Deputy Manager at National

Engineering & Technical Company, then an affiliate of NNPC. In this statement Engr. Bello deposed as follows.

*24.1 On or around **16 October 2008** he was contacted by a Max Nduaguibe who stated that he had been contacted by two IPCO employees, a Quantity Surveyor (later identified to be Mr Wale Badmus) and the Accountant, Mr Blessing Wogu, who wanted to discuss with NNPC how IPCO had relied on forged documents in the arbitration. Mr Nduaguibe also produced a document bearing the date July 2008 and headed "Bonny Export Terminal Arbitral Award, A Proposal for Review Support Services". Page 1 is headed "The Statement of Proof". The makers of the statement (apparently two in number) are not identified therein but one of them was Mr Wogu. They express concern at the way their IPCO expatriate colleagues are behaving in respect of the NNPC/IPCO arbitration and state that it is their mission "to stop NNPC from releasing to IPCO already paid into Dutch [Deutsche] Bank and assist NNPC to put an end to this frivolous claim of IPCO anywhere on the globe" and "to draw a program of activities that will be submitted to the GMD (Group Managing Director) and strictly adhered to if we are to meet the time to beat the appeal date and file necessary municipal (Nigerian) legal processes that will disable the enforcement of New York Convention Award (Section 103 of the Act)" in return for a reward to compensate them for missing out on a bonus payable by IPCO of around US\$ 7.5 million. The makers of the statement go on to allege forgery of documents put before the Tribunal and give 6 Variation claims as examples: Real Engineering Nigeria (perimeter fencing and steel fabrication); Embeco Nigeria Ltd (plant and equipment hire, concrete supply and erection of platform); Eddyson International (fire foam); Coseda Nigeria Ltd (swamp buggies); and Geosite Surveys (houseboat). The statement goes on: "We will get IPCO contractors and vendors who were ignorantly used in the process but variously owed since 1998 through 2001 to support with witness documents and stand as witnesses should the need arise in a bid of putting off this claim. However, a guaranteed prompt payment of the outstanding will be good bait."*

24.2 Mr Nduaguibe also handed to Engr. Bello a copy of an IPCO weekly update for the week ending 24 March 2002 which stated that a comparison review between the Interim Variation submission of 1999 and the final Variation submission had found that there was a large amount of contradictory information. One copy of the final submission had been retrieved and the damaging material removed and "Fred" was to retrieve the second copy from PPMC¹ in order to do the same.

¹ Pipelines Product Marketing Corporation, a subsidiary of NNPC to which was transferred the responsibility for the BET project.

24.3 On **20 October 2008**, the GMD's office received a letter dated 15 October 2008 from Danagogo & Danagogo Advocates on behalf of a group of seven creditors stating that they had discovered that IPCO had forged documents, "a development that was confirmed by [Mr Wogu] when confronted on the matter."

24.4 On **20 November 2008**, NNPC presented the Nigerian Attorney General with a formal complaint based on the first statement² and the IPCO weekly update and on the same date Engr. Bello was provided by Mr Nduaguibe with a second statement headed "Background" made by one unidentified individual (Mr Wogu) in which were identified further examples of inflated Variations claims based on forged documents.

24.5 Engr. Bello also exhibited documents relating to the Variation claims for the additional houseboat (Variation 18), perimeter fencing (Variation 17) and concrete supply (Variation 15) in support of a submission that the evidence of forgery so far collected was only "the tip of the iceberg."

30. Blessing Wogu, the IPCO accountant, was, for NNPC, a key "whistle blower". He was one of the compilers of the "Statement of Proof" of July 2008 referred to in 24.1 above. On **20 November 2008** he attended at the DPP's offices in Nigeria and was arrested. On **21 November 2008** he gave his first statement to the police. This referred to the visit to his office of Chief Alagba: see [51] below. On **24 and 25 November 2008** the police raided IPCO's premises in Lagos and Port Harcourt, searched them and seized documents and computers. Two further employees were arrested. On **29 November 2008** Mr Wogu gave a second statement to the police. The second statement is not particularly easy to follow since it appears to be a response to a series of questions which are not recorded and to documents shown to the witness which are not exhibited.
31. Field J summarised the effect of those statements and of the witness statement of Engr Bello in [30 – 34] of his judgment. In essence the fraud was said to consist of producing for the purposes of the Final Claim on NNPC various forged documents in which the amount charged by suppliers to IPCO had been fraudulently overstated. That exercise ("the Original Fraud") was supplemented by a Second Fraud. The documents submitted as part of the Original Fraud did not tally with documents that had been submitted as part of the interim claims. So the non-conforming documents were retrieved from NNPC and new forgeries were substituted. In addition there had been further forgeries in 2004 and 2005, not made for the purposes of the Award, but for the purposes of incorporating the claims and variation costs into the Accounts.

The sequel in England

32. On **2 December 2008** NNPC applied to stay enforcement of the order of Tomlinson J on the ground that the Award had been obtained by fraud. On **4**

² i.e. the "document bearing the date July 2008 and headed "Bonny Export Terminal Arbitral Award, A Proposal for Review Support Services" referred to in 24.1.

December 2008 Flaux J indicated to NNPC at an *ex parte* hearing that the application was not suitable for disposition on an *ex parte* basis. On **16 December 2008** at an *inter partes* hearing Flaux J stayed the execution of Tomlinson J's order of 17 April 2008 until further order. He did so in order to hold the ring whilst an application was made under section 103 (3) of the Act to set aside that order or for an order that enforcement be further adjourned. The stay was on terms that the application be made promptly. He made orders for NNPC to provide detailed particulars of the fraud alleged and for service by both sides of evidence. He also ordered NNPC to maintain the guarantees in the sum of \$ 80 million in toto ordered by Gross J and Tomlinson J. NNPC's application was in essence based on an analysis of the documentary evidence seized by the Nigerian Police compared with what had been produced at the arbitration.

33. On **18 December 2008** NNPC filed an application (a) to vary the order of Tomlinson J of 17 April 2008 so as to provide that enforcement be set aside on grounds of public policy or (b) to adjourn enforcement with liberty to apply.
34. On **19 January 2009** NNPC served Particulars of Fraud ("POF") pursuant to the order of Flaux J of 16 December 2008. The Statement of Truth at the end of it was not signed until 6 September 2013, shortly before the hearing before Field J.
35. On **29 January 2009** Tomlinson J heard NNPC's application. He adjourned the hearing of it; ordered NNPC to identify each document which it contended was forged or fraudulent; and gave directions for the exchange of factual and expert evidence. On **20 February 2009** NNPC served a List of Documents it relied on in support of an allegation of fraud or forgery. The documents relied on were documents copies of which had been provided to NNPC by the Nigerian police.

Progress on the fraud allegations in Nigeria

36. On **13 March 2009** 20 criminal charges were filed in Nigeria against IPCO and six of its employees, including Mr Wogu. The principal charge was of conspiracy to defraud by making false final variation claims.
37. On **27 March 2009** NNPC applied to amend its Re-Re-Amended Originating Motion so as to include the fraud allegations contained in the POF.
38. On **5 June 2009** IPCO applied in Nigeria seeking an injunction to prevent NNPC from prosecuting its Notice of Motion of 27 March 2009 pending the outcome of the appeal from Auta J. On **10 June 2009** IPCO issued a Preliminary Objection to that Notice of Motion. The ground alleged was lack of jurisdiction given IPCO's appeal from the decision of Auta J.
39. On **17 June 2009** NNPC and IPCO agreed that NNPC's application to amend its Originating Motion should be heard after the determination of IPCO's appeal of Auta J's decision. As a result no application to amend to rely on fraud has yet been heard in Nigeria.

The Consent Order in England

40. In the light of developments in Nigeria and the allegation of fraud it became necessary to decide what to do about the order of Tomlinson J of 17 April 2008. In the end by a consent order made on **17 June 2009** (“the Consent Order”) (i) those parts of the order directing payment of the Non-Payment award (\$ 1,641,234) and the Variations award (\$ 58,521,249.55, less \$ 7,691,086.33) were set aside; (ii) the decision on the enforcement of the Award was adjourned generally pursuant to s 103 (5) of the *Arbitration Act 1995* and (iii) there was to be liberty to apply generally.
41. Gross J made the Consent Order. Before doing so he sought information as to the developments that had occurred since the hearing before him in 2005. A letter of **11 June 2009** in terms agreed between the parties was provided by Stephenson Harwood, NNPC’s solicitors. It included the following paragraph:

“IPCO has subsequently accepted that the question of whether the award was obtained by (IPCO's) fraud and should be set aside, ought to be resolved by the Courts in Nigeria, which (as you will be aware) are the Courts of the seat of the arbitration (and before which there is a pending application to set aside the award). As a result, it has been agreed that certain parts of [Tomlinson J's Order] should be set aside (i.e. so as to prevent enforcement for the time being of the remainder of the award); that any decision on enforcement of the award should be adjourned with liberty to apply; that NNPC should maintain its guarantees in favour of IPCO; that various undertakings in support of the English proceedings should be discharged; and that IPCO should pay NNPC's costs.”

Noticeably the letter contains no statement as to the expected time scale in Nigeria and refers to an agreement that parts of Tomlinson J’s order should be set aside so as to prevent enforcement “*for the time being*”.

NNPC’s principal submission

42. NNPC contends that IPCO cannot seek to enforce the Award now unless there has been a significant change of circumstances. As will appear hereafter it is apparent that the proceedings in relation to the enforcement of the Award may take decades. NNPC contends that, insofar as this is so, there has been no such change in circumstances, having regard to the basis upon which the Consent Order was made, which basis is, they submit, apparent from the communications between the solicitors which preceded the making of the order. These contemplated the possibility of a very long delay. The fact that that possibility has now materialised is no basis for ordering enforcement now.
43. That begs the question as to whether the negotiations between the parties are admissible for the purposes of deciding the basis upon which the order was made. I do not accept that they are for two reasons.
44. First, whilst the order was one made by consent, it was, none the less, an order of the Court and, moreover, one in relation to which the judge had asked for information as to the developments which gave rise to it and been sent a letter in agreed terms. In determining the basis on which the order was made it is

necessary to have regard to the circumstances by reference to which the Court made it.

45. It is, of course, possible for an order to recite the basis upon which it is made or for the order to be the sequel to a previously concluded contract or agreed understanding, which the court could be shown as the basis upon which the parties agree that the court should be invited to make the order. Neither of these things happened. Further nothing in what Gross J was told indicated that the question of enforcement might not return to England for decades. Had he understood that it might not and that, if it did not, IPCO could do nothing about it, I doubt that he would have been prepared to make the order, at least without further inquiry.
46. Second, insofar as the Consent Order is to be regarded as a contract, the contract in this case is contained in the order itself. On classic principles the antecedent negotiations are inadmissible for the purpose of its construction.
47. Even if that is too strict a view, and one should look more generally to what the parties had in mind, it is necessary to examine the effect of the antecedent correspondence. The judge set out the course of negotiations in [38] to [41] of his judgement which I gratefully adopt:

“38 *IPCO was ordered by Flaux J to file its evidence in opposition to the Fraud Allegations by 17 April 2009. However, by letter dated 9 April 2009, IPCO through their solicitors, Lovells, sought NNPC's agreement to an extension for the service of their evidence to at least 31 July 2009. NNPC had served over 1,600 pages of evidence; given the lapse of time (over 10 years in some cases) former employees were proving difficult to trace, contact and interview; access to third party suppliers was proving difficult, particularly those no longer in business; IPCO only had a skeleton staff in Nigeria who had been subjected to threats; document taken by the police had not be returned. The letter continued:*

*9. As you and your client are aware, our client is suffering serious financial prejudice as a result of your client's failure to pay for work carried out on the BET Project, for which there is no satisfactory explanation (we note that your client's case on this application is merely that sums awarded in respect of the work carried out were inflated). **Given the likely delay if this matter goes back to Nigeria, and** notwithstanding our client's arguments (among others) that your client is not entitled to raise these allegations now, that any application in Nigeria is time barred and that in all the circumstances it would not be proper to adjourn enforcement in any event, our client is entitled to have a fair opportunity properly to prepare its evidence to answer comprehensively your client's allegations of fraud.*

10. There is no prejudice or significance suffered by your client in agreeing to the terms of the extension sought,

given that your client's application to adjourn the decision on enforcement pending the outcome of your client's application to set aside the Award in Nigeria. Indeed, we understand that your client has now, belatedly, filed an application in Nigeria to set aside the Award on the basis of the alleged fraud **which is due to be listed shortly**. Consequently a decision on the issue as to whether or not your client's application in Nigeria is time-barred will probably be heard **within the next several weeks**, and such decision will have a significant impact on the nature of your client's application in this jurisdiction. Additionally, the proposed amendments to the timetable for the hearing are entirely consistent with your client's invitation to the Court to "hold the ring".

39 By letter dated **16 April 2009**, NNPC's solicitors, Stephenson Harwood, refused IPCO's request for an adjournment and stated therein:

3. The nature of NNPC's application is such that it only needs to establish a *prima facie* case of fraud. Therefore, unless IPCO's evidence unequivocally explains the documentary evidence of fraud presented by NNPC, IPCO will fail to resist NNPC's application on the merits. IPCO are not entitled to additional time simply to contact every conceivable witness from whom it may want to put forward a witness statement in the jurisdiction where the issue of fraud is to be finally determined (i.e. Nigeria). We see no reason why, if IPCO has a straightforward and irrefutable answer to the allegations of fraud, it cannot marshal its evidence and put it forward in the available time before the hearing scheduled in June...

10. The hearing of our client's application in Nigeria is not a reason to seek an adjournment from the English Court and the original timetable was not fixed on the basis that the English Court should await the decision in Nigeria. In any event at the time of writing **we do not know when the application is likely to be heard...**

40 Lovells then wrote to Stephenson Harwood on **20 April 2009** conceding NNPC's application that Tomlinson J's order be varied to order that enforcement of the Award be adjourned under s. 101 (5) of the Act. The key parts of this letter read:

9. Even more importantly ... the Court will not be conducting a trial of the alleged fraud issues at the hearing in June. It will exercise its discretion, following a brief consideration of the available material, as to whether your client's allegations have a real prospect of success on the

merits. In this regard, the burden on our client (a matter to which we return below) is very onerous...

11. Notwithstanding these difficulties, progress has been made ... IPCO is confident that it will in due course be in a position to provide straightforward and robust answers, supported by compelling evidence, to most, if not all, of your client's allegations.

However, as to your third "principal objection", given the number and nature of your client's allegations, the difficulties outlined above and the task of the English Court on an application of this nature (**we do not accept that your third "principal objection" in your paragraph 3 accurately** sets out the question for the English Court or the test to be applied), our client reluctantly accepts that the decision on further enforcement of the Tomlinson Order should be adjourned.

Our client's decision in this regard is based on a realistic assessment that the English Court is unlikely on a summary application of this nature to carry out a detailed examination of the evidence or to determine at this stage that your client's proposed challenge to the award on the variations head of claim has no real prospect of success. Accordingly, our client accepts that the appropriate place to determine whether your client is entitled to bring such a challenge³ (**a matter which we understand may be determined by the Nigerian Court in fairly short order**), and, if so, for its determination, is Nigeria.

We note for the record that our client's decision has been reached with the greatest of regret. **It is entirely without prejudice to all its rights (including returning to the English Court in the case of further delay by NNPC in Nigeria)...**"

41. Stephenson Harwood replied by letter dated **8 May 2009** stating, *inter alia*:

"In relation to the penultimate paragraph in your fax, we understand that directions have been given in relation to the application to amend and that the hearing is now scheduled for 17 June 2009. We do not know (and can only assume that you do not know either) whether or not our client's Application will be "determined by the Nigerian Court in fairly short order" on or after that date, and **the Consent Order is not made on the basis**

³ The contention of IPCO being that amendment to NNPC's Notice of Motion to plead fraud should be refused and that the claim to set aside was time barred.

that any expectation or understanding you have as to when the question of fraud will be determined in Nigeria is correct.

Nor do we accept your reference to a "right to return to the English Court in the case of further delay by NNPC in Nigeria) ...". As appears hereafter, it is in fact your client which is delaying progress in Nigeria by launching satellite applications designed to harass our client's officers and employees, but in any event your concession is that the issue of fraud should be determined in Nigeria in accordance with Nigerian procedure. The Consent Order is made on that basis. Your client does not have the right to shuttle back and forth between the two jurisdictions depending on where it perceives its tactical advantage to lie at any given moment."

48. On **14 May 2009** Lovells replied to the letter of 8 May 2009 in a letter which included the following:

"In view of what we say below we do not consider it appropriate at this time to respond to the unnecessary and inaccurate commentary forming the bulk of your letter (and our refusal to do so is not an indication of an acceptance by us or our client of its validity or accuracy)".

49. I find it impossible to construe these exchanges as amounting either to a concluded agreement or to an agreed basis or understanding upon which the order was to be made. The letters from Lovells (for IPCO) refer to the likely delay in Nigeria but contemplate the possibility that matters may be determined in "*fairly short order*" and are without prejudice to all of IPCO rights ("*including returning to the English Court in the case of further delay by NNPC in Nigeria*)...". Those from Stephenson Harwood (for NNPC) say they do not know when NNPC's application will be heard and assert that the order is not made on the basis that any expectation that Lovells may have is correct or an acceptance that there should be a right to return in the case of further delay by NNPC. That is (i) at best a statement of the basis upon which Stephenson Harwood/NNPC are proceeding and (ii) is not a statement that the basis upon which anyone is proceeding is that the resolution of the issues may take several decades. Lovells' final letter does not accept what Stephenson Harwood says.

Events after the Consent Order

50. On **19 July 2010** an application which had been made in Nigeria to quash the criminal charge was dismissed as "*completely misconceived*".

The 7 creditors' witnesses

51. Part of the evidence obtained for the criminal trial consisted of the statements of witnesses representing the 7 creditors referred to in [24.3] of the judgment of Field J cited in [29] above. The principal witness was Chief M.D. Acabo Alagba ("Chief Alagba"). He had a company called Maduala (Nig) Enterprises Ltd ("Maduala") which had supplied goods and services to IPCO from 1999. His statement of **20 December 2008** recounts how in August 2008 he went to Mr

Wogu's office at IPCO's premises to submit an invoice for two security men in relation to a project in which IPCO had engaged Maduala to supply building materials and labour for the construction of a court house, the building of which had stopped in 1999. When there he saw a document fall out of a file as Mr Wogu "*left to ease himself*". He picked up the document and, when he read it, discovered that it was a list of monies owed by IPCO to contractors which totalled over N 1 billion. It showed that IPCO was claiming N 36,000,000 from NNPC as against the N 3.9 million which was due to Maduala in respect of the court house security in October 2008. The statement referred to the fact that in October 2008 Maduala wrote to the Group Managing Directors of NNPC through its lawyer – a reference to the letter of 15 October 2008 (see [39/24.3]above and [52] below) - in which Maduala was named as a creditor of IPCO for N 3.9 million.

52. Chief Alagba's statement went on to record that he reported the position to other contractors and they informed others. A group was formed with a view to writing to NNPC to get them to pay the actual debts due from IPCO to the members of the group. A letter was written to NNPC by Danagogo & Danagogo on **15 October 2008** and NNPC wrote to the Attorney General of the Nigerian Federation ("the AG") on **13 November 2008**.
53. The other creditors gave statements bearing the same date to the effect that a particular amount was owed to them by IPCO. The implication of their statements was that it was less than what appeared on the list which Chief Alagba saw. The amount that was said to be on the list only appears in two of the statements (those of Messrs Alakpa and Igorigo).

The aborted criminal trial

54. The trial of the conspiracy charge was set to begin on **23 September 2010**. On **17 September 2010** the police had asked the 7 creditor witnesses to attend for a pre-trial hearing. On **18 September 2010** Danagogo, Oputa and Associates, wrote to the Commissioner of Police on behalf of the 7 creditors to say (i) that their clients did not have the financial capabilities to travel from Port Harcourt to Abuja to attend to the matter; (ii) that the statements they had made to the police were made with the understanding that they were being made in furtherance of the recovery of the outstanding debt due from IPCO; (iii) that they had resolved "*to clarify their position in the matter predicated purely on the content of the document Chief Alagba saw at IPCO, hence our clients' various reactions on the matter*"; (iv) that they had now each signed statements which were enclosed clarifying their position; and (v) that "*our clients will not be disposed to participate in the aforesaid prosecution, and, if compelled their evidence will be in line with their present resolve*".
55. The attached statement of Chief Alagba said that there was nothing on the document which fell to the floor at Mr Wogu's office to show that it was an IPCO document. He just assumed it was prepared by IPCO since it fell out of Mr Wogu's file. He said that he had no idea how much was owed to the subcontractors other than him; that the N 3.9 million was due in respect of the Court House and not the Terminal; that he was not aware of any forgery of any document by IPCO or any of its staff; and that the statement by the other

subcontractors was based entirely on his information to them which information was based solely on the document which he saw in Mr Wogu's office.

56. The other six statements were to the effect (a) that the witness had no evidence that the amount owed to his company by IPCO was inflated to NNPC; (b) that it was Chief Alagba who had told him that the amount against his company's name was inflated on the list which Chief Alagba saw but which he did not; (c) that Chief Alagba did not know how much IPCO owed his company; (d) that the witness was not aware that any document of his company was forged by IPCO or its staff; and (e) that their company did not submit a variation claim to IPCO. Four of the witnesses said that they were not told the inflated figure. Mr Alakpa and Mr Igorigo said that they were told the inflated figure by Chief Alagba.

Criminal charges struck out and filed again

57. On **22 September 2010** the Inspector General of Police applied for leave to withdraw the criminal charges because of the position taken by the 7 creditors' witnesses. On **1 December 2010** the criminal charges were struck out and the accused were discharged. The decision appears to have been made without any reference to the evidence of Blessing Wogu or the documents seized by the police (and what Mr Wogu said about them).
58. Not surprisingly, therefore, on **17 January 2011** NNPC's solicitors, Babalakin & Co ("Babalakin") wrote to the Attorney General of the Federation of Nigeria ("the AG") criticising the police decision to withdraw the charges, which decision they described as "*spurious*", and urging him to file fresh charges and take over the conduct of the prosecution. They said that if this "*charade*" was allowed to stand the Federal Government would not only have been defrauded of a large sum but would also be exposed to a colossal sum of money currently in excess of \$ 200 million because:

"the only impediment that has restrained the English courts from entering final judgment against the NNPC is the criminal investigations of IPCO and its prosecution which ought to be pending".

59. On **22 June 2011**, after further prompting from Babalakin, fresh criminal charges were filed against IPCO and five others founded on the allegation that the Variations claim had been fraudulently inflated by the use of false and forged documents.

Proceedings in the Federal Court of Appeal

60. At a hearing on **19 May 2011** the Nigerian Court of Appeal, of its own motion, pointed out that IPCO's Notice of Appeal as to fact, filed on **24 February 2007**, for which the Court had given permission on **20 February 2007**, had been signed by an unidentified person on behalf of IPCO's counsel (in fact a lawyer at his firm) and was, therefore, invalid. On **6 October 2011** IPCO applied for an extension of time to file another (out of time) notice of appeal as to fact.
61. At a hearing on **21 February 2012** the Nigerian Court of Appeal, again of its own motion, observed that the first notice of appeal had to be withdrawn before any

further steps could be taken and that on its withdrawal IPCO's application to extend time would have to be re-filed and so could not be granted on that day, even though NNPC was not objecting.

62. IPCO accordingly withdrew its Notice of Appeal as to fact and on **9 March 2012** made a fresh application for an extension of time in which to file a replacement Notice of Appeal as to fact and to combine the two Notices of Appeal by amending its existing Notice of Appeal as to law. This application was due to be heard on 18 April 2012 but the Court did not convene on that date.
63. On **13 April 2012** NNPC filed a Motion on Notice seeking to set aside the order of the Court of Appeal of 20 February 2007 made in response to the "Trinity Prayer", by which permission had been granted to appeal to IPCO on fact. The basis for the application was that the Notice of Appeal had been improperly signed i.e. the same point as the Court had earlier taken itself.
64. IPCO's application of 9 March 2012 and NNPC's application of 13 April 2012 came up before the Court of Appeal on **15 October 2012**. The Court rejected IPCO's argument that the Court was *functus officio* and could not set aside its own decision of 20 February 2007. It indicated that it was safer and in the best interests of IPCO for the decision to be set aside so that IPCO could bring another application for leave to appeal. The Court indicated that this application would be granted as a matter of course and would be heard on a date to be fixed and that IPCO's other applications would be dealt with on the adjourned date. The matter was adjourned to 27 November 2012. IPCO filed a fresh application for leave to appeal against Auta J's decision of 20 February 2006.
65. IPCO's Trinity Prayer came before the Court of Appeal on **15 January 2013** together with IPCO's application to amend the first Notice of Appeal to include the grounds in the second Notice of Appeal. The Court observed that IPCO's reply affidavit did not form part of the Court record. The hearing was adjourned.
66. On **5 February 2013** NNPC applied to strike out IPCO's appeal on the ground that Okeke J had retired (so that the direction sought - that she should deliver the ruling she had long ago written in relation to IPCO's Preliminary Objection seeking to strike out NNPC's action to set aside the Award - was now otiose) and for want of prosecution. The want of prosecution was said to lie in the fact that the appeal had not been heard, even though the Appellant's Brief, the Respondent's Brief and the Reply Brief had all been filed by June 2009.
67. On **26 February 2013** IPCO issued a Preliminary Objection to NNPC's application of 5 February 2013 on the grounds that (i) NNPC had adopted the wrong procedure for bringing the application since it should have filed a Notice of Preliminary Objection, which ought to be determined at the appeal and not a Motion to Strike Out which would involve an extra hearing before the Court of Appeal hearing; and (ii) that the application raised a fresh issue of fact namely whether Okeke J had retired for which permission was required.
68. On **27 February 2013** the Court of Appeal sat to hear IPCO's Trinity Prayer, and its application to amend its first Notice of Appeal so as to include the additional grounds of appeal in its second Notice of Appeal and NNPC's application of 5

February 2013. The upshot was that the Court directed that IPCO should file a written address in support of its pending applications to regularise IPCO's appeal. The matter was adjourned to 11 April 2013.

69. The hearing before the Court of Appeal did not take place until **3 June 2013** when the matter was adjourned to 10 June 2013 to allow IPCO time to file a Reply to NNPC's address filed on 26 March 2013. On **10 June 2013** the hearing was adjourned until 29 October 2013, when the hearing took place.
70. On **25 November 2013** the Court ruled that the Trinity Prayer be granted, IPCO was ordered to file its (second) Notice of Appeal (on fact) within 14 days and directed to apply to consolidate its two Notices of Appeal once the second Notice was filed. The way was now open for IPCO's appeal to proceed.

Further developments in the Nigerian criminal proceedings

71. The arraignment of those charged was due to take place on **24 January**, then **28 March** and then **13 June 2012**. None of the accused – IPCO, Mr Ladipo, Mr Wogu, Mr Rea, Mr Bazor and Mr Simpson, who faced 20 counts - appeared on those dates. From September 2011 onwards Babalakin had been writing to the AG, the DPP, the Minister of Petroleum and others with a view to securing that those accused were arraigned and the charge was proceeded with: see their letters of **1 November 2011**, **1 and 21 March**, **31 August**, **4 and 18 October 2012**. They made the point that, if this did not happen, NNPC might have to pay over \$ 200 million as a result of enforcement of the Award.
72. On **22 October 2012** the Deputy Director of Public Prosecutions ("DDPP") filed a report. He expressed the view that the criminal prosecution of IPCO had no real prospect of success. He observed that the 20 allegedly falsified Variations and the Optional Claims were not attached to the Proof; there was no statement from NNPC attached to the Proof; the prosecution's witnesses were unwilling to testify and had said in their notarised statements that they had no evidence that sums due had been inflated. It is not apparent that the DDPP took into account the statements of Blessing Wogu. We were told that these were included in the Proof but it is not clear whether that was so.
73. On **14 January 2013** the DDPP on behalf of the AG wrote to IPCO to say that the AG had decided to discontinue the criminal proceedings on the grounds that the case had no reasonable prospect of conviction; and had decided to convene a round table meeting of "*all the stakeholders*" to explore an out-of-court settlement. A letter in similar terms was sent to NNPC on **22 January 2013** but omitting the statement that the AG had decided to discontinue the criminal proceedings against IPCO. A meeting between representatives of NNPC and IPCO took place at the offices of the Solicitor General on **29 January 2013**.
74. On **18 February 2013** NNPC sent a long briefing note to the AG explaining why it considered that the prosecution had been poorly handled in a number of respects but had a real chance of success, and asking that the AG issue a *fiat* to counsel nominated by NNPC to take over the prosecution.

75. On **20 February 2013** NNPC wrote to the Solicitor General confirming the revised position of the Ministry of Justice, said to have been stated by the Solicitor General at a meeting the previous day, to the effect that it no longer believed that the pending Charges against IPCO and others should be withdrawn and asking him to communicate the Ministry's revised position to NNPC and IPCO formally. On the same day NNPC nominated to the AG Mr Solomon Asemota SAN as counsel to take over the prosecution.
76. On **4 March 2013** the AG authorised Mr Asemota to exercise his powers in respect of the prosecution of the Charge, at NNPC's expense. On **8 March 2013** the DPP on behalf of the AG wrote to NNPC to say that "*in view of emerging facts there is a prima facie case against IPCO*" and that the AG had farmed the case to a Senior Advocate.

Proceedings in England

77. Meanwhile on **24 July 2012** IPCO had issued its renewed application to enforce the Award in the sum of \$ 100,420,118 plus interest. This was not the full amount due under the Award but a portion which IPCO claimed was on any view due.

The progress of the Charge in Nigeria

78. On **10 April 2013** IPCO applied for permission to apply for a judicial review of the appointment of a prosecutor by the AG. On **12 April 2013** IPCO filed a motion for an injunction restraining the AG from proceeding with the prosecution whether directly or indirectly. On **22 April 2013** the Nigerian High Court, on an *ex parte* application, granted IPCO permission and ordered the AG to show cause as to alternative injunctive relief. On **29 April 2013** IPCO issue a motion for a stay of the criminal proceedings.
79. After a number of adjournments for various different reasons on **22 April 2015** IPCO's challenge to the AG's decision to issue a *fiat* was heard. A ruling was delivered on **3 June 2015**. The Preliminary Objection of the AG was upheld and the judicial review proceedings were dismissed. On the same day the criminal proceedings were adjourned to 2 July 2015 for plea. Thus, four years after the second Charge, and 6 ¼ years after the first Charge was filed, the criminal proceedings could, in effect, start.

The Appeal from the decision of Auta J

80. On **8 May 2015**, the Court of Appeal delivered its judgment on the appeal from Auta J's judgment of 20 February 2006. This was nearly 9 years 3 months after he had delivered it. It is apparent from the judgment that the Court was the recipient of elaborate submissions by both sides.
81. The Court held that, once a judge has retired, then from the official date of his retirement another judge was incompetent to read the decision of the retired judge. The appeal was, therefore, futile. The Court also held that the endorsement by the Chief Judge did not restrict the re-assignment to Auta J specifically to the hearing of the application of 29 November 2009. The transfer of the suit to the Chief Judge for necessary action was more or less for reassignment to another judge for

trial *de novo*. The bone of contention was the administrative decision of the Chief Judge who had an unfettered and unqualified discretion to assign, re-assign or transfer cases to any Judge of the Federal Court, and Auta J was in no position to question or disobey the directive made.

82. Judge Chinwe Iyizoba, who gave the leading judgment found it curious that the parties had spent 10 years “*pursuing this simple matter*” and pointed out that it could have been resolved by writing to the Chief Judge to clarify his directive to Auta J; or the action could have proceeded before Auta J to save time and cost. I find it curious as well. Part of the reason is no doubt that IPCO thought that Okeke J was likely to decide in their favour.
83. After the appeal the civil case was allocated to Tsotho J.
84. On **19 June 2015** IPCO filed a Notice of Appeal to the Supreme Court against the decision of the Court of Appeal. (Mr Black indicated that if this Court were to order a time limited adjournment IPCO would be content for there to be a condition that the appeal be withdrawn).

The judgment of Field J

85. After a 6 day hearing in October 2013, ending on **24 October 2013**, the judge handed down judgment on **14 March 2014**. Having recounted the facts up to June 2013 he considered whether there had been a sufficient change of circumstances since the order of Tomlinson J to justify a re-consideration of whether the Award should be further enforced.
86. He recorded that it was common ground that the approach of the court should be as articulated in [73] – [76] of Tomlinson J’s judgment, namely that the change of circumstances must be significant and causatively linked to the variation of the earlier order. I take that to mean that there has been a change which impinges on the reasons for which the court made the order and which is of such significance that it is necessary or appropriate to reconsider the original decision. In practice the change must be such that, if the changed situation had been apparent when the original order was made, it would or might have led to a different result.
87. The judge considered the terms of the Consent Order and the factual background to the agreement embodied therein. In his view IPCO was, by agreeing to that order, conceding that NNPC’s case on fraud in support of its application to vary Tomlinson J’s order established a *prima facie* case of sufficient cogency to require the court to adjourn IPCO’s enforcement application under s 103 (5). He also took the view that the Consent Order was not made on the basis that NNPC’s application to amend its Re-Re-Amended Motion by pleading fraud would be heard and determined in fairly short order [69].

Change of circumstances

The matters relied on before the judge

88. He then turned to consider 8 separate occurrences which Mr Michael Black QC for IPCO contended both singly and in aggregate required the Court to consider

afresh whether all or part of the Award should be enforced. The general tenor of Mr Black's submission had been that these occurrences, particularly numbers 1-7, showed that NNPC's fraud allegations were not made *bona fide* but solely for the purpose of blocking enforcement.

89. In relation to these submissions the judge took the view that by entering into the Consent Order IPCO was agreeing that NNPC's pleaded fraud case - based on the Particulars of Fraud, the Schedule of Documents, the second witness statement of Engr Bello, and the witness statements of Messrs Williams and Leishman - amounted to an arguable challenge to the Award in Nigeria, a change of circumstances in relation to NNPC's fraud case would only be sufficient to re-open the exercise of the Court's discretion if it showed that that fraud case was hopeless and/or not *bona fide*. He took the view that none of the first 7 occurrences demonstrated either of those things or was otherwise a reason justifying the re-consideration by the Court whether to exercise its discretion to enforce the Award or not. I set out below the occurrences relied on and the judge's view of them.

Occurrence 1

90. The first matter relied on was the report of the Inspector General of Police dated 30 December 2008 to the Federal Minister of Justice, which was disclosed to IPCO in 28 February 2013. That report was based on the statements made by Mr Wogu before and after his arrest, the statements made by the 7 creditors' witnesses, and the documents seized by the police. It stated in [10] that documents in respect of 22 Variations and 4 Optional Items had been found to be forged by the insertion of inflationary figures and that it was through the submission of these fraudulent documents to the arbitration panel that IPCO was able to obtain the Award.

91. Paragraph 11 said:

"In order to enhance the appeal case of NNPC, it is recommended that the Hon. Attorney-General should initiate Criminal Proceedings against the two Nigerians and the four expatriate staff of IPCO (Nigeria) Ltd who were found to have conspired and forged various payment documents of creditors. To this end, all the documents recovered during Police search have been carefully scrutinized and the relevant ones retained for further evidential proof."

92. Mr Black submitted to the judge that, if IPCO had known of this report prior to the Consent Order, it would have affected its decision whether to contest NNPC's application to vary because it showed that IPCO was being trapped between NNPC relying on the evidence of Mr Wogu and the 7 creditors and the police.
93. The judge regarded the police report as an unexceptional document save to the extent that it recommended the initiation of criminal proceedings to "*enhance the appeal case of NNPC*". It was not something from which it was to be inferred that the police knew that the evidence of Mr Wogu was false or that they were indifferent to the strength of the evidence so far obtained and were acting solely to assist the NNPC. I agree.

Occurrences 2 and 3.

94. The next matter relied on was the qualification by the 7 creditors of their evidence and their refusal to attend to give evidence followed by the withdrawal of the charges. This, it was submitted, seriously undermined NNPC's forgery and fraud case. The 7 statements had been orchestrated by Mr Wogu: see para 24.1 of Field J cited in [29] above (*"We will get IPCO contractors and vendors who were ignorantly used in the process but variously owed since 1998 through 2001 to support with witness documents and stand as witnesses should the need arise in a bid of putting off this claim"*.) The change of position of the 7 creditors showed that Mr Wogu had orchestrated false evidence.
95. The judge did not regard these events, or the withdrawal of the first set of charges, as significantly undermining NNPC's fraud case in support of its application to Tomlinson J for a stay. Chief Alagba in his second statement continued to say that he had seen a document setting out inflated figures which, because it fell out of an IPCO file, he assumed had been prepared by IPCO. The later statements by the other creditors to the effect that their evidence had been based on what Chief Alagba had told them were a repetition of the substance of their first statements. None of the 7 had said in their new statements that the original evidence they had given was false. Nor was the NNPC fraud case based solely or principally on the evidence of the 7 creditors, but on documents found in the possession of IPCO and the evidence of Mr Wogu. The evidence fell well short of proving that Mr Wogu orchestrated the evidence of creditors knowing it to be false.

Occurrences 4 and 5

96. The lobbying of the AG on behalf of NNPC leading to new charges and the further lobbying urging the diligent prosecution thereof – No 4; and the AG's decision to issue his fiat to Mr Asemola SA – No 5; showed, it was submitted, that NNPC was fearful that without the criminal charges its challenge to the Award in Nigeria would be seriously weakened and that there was a concerted effort by NNPC to use the charges to prevent the enforcement of the Award.

Occurrence 6

97. This was the view of the DDPP that the prosecution of the new charges had no realistic prospect of success. It was said seriously to undermine NNPC's case in forgery and fraud.
98. As to that, the judge thought that NNPC's lobbying, whilst unattractive, did not undermine the strength of NNPC's pleaded case in fraud, supported as it was by the evidence supplied in compliance with the order of Flaux J. Nor did it establish that NNPC's challenge to the Award in Nigeria was not made *bona fide*. The DDPP's view reached on 22 October 2008 was based on the evidence that the prosecution was intending to call, principally that of the 7 creditors and not on NNPC's analysis of the scheduled documents referred to in the POF and Mr Wogu's evidence. The view of the DDPP came nowhere near qualifying as a sufficient change of circumstances to warrant going behind the Consent Order and considering afresh whether to enforce the Award.

Occurrence 7

99. Reliance was placed on a change of evidence in Mr Wogu's witness statement of 27 September 2013 in respect of "the MII documents". The position is a complicated one and is set out in paragraphs 77-81 of the judgment. In essence in his 27 September 2013 statement Mr Wogu said that his first witness statement of 12 July 2013 incorrectly gave the impression that MII documents were forged prior to the issue of the Award when the MII forgeries were in fact created after the Award for the purpose of the audit. This change of heart, it was submitted, seriously undermined Mr Wogu's earlier evidence in support of NNPC's application to vary Tomlinson J's order and was an attempt to turn post-award forgeries into pre-award ones.
100. The judge was left in no doubt that in his witness statement of 12 July 2013 Mr Wogu said that MII documents were forged pre-Award; but it was not clear whether he said this in his Background Statement and his second police statement. The judge was unsure why Mr Wogu said what he did in his July 2013 statement; but he did not feel obliged to conclude that the whole of his evidence had been rendered worthless. The statement did not undermine NNPC's fraud case to anything like the extent necessary to justify going behind the Consent Order. Moreover, where the POF pleaded forged MII documents it made clear that these documents were not submitted to the Tribunal, but were relied on as evidence from which a fraudulent submission of other documents to the tribunal could be inferred. This development was "*within the range of risk*" that IPCO must be taken to have accepted when it entered into the Consent Order.

Occurrence 8

101. The decision of the Nigerian Federal Court of Appeal made on 15 October 2012 setting aside the earlier grant of leave on 20 February 2007 to appeal Auta J's decision that he would determine NNPC's Re-Re-Amended Motion to set aside the Award and IPCO's Preliminary Objections thereto was, Mr Black submitted, such as to set back the civil proceedings in Nigeria over the validity of the Award some 5 ½ years and was the sort of circumstance envisaged by Tomlinson J as a sufficient ground for re-exercising the Court's discretion.
102. As to this the judge took the view that in April 2008, when Tomlinson J gave judgment, an appeal from the decision of Auta J of 20 February 2006 could take four years down to 2010 and a further appeal to the Supreme Court an additional five years. When IPCO agreed to the Consent Order in June 2009 it could have had no expectation as to when the fraud allegations would be dealt with and must have been fully aware of the risk of very significant further delay resulting from the introduction of the fraud allegations. In addition it was IPCO's fault that led to the decision of the Court of Appeal on 15 October 2012.

The judge's decision

103. Accordingly, as he held, IPCO had failed to establish any change of circumstances justifying a further application to enforce the Award.

Exercising the discretion if there was a change of circumstances

104. The judge also decided that, even if he had been persuaded that it was appropriate to consider enforcement afresh, he would still have refused to enforce any part of the Award because, in his opinion, NNPC had a good *prima facie* case that IPCO practiced a fraud on the Tribunal which undermined the validity of the whole Award [94]. He reached that conclusion for 4 reasons.
105. First, he was presented with conflicting expert opinions on Nigerian law. He thought that the appropriate course would have been to assume that there was a realistic prospect that the Nigerian Court would agree with the view of Mr Daudu SAN, a legal practitioner of over 20 years standing, that the whole Award would be vitiated if NNPC's fraud allegations were substantially proved.
106. Second, he thought that any reassessment would have to be on the basis that NNPC's fraud allegations would not be statute barred in Nigeria, that also being Mr Daudu's opinion.
107. Third, he was not satisfied that the evidence of fraud on a *Soleh Boneh* assessment of NNPC's fraud case would be subject to the principle stated in *Ladd v Marshall* [1954] 1 WLR 1489. There was in fact no evidence before him as to whether in Nigeria the principles in that case applied to applications to set aside an award on the grounds that it had been procured by fraud.
108. Fourth, he considered the evidence that NNPC had adduced which he held established a good *prima facie* case that numerous claims submitted to the Tribunal were fraudulently inflated. The judge considered a Schedule provided to him giving particulars of the evidence relied on by NNPC in respect of each of the POF that related to a Variation claim. He noted that in respect of about 17 of the pleaded Variation frauds NNPC alleged that fraudulently altered POs were submitted to the Tribunal⁴. In many other instances NNPC relied on admittedly forged documents, including the MII forged documents, which were not put before the Tribunal but which were relied on to support the claim that the documents that were submitted were dishonestly inflated.
109. He also referred to NNPC's reliance on the witness statements of Mr Wogu made on 12 July and 27 September 2013. In the former, as the judge summarised it:

"... Mr Wogu confirms what he says in his two police statements and he goes on to state that: (i) the Variation claims were prepared by Mike Simpson, Doug Atkin, John Fowler and Wale Badmus, all of whom were employed by IPCO; (ii) forged documents were generated by himself and others as backups to the inflated amounts claimed in respect of Optional Items and Variations in the arbitration; and (iii) the creation of these documents was authorised variously by Messrs Peter Rea, Paul Lawrence and Jim Bazor."

⁴ For example, in support of the quantum of Variation 14, IPCO produced in the arbitration and Mr Atkin, a senior manager, certified as "true and accurate" a Purchase Order and Priced Material List for a total sum of \$ 629,174.75. The Nigerian Police located original versions of these documents which showed a value of \$ 421,085. The total figure in the Purchase Order was altered and a New Price Material List was, so it appeared, forged from scratch.

110. He also referred [100] to the witness statements made by representatives of 13 of IPCO's subcontractors⁵, who confirmed that documents submitted to the Tribunal in relation to purported supplies from their firms were forged or related to non-genuine supplies. These documents supported 4 of the alleged Variations frauds and 15 of the Optional Items frauds (although the Award did not order any payment in relation to the latter – amounts in respect of these were claimed and recovered in High Court proceedings). In addition he referred to reports from Mr Radley, NNPC's handwriting expert to the effect that the handwriting on the Purchase Orders submitted by IPCO to the Tribunal was, for the most part, verifiable as that of Mr Wogu and that there was strong evidence that Mr Wogu wrote the text of the writing shown on 6 poor quality photocopies of such Orders. There was also evidence from the handwriting experts that Mr Rea and Mr Lawrence wrote all of the signatures on the admittedly forged documents.
111. The judge also recorded [103] a particular finding of Mr Radley, who:
- “... noticed from some impressions on certain documents that: (i) an original invoice, purportedly from Frankie Enterprises, dated 28 October 2008, had been written whilst resting on an IPCO PO dated 12 November 1998; (ii) the original of an invoice, purportedly from Geodiez Nigeria Ltd, dated 3 January 1999, had been written while resting on an IPCO PO dated 15 January 1999; and (iii) the entries and signature on an IPCO monthly time chart dated August 1997 were all written whilst the document remained in the same position whilst on top of a SPCC⁶ dated 31 March 1997. In the experts' joint statement, Mr Ansell agreed with Mr Radley's analysis of these 3 documents, but in his Addendum he expresses the view that the 3 examples given by Mr Radley do not amount to mass or multiple fabrication of documents but may only, taken alone, indicate "administrative error or poor office practices".”*
112. NNPC contended that the two invoices could not, if genuine, have been written on top of IPCO's retained copies of POs since (i) the invoices would have been written at the offices of the suppliers and not on IPCO's retained copy of the PO; and (ii) the invoice date should follow, not precede, the date of the PO. In addition (a) representatives of the two suppliers had confirmed that the invoices put forward in the arbitration were forgeries and (b) the entries on the time chart had been filled out all in one go (since the chart had not moved during the completion of all the entries) contrary to what would normally be expected.
113. The judge also had [105] the evidence of Mr Atkin, a senior manager of IPCO who gave evidence at the arbitration, that IPCO staff, at the behest of senior management, had altered the original PO (termed by him the “Reference Purchase Order”) by tippexing out the original total value and substituting a larger one. These documents, which were “*never issued to any supplier*” were then, at least in some cases, relied on as evidence of quantum in the arbitration. They did not record the true value of the supply recorded on their face. IPCO's case in respect of these documents is that the alterations reflected additional costs which it had incurred such as freight, customs duties, off-loading, storage and handling, the

⁵ In addition to 2 who had given evidence in early 2009, before the Consent Order.

⁶ Subcontractor Payment Control Certificate.

cost of installation testing and commissioning and of the de-commissioning and removal from site of surplus items and that the “*Total value*” box was honestly intended to reflect and did reflect the true cost of the work installed. The documents were however put forward to the tribunal without explanation as to the alteration and there was, as the judge accepted, “*considerable force*” in the submission that the tribunal would naturally assume that the “*Total value*” simply stated the purchase price of the items and not any subsequent costs. He also observed [111] that the use of Reference Purchase Orders sat ill with the fact that for many other claims IPCO submitted a PO stating the purchase price and, for associated costs included a separate item in the Calculation Sheet under the heading “*INL Support Items*”.

114. He could have added that the altered Total value did not consist simply of adding to the original total a sum representing freight etc. Instead, at least in one of the examples we were shown, the individual items making up the original total value had been altered, and not by some identical percentage.
115. The judge also considered the evidence in response of Mr Fowler, and Mr Rea of IPCO [107] – [108]. Their evidence was that Mr Wogu created forged documents after the Award in order to persuade an independent accountant, Ms Funke Okubadejo, that falsely stated liabilities in the P & L statement were genuine. By creating false liabilities Mr Wogu would, they said, have the ability to control substantial funds once the Award was honoured.
116. He also considered [109] Mr Wogu’s 12 July 2013 statement in which he denied this allegation and stated that it would have been impossible for him to organise payments to himself or IPCO’s contractors given IPCO’s sophisticated payment controls. Mr Wogu also said that there were no such things as “*Reference Purchase Orders*”. The judge, not surprisingly held that IPCO had failed to provide any convincing explanation as to how Mr Wogu would have been able to engineer the receipt by himself of the inflated Variation proceeds.
117. In the light of all that the judge concluded that NNPC had established a good *prima facie* case that was fit to go to trial in Nigeria for the reasons which he set out at [111] of his judgment.
118. The judge considered the submission that he should apply a sliding scale balancing the merits of the challenge against the likely timescale before it was determined so that where that challenge would not take place within any commercially relevant timescale discretion should be exercised in favour of enforcement. He considered the case of *Continental Transfer Technique Ltd v Federal Government of Nigeria* 697 F. Supp.2d 46 (2010), a decision of the US District Court for the District of Columbia and its reference to the factors that the US Court of Appeals for the 2nd Circuit stated in *Europcar Italia S.p.A. v Maiellano Tours* should be weighed when determining whether to adjourn an enforcement application under Article VI of the Convention. I refer to the latter case below.
119. Having done so he concluded that, if he were exercising the discretion under s 103 (5) afresh he would order an adjournment on terms that the existing security

of \$ 80 million should be maintained with liberty to apply notwithstanding the likely delay in the determination of NNPC's challenge in the light of:

"...i) my finding that NNPC has a good prima facie case that IPCO fraudulently procured a substantial part of the Award rendering it arguable that the Award as a whole is vitiated; (ii) the scrutiny of NNPC's challenge to the Award in Nigeria would likely be of a higher level than that undertaken in this court pursuant to the Soleh Boneh approach; (iii) the parties, both of whom are Nigerian, agreed to an arbitration in Nigeria; (iv) considerations of comity that are due to the courts of Nigeria; (v) the presence in Nigeria of a plenitude of NNPC assets against which IPCO could enforce if NNPC's challenge were unsuccessful; (vi) the continued applicability of the orders made by Tomlinson J and the Court of Appeal that NNPC must maintain security in the sum of US\$80 million."

120. Accordingly IPCO's application to enforce the Award failed. The judge finished his judgment with a call upon the Nigerian courts to use their powers of case management to expedite not only the hearing of NNPC's challenge to the Award but also any resulting appeals. He observed that :

"For the sake of the parties and the reputation of the Nigerian legal system, this Gordian Knot must surely be cut as quickly as possible".

The Knot remains uncut.

Ground 1 of the appeal

121. Mr Black submits that the likelihood is that the issue as to the validity of the Award will not be determined in Nigeria for 20 years or more. In effect the question whether IPCO is entitled to enforce will not be determined in any commercially relevant timescale. In those circumstances the challenge to the Award should be treated *as if* it was one which would never be determined. The judge should, therefore, have lifted the adjournment. In doing so the court would (a) avoid subjecting the Award to a permanent adjournment on no more than, at best, a *prima facie* case of fraud; (b) give effect to the predisposition to enforcement under the New York Convention; and (c) require NNPC properly to establish its fraud challenge with appropriate evidence to the requisite standard of proof.
122. Instead what the judge has done, he submits, is to postpone the question of enforcement indefinitely and wrongly to place a burden on IPCO to prove that NNPC's case is "*hopeless and/or not bona fide*". Influenced by that approach he has, when deciding how he would have exercised his discretion, assumed that he had to approach matters on the most favourable basis to NNPC by assuming that disputed issues of Nigerian law would be determined in NNPC's favour.

General principles

123. In *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 this court was concerned with an application to enforce an award. Lord Justice Staughton, with whom Roch and Neil LJ agreed, said this:

“In my judgment 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, for example, by movement of assets or by improvident trading, 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 insufficient⁷ net assets within the jurisdiction the case for security must necessarily be weakened”

124. Thus the more plausible the challenge to the validity of the award the less disposed will the court be to enforce it or grant security; the greater the prejudice arising from non-enforcement the less likely will the court be to refuse it without ordering security; and *vice versa* in each case. In the result in that case the court thought that the contention that the arbitrator was not validly appointed was seriously arguable and ordered security in the sum of \$ 5 million when the award was for \$ 9.8m.
125. “*Sliding scale*” is not, in my view, an entirely correct metaphor unless understood, not as a reference to a slide rule but to a pair of scales. There are opposing factors to be weighed in the balance. I accept, however, that marginal changes in the plausibility of a challenge are unlikely to lead to enforcement if it has been denied before and that, if a *prima facie* case of fraud remains, the Court will be very reluctant to order immediate enforcement. Nor is it appropriate for the Court to be asked to keep some sort of watching brief over the curial court and revisit its assessment of the merits if there is any change in the apparent cogency of the challenge.
126. In his decision in the present case [2005] 2 Lloyd’s Rep 326 Gross J set out the relevant principles in the following terms:

“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**

⁷ The report has “*insufficient*” but there was a dispute before us as to whether this was a misprint for “*sufficient*”.

enforce the award: Mustill & Boyd, *Commercial Arbitration*, 2nd edition, 2001 Companion, at p.87.

- 12 Secondly, s.103 (2) (f) is only applicable when there has been an order or decision suspending the award by the court in the country of origin of the award ("the country of origin"). S.103 (2) (f) is not triggered automatically by a challenge brought before the court in the country of origin. This conclusion flows from the wording of s.103(2)(f) itself, it is supported by leading commentators (Van den Berg, *The New York Convention of 1958* (1981), at p.352, Fouchard, Gaillard, Goldman on *International Commercial Arbitration* (1999), at pp. 980-1) and it is consistent with the provisions of s.103(5) of the Act – which would be otiose, or at least curious, if an application to the court in the country of origin automatically resulted in the award being suspended.
- 13 Thirdly, considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution: *DST v Rakoil* [1987] 2 Lloyd's Rep. 246, at p.254. The reference to public policy in s.103 (3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s.103 (3) is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice: Mustill & Boyd, at pp. 91-2.
- 13 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.
- 14 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.....

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

- 15 *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 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”.*

127. When the decision of Tomlinson J in this case was considered by the Court of Appeal - [2009] 1 Lloyd's Law Rep 94 - this Court held that it was open to the court to enforce part of an award if it is possible to enter judgment “*in terms of the award*”. The court endorsed [73] to [76] of his decision. It also referred [19] to the importance of uniformity in the implementation of the Convention and derived assistance from an Austrian case on enforcement of part of an award.
128. Reference is often made in this context (and was made by the judge) to the decision of the US Court of Appeals for the 2nd Circuit in *Europcar Italia S.p.A. v Maiellano Tours* 156 F,3d 319 (1998) as to the factors to be weighed when determining whether to adjourn an enforcement application under Article VI of the Convention:

“(1) *the general objectives of arbitration – **the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;***

- (2) ***the status of the foreign proceedings and the estimated time for those proceedings to be resolved;***
- (3) *whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;*
- (4) *the characteristics of the foreign proceedings including (i) whether they were brought to enforce the award (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;*
- (5) *a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive "suitable security" and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country ... and*
- (6) *any other circumstances that could tend to shift the balance in favor of or against adjournment...*

Because the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards, the first and second factors on the list should weigh more heavily in the district court's determination."

Conclusion on ground 1

129. IPCO did not submit, and neither expert suggested, that the challenge to the Award will never be determined; and I do not regard it as appropriate to approach this case *as if* that was so. To do so would be to introduce a hypothesis that is likely to be wrong. At the same time the likely delay is a plainly material factor.

Did the judge apply the right test in deciding whether or not to re-open the exercise of the court's discretion?

130. Insofar as the judge decided that the court should only consider the re-opening of the exercise of its discretion if IPCO showed that the fraud case was hopeless or not made *bona fide*, he applied, in my view, too strict a test. The relevant question was whether there had been a significant change in circumstances since the Consent Order which impinged on or related to the reason for seeking a variation: as Tomlinson J had held. Whilst the Consent Order had been made on the basis that there was a sufficiently arguable challenge to the Award to justify a further adjournment of the question of execution a significant change to the plausibility of the argument for annulment of the award might justify a reconsideration of the

exercise of discretion, especially if taken with other factors such as delay, even if it could not be said that the fraud case was completely hopeless.

131. Although IPCO accepted that the Court would “*exercise its discretion following a brief consideration of the available material as to whether your client’s allegations have a real prospect of success*” (a reference to the *Soleh Boleh* approach) and described its decision to agree to an adjournment as based on a “*realistic assessment that the English Court is unlikely ... to determine at this stage that your client’s proposed challenge to the award on the variations head of claim has no real prospect of success*” I do not regard that as accepting that no diminution of the prospects of success, however major, could be treated as a change of circumstances, unless, as a result, the challenge could properly be described as hopeless. The application of so rigid a criterion is (a) inconsistent with the *Soleh Boleh* approach, which deals with degrees of plausibility, and (b) ignores the potential significance of extended delay. An applicant in the position of IPCO is not entitled to a second bite at the same cherry; but a fresh cherry may prove fruitful to him.
132. Whilst there is a distinction between deciding (a) whether to re-open the exercise of the court’s discretion; and (b) if so, how to exercise it, the considerations relating to the two issues are closely intertwined such that in practice the question is a composite one and I propose to consider it as such.

IPCO’s primary case

133. IPCO contends that there has indeed been a significant change in the plausibility of the fraud claim and, even more so in the delay now in question, such that the Award should now be enforced.
134. As to the former, IPCO points out that there have been the following developments:
- a) The 7 creditors have withdrawn their evidence;
 - b) Mr Wogu has recanted on his evidence that the forged MII documents were used to secure the Award; and
 - c) The Nigerian criminal proceedings have been dropped twice and only survive because they have been farmed out to NNPC who want them to continue in order to resist enforcement.
135. Against that there is the material which the judge took into account and to which I have referred in [105] to [116] above. These matters, arising for the most part after the date of the Consent Order seem to me to have *improved* NNPC’s case on fraud. Further the POF were based almost exclusively on documentary evidence which has not changed since the Consent Order.
136. If I consider the strength of the case for challenging the Award on the grounds of fraud without reference to other considerations it does not seem to me that the judge was in error in deciding that there were insufficient grounds to exercise a discretion afresh and to do so in IPCO’s favour. In the light of Mr Wogu’s

evidence, both to NNPC and to the police in 2008 and in his very detailed statement of 12 July 2013, and the other material before the judge, together with the Schedule of evidence relied on put before the judge and of subcontractor evidence produced by NNPC in October 2013. there remains a good *prima facie* case that the Award was in part obtained by fraud. The grounds of appeal do not claim that there was not.

The 7 creditors' second statements

137. The evidence of the 7 creditors was, of course, originally relied on. But, in truth, it was of limited value and never a critical part of NNPC's fraud challenge (as opposed to the Nigerian police's first prosecution).
138. The thrust of the statements was that Chief Alagba had seen a document in IPCO's offices recording inflated sums as being due to his company and others. Chief Alagba's first witness statement of 20 December 2008 complained of the non-payment of N 3,962,926 due to IPCO as at October 2008 in respect of the provision of security men for a court house building where work had stopped. It referred to a total of N 1 billion being said to be due to the contractors on the list. But the list was not available; nor did the evidence of the 7 creditors show what IPCO had claimed from NNPC in respect of each of the creditors in relation to the BET project.
139. The letter of 15 October 2008 from Danagogo had been written on behalf of 77 companies, including the 7 creditors, whose true claims on IPCO totalled nearly N 223 million. This is obviously much less than the N 1 billion referred to by Chief Alagba as being on the list he saw. The discrepancy between the two figures is unaffected by the 7 creditors' second statements.
140. The 7 creditors' witnesses evidently felt reluctant to give evidence in the criminal proceedings and highlighted the undoubted limitations of their statements. They did not, however, suggest that anything in them was false but emphasized that Chief Alagba had never seen any forged documents (he never suggested that he had) and that they only knew what he had told them (as was apparent from their original statements).

Mr Wogu's recantation

141. The fact that Mr Wogu had to accept that he was wrong to say in [85] of his 12 July 2013 statement that the MII forgeries were used "*for most of the foreign purchase orders used in the Variations submissions to the arbitral tribunal*", was obviously a significant *volte face*. (The change of heart also appears to be inconsistent with three examples in relation to forgeries that he had given in his statement headed "*Background*" of 20 November 2008). But it was not, in my view, one of such significance as either to demolish the case that he makes or to weaken it to such an extent that the judge should have re-exercised the discretion and permitted enforcement, particularly in the light of the Court's reluctance to allow an applicant a second (or third) bite at the cherry on the issue as to the strength of the challenge.

142. Moreover it was a change (in September 2013) to a statement (in July 2013) that had not been made by him at the time of the Consent Order. It might be possible for an alteration to a statement made after the Consent Order to have such an effect on the case presented before that date as to amount to a significant change of circumstances if, for instance, the alteration demonstrated that the witness could not be believed. But, like the judge, I do not regard the September 2013 statement as undermining NNPC's case to anything like the extent necessary. Further, as the judge noted [91], NNPC's case as to the forged MII documents was that these documents were not submitted to the Tribunal but were evidence from which a fraudulent submission of other material could be inferred. Mr Wogu's evidence had always been that some forgeries were created after the Award for the purpose of completing a paper trail for IPCO's auditors: see his "Background" statement and both of his statements to the police. In his second statement to the police he made reference to an MII invoice being used for the purpose of submission to the auditors. I note that at [86] of his second statement Engr Bello said that there were "*very many cases where there is an MII invoice in the amount of a fraudulently inflated claim, but not produced to the Tribunal*".

The criminal prosecutions

143. The abandonment of one, and the proposed abandonment of another, criminal prosecution, are obviously relevant considerations. But the significance of it is not very great. The original prosecution appears to have been dropped because of the retraction of the evidence of the 7 creditors and without reference to the evidence of Mr Wogu. The most recent expression of opinion from the AG is that there is a *prima facie* case against IPCO: see [76] above. Further at the time of the letter of discontinuance of 14 January 2013 (see [73] above) most of the evidence relied on by NNPC – Mr Wogu's statement of 12 July 2013, the expert forensic analysis of August 2013, IPCO's admission that it altered documents which were put before the tribunal, and the evidence of the 13 subcontractors – did not even exist.
144. In short, in my judgment there had not been by the time of the hearing below such a change of circumstances relating to the plausibility of the fraud challenge as required the judge to decide that the discretion should be exercised again in favour of enforcement.
145. In reaching this conclusion I have not ignored the fact that, as both parties' experts agree, NNPC will have to prove its fraud challenge in Nigeria to the criminal standard decades after the relevant events in circumstances where the witnesses for IPCO are currently between 60 and 80. I do not regard that as, of itself, a reason for enforcement particularly since the difference between the criminal and the civil standard is not greatly different where fraud is concerned.
146. Nor have I ignored the fact that the judge proceeded on the assumption that if fraud in some respect was proved the entire Award would be set aside and that limitation would not be a bar. There was, in the light of the expert evidence filed, a realistic prospect, as the judge found, of NNPC establishing both of these propositions, although both were disputed. Since that was so he was entitled to proceed, *for present purposes*, as he did, on the assumption that NNPC would overcome these hurdles. He was not thereby assuming that, at the end of the day, NNPC would establish those propositions but only, as he said, that there was *a*

realistic prospect of establishing, and that it was arguable, that the Award as a whole was vitiated: see [95] and [115] of the judgment. The judge was not bound to hold a hearing of the expert evidence and reach a finding of fact. Nor do I think, as was suggested by Mr Black, that, in the light of the Court's pre-disposition to enforcement, the onus of proof on NNPC, and the existence of conflicting opinions on Nigerian law, the judge was bound to assume that limitation would be a fatal bar to NNPC's claim; or that, because the Nigerian Court might take that view, the judge should have thought that there was no realistic prospect of the fraud challenge succeeding.

Prospect of repayment

147. The strength of the case is an important but by no means the only consideration. Another relevant consideration is the prospect of repayment by IPCO if, after payment by NNPC, the Award is eventually set aside, in whole or in part. Since IPCO's only real asset is the Award the prospect of repayment is illusory.

Delay

148. When the matter came before Gross J in 2005 "it was confidently expected by both sides that the strike-out application would have been determined by the end of 2005 at the latest". When matter came before Tomlinson J in early 2008 he described the subsequent developments as "*catastrophic*". At that stage Tomlinson J had evidence from IPCO's expert witness, retired Supreme Court Judge Eso, that it was likely to take at least four years for the appeal from Auta J's decision of February 2006 to reach the Court of Appeal. This would mean determination in early 2010, although NNPC's expert - Mr Fagbohunlu - thought that the appeal might be disposed of by October 2008 [49]. Tomlinson J thought that Judge Eso's estimate of the time for disposal was more realistic. Whatever decision was made by the Court of Appeal there could then be an appeal to the Supreme Court, on law as of right and on fact with permission, which might take up to 5 years. There were a number of possibilities as to what the Court of Appeal might decide should happen and the decisions made by first instance judges in consequence would themselves be open to appeal to the Court of Appeal and the Supreme Court.
149. Tomlinson J then said this:

*"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."*

150. It is not entirely clear to me whether in the sentence beginning “*The potential delay involved ...*” Tomlinson J was referring, as I think to be the case, to (a) the period between the hearing before him in April 2008 and whenever the Court of Appeal gave judgment on the appeal (in the event May 2015) plus five years to get to the Supreme Court; or (b) to a delay of five years after the decision of the Court of Appeal until a decision was reached at first instance in consequence of that decision. In favour of (a) is the fact that the reference to five years appears to relate to the time taken to get to the Supreme Court to which Tomlinson J had been referring in the preceding paragraph and (ii) the fact that the next sentence contemplates that “*at the conclusion of that period*” Okeke J might give judgment, which is something that would arise after the determination by the Court of Appeal and, possibly, the Supreme Court. In addition, it seems somewhat unlikely that if the decision of the Court of Appeal was that Okeke J should read out her ruling it would take 5 years from the decision of the Court of Appeal for her to do so.
151. The judge went on to observe that the prospects as to what might occur after the ruling on the preliminary objection were “*equally dismaying*”. The appeal process – to the Court of Appeal and, potentially, the Supreme Court – could take 8 or 9 years.
152. The Consent Order was made 14 months later.
153. The position at the time of Field J’s judgment (April 2014) was as follows. First, IPCO’s application of 5 June 2009 to enjoin NNPC from prosecuting its application to amend to plead fraud and its Preliminary Objection of 10 June 2009 to NNPC’s application to amend remained undetermined.
154. Second, whereas Tomlinson J contemplated that the appeal from Auta J’s judgment would be determined in early 2010, it had still not been determined. The result was that, so far as the non-fraud challenge to the Award was concerned, NNPC was in 2015 back to where it was in February 2006 – save, of course, for the fact that IPCO could not appeal to the Court of Appeal but could still appeal to the Supreme Court, which might take another five years. In April 2014 the fact that the Court of Appeal might not deliver judgment for another a year was well on the cards.
155. How long it will now take for the preliminary objection to be determined by Auta J is unknown. There could then be an appeal to the Court of Appeal and thence to the Supreme Court – a process which could, on past form take as much as to 9 - 14 years from the time when Auta J reaches his decision. If the result is that the Preliminary Objection is overruled it will then be necessary for the High Court to hear the challenge to the Award, followed by an appeal to the Court of Appeal and, possibly, the Supreme Court. That appeal process could take a similar length of time. In addition there could be a further lapse of time between the decision of any final appeal court on the Preliminary Objection and any subsequent decision on the challenge at first instance.
156. In relation to the fraud challenge it will similarly be necessary for the court to deal with the Preliminary Objection to that challenge. The ruling on that could go to the Court of Appeal and the Supreme Court. If that Objection fails the Court will

have to address the merits of the fraud challenge. The ruling on that could also go to the Court of Appeal and the Supreme Court. Whether the non-fraud challenge and the fraud challenge could be consolidated is not apparent. Given the fragmented way in which challenges have so far proceeded in this case I do not have great confidence in that occurring.

157. It is not clear whether or not the existence of the criminal proceedings will themselves act as a brake on the progress of the challenges to the Award. It is not beyond the bounds of possibility that someone will suggest that there should be no determination of the fraud challenge before the outcome of the criminal trial.
158. The analysis set out above derives from (i) a consideration of the applications now in issue; (ii) the timescales for determination at first instance contemplated by Tomlinson J; (iii) and what has happened in fact. It is supported by the expert evidence before Field J. The Hon Justice S.M.A. Belgore, former Chief Justice of Nigeria, instructed on behalf of IPCO, agreed with the evidence of the late Justice Eso that it was “*conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for twenty or thirty years or longer*”. I take him to be meaning another 20 or 30 years from the date of his report in 2013 rather than from that of Justice Eso in 2007 i.e., at the very lowest, an additional 6 years. Consistently with that he said that there had been no change in the delay in the administration of justice in Nigeria since Justice Eso made his first witness statement and that in fact the circumstances were “*far worse*” as the courts were experiencing more congestion.
159. Field J did not accept that there had been any significant change of circumstances with regard to delay because IPCO “*must have been fully aware of the risk of very significant further delay resulting from the introduction into the extant proceedings of the fraud allegations*”.
160. If one leaves the fraud challenge aside for a moment, the position in relation to the non-fraud challenge is that the appeal from Auta J was determined five years later than Tomlinson J had estimated – in May 2015 and not early 2010 - so that the time from first instance (February 2006) to Court of Appeal (May 2015) decision had increased from 4 years to 9.
161. As to the fraud challenge, no evidence was put before the Court as to the delays to be expected consequent on its introduction and, as appears from paras [44] - [49] above, I do not accept that the Consent Order was made by the Court on any particular basis as to timing. In addition the order contained an express permission to apply, whose function was to enable the Court to revisit the question of adjournment in the light of subsequent developments or the lack of them.
162. Further still, the sequence of events since September 2010, which involved the striking out of one criminal charge, the filing of another, a decision to discontinue that prosecution followed by a decision to farm it out to NNPC was itself a significant development.
163. By the time Field J gave judgment in 2014 the fraud challenge, initiated in Nigeria in 2009 had not proceeded at all. This was because on the same day as the Consent Order was made NNPC agreed that its application to amend to plead

fraud should be heard after the determination of IPCO's appeal from Auta J. Since the Court had asked for information but was never told of the agreement to delay the fraud challenge until after the appeal from Auta J it was open to it to revisit the question of adjournment in the light of that agreement.

164. I do not find it profitable to seek to determine which party (if either) is more to blame for the delay, which appears, to me in large measure, to result from the workings of the Nigerian legal system. IPCO's use of the Preliminary Objection mechanism in relation to the non-fraud challenge was a cause of delay but, like Tomlinson J, I regard it as a course which IPCO was entitled to take. The same applies to the appeal from Judge Auta. The Court of Appeal's determination, *mero motu*, of 19 May 2011 that the IPCO Notice of Appeal had been signed by the wrong person and the sequel thereto set matters back in relation to the non-fraud challenge for years and was not something that in 2009 anyone would have expected. To an outside observer the decision and its sequel seems a highly technical one, particularly in circumstances where the Court of Appeal had granted permission to appeal on 20 February 2007 and NNPC had made no objection thereafter. The error was no doubt IPCO's responsibility but NNPC sought to take full advantage of it by its own motion of 13 April 2012. The permission given in 2007 was then set aside in October 2012.
165. By its applications of 5 and 10 June 2009 IPCO sought, for reasons which are not apparent, to postpone the question of whether NNPC could amend to plead fraud until after the appeal. That sits ill with the impression given by IPCO's solicitors in the correspondence leading to the Consent Order that matters might be determined in relatively short order. But NNPC consented to this postponement. So both sides appear to have thought it appropriate to clear the decks by dealing with the non-fraud challenge first. No attempt appears to have been made by the parties to secure an early determination of either the non-fraud or the fraud allegation or of NNPC's entitlement to make them or any consolidation of the two. This may well be because, as Justice Eso had said in his evidence, there was no real prospect of an accelerated hearing of any appeal or application.
166. It has now become plain, from what has and has not occurred, and from the expert evidence, that the situation in respect of the delay to be expected before any resolution of NNPC's challenge to the Award has gone beyond the "*catastrophic*" description adopted by Tomlinson J in 2008. The doubling of time between first instance and Court of Appeal decision in relation to the decision of Auta J (on what might be thought to be one of the simpler issues in the case) was significant in itself. It also has a significant knock-on effect because that increase in delay (together with the evidence that delays have got far worse) potentially applies to any subsequent series (of which there may well be more than one) of appeals in relation to both the non-fraud and the fraud challenges. What has happened is significant both as a crystallisation of what was previously to some extent a matter of a speculation as to how long the appeal would take and as an eye-opener as to what is likely to happen in future in relation to both sets of challenges to the Award. These changed circumstances, which relate directly to the reason why an adjournment was granted in the first place, required in 2014 and, *a fortiori*, require now, a reconsideration of the exercise of the Court's discretion to adjourn.

Exercising the discretion

167. The judge decided, for the reasons which he gave, that, if it fell to him to exercise a discretion afresh, he would order the continuance of the adjournment on terms that the existing security of \$ 80 million was maintained (with liberty to apply) “*notwithstanding the likely delay*”. Those words fail, in my view, to give any real or sufficient weight to the character and extent of the delay, which is such that any challenge to the Award is not likely to be resolved for up to a generation from now. Such a result makes a mockery of the aim of the Convention which is to secure the expeditious resolution of commercial disputes and the timely enforcement of awards. In failing to take this into account and to recognize that there had been a significant change in circumstances, and how significant it was, the judge was, in my view, in error. It thus falls to us to exercise the discretion afresh.
168. What then are we to do? We are faced with a stark choice. If we order that the Award be enforced, the enforcement may well be successful and will certainly be successful as to \$ 80 million. If it is, the prospect of NNPC recovering the amount paid if the Award is, in the end, set aside in Nigeria is practically non-existent. That may mean that IPCO receives payment under an Award which it obtained by fraud. I agree with the submission of NNPC that that is a course which the Court should be deeply reluctant to take.
169. We could, of course, permit enforcement conditional on the provision of adequate security by IPCO for the return of the monies if the Award was set aside by NNPC. Such security might itself be difficult and expensive for IPCO, which is not a State organisation, to procure from a bank or similar institution (since it would require payment many years hence) and would probably involve IPCO’s parent either tying up money indefinitely or providing security over its assets for a very long period. Even if security was provided the final resolution of the validity of the Award would probably not take place for decades.
170. If, on the other hand, we decline to order enforcement the result is likely to be that IPCO, if the Award is upheld, will not be entitled to receive the fruits of it for a generation (albeit with interest at the currently generous rate of 14%). That, in commercial terms, is absurd. It is inconsistent with the principles that underpin the New York Convention, which was intended to foster international trade by ensuring a relatively swift enforcement of awards and a degree of insulation from the vagaries of local legal systems. Such a result in effect, converts the Award, which ordered payment within 21 days, into a 30 + year Loan Note. To describe an order that produces such a result in a case of this kind as an “*adjournment*” or a “*temporary holding measure*” is something of a misnomer.
171. Further, whether IPCO or its group will be around by the time that any payment is made is uncertain. In the light of that timescale it is impossible to be wholly confident that NNPC would exist in its present form. In addition delay of the type now under consideration is likely to impair the fairness of any trial of the fraud issue.
172. I am conscious of the need for comity between the Courts of friendly foreign States, especially when the Court in question is the Court of the seat of the arbitration to which the parties agreed. But – and I intend no disrespect whatever to the judges of the Federal Republic of Nigeria – the plain fact of the matter is that

the operation of the judicial system in Nigeria has not kept pace with the need to give effect to the principles underlying the New York Convention⁸. The fact that parties are permitted to take preliminary objections to applications with the result that, if the objection fails, the original application has then to be heard, with the possibility of at least one and quite likely two appeals in relation to both the preliminary objection and the original application, coupled with the increasing demands on the Nigerian legal system, and the absence of any fast track procedure or active case management, renders the process sclerotic⁹.

173. The English Courts are not to be regarded as some kind of reserve tribunal for deciding on questions as to the validity of awards which ought, *prima facie*, to be determined by the court of the seat. But it is, in my view, necessary to take account of the principles underlying the Convention, to which both the United Kingdom and Nigeria are parties, in determining what course to take, and, so far as possible, to give effect to them.

Decision

174. In my judgment the appropriate course to take is as follows. First, we should order that IPCO's application to enforce should be adjourned pending the determination by the Commercial Court pursuant to section 103 (3) of the Act as to whether the Award should not be enforced in whole or in part because it would be against English public policy so to do.
175. Second, we should make that order conditional upon the provision by NNPC of further security in a form and within a time period to be agreed, or if not agreed, to be determined by this Court, in the sum of \$ 100 million.
176. Third, we should order that, if such security is not provided within a period which we shall specify from the time when the form of security is agreed or determined, IPCO shall have permission to enforce the Award.
177. Fourth, we should order that, if such security is provided, then, if and to the extent that it is determined by a final order of the courts of England and Wales that the enforcement of the Award is not contrary to the public policy of England & Wales, IPCO may enforce it.
178. Fifth, there shall be Permission to apply to the Commercial Court.
179. I regard this as the appropriate solution for a number of reasons. It is consistent with the underlying purpose of the Convention. It provides a route by which the question whether enforcement of the Award should be granted, or refused on the ground that it was obtained by fraud, will be determined within a reasonable timescale and with a depth of review on that question which is unlikely to be less

⁸ See Justice Eso: "*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*".

⁹ Justice Eso's evidence reveals that Nigeria had by 2007 set up a committee to examine the existing system and make recommendations towards the modernisation of arbitration law and practice in Nigeria in an attempt to make it meet with international standards but, so far as I am aware, it has not yet published any recommendations.

than that of the courts of Nigeria. Mr Nash made it plain that NNPC was prepared to deal with the fraud challenge in this jurisdiction (although its contention was that the adjournment ordered should continue) and wanted the fraud issue to be determined.

180. I recognise that that will mean that, if enforcement is not inconsistent with English public policy, it will be enforceable in England notwithstanding the challenges to it in Nigeria. This Court is not however bound to defer enforcement until the court of the seat has ruled on a challenge, however long that may take. In my view, the position has now been reached when the Award should (unless the fraud challenge here succeeds) be enforced, notwithstanding the existence of a non-fraud challenge which will only finally be determined in Nigeria in a far too distant future.
181. I have considered whether, as an alternative, the Court should either enforce part of the Award or increase the security beyond the \$ 80 million currently provided but otherwise allow the adjournment to continue. Given that interest is accruing at 14% per annum the \$ 80 million figure for security confirmed in 2008 is now well behind the figure due when allowance is made for interest. Further, on IPCO's calculations, NNPC's fraud challenge is said to affect only about \$ 23.7 million¹⁰ of the \$ 138 million outstanding principal of the Award (see the Schedule to Mr Rea's second witness statement) and the number of cases in which apparently fraudulent documents were produced to the tribunal is limited. But fraud is alleged in relation to all but one of the Variations the subject of the Award. IPCO's calculations are that, overall nearly \$ 90 million, including interest, was unchallenged and unpaid. IPCO accepted that in relation to 8 of the POF there were apparently forged documents and in relation to 17 of the POF there were altered RPOs, at least 15 of which were produced to the tribunal. In addition the forged MII documents, although not put before the tribunal, are relied on by NNPC as evidence that the claims to which they related were fraudulently increased.
182. I have, however, come to the conclusion that, in circumstances where there is a viable challenge to the whole Award it is inappropriate to order any part of it to be paid; and that an increase in security alone does not address the real problem. .
183. In those circumstances it is unnecessary to determine whether it is feasible, on the facts of the present case to order enforcement of part of the Award "*in the terms of the award*".
184. The course which I propose will require the English Court to determine whether it would be against English public policy to enforce the Award. But that is something that it would have to do anyway before it could order enforcement and had been the subject of NNPC's application to the Commercial Court of 18 December 2008. I recognise that that is an issue which will be determined as a matter of English public policy which may not be the same as that of Nigeria. I do not, however, regard the possibility that the English Court would permit

¹⁰ The figure in the schedule at page 3/1150A in column [C] is \$ 23,144,559.71 to which is to be added \$ 591,919.49 being the difference between \$ 844,970.56, which we were told was the correct figure for Variation 9 and \$ 253,051.07, the figure in the Schedule, making \$ 23,736,479.20.

enforcement on public policy grounds when the Nigerian Court would not as sufficient ground to preclude the course which I propose. In any event, as the judge pointed out, the proposition that fraud vitiates the whole Award (which is something that I do not decide) finds support in English law principles. It may turn out that English law is more severe than that of Nigeria, whose law on the subject is, itself, in dispute.

185. In deciding whether the Award was obtained by fraud the Court will not be engaged in a review that pays any deference to the Award itself, since the issue will be whether, unbeknownst to the tribunal, it was obtained by fraud. In this respect both the English and the Nigerian Court will be deciding an issue of fact and the only potential (but by no means certain) difference between them is as to whether fraud means that the whole of the Award is vitiated. Lastly I can see no other way to cut the Gordian knot in a manner that does substantial justice to the parties.

Westacre

186. In *Westacre Investments Inc v Jugoinport-SPDR Ltd* [2000] 1 QB 288 this court was concerned with the enforcement of an award that was said to have been obtained by perjury. Waller LJ, departing slightly from the decision of Coleman J, indicated the circumstances in which under the New York Convention a party should be entitled to pursue the allegation that an award had been obtained by fraud in the following terms:

“But I would thus agree with the judge that normally the conditions to be fulfilled will be (a) that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators; and (b) where perjury is the fraud alleged i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result.”

187. The application of this test may have curious results in a case where the court of the seat applies a less rigorous test in respect of the admission of evidence of fraud. The English court, applying *Westacre*, may decline to consider the fraud challenge on the ground that one or other or both of the *Westacre* conditions are not satisfied, in circumstances where the court of the seat, will apply a less stringent test in deciding to entertain an application to set the award aside for fraud. If that is so, the case for an adjournment of enforcement will, all other things being equal, be that much the stronger.
188. As to the first condition, IPCO’s position, confirmed after the Court had raised the possibility of a s 103 (3) hearing was that it would waive any reliance on the first condition. The order should record this.
189. As to the second condition, the court’s formulation includes the words “i.e. where the very issue before the arbitrators was whether the witness or witnesses were lying”. I do not understand it to have been suggested at the arbitration that IPCO’s witnesses were lying. However, I see no good reason for adopting a different approach in a case where perjury is alleged subsequently; now where what is

alleged is that the Award was obtained by the production of documents that were known to be false or forged. Insofar as such documents were vouched by witness statements, the maker, if he had the necessary knowledge, would, if he confirmed that statement on oath or affirmation, be a perjurer and the Award would have been obtained by fraud even if the knowingly false statement had not been sworn to.

190. The circumstance in which a challenge of this kind is usually raised is before there has been any response to the allegation of perjury. Here the position is different because the allegation of fraud has been raised and at least in part responded to. Nevertheless IPCO is, in my view, entitled to the protection that the principle established in *Westacre* affords. Accordingly it will be for NNPC to identify which is the evidence that it relies on as passing that test and in respect of what allegations it is said to be satisfied. It will be for the Commercial Court judge to decide whether, and in relation to which allegations, the second condition is satisfied.
191. Such evidence may include evidence emanating from IPCO e.g. the admission that the so called “Reference Purchase Orders” were put before the tribunal which had been altered from their original form. Whilst there is a degree of artificiality in divorcing the account given by IPCO (that purchase orders were presented to the Tribunal with figures that differed from the original) and the explanation (that the amendments were made as part of a process of recording the true cost) in the context of this case I consider the division justifiable. The purpose of Waller LJ’s test is to assess whether there is a *prima facie* case of fraud which is sufficient to overcome the extreme caution of the court when invited to set aside an award on the grounds of public policy. If an account is given of what occurred which, absent explanation, would reasonably be expected to be decisive at a hearing, the claim to avoid should not be ruled out of consideration because an answer has been put forward, which, on cross examination of the witnesses or otherwise, may, itself , prove false.
192. It is undesirable that a situation should develop whereby the question whether, and in relation to which allegation, the second *Westacre* condition is satisfied leads to a lengthy trial, which, insofar as the condition is satisfied, is then followed by what is, at least in part, a lengthy replay. The question is a preliminary and threshold one which is to be determined on a relatively brief assessment; and without reference to any answer that may be put forward. If and to the extent that there is dispute about whether the condition is satisfied it will be for the Commercial Court judge to ensure that it is determined in an expeditious manner. I would hope that there could be a measure of agreement e.g. in relation to the RPOs that the condition was met.
193. I would not rule out the possibility of a “rolled up” hearing at which the Court decides whether the second *Westacre* condition is satisfied and, if it is, whether fraud is, in the light of IPCO’s answers or explanation, established. My preliminary assessment is that that is not the preferable course because it will not, unless the judge gives a judgment at half time in relation to the *Westacre* condition, filter out any allegation. It will, however, be for the parties and the judge to decide.

Costs

194. IPCO contends that, even if its appeal were to fail, it should be entitled to set off the order which the judge made that it should pay NNPC's costs, and any order made against it by this Court, against the Award. That is, in effect, a contention that we should now recognise the Award. However, the Court has power under s 101 (1) of the Act to adjourn recognition as well as enforcement. In my view we should, of our own motion, adjourn any question of recognition of the Award until after the determination of the question whether to enforce it is against public policy. Any order for costs made below (if upheld) and any order made by us should take effect without set off. This is what the judge decided and I agree with him. It would not be right to allow any costs ordered against IPCO to be set off now against an Award which IPCO may not be entitled to enforce. That would, in effect, be a partial enforcement of the Award.

Lord Justice Burnett

195. I agree.

Lord Justice Sales

196. I agree.