

# Court confirms arbitral tribunal's construction of an arbitration agreement as to the correct seat of the arbitration

By Richard Bamforth & Emily Hudson

In *Process and Industrial Developments Ltd v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm) the court granted an application to enforce a US\$6 billion arbitral award against the Federal Republic of Nigeria. A key issue underlying the application related to the jurisdiction of the arbitral tribunal and its decision as to the seat of the arbitration. The judgment provides a helpful overview of these issues and confirms the prevailing view that the English court will seek, where possible, to uphold parties' agreements to arbitrate as well as arbitration awards themselves.

## Background

The parties entered into an agreement for the construction and operation of a gas processing facility through which Process and Industrial Developments Ltd ("PID") would supply gas to the Federal Republic of Nigeria ("Nigeria"). The agreement was governed by Nigerian law and contained an arbitration agreement, which set out the process for the commencement of arbitration and constitution of the tribunal. Importantly, the arbitration agreement stated that "the venue of the arbitration shall be London, England or otherwise as agreed by the Parties".

When a dispute arose in relation to the agreement, PID commenced arbitration. The procedural history continued as follows:

- The tribunal was appointed and made an interim award on certain preliminary issues. The interim award referred to the seat of the arbitration as being England and ended with the words "place of arbitration: London, United Kingdom".
- Hearings subsequently took place in London and resulted in an award on liability, which included the same wording as the interim award in relation to the place of

arbitration.

- Nigeria issued proceedings before the English court seeking for the award on liability to be set aside: this claim was later dismissed.
- Nigeria commenced proceedings in Nigeria, again seeking to set aside the award on liability. One of the grounds relied upon was that the parties had effectively agreed that the seat of arbitration was Nigeria. This was the first time that an issue as to the arbitral seat had arisen.
- Correspondence then ensued before the tribunal as to whether the seat of arbitration was London or Nigeria. Nigeria contended that the mention of venue within the arbitration agreement did not designate the seat of arbitration. PID's position was that the parties had agreed to London as the seat of arbitration through the arbitration agreement or, alternatively, that this had been determined by the tribunal without objection from Nigeria, as confirmed in the interim award and award on liability. The tribunal did not hear any submissions on this issue but stated that they would make a finding on the point.



- In the interim, Nigeria obtained an injunction from the Nigerian court, restraining the parties from continuing with the arbitration. PID confirmed to Nigeria that it would not participate in the Nigerian proceedings.

- The tribunal made a procedural order confirming that the seat of the arbitration was London. The tribunal concluded that the parties had agreed upon London as the venue in the arbitration agreement and this meant the selection of London in the juridical sense, invoking the supervisory jurisdiction of the English court.

- Nigeria sought a further order from the Nigerian court setting aside the procedural order; this application was ultimately not pursued and was struck out.

- The Nigerian court set aside the award on liability.

- The arbitration continued (with Nigeria reserving its position as to the award on liability) leading to a final award on damages

against Nigeria.

- PID issued proceedings seeking enforcement of the final award.

## Judgment

### *Seat of arbitration*

It was not in issue that supervisory jurisdiction over the arbitration could only be exercised by the courts of the arbitral seat; the key question was whether the provision of a venue within the arbitration agreement represented a choice of seat or merely a geographic location for hearings. Mr Justice Butcher held that it was implicit in the parties' agreement to arbitrate that the tribunal could determine any issue as to the arbitral seat, including by construing the arbitration agreement. The tribunal was entitled to make the procedural order as to the arbitral seat and had not acted in breach of the Nigerian injunction in so doing, as it was not named as a party in those proceedings. Nigeria argued that there had been procedural unfairness as, *inter alia*, the parties had not had the opportunity to address the tribunal as to the correct arbitral seat. However, the judge found that

remedies for procedural unfairness in respect of the procedural order were available to Nigeria but it did not utilise them. In fact, Nigeria had not pursued, and allowed to be struck out, the Nigerian proceedings seeking to set aside the procedural order. Furthermore, Nigeria had invoked the English court's jurisdiction itself, by seeking an order to set aside the award on liability.

Mr Justice Butcher noted that the tribunal's procedural order as to seat was issued before the order of the Nigerian court setting aside the award on liability. As such, the Nigerian order was ineffective, on the basis that it was made by a court that was not the supervisory court. Neither the procedural order, nor the final damages award, had been set aside by any court. The procedural order determined the arbitral seat as being London and therefore Nigeria could not ask the court to revisit this question.

### *Issue estoppel*

Mr Justice Butcher also held, as alternatively argued by PID, that the tribunal's procedural order as to the arbitral seat created an issue estoppel which then precluded any further argument before the court on this issue. There was no issue between the parties that two of the four conditions required for an issue estoppel had been met, namely identity of parties and subject matter. Whilst a further condition is that a decision should be final and conclusive and the key determination on the seat formed part of a procedural order only, the judge found that this could in fact be regarded as final and conclusive at the point at which the order could no longer be reviewed by the tribunal, which was at the latest when the arbitration concluded. The final condition, that a judgment must be given by a foreign court of competent jurisdiction, was met as the judge found that the tribunal did have jurisdiction to make the procedural order.

### *Construction of arbitration agreement*

It was not in issue that construction of the agreement was governed by Nigerian law and it was agreed by the parties that Nigerian principles of construction should be taken to be the same as those of English law. On that basis, the judge agreed with the tribunal that the agreement provided for the seat of arbitration to be in England. The reference to a venue represented an anchoring of the entire arbitration to London rather

than simply providing that the hearings should take place there. A reference to venue solely as geographical location would be an inconvenient provision which the parties were unlikely to have intended. The judge also held that there had been an agreement by conduct, based upon the wording contained within the interim award and the award on liability as to seat and venue of the arbitration. Nigeria did not object to these statements and continued to participate in the arbitration.

### *Enforcement of final award*

The judge dismissed Nigeria's argument that the court should refuse enforcement of the arbitral award, as contrary to public policy. Mr Justice Butcher did not consider that there was any element of penalty or punitive damages in the sums awarded; in any event, whilst it was open to Nigeria to challenge the final award, it had not done so. The grounds on which enforcement of an award can be refused by reason of public policy are narrow and it is necessary to have regard to the strong public policy in favour of enforcing arbitral awards. There was no public policy requiring the refusal of an enforcement of an arbitral award of compensatory damages, even if those damages were higher than those which might be awarded by the English court.

### **Comment**

The judgment emphasises the importance of the seat of arbitration, as determinative of which courts have supervisory jurisdiction over the arbitration proceedings. The choice of seat will have significant implications for an arbitration and is therefore an issue which merits careful consideration at the outset when drafting the arbitration agreement. Parties should be reminded that a reference to a 'venue' or 'place of arbitration' may be taken to mean the arbitral seat, so should pay attention to this in their drafting, particularly in ad hoc arbitration agreements.

The judgment also confirms the English court's general support for arbitration, in terms of recognising the terms upon which parties agree to arbitrate as well as confirming the policy arguments in favour of upholding arbitral awards themselves where possible. In these types of high value disputes, the judge's pro-arbitration comments should be welcomed by parties involved in arbitrations with some nexus to England.

## ABOUT THE AUTHORS



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