Neutral Citation Number: [2019] EWHC 2241 (Comm)

Case No: CL-2018-000182

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/08/2019

**Before** :

**MR JUSTICE BUTCHER**

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**Between :**

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| **PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED** | **Claimant** |
| **- and -** | |
| **THE FEDERAL REPUBLIC OF NIGERIA** | **Defendant** |

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**Ian Mill QC** (instructed by **Kobre & Kim (UK) LLP**) for the **Claimant**
**Harry Matovu QC** (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Defendant**

Hearing dates: 14th June 2019

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# Approved Judgment

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

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MR JUSTICE BUTCHER

**MR JUSTICE BUTCHER :**

Introduction

1. This is an application by the Claimant, Process and Industrial Developments Ltd ("P&ID"), pursuant to s. 66 Arbitration Act 1996, for an order that P&ID have leave to enforce an arbitration award dated 31 January 2017 in the same manner as a judgment or order of this court to the same effect. The Defendant, the Federal Republic of Nigeria ("the FRN"), resists the making of such an order.

2. The award of 31 January 2017 to which this application relates is stated to be a Final Award made by the majority of a tribunal consisting of Sir Anthony Evans, Chief Bayo Ojo SAN, and Lord Hoffmann ("the Tribunal"). The majority was comprised of Sir Anthony Evans and Lord Hoffmann, and Chief Bayo Ojo dissented. I will refer to that award as "the Final Award".

3. The Final Award was made in arbitration proceedings relating to a dispute between P&ID and the FRN arising out of a Gas Supply and Processing Agreement (the "GSPA") entered into between P&ID and the FRN acting by its Ministry of Petroleum Resources ("the Ministry"), dated 11 January 2010.

4. An application to enforce an arbitration award under s. 66 Arbitration Act 1996 is a summary procedure. It usually does not require a detailed investigation of the facts of the arbitration. In the present case, however, because there is an issue between the parties as to the seat of the arbitration, and as to whether enforcement under s. 66 Arbitration Act 1996 is available to P&ID at all, it is necessary to summarise the salient facts.

Factual Background

5. Under the terms of the GSPA between the parties:

   (1) The FRN was to supply natural gas ("Wet Gas"), at no cost to P&ID, via a government pipeline, to the site of P&ID's production facility.
   (2) P&ID was to construct and operate the facility necessary to process the Wet Gas by removing the natural gas liquids ("NGLs") contained within it, and to return to the FRN lean gas suitable for use in power generation or other purposes, at no cost to the FRN.
   (3) P&ID was to be entitled to the NGLs stripped from the Wet Gas.
   (4) The GSPA was to run for 20 years from the date of first regular supply of Wet Gas by the FRN.

6. Clause 20 of the GSPA provided, in part, as follows:

> "The Agreement shall be governed by, and construed in accordance with the laws of the Federal Republic of Nigeria.
>
> The Parties agree that if any difference or dispute arises between them concerning the interpretation or performance of this Agreement and if they fail to settle such difference or dispute amicably, then a Party may serve on the other a notice of arbitration under the rules of the Nigerian Arbitration and

> Conciliation Act (Cap A18 LFN 2004) which, except as otherwise provided herein, shall apply to any dispute between such Parties under this Agreement. Within thirty (30) days of the notice of arbitration being issued by the initiating Party, the Parties shall each appoint an arbitrator and the arbitrators thus appointed by the Parties shall within fifteen (15) days from the date the last arbitrator was appointed, appoint a third arbitrator to complete the tribunal. …
>
> The arbitration award shall be final and binding upon the Parties. The award shall be delivered within two months after the appointment of the third arbitrator or within such extended period as may be agreed by the Parties. The costs of the arbitration shall be borne equally by the Parties. Each Party shall, however, bear its own lawyers' fees.
>
> The venue of the arbitration shall be London, England or otherwise as agreed by the Parties. The arbitration proceedings and record shall be in the English language.
>
> The Parties shall agree to appropriate arbitration terms to exclusively resolve any disputes arising between them from this Agreement."

7. By 2012 a dispute had arisen in relation to the GSPA. P&ID contended that the FRN had failed to make available Wet Gas in accordance with the GSPA. On 22 August 2012 P&ID served its Notice of Arbitration. On 19 September 2012, P&ID appointed Sir Anthony Evans to act as arbitrator. On 30 November 2012, the FRN appointed Chief Bayo Ojo, SAN as its arbitrator. The two arbitrators invited Lord Hoffmann to become "chairman" of the arbitral tribunal, and he accepted this appointment on 29 January 2013.

8. By its initial Statement of Case in the arbitration, served on 28 June 2013, P&ID claimed that the FRN was in repudiatory breach of the GSPA, and that that repudiation had been accepted. P&ID claimed damages, quantified at that stage as US$5,960,226,233 plus interest.

9. On 3 July 2014 the Tribunal made a unanimous Part Final Award. It bore the heading "In the matter of the Arbitration Act 1996 (England and Wales) and in the matter of an arbitration under the Rules of the Nigerian Arbitration and Conciliation Act (Cap A18 LFN 2004)". That Part Final Award dealt with certain preliminary issues which arose. The first was as to whether the Tribunal had jurisdiction to rule on its own jurisdiction. It held that it had. It said that the Arbitration Rules scheduled to the Nigerian Arbitration and Conciliation Act 1988 ("ACA") were clear on this point, and cited Article 21 of those Rules. It continued in paragraph 36: "By the law of the seat of arbitration, England, section 30(1) of the Arbitration Act 1996 confers a similar jurisdiction." The Part Final Award also determined that the Ministry and the Government of the FRN were one and the same, and it had entered into the GSPA on behalf of the Government. The Part Final Award specified, at the end: "Place of arbitration: London, United Kingdom".

10. A hearing on liability took place before the Tribunal on 1 June 2015. On 17 July 2015 the Tribunal issued a second Part Final Award, which has been referred to on this application, and to which I will refer, as "the Liability Award". It bore the same heading as the first Part Final Award. In the Liability Award the Tribunal unanimously decided that the FRN had repudiated the GSPA by failure to perform its obligations thereunder; that P&ID was entitled to and did accept the FRN's repudiation of the GSPA; and that P&ID was entitled to damages, in an amount to be assessed, for the repudiation of the GSPA. The Liability Award stated, at the end: "Place of arbitration: London, United Kingdom".

11. Following the Liability Award, there occurred a number of matters which have been the subject of debate on this application, and which it is necessary to refer to in somewhat more detail.

12. On 23 December 2015 Stephenson Harwood LLP, acting for the FRN, issued an Arbitration Claim Form in this Court (ie the Commercial Court). In that Claim Form the "Remed[ies] Claimed" were as follows: (1) an order under CPR Part 62.9(1) extending the time under s. 70(3) Arbitration Act 1996 for an application under s. 68 of that Act; and (2) an order setting aside the Liability Award and/or remitting it for further consideration under s. 68(2)(d) or s. 68(2)(f) Arbitration Act 1996, on the basis that there had been a serious irregularity. The Grounds specified in the Claim Form were: (A) that there was an internal inconsistency in the Liability Award; (B) that the Tribunal had not dealt with the Ministry's case that it lacked factual authority to perform the GSPA separately from its case that it lacked legal capacity to do so; and (C) that there had been no reasoning on the issue of whether the Ministry's conduct was repudiatory.

13. The FRN's solicitors served a witness statement in support of its applications for an extension of time and under s. 68 Arbitration Act 1996. This was a statement of Folakemi Adelore, the Director of Legal Services at the Ministry, and was dated 22 December 2015. Ms Adelore stated (at paragraph 10) that the proposed claim was brought 4 months, 8 days out of time; that "this delay was not in any way deliberate or calculated"; and that the reason for it was the political situation in Nigeria, which had seen elections on 28 and 29 March 2015 result in the defeat of the administration of President Goodluck Jonathan, and a subsequent period in which the new administration was settling into office, meaning that ministers, including the Attorney-General of the FRN, had only been appointed in November 2015.

14. Ms Adelore's witness statement stated, at paragraph 22:

> "On 21 July 2015, TMS [Twenty Marina Solicitors (the legal representatives of the Ministry in Nigeria)] advised me as to whether the Award failed completely and/or clearly to address the issues presented by the Respondent and as to whether or not it should be challenged accordingly. The Ministry understood that in order to challenge the Award, it would need to instruct a firm of solicitors in the U.K. given that any such challenge would have had to be before the English courts under the English Arbitration Act 1996. (Nothing set out in this statement shall constitute a waiver of privilege.)"

15. Ms Adelore's witness statement further stated, at paragraph 33:

> "Since receipt of the documents on 25 November 2015, Stephenson Harwood and Leading Counsel have been considering the merits of the Applications, advising the Ministry on the same and preparing the Applications. The issue of jurisdiction of this Court and the seat of the Arbitration had first to be considered, in particular given the differing headings on the various procedural orders and the Part Final Award dated June 2014."

16. As is standard practice, the FRN's applications were put before a judge of the Commercial Court on paper. On 10 February 2016 Phillips J made an order dismissing the FRN's application for an extension of time. Phillips J's Reasons stated that there was no adequate explanation for the delay. Paragraph 3 of those Reasons was as follows:

> "In refusing to extend time I further take into account that the grounds of appeal have no merit. As to ground (A), it is incorrect to say that the Tribunal found that the claimant was not in breach of art 6(a): the finding was that the claimant had put itself in a position where it was impossible for it to comply with art 6(a) by virtue of its own breach of art 6(b). There was no internal inconsistency in the Tribunal's reasons. As to ground (B), the Tribunal clearly addressed the actual authority of claimant to enter and perform the GSPA, holding that that was the *prima facie* position and rejecting the claimant's arguments to displace that starting point. There was no ambiguity or confusion in its findings between the concepts of capacity and authority. As to ground (C), there was a clear and sufficient finding that the breach of art 6(b), rend[er]ing it impossible to perform art 6(a), was a repudiatory breach. The contention that separate consideration should have been given to a breach of art 6(b) alone is misconceived."

17. After this decision by Phillips J, by Originating Motion dated 24 February 2016 the Minister of Petroleum Resources of the FRN commenced proceedings in the Lagos Judicial Division of the Federal High Court of Nigeria. The Originating Motion sought essentially the relief which had been sought in the English action: an extension of time, and the setting aside and/or remission of the Liability Award. One of the Grounds of this application was stated to be that "The parties have effectively agreed that the seat of arbitration is Nigeria and consequently Nigerian law is the *lex arbitri*." In the Affidavit in Support sworn by Safiat Kekere-Ekun, she said that after the ruling of Phillips J, the FRN had "embarked on a careful and comprehensive review of the entire case file of the arbitration proceedings … followed by series of brainstorming sessions particularly with respect to the seat of the arbitration." She said that, as a result of this consideration, she believed that the GSPA was "more closely connected to Nigeria than any other country including England", and that "the present Applicant's reference to the English courts was as an inadvertence."

18. The Originating Motion and, the Affidavit in Support were sent to P&ID's representatives and to the members of the Tribunal, by email, on 4 March 2016. On 7 March 2016, the legal representatives of the Ministry wrote to the Tribunal, requesting an extension of time to serve its statement on damages. The letter stated: "As the Tribunal is aware, we are dissatisfied with the Award on liability; we are currently contesting the Award in a court of law." This produced a response from SCA Ontier on behalf of P&ID on 8 March 2016. That response strongly opposed any extension of time. As to the mention of a contest to the Liability Award in a court of law, SCA Ontier referred to the prior application to the English court, following consideration of the issue of the location of the seat by the Ministry's legal team. SCA Ontier stated that "P&ID regards [the Nigerian] proceedings as abusive and as a deeply unattractive attempt to forum shop." The Ministry's legal representatives responded to this on 9 March 2016. That letter stated, in part "It cannot seriously be contended that the parties have agreed to any other curial law or law governing the proceedings of this arbitration than the Nigerian Arbitration and Conciliation Act 1988 … and the Rules made pursuant thereto… Since the claimant has chosen to address matters of 'seat' not raised in our request we feel it is important to respond by way of clarification. Contrary to the Claimant's assertion the issue of seat of the arbitration has not been determined by any Court. Furthermore, and contrary to the Claimant's assertion, the arbitration clause did not designate 'England as the Seat of the Arbitration'. The Arbitration clause merely makes mention of the 'venue' of the arbitration. In any event we fail to see the relevance of these matters to the fairly straight forward application for extension of time."

19. On 10 March 2016, SCA Ontier replied to the email of 9 March 2016. This email stated that P&ID's position was that the parties had agreed, by the arbitration clause in the GSPA, that London was the seat of the arbitration; alternatively, it had been determined by the Tribunal, without objection from the FRN, by the statement in the two Part Final Awards and in procedural orders that the "Place of Arbitration" was London; alternatively, by the English Court's assumption of jurisdiction at the invitation of the FRN. The Ministry's representatives took issue with this by email on 11 March 2016, stating that "Place of Arbitration" referred simply to the venue for hearings; and that the Ministry had "always maintained its position that this arbitration including its seat is Nigeria." SCA Ontier replied on the same date, disagreeing, and stating that the "place of the arbitration" meant the seat; and also referring to a letter which P&ID's solicitors had written on 24 October 2013 which had stated that the seat of the arbitration was London with which no issue had been taken by the Ministry until 2016. The Ministry's legal representatives disputed these matters on 13 March 2016.

20. On 14 March 2016 Lord Hoffmann, on behalf of the Tribunal, sent an email to the parties' legal representatives. This email stated: "The Tribunal notes the correspondence between the parties as to (1) the seat of arbitration (2) the respondent's application for an extension of time for it to serve its evidence. The Tribunal will shortly give a ruling on these matters and does not invite further submissions."

21. On the same date, Mr Shasore SAN on behalf of the Ministry sent an email to the Tribunal which stated: "Respondent has not made an application for determination of seat which we do not believe is in controversy. We merely asked for extension of

time." The terms of this email are perhaps surprising. That a "controversy" in relation to the seat of the arbitration had by now arisen was quite clear from the correspondence of the previous ten days.

22. On 16 March 2016 the Tribunal gave to the FRN an extension of time for its statement and evidence on quantum until 8 April 2016. On 18 March 2016 SCA Ontier wrote to the Ministry's legal representatives, copying in the Tribunal, saying that it was clear that the issue of the seat of the arbitration was in controversy and that "the Tribunal's forthcoming determination of the issue of seat will provide necessary clarity on the point." On 1 April 2016 SCA Ontier wrote to the Tribunal encouraging it to rule on the seat of the arbitration prior to a hearing in the Nigerian proceedings scheduled for 20 April 2016.

23. In response to these developments, on 5 April 2016 the Ministry issued a Motion on Notice in the action which it had commenced in the Federal High Court of Nigeria giving notice that it would seek "An order restraining the parties in this suit whether by themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate directly or indirectly in the arbitral proceedings between the parties before: Lord Leonard Hoffmann ('Presiding Arbitrator'), Sir Anthony Evans, and Chief Bayo Ojo, SAN pending the hearing and determination of this suit." A copy of this Motion was sent by email to SCA Ontier and to the Tribunal on 5 April 2016.

24. SCA Ontier responded on 8 April 2016, stating that P&ID would not be participating in the Nigerian proceedings, "inter alia on the basis that London is the seat of the arbitration", and (amongst other things) that "the reality is that your client's recently instituted Nigerian proceedings, including its application for injunctive relief, are an illegitimate attempt to circumvent the ongoing arbitration and a breach of your client's own obligation to participate in the arbitration in good faith."

25. The Ministry's response was, on 14 April 2016, to ask the Tribunal to await the outcome of the pending interlocutory application in the Nigerian Courts. SCA Ontier on 19 April 2016 urged the Tribunal to make a prompt ruling in relation to the issue of the seat of the arbitration, which was "now especially urgent" in light of the hearing in the Nigerian Courts scheduled for 20 April. On the same day, Lord Hoffmann responded on behalf of the Tribunal:

> "The Tribunal acknowledges receipt of [SCA Ontier's email of 19 April 2016]. Until now, the Tribunal has not considered that there was an issue arising in the arbitration which required it to pronounce upon where the seat is located. It has not been invited to do so by the Nigerian court. However, if that court were to grant an injunction affecting the arbitration, the Tribunal would of course have to rule on the question of the seat in order to decide what effect should be given to the injunction. [SCA Ontier's email of 19 April 2016] invites the Tribunal to give such a ruling in advance of any decision in Nigeria. The members of the Tribunal will consult on whether it would be appropriate to do so."

26. On 20 April 2016, the Hon Justice I.N. Buba made an order in the Lagos Judicial Division of the Federal High Court of Nigeria, as follows

> "(1) That an order is granted to the Applicant [the Minister of Petroleum Resources] restraining the parties to this suit whether by themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate directly or indirectly in the arbitral proceedings between the parties before: Lord Leonard Hoffmann ('Presiding Arbitrator'), Sir Anthony Evans, and Chief Bayo Ojo, SAN pending the hearing and determination of the Motion on Notice dated 5/4/2016."

The Court adjourned the hearing of the substantive application for an extension of time and to set aside or remit the Liability Award until 23 May 2016.

27. The fact that this order had been made by the Nigerian court was notified by the Ministry's legal representatives to the Tribunal, and to SCA Ontier, by email on 21 April 2016. On that date SCA Ontier also wrote to the Tribunal referring to the events in the Nigerian Court on the previous day, and saying "we would be grateful if the Tribunal would confirm that a ruling will now be made on the question of seat" and "it would assist [P&ID] to know if that ruling is likely to be made prior to 23 May 2016."

28. On 26 April 2016 the Tribunal made "Procedural Order No. 12". It stated at the end: "Place of arbitration: London", and was "signed on behalf of the Tribunal" by Lord Hoffmann as "Presiding Arbitrator". Procedural Order No. 12 was to the following effect:

(1) In light of the Ministry's commencement of proceedings in the Federal High Court in Lagos, it was apparent that there was a dispute between the parties as to whether the Nigerian courts were entitled to exercise supervisory or curial jurisdiction over the arbitration, and that this depended on whether Nigeria or England was the "seat" or "place" of the arbitration. It was stated that "This is an important question, not only for the purpose of determining the jurisdiction to supervise the proceedings and award, but also for the purpose of the enforceability of the award."
(2) That the issue of the seat of the arbitration had been first raised by the Ministry in its originating motion in the High Court of Lagos on 24 February 2016; that it had been contested by P&ID and that the parties had made submissions on it in letters or emails dated 8, 11 and 13 March 2016.
(3) That P&ID had requested a ruling on seat before the injunction granted by the Nigerian court. "The Tribunal considers that it must therefore consider the question of the seat of arbitration for the purpose of deciding the future conduct of the arbitration. The Tribunal has the power to determine its own jurisdiction (section 12 of the Nigerian Arbitration Act) and its opinion on the disputed question may also be of assistance to the Nigerian court."
(4) That, as to the law, the meaning of the words "the venue of the arbitration shall be London, England" in the GSPA were to be construed in accordance with Nigerian law, and reference was made to s. 16 of the ACA. The Tribunal concluded that

the parties had agreed on the "place of the arbitral proceedings" within s. 16(1) of the ACA and thus that the Tribunal's power to determine that place was excluded. The question was as to what was the effect of the choice of London by the parties. Having referred to the fact that the ACA was based on the UNCITRAL Model Law, to textbook authority, and to the decision of the Supreme Court of Nigeria in Nigerian National Petroleum Corporation v Lutin Investments (2006) 2 NWLR (Pt 965) 506, the Tribunal said:

> "In the opinion of the Tribunal, the parties' selection of London as 'the venue *of the arbitration*' rather than of any particular steps (such as hearings) *in the arbitration* indicates that London was selected under section 16(1) as the place of the arbitration in the juridical sense, invoking the supervisory jurisdiction of the English court, rather than in relation to any particular events in the arbitration."

(5) That in any event, by reason of matters in the course of the arbitration – set out in paragraphs 19-39 of Procedural Order No. 12 – "the parties and the Tribunal have consistently acted upon the assumption that London was the seat of the arbitration", and that "the Tribunal considers that the Government must be taken to have consented to this being the correct construction of the GSPA."

29. On 9 May 2016 the FRN issued an originating motion in the Nigerian Courts seeking to set aside the Tribunal's Procedural Order No. 12 and to remove the arbitrators. This motion contended that the Tribunal had misconducted itself, had not given the FRN a proper opportunity to present its case on the issue of seat, and had violated the obligation to provide the FRN with a fair hearing. It was contended that Procedural Order No. 12, which it argued was a partial award, was contrary to Nigerian public policy. The action commenced by this originating motion was ultimately struck out on 21 November 2016 for want of prosecution by the FRN.

30. On 24 May 2016 the High Court of Lagos made an order in the action which had begun on 24 February 2016 as follows:

> "1. That an order is granted to the Applicant enlarging the time within which the Applicant may apply to set aside the arbitration award of the tribunal on liability dated 17th July 2015 …
> 2. That an order is granted to the Applicant setting aside and/or remitting for further consideration all or part of the arbitration Award of Lord Leonard Hoffmann, Chief Bayo Ojo, SAN and Sir Anthony Evans and for such further or other orders as this Honourable Court may deem fit to make in the circumstances."

31. When this order was notified to the Tribunal, Lord Hoffmann emailed the parties on 27 May 2016, as follows:

> "… As the parties will be aware from Procedural Order No 12, the Tribunal has decided that the seat of the arbitration is England. It follows that the Federal Court of Nigeria had no jurisdiction to set aside its Award.
>
> The Tribunal will therefore be proceeding with the reference and would be grateful if the Respondent would indicate whether it intends to take part in the proceedings. It wishes to

> issue a Procedural Order for the further conduct of the arbitration and would therefore wish to have the Respondent state its position before Friday 3 June 2016."

32. On 21 June 2016, the Ministry wrote to the Tribunal saying that it intended to participate in the damages phase of the arbitration "while maintaining its position on the award on liability."

33. The arbitration proceedings continued. There was an oral hearing on quantum on 30 / 31 August 2016. The Tribunal issued its Final Award, as I have said, on 31 January 2017. In the Final Award:

    (1) The majority of the Tribunal found that, had the FRN not repudiated its obligations under the GSPA, P&ID would have performed its obligations thereunder, and had therefore suffered loss in the amount of the income over 20 years from the sale of the NGLs which would have been extracted from the Wet Gas supplied by the FRN, less CAPEX and OPEX.
    (2) As the damages had to be assessed once and for all, it was necessary to estimate the value of that stream of profit at the time of the breach, making an appropriate discount for the fact that P&ID would be awarded immediate payment of sums which would actually have been received over a 20 year period.
    (3) The net present value of the profits which would have been earned was assessed by the majority as being US$6,597,000,000. It was stated (in paragraph 110): "This is the measure of damages. It is a very large sum because (a) it is the present value of income which would have been earned over a long period and (b) the GSPA would have been very profitable for P&ID and (although the Tribunal has not had to make any findings on the point) probably for the Government as well."
    (4) The FRN was also ordered to pay interest on the sum of US$6,597,000,000 at 7% per annum from 20 March 2013 until the date of the Final Award and at the same rate thereafter until payment.

34. The FRN has not paid any part of the Final Award, and has not applied to set it aside in any jurisdiction.

The present proceedings

35. P&ID commenced the present proceedings in this Court, seeking leave to enforce the Final Award in the same manner as a judgment, on 16 March 2018.

36. On 24 May 2018, the Foreign and Commonwealth Office served the Arbitration Claim Form on the FRN. The FRN did not file an Acknowledgement of Service in time, or until 12 October 2018, when it applied for relief from sanctions. At a hearing on 21 December 2018, Bryan J granted relief from sanctions and set a timetable for the filing of further evidence and skeleton arguments leading to a planned hearing on 15 February 2019. Due to an increase in the time estimate for the hearing, that hearing date was vacated, and the matter came on before me on 14 June 2019.

The nature of the hearing

37. CPR r. 62.18 establishes a procedure whereby an applicant may apply to the court without notice for an order giving permission to enforce an arbitration award in the same manner as a judgment; for the court to give such permission; for the defendant, if it wishes to do so, then to apply to set aside that order; and for there to be no enforcement of the award until after the end of the period in which the defendant may apply to set the order aside or until any application made by the defendant within that period has been disposed of. That is not the procedure which has been followed here, in that P&ID has not sought an order under s. 66 Arbitration Act 1996 without notice, but has sought an order on notice and *inter partes*. This way of proceeding has been sensible in the circumstances. As Mr Mill QC for P&ID submitted, the significant matter to observe is that the objections to enforcement which can be raised by the FRN must be the same as could have been raised on an application to set aside an order made without notice.

38. That, however, is subject to a further particular feature of the present case. Through Mr Mill, P&ID stated that, if the Court were to consider that the juridical seat of the arbitration was not in England and Wales, and thus, as he put it, the Final Award was not "a domestic award", then P&ID's present application under s. 66 Arbitration Act 1996 would fail and should be dismissed. He said that in such circumstances P&ID would take other steps to seek to enforce the Final Award, which I understood to mean an application under s. 101 Arbitration Act 1996 to enforce a New York Convention Award. Whether, in view of s. 2(2)(b) and s. 104 Arbitration Act 1996, this concession was necessary is not clear to me, but it was made, and the hearing proceeded on that basis: P&ID Skeleton, paras. 25, 29.4; Transcript pp. 71-72, 111, 168-169.

The Contentions of the Parties

39. For P&ID, Mr Mill made the following principal submissions.

(1) First, that the Tribunal was entitled to rule, as it did in Procedural Order No. 12, on the seat of the arbitration, and that it is no longer open to the FRN to challenge that ruling. On that basis, the order of the High Court of Lagos on 24 May 2016, purportedly setting aside or remitting the Liability Award was of no effect: the seat of the arbitration was England, and only the English courts had jurisdiction over challenges to an award, and England was the sole forum for remedies seeking to attack an award by the Tribunal.
(2) Secondly, and if necessary for P&ID to succeed which Mr Mill submitted it was not, that Procedural Order No. 12 created an issue estoppel in relation to the seat of the arbitration.
(3) Thirdly, that, in any event, the conclusions of the Tribunal in Procedural Order No. 12 were correct.
(4) Fourthly, and again if necessary, that the FRN's application to the English Court under s.68 Arbitration Act 1996 had itself created an issue estoppel which precluded an argument that Nigeria was the juridical seat of the arbitration.
(5) Fifthly, that the arguments which the FRN has sought to raise as to (a) the award of damages in the Final Award being manifestly excessive and penal, and (b) the Tribunal having no jurisdiction to award pre-award interest, are without merit.

40. For his part, Mr Matovu QC, for the FRN, made the following main submissions:

(1) That the issue of the location of the juridical seat of the arbitration was to be determined in accordance with the law governing the arbitration clause of the GSPA; that that was Nigerian law; and that as a matter of Nigerian law the seat of the arbitration was Nigeria.
(2) That the orders of the Nigerian Court (i) on 20 April 2016 to restrain further conduct of the arbitration, and (ii) on 24 May 2016 to set aside and/or remit the Liability Award were highly significant, given that, as he contended, the Nigerian Court was the supervisory court. Procedural Order No. 12, on this basis, was issued in "flagrant breach" of an injunction of the supervisory court, as well as having been arrived at in a procedurally unfair fashion. Equally, the Liability Award had been set aside by the supervisory court, and the Final Award, which depended on it, was therefore a "nullity".
(3) That the FRN's earlier application under s. 68 Arbitration Act 1996 to the English Court had been a mistake, and had not created an issue estoppel.
(4) That in light of the foregoing there was nothing to prevent the FRN from arguing before this Court that the seat of the arbitration was Nigeria.
(5) If, contrary to these arguments, the seat was England, then nevertheless as a matter of discretion the Final Award should not be enforced because (a) the amount awarded and the basis on which it was awarded were manifestly excessive and contrary to English public policy; and (b) that as a matter of Nigerian law, as the governing law of the GSPA, pre-award interest was not available.

Analysis

41. There are two groups of issues which fall for consideration. In the first place, the issue of what is the seat of the arbitration, and whether it is open to the FRN to contend that it is Nigeria and not England. Secondly, if the seat of the arbitration is England, or if it is not open to the FRN to contend otherwise, are the other bases on which the FRN resists enforcement of the Final Award valid. I will deal with these two matters in turn.

*The Seat of the Arbitration*

42. As I have said, there are issues as to whether it is open to the FRN to contest that the seat of the arbitration was England, and if it is, where the seat was. It is convenient before considering those issues to summarise the legal framework of these debates.

*Legal Framework*

43. There was no dispute that the concept of the legal or juridical seat of an arbitration indicates a link between the arbitration and a system of law. Nor was it in issue that it is the courts of the seat of the arbitration which, alone, will have supervisory jurisdiction over challenges to awards in the arbitration.

44. Section 3 of the Arbitration Act 1996 provides:

> "In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated-
>
> (a) By the parties to the arbitration agreement, or

> (b) By any arbitral or other institution or person vested by the parties with powers in that regard, or
>
> (c) By the arbitral tribunal if so authorised by the parties,
>
> or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

45. In the present case, the GSPA was governed by the laws of the FRN, and clause 20 of the GSPA provides that the rules of the ACA apply to any dispute between the parties. It was not in dispute that the exercise of determining the seat of the arbitration (by whoever conducted) requires a consideration of Nigerian law. In the first place, because Nigerian law is the governing law of the GSPA, questions of construction of the GSPA have to be conducted in accordance with the principles of construction recognised by Nigerian law. Secondly, because of the incorporation of the rules of the ACA it is necessary to see whether and what that Act provides as to what the seat of the arbitration is, and how it may be chosen or determined.

46. The provisions of the ACA include the following:

> "[Section 15] (1) The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the schedule to this Act.
>
> (2) Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected to any particular arbitral proceedings, the arbitral tribunal may, subject to this Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing.
>
> …
>
> [Section 16] (1) Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (2) Notwithstanding the provisions of subsection (1) of this section and unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.
>
> …
>
> [Section 26] (1) Any award made by the arbitral tribunal shall be in writing and signed by the arbitrator or arbitrators.
>
> …

> (3) The arbitral tribunal shall state on the award-
>
> (a) the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms…
>
> (b) the date it was made; and
>
> (c) the place of the arbitration as agreed or determined under section 16(1) of this Act which place shall be deemed to be the place where the award was made."

47. The ACA also provides, by section 12:

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

48. The Arbitration Rules which appear as schedule 1 to the ACA contain, in Articles 15 and 16, the following:

> "General Provisions
>
> Article 15
>
> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
>
> …
>
> Place of Arbitration
>
> Article 16
>
> 1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
>
> 2. The arbitral tribunal may determine the locale of the arbitration within the place agreed upon by the parties. It may hear witnesses and hold meeting for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

> 3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or document. …"

49. It was not in dispute before me that, as it appears in section 16(1), as opposed to section 16(2), of the ACA, the "place of the arbitral proceedings" meant the same as the juridical seat (Transcript p. 119, 125).

50. The issue which, from the end of February 2016 onwards, separated the parties was as to where the juridical seat of the arbitration was, and in particular whether the provision in clause 20 of the GSPA that the "venue" of the arbitration was to be "London, England or otherwise as agreed by the Parties" represented a choice of that seat, or merely of the geographical location where the arbitral tribunal might hold hearings. There was (and is) no issue but that the parties could determine the seat. Equally, there was (and is) no suggestion that this was a case in which, because the parties had not chosen the seat, it fell to the arbitral tribunal to choose the seat.

*P&ID First Argument: Procedural Order No. 12 determines seat without reference to the doctrine of issue estoppel*

51. P&ID contended that the decision of the Tribunal in Procedural Order No. 12 meant that the issue of seat was determined between the parties, and not something which the FRN could now challenge. Further, P&ID contended that this was so, whether or not Procedural Order No. 12 technically established an issue estoppel.

52. The issue which the Tribunal addressed in Procedural Order No. 12 is perhaps a somewhat unusual one. It was not an issue which was amongst the matters in dispute between the parties at the outset and which had been referred to arbitration. Yet it was an issue which depended on the proper construction of the GSPA, and upon whether the conduct of the parties had established some other agreement.

53. Nevertheless, although not amongst the pre-existing issues which were referred to arbitration, I consider that it was an aspect of the parties' agreement to arbitrate that the Tribunal should have the ability to determine an issue as to where the seat of the arbitration was, including an issue as to the construction of the arbitration clause in the GSPA. It is true that, if such an issue arose and were not first determined by the arbitral tribunal, then it would fall to be determined by a court, whether on enforcement or otherwise, but in the first instance it would be for the arbitral tribunal to decide. I consider that this is implicit in the agreement to arbitrate in the present case. It is clear that, by reason of subjecting the arbitration to the ACA and Arbitration Rules, the parties agreed that, to the extent that they had not effectively provided for the seat, the Tribunal could decide on where it should be. It would be consistent with that for the Tribunal to be able to decide any dispute as to whether there had been an effective choice of seat, and if so what the chosen seat was. The parties may be taken to have desired that the Tribunal should determine that matter, because if the arbitrators could not do so, then the question would arise as to who should, in circumstances where the parties might be at loggerheads as to where the seat was, and thus what was the curial court. Furthermore, although I do not consider that the issue of the determination of seat is strictly one of the arbitrators' jurisdiction or as to the existence or validity of an arbitration agreement, s. 12 ACA, applied to the arbitration by clause 20 of the GSPA, demonstrates the intention of the parties to

confer a very wide power on the arbitrators to decide issues relating to the validity and width of the arbitration agreement itself.

54. The somewhat unusual nature of this type of determination might give rise to an argument as to whether a ruling on such an issue constitutes an award or a procedural order. In the present case, the Tribunal decided it by way of procedural order. In its origination motion in the Nigerian courts commenced on 9 May 2016, by contrast, the FRN contended that it amounted to an award. Mr Mill for P&ID submitted before me that it could have been an award but that it made no difference. It appears to me that the correct characterisation of the determination might have had implications as to whether the Tribunal itself could have revisited it and, at least if the seat of the arbitration is England and ss. 67-69 of Arbitration Act 1996 are applicable, as to when and how it could be challenged in court: see the review of the law in relation to procedural orders and awards in ZCCM Investments Holdings PLC v Kansanshi Holdings PLC [2019] EWHC 1285 (Comm). Here, however, no challenge has been pursued in any court, either to the decision on seat itself, or as to the Final Award in the arbitration.

55. As I understood P&ID's first argument, the combination of a matter which the Tribunal was, in accordance with the arbitration agreement between the parties, authorised to decide, coupled with the lack of challenge to that decision in any court means that that decision must be taken as binding on the FRN for the purposes of ascertaining the seat of the arbitration when it comes to enforcement; and that it is not necessary to examine in turn all the requirements of an issue estoppel, which is a concept which applies to a wider field, and whether or not it applies is not determinative of whether there can a challenge to the location of the seat here. In principle, I consider that this submission is correct. Given the consensual nature of arbitration, and the importance to be accorded to respecting the integrity of the parties' choice, given that the Tribunal has made a ruling on seat, which has not been successfully challenged in any court, then subject to an examination of the particular arguments of the FRN to which I will turn, I consider that this is not an issue which can be revisited on an application under s. 66 Arbitration Act 1996.

56. The FRN relied, as I understood it, on three particular grounds to resist the above conclusion.

57. The first was that it contended that Procedural Order No. 12 was sought by P&ID and made by the Tribunal in breach of the injunction of the Nigerian Court of 20 April 2016. Mr Matovu submitted that, as the Nigerian court was the supervisory court, Procedural Order No. 12 was a nullity, or at least that this Court could not, in exercising its discretion as to whether to enforce the Final Award, fail to have regard to the breach.

58. As to this, while it may be the case that, assuming the Nigerian Court had relevant jurisdiction, P&ID's request on 21 April 2016 for the Tribunal to confirm that it would proceed to make a ruling on seat might have been in breach of the order of 20 April 2016, I do not consider that the Tribunal was acting in breach of that order in issuing Procedural Order No. 12. The arbitrators were not named as respondents to the application for an injunction; they had not been named in the Motion on Notice for this injunction as parties who would be served; and the terms of the injunction did not, in my judgment, apply to them. The order restrained the parties, "whether by

themselves or through their agents, servants, privies, assigns, representatives or anybody whatsoever from seeking and or continuing with any step, action and or participate in the arbitral proceedings between the parties before" the Tribunal. I do not consider that, when the Tribunal proceeded to a ruling, there was thereby a breach of the injunction that the parties should not seek or continue with any step or action or participation in the arbitration, or that the parties were in some way acting by the arbitrators when the Tribunal issued its Procedural Order No. 12. In the circumstances, I do not consider that Procedural Order No. 12 was made by the Tribunal in breach of an order of the Nigerian Court.

59. Insofar as Mr Matovu sought to bolster this first point by submitting that the order of the Nigerian court was an order "of the supervising court", that depends, in part, on Procedural Order No. 12 not being a binding determination of what the seat of the arbitration was, which is what, at this juncture, the FRN is seeking to establish. It is pertinent to recall, in this context, that at the time at which the injunction order was made, and at the time of Procedural Order No. 12, there had been no argument before and no resolution by any court, whether in Nigeria or elsewhere, that Nigeria was the seat of the arbitration. On the contrary, to the extent that any court's jurisdiction had been invoked as that of the supervisory court, it was that of this Court, to which the FRN had applied under s. 68 Arbitration Act 1996 in respect of the Liability Award.

60. The second point raised by the FRN in this context is a contention that the Tribunal was not invited to decide the issue of seat. This point overlaps with the third point as to procedural unfairness, considered below. Insofar as it was a discrete point, however, I did not consider that it had force. It is certainly true that the correspondence which led to the making of Procedural Order No. 12 commenced with the FRN seeking an extension of time. During the course of the correspondence it nevertheless became quite apparent that the parties had come to be in disagreement as to what was the seat of the arbitration. No doubt because the FRN wished to get before the Nigerian Courts before the Tribunal had ruled on seat, it sought to suggest that there was not an issue on the subject for the Tribunal to determine (see its email of 14 March 2016). Because it wanted the Tribunal to rule on seat before the Nigerian courts considered the motion to set aside the Liability Award, P&ID, by contrast, was seeking that the Tribunal should proceed to rule on the seat. In my judgment, in light of the fact that it was apparent that the parties disagreed on the issue, and that P&ID had asked it to do so – as it did by its communications of 1 April 2016 and 19 April 2016 – the Tribunal was entitled to decide to make a ruling as to seat.

61. The third point raised by the FRN is that the procedure adopted by the Tribunal in coming to its conclusion on seat was unfair. Mr Matovu, in his measured and attractive submissions, contended that it had involved "something of a rush to judgment by the Tribunal at the instigation of [P&ID] without giving [the FRN] a fair and proper opportunity to present a fully developed case for the purposes of a putative ruling on seat." Mr Matovu made a particular criticism of the fact that the Tribunal did not give a proper indication of the issues which it was considering deciding. It could, he said, have been contemplating deciding (i) whether there had been an agreement in clause 20 of the GSPA as to seat and if so what it was; (ii) if there had not, should the Tribunal now determine a seat, and if so what it should be; (iii) whether the parties had conducted themselves in such a way that there was a

convention or agreement by conduct as to seat; and (iv) whether the Tribunal should rule on those issues or give directions for their determination. As the Tribunal had not identified what matters it was contemplating deciding, it had not had proper submissions on them. Mr Matovu submitted that if proper notice had been given, the Tribunal would have been provided with much fuller submissions on the relevant Nigerian law, and on whether there could be said to have been any agreement as to seat, or an estoppel by convention, by reason of the conduct of the parties. He also argued that it was particularly unfair to the FRN, in that once it had issued its Motion on Notice on 5 April 2016, and a *fortiori* after the injunction order of 20 April 2016, it was precluded from making submissions in the arbitration.

62. In my judgment, the difficulty with these submissions, whatever otherwise might be their cogency, is that the FRN had remedies for any procedural unfairness, but it did not utilise them.

63. Thus, if Procedural Order No. 12 was, correctly analysed, a decision which the Arbitral Tribunal itself had power to review and amend, then the FRN could have made submissions to the Tribunal that it should do just that. It did not do so. If, as the FRN was at one point disposed to argue, Procedural Order No. 12 constituted an award, then it could have been subject to challenge pursuant to section 68 Arbitration Act 1996, on the basis that there had been serious irregularity affecting the tribunal, the proceedings or the award. If, on the other hand, Procedural Order No. 12 was, as it said it was, a procedural order, then it would have been open to the FRN to attack the Final Award pursuant to section 68 Arbitration Act 1996, on the same basis. It did neither and the time for doing so is long past.

64. It might be said that the curial remedies which I have referred to in the previous paragraph could only have been sought by recognising that England was the seat of the arbitration, which was the matter the FRN wished to dispute. I consider that the FRN could properly have sought those remedies in order to challenge the Tribunal's finding of seat, without prejudice to its contention as to where, putting that ruling aside, the seat was located. In any event, and be that as it may, the FRN did not even take the equivalent steps which, consistently with its position that the courts of Nigeria were the supervisory courts, it might have taken there. Thus, it did not pursue, and allowed to be struck out, the action which it began in the Nigerian Court on 9 May 2016, which had included seeking to set aside Procedural Order No. 12 for misconduct under section 30(1) and/or the removal of the arbitrators for misconduct under section 30(2) ACA. Nor has the FRN applied to set aside the Final Award in any jurisdiction, including Nigeria. Again, the time for doing so in accordance with the ACA is long past.

65. Mr Matovu submitted that it had not been necessary for the FRN to pursue these remedies, including in particular the action which it had begun in the Nigerian Court on 9 May 2016, because it had obtained an order from the Nigerian Court on 24 May 2016 "setting aside and/or remitting [the Liability Award] for further consideration". He submitted that this rendered it unnecessary to seek what he described as "ancillary relief". He referred to the case of Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corp (2014) 6 CLRN 150, a decision of the Court of Appeal of Nigeria (Abuja Division).

66. I do not accept this submission. Procedural Order No. 12 was issued before the order of the Nigerian Court purporting to set aside or remit the Liability Award for consideration. As long as Procedural Order No. 12 stood, it of itself created a basis for saying that the order of the Nigerian Court of 24 May 2016 was ineffective, as being made by a court which was not the supervisory court as determined by the decision of the arbitral panel. It also had implications for the future conduct of the arbitration and for future awards. Nor do I accept that the Nigerian Agip case is of relevance here. It concerned the question of whether, when an arbitral panel had issued a partial award, and was proceeding towards a final award on damages, a party which was challenging the partial award in court could obtain an interlocutory injunction stopping the arbitration from proceeding. It was held that it could not, and that the challenge to the partial award would be dealt with in the proceedings. That is not analogous to the facts here.

67. As a result, I conclude that the terms of Procedural Order No. 12, coupled with the fact that neither it nor the Final Award have been set aside by this or any court, determine the location of the seat of the arbitration as being London, England, and that that is not a matter which the FRN can now ask this court to revisit.

*P&ID's Second Argument: Issue Estoppel*

68. P&ID's second argument was that the Tribunal's decision in relation to seat in Procedural Order No. 12 created an issue estoppel. It contended that it was not necessary for it to succeed on this point if I was with it in relation to its first argument, which I am.

69. The doctrine of res *judicata* has two particular aspects of potential relevance in the present context. The first is what is termed "cause of action estoppel". This was described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 at [17] as follows: "… once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. … It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings." There was no contention that a cause of action estoppel of this sort arose in the present case.

70. In addition to "cause of action estoppel" there can also be "issue estoppel". The nature of such an estoppel was explained by Lord Keith of Kinkel in Arnold v NatWest Bank Plc [1991] 2 AC 93 at 105-106, as follows:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. This form of estoppel seems first to have appeared in Duchess of Kingston's Case (1776) 20 St. Tr. 355. A later instance is Reg. v Inhabitants of the Township of Hartington Middle Quarter (1855) 4 E. & B. 780. The name 'issue estoppel' was first attributed to it by Higgins J in the High Court of Australia in Hoysted v Federal Commissioner of Taxation (1921) 29

> CLR 537, 561. It was adopted by Diplock LJ in Thoday v Thoday [1964] P 181.
>
> …
>
> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."

71. The conditions which must be satisfied for there to be an issue estoppel have been considered in a number of cases. They were summarised as follows in Good Challenger Navegante S.A. v Metalexportimport S.A. (The 'Good Challenger') 2004 1 Lloyd's Rep 67, at [50] per Clarke LJ:

> "The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign Court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that there must be identity of subject matter, which means that the issue decided must be the same as that arising in the English proceedings: see in particular Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2) [1967] 1 AC 853, The Sennar (No. 2) [1985] 1 WLR 490, especially per Lord Brandon at p. 499, and Desert Sun Loan Corporation v Hill [1996] 2 All ER 847."

That case involved a decision by a foreign court as arguably founding an issue estoppel. There is however no doubt, and it was not contested before me, that an issue estoppel can be created by the decision of an arbitral tribunal: see Arbitration Law, ed Merkin, para. 18.132.

72. I did not understand there to be an issue as to requirement (3) in Clarke LJ's enumeration of conditions. Nor did I understand there to be any issue as to (4), in that the issue of the location of the seat addressed by the Tribunal is the same as that sought to be raised by the FRN now. As to (2), while the reference to a decision "on the merits" might suggest that only a decision on the substantive issues between the parties could create an issue estoppel, one of the cases referred to by Clarke LJ, Desert Sun Loan Corporation v Hill [1996] 2 All ER 847, [1996] CLC 1132 establishes that an issue estoppel can arise in relation to a procedural or non-substantive issue. As to the other requirement under (2) that the decision should be "final and conclusive", if Procedural Order No. 12 was what it said it was, namely a procedural order, then it may well be that, in theory at least, it was susceptible of review by the Tribunal itself, and if that is right it would not, when issued, have been "final and conclusive". I would consider, nevertheless, that it should be regarded as "final and conclusive" at the point when it could not be reviewed by the Tribunal, which was at latest when the arbitration concluded. If Procedural Order No. 12 was in reality an award which finally determined the issue before the Tribunal (even if it

might have been subject to an appeal to a court), then it will have been final and conclusive on the issue of seat when made. On either basis I consider that Procedural Order No. 12 should be regarded as satisfying requirement (2).

73. I understood Mr Matovu to contest whether condition (1) was satisfied, by his submission that a "ruling which an arbitral tribunal is not entitled to make will not create an issue estoppel" and that the Tribunal was not entitled to make the ruling contained in Procedural Order No. 12. The contention that the Tribunal had not been entitled to make that ruling was based on the argument that the courts of Nigeria had on 20 April 2016 injuncted the Tribunal from taking any further steps in the reference.

74. For reasons which will already be apparent, I do not accept the contention that the Tribunal was not entitled to make a ruling on seat. As I have said, I consider that the Tribunal was authorised to determine a dispute as to the location of the seat; that it had been asked to do so by P&ID on 1 and 19 April 2016; and that the order of the Nigerian Court of 20 April 2016, even if the Nigerian Court had relevant jurisdiction, did not injunct the Tribunal from proceeding with the reference (see paragraph 58 above).

75. Mr Matovu advanced four other arguments as to why there was no issue estoppel created by Procedural Order No. 12. These overlap with arguments of the FRN which I have already considered in relation to P&ID's first way of putting its case.

76. The first of these arguments was that the FRN "was not, in fact, given a proper opportunity to make submissions to the Tribunal in relation to the issue of seat". Mr Matovu submitted that "Publication of a ruling in these circumstances was contrary to the basic notions of fairness and due process on which the principle of issue estoppel is based." The "circumstances" to which he was referring here were, in particular, the way in which the issue of seat had emerged out of the FRN's application for an extension of time, and what Mr Matovu characterised in the course of his submissions as the tribunal's "rush to judgment".

77. Given the nature of the FRN's complaint here, which was based on considerations of fairness, and due process, it must be very relevant that the FRN had remedies in relation to the suggested procedural unfairness of the Tribunal's determination, which it did not pursue (see paragraphs 64-66 above). Given that, I am not able to accept that there would be an unfairness in recognising an issue estoppel as a result of Procedural Order No. 12.

78. The second point advanced on behalf of the FRN in this context was that the FRN could not have participated in making submissions on seat because it had itself been enjoined from taking any steps in the arbitration by the order of 20 April 2016. Mr Matovu submitted that "An issue estoppel cannot reasonably be invoked when a party has been restrained by a court of competent jurisdiction from participating in the earlier proceedings on which the estoppel is founded."

79. I was wholly unpersuaded by this point. The fact that the FRN was subject to an injunction from the Nigerian courts was because it had obtained one. Moreover, the reason why the FRN had gone to the Nigerian courts to obtain an injunction was, as Mr Matovu frankly accepted, because it was concerned that the Tribunal would hold that the seat of the arbitration was London. But that was not of itself a good reason for

seeking to enjoin the parties from pursuing the arbitration. As I have indicated, I consider that the parties had agreed that disputes as to seat should be resolved by the Tribunal and it had no good reason for seeking to prevent that happening. If it had concerns about its ability to make submissions on the point, it could have asked for further time to do so. But I do not see that the fact that, as it says, it was bound by an injunction which it had itself procured from the Nigerian courts, and which it could undoubtedly have had discharged if it had wanted to, constitutes a reason for not recognising an issue estoppel.

80. The third argument raised was that once the Liability Award had been set aside or remitted by the Nigerian Court by its order of 24 May 2016, the FRN had no reason to seek to challenge the Tribunal's ruling on seat. I have given reasons why I do not consider that that is correct in paragraphs 65-66 above. I do not consider that this provides a reason for not recognising there as being an issue estoppel on the issue of seat.

81. Fourthly, Mr Matovu contended that in the light of the decision of the Nigerian High Court (Ogun Division) in Zenith Global Merchant Ltd v Zhongfu International Investment FZE [2017] All FWLR 1837, there was no issue estoppel. The submission was that that case, albeit decided after Procedural Order No. 12, provided an authoritative statement of the Nigerian law on the determination of seat; that it indicated that the decision of the Tribunal on the issue was wrong; and that, in line with the decision in Arnold v National Westminster Bank PLC [1991] 1 AC 93, the fact of such subsequent material demonstrates that to recognise an issue estoppel would create injustice.

82. The exception to the doctrine of issue estoppel recognised in Arnold v National Westminster Bank is that, in the case of "special circumstances", including in particular a subsequent change of the law, it may cause injustice to recognise an issue estoppel. The making of the decision in Zenith Global did not in my judgment constitute "special circumstances" of this sort. Zenith Global did not represent a change in the law of Nigeria. Furthermore, that case concerned the construction of an arbitration clause in terms different from clause 20 of the GSPA. The clause in that case did not contain the word "venue". While Akinyemi J used the term "venue", taking it from the submissions of counsel, to describe the geographical location where an arbitration may take place in contradistinction to the juridical seat, he was not actually construing a contract which included that term, and clearly was not construing one which contained that term in the particular context in which it is used in clause 20 of the GSPA. Moreover, Zenith Global was not a decision that the "venue" of an arbitration can never be the juridical seat, and Mr Matovu did not suggest that it was. In light of these points I do not consider that it can be said that the fact of the Zenith Global decision makes it unjust to recognise the Tribunal's decision in Procedural Order No. 12 as giving rise to an issue estoppel.

83. Accordingly, I consider that Procedural Order No. 12 did create an issue estoppel which precludes an argument as to seat on this application.

*P&ID's Third Argument: the decision of the Tribunal in Procedural Order No. 12 was correct*

84. Mr Mill submitted that, if, contrary to his first two ways of putting the matter, it was open to the FRN to challenge the location of the seat of the arbitration on this application, then this court would have to resolve that question. As he submitted, if that issue was examined by this Court, it would itself reach the same conclusion as reached by the Tribunal in Procedural Order No. 12.

85. The GSPA is written in English. As I have said, it was not in issue that the question of its construction is governed by Nigerian law. However, it was undisputed before me that Nigerian principles of construction should be taken to be the same as those of English law. In the present case, there was no evidence that those principles are different from those of English law, and so, on the present hearing, they are to be presumed to be the same. Furthermore, Mr Matovu suggested that this presumption probably reflected the reality. Applying the approach to construction of English law, I conclude that, while there are significant arguments the other way, the GSPA provides for the seat of the arbitration to be in England. I say this for the following principal reasons:

(1) It is significant that clause 20 refers to the venue "of the arbitration" as being London. The arbitration would continue up to and including the final award. Clause 20 does not refer to London as being the venue for some or all of the hearings. It does not use the language used in s. 16(2) ACA of where the tribunal may "meet" or may "hear witnesses, experts or the parties". I consider that the provision represented an anchoring of the entire arbitration to London rather than providing that the hearings should take place there.

(2) Clause 20 provides that the venue of the arbitration "shall be" London "or otherwise as agreed between the parties". If the reference to venue was simply to where the hearings should take place, this would be an inconvenient provision and one which the parties are unlikely to have intended. It would mean that hearings had to take place in London, however inconvenient that might be for a particular hearing, unless the **parties** agreed otherwise. The question of where hearings should be conveniently held is, however, one which the **arbitrators** ordinarily have the power to decide, as indeed is envisaged in s. 16(2) ACA. That is likely to be a much more convenient arrangement. Clearly if the parties were in agreement as to where a particular hearing were to take place, that would be likely to be very influential on the arbitral tribunal. But if for whatever reason they were not in agreement, and it is not unknown for parties to arbitration to become at loggerheads about very many matters, then it is convenient for the arbitrators to be able to decide. If that arrangement was to be displaced it would, in my judgment, have to be spelled out clearly. Accordingly, the reference to the "venue" as being London or otherwise as agreed between the parties, is better read as providing that the seat of the arbitration is to be England, unless the parties agree to change it. This would still allow the arbitrators to decide where particular hearings should take place, while providing for an anchor to England for supervisory purposes, unless changed.

(3) The reference in clause 20 to the provisions of the rules of the ACA is not inconsistent with the choice of England as the seat of the arbitration. The non-mandatory provisions of the Arbitration Act 1996 are displaced by that provision; but the mandatory provisions of the Arbitration Act 1996 apply.

(4) The case of Zenith Global was decided long after the conclusion of the GSPA. It cannot therefore be used to support any argument that, at the time of conclusion of the GSPA the word "venue" was being used in the sense in which it was used in that case. In any event, as I have already set out, it does not involve construction of a clause in the same terms as clause 20 of the GSPA.

86. For completeness I should say that these conclusions appear to me to be in line with the English jurisprudence referred to in Arbitration Law ed. Merkin, para. 1.30, and in particular Shashoua v Sharma [2009] EWHC 957 (Comm) and Enercon GmbH v Enercon (India) Ltd [2012] EWHC 689 (Comm). The decision in Zenith Global suggests that such English authorities (as well as those of other common law jurisdictions) would be regarded as persuasive in ascertaining Nigerian law in this area. These cases were not, however, cited at the hearing of the application, and I reached my conclusions on construction without regard to them.

87. I have also reached the same conclusion as did the Tribunal in relation to there being an agreement by conduct that the seat of the arbitration as provided for by clause 20 of the GSPA should be regarded as London. In this regard the terms of the Part Final Award of 3 July 2014, which I have quoted in paragraph 9 above are of significance. It stated in terms that the seat of the arbitration was England. Further, that Part Final Award, and the Liability Award both stated, at the end, that the place of the arbitration was London, England. Given the terms of s. 26(3)(c) ACA, that was a clear statement that the Tribunal considered that the legal seat was England. The FRN did not object to these statements in the Part Final Award of 3 July 2014 or the Liability Award and continued to participate in the arbitration. Like the Tribunal I consider that, objectively viewed, there was here an agreement by the FRN that the seat stipulated in clause 20 of the GSPA was England.

*P&ID's Fourth Argument: Effect of the application to the English Court*

88. P&ID also contended that the FRN's conduct in making an application under s. 68 Arbitration Act 1996, and the refusal by Phillips J of an extension of time to bring such an application itself precluded the FRN from denying that the seat of the arbitration was England and that the English courts were its supervisory courts. This submission was not accompanied by any detailed analysis of how the requirements of an issue estoppel were made out in relation to that decision. In view of the conclusion which I have reached on the other points made by P&ID as to the seat of the arbitration and the effect of Procedural Order No. 12, I do not need to express a view as to this point, and in the circumstances, prefer not to do so.

*Grounds for Non-Enforcement if the seat of the arbitration is England*
*Public Policy*

89. The FRN submitted that even if the seat of the arbitration was England and the Final Award was a "domestic" award, this court should refuse leave to enforce it in the same manner as a judgment. Two points were relied upon as reasons why the court should refuse leave.

90. The first argument is that it would offend English public policy to enforce the Final Award. The FRN contends that it is contrary to English public policy to enforce an

award for damages which are "not compensatory, but hugely inflated and penal in nature". To support its contention that English public policy is against enforcement of an award of damages of that nature, the FRN relied on JSC VTB Bank v Skurikhin [2014] EWHC 271 (Comm), especially at paragraphs 90-92, and Midtown Acquisitions LP v Essar Global Fund Ltd [2018] EWHC 2545 (Comm), especially at [42]. To support its argument that the Final Award gave damages which were not compensatory, but hugely inflated and penal, the FRN relied on three particular points, namely (1) that the Tribunal had applied an incorrect and unduly low discount rate to the assessment of future cash flows from the project; (2) that the Tribunal had ignored the fact that the GSPA required P&ID to grant the FRN a 10% carried interest in the project; and (3) the majority of the Tribunal did not make any deduction on grounds of a failure to mitigate.

91. In relation to these points, the FRN relied on evidence from Mark Handley, contained in his Third Witness Statement. That witness statement referred to the reasons why the FRN contends that the sum awarded was manifestly excessive, and stated (at paragraph 121): "… the massive payment of damages to P&ID far and above the level required to be compensatory demands the conclusion that the Final Award was punitive in effect."

92. The FRN also relied on an expert report of Prof. Louis T. Wells. At the outset of the hearing, P&ID objected to this report, which was served only on 15 May 2019, on the basis that it was served inexcusably late and without notice. I decided, however, that the FRN should be permitted to rely on the report. It had undoubtedly been served late, but I was satisfied that this had not been for tactical reasons. Given the nature of the case, and its importance to both sides, I considered that it was preferable for the report to be in evidence, if that did not create prejudice to P&ID. I concluded that it did not create prejudice to P&ID in that the points it makes, while expanding upon, and lending expert support to, points made by Mr Handley in his witness statement, did not cover entirely new ground, and also because P&ID confirmed through Mr Mill at the hearing that it was content to deal with the report if admitted, and would not seek an adjournment.

93. Prof. Wells' report focuses on a particular issue, namely the Tribunal's approach to the discounted cash flow calculation, and in particular the discount rate applied. Prof. Wells expresses the view that the award of damages reached was, as a result of an erroneous approach to the discount rate, "clearly unreasonable and manifestly excessive and exorbitant", and "not a reasonable assessment of P&ID's actual loss; whether intentionally or not, it was punitive."

94. I did not understand P&ID to dispute that, if enforcement of an award would be contrary to public policy, that would be a ground for refusal of enforcement under s. 66 Arbitration Act 1996, even though it is not mentioned in the section. I accept, as suggested in Russell on Arbitration (24th ed), para. 8-011, that it would be a matter which fell to be considered by the Court in exercising its discretion.

95. Looking at the Final Award itself, there can be no doubt that the Tribunal was intending to award only compensatory damages, and that there was not intended to be any element of penalty or punitive damages in the sums awarded. In paragraph 40 it is stated that: "The damage suffered by P&ID is the loss of the net income it would have received if it had been supplied with wet gas in accordance with the contract and

had been able to extract and sell the natural gas liquids." The Tribunal went on to consider and reject an argument that P&ID would not have performed the contract, and to hold that losses of the kind referred to in paragraph 40 were not too remote (paragraphs 41-56), and were quantified at US$6,597,000,000 (paragraphs 57-110).

96. The Final Award, consistently with my earlier conclusions, was one given in an arbitration whose seat was England. It could, accordingly, have been the subject of an application under s. 68 Arbitration Act 1996 in relation to serious irregularity. No such application was made and the Final Award has, plainly, not been set aside or remitted.

97. Are there any grounds of public policy on which such an award, which is intended to and is expressed as awarding compensatory damages, and which could have been but has not been subject to remedies under ss. 68 Arbitration Act 1996, should not be enforced? In my judgment there are not.

98. The grounds on which enforcement of an award can be refused by reason of public policy are narrowly circumscribed. In Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co [1987] 2 Lloyd's Rep 246, at page 254 Sir John Donaldson MR said this:

> "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J remarked in Richardson v Mellish (1824) 2 Bing. 229, 252, 'It is never argued at all, but when other points fail.' It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

99. In IPCO (Nigeria) v Nigerian National Petroleum Corp. [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326 at [13], in the context of arguments to the effect that a foreign award should be refused enforcement under s. 103(3) Arbitration Act 1996, Gross J reiterated the extreme caution with which arguments to the effect that enforcement should be refused on public policy grounds should be approached. In that case he also considered an argument that because of errors allegedly made by the tribunal in its assessment of damages the award was so excessive and that its enforcement would be contrary to public policy. He dismissed the argument at paragraph 50, saying:

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

100. Further, in considering whether there should be a refusal of enforcement of an award on the grounds of public policy, it is necessary to have regard to, and take into account, the strong public policy in favour of enforcing arbitral awards: see Westacre Investments Inc v Jugoimport-SPDR Ltd [1999] QB 740 at 770-771, 773 per Colman J (that decision was upheld on appeal: [1999] 2 Lloyd's Rep 65).

101. In Pencil Hill Ltd v US Citta Di Palermo SpA (Mercantile Court, 19 January 2016), the court considered an argument that a New York Convention award should not be enforced in England and Wales because it included an award in respect of a penalty. HHJ Bird conducted a review of relevant authorities at paragraphs 12 – 25, and concluded that the award should be enforced in its entirety. At paragraph 32 the judge said:

> "In my judgment the public policy of upholding international arbitral awards … outweighs the public policy of refusing to enforce penalty clauses. The scales are tipped heavily in favour of enforcement."

102. I am clearly of the view that there is no public policy which requires the refusal of enforcement to an arbitral award which states and is intended to award compensatory damages, and where, even if the damages awarded are higher than this Court would consider correct (as to which I express no view), that arises only as a result of an error of fact or law on the part of the arbitrators. The enforcement of such an award would not be "clearly injurious to the public good" or "wholly offensive to the ordinary reasonable and fully informed member of the public". Furthermore, the public policy in favour of enforcing arbitral awards is a strong one, and, if a balancing exercise is required at all, outweighs any public policy in refusing enforcement of an award of excessive compensation. The labelling of such excessive compensation as "punitive" or "penal", as the FRN seeks to do in this case does not alter this conclusion.

103. The cases to which the FRN referred do not, in my judgment, begin to establish a public policy which would require non-enforcement of the Final Award here. JSC VTB Bank v Skurikhin, which did not involve enforcement of an arbitration award, merely decided that there was an arguable case, for the purposes of CPR Part 24, that foreign judgments which themselves stated that they awarded "penalties or fines" (paragraph 11) would be unenforceable. Midtown Acquisitions v Essar was a case in which a foreign judgment creditor sought to enforce its judgment. It was successful. Moulder J rejected as unarguable on the facts a defence that, because the amount claimed was said to involve a double recovery, enforcement would be contrary to public policy. She did not examine the ambit of such policy.

*Pre-award interest*

104. The FRN also contended that enforcement of the Final Award should be refused to the extent that it awarded pre-award interest. It contended that, under Nigerian law, pre-award interest was only available in circumstances where (i) the parties expressly provided for it in their contract, (ii) the contract includes an implied term to that effect, based on trade usage or mercantile custom, or (iii) there is an applicable statutory power to grant it; and that none of (i) – (iii) applied here. This was said to mean that the Final Award contained "a decision on matters beyond the scope of the submission to arbitration".

105. P&ID's response to this issue was three-fold. In the first place it contended that this objection was premised on the Final Award being a New York Convention Award, the ground for non-enforcement sought to be relied upon being that in s. 103(2)(d) of the Arbitration Act 1996, and that it had no application if the Final Award was found to be a "domestic" award.

106. Secondly, and in any event, that the suggestion that the arbitrators did not have jurisdiction to award pre-award interest was not advanced during the arbitration proceedings. Instead, P&ID had claimed interest in its Notice of Arbitration and in its Statement of Case; the FRN had not joined issue, in its Statement of Defence, with P&ID's entitlement to claim interest; P&ID had maintained its pleaded interest claim in its Statement of Case on quantum; and the FRN, in its responsive written submissions on quantum, had noted that P&ID was claiming pre-award interest and had not argued that this was in issue.

107. Thirdly, P&ID contended that the FRN was out of time to make an application to set aside the Tribunal's award of pre-award interest.

108. In circumstances where, as I have found, the seat of the arbitration was England, any excess of jurisdiction by the arbitrators could have been the subject of an application under s. 67 Arbitration Act 1996. Given that there was no such application in relation to the award of pre-award interest (or at all), I do not consider that there can now be a separate objection to enforcement on the basis of a lack of jurisdiction.

109. In any event, the suggestion that the award of pre-award interest was beyond the scope of the submission to arbitration is not made out. Interest, which was not said to be confined to post-award interest, was claimed in the Notice of Arbitration. Issue was joined with P&ID's claim, but there was no suggestion that the tribunal lacked jurisdiction to award pre-award interest. In the circumstances I do not consider that the issue was jurisdictional. It may be that the FRN had answers to the claim which it did not put forward, but that is a different matter.

Conclusion

110. For these reasons, I am prepared to make an order enforcing the Final Award in the same manner as a judgment or order of this Court to the same effect. I will receive submissions from the parties as to the precise form of order appropriate.