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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ESSO EXPLORATION AND PRODUCTION NIGERIA LIMITED, et al.,

Plaintiffs,

v.

14 Civ. 8445 (WHP)

NIGERIA NATIONAL PETROLEUM CORPORATION,

Defendants.

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New York, N.Y.
March 20, 2015
12:00 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

FRESHFIELDS BRUCKHAUS DERINGER, LLP

Attorneys for Plaintiffs

BY: MICHAEL LACOVARA

ELLIOT FRIEDMAN

DAVID Y. LIVSHIZ

CHAFFETZ LINDSEY, LLP

Attorneys for Defendants

BY: CECILIA MOSS

PETER R. CHAFFETZ

JENNIFER PERMESLY

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1 (Case called)

2 THE COURT: Good morning. This is a conference and a
3 pre-motion conference concerning a position for an arbitration
4 award. Ever so briefly, the *Readers Digest* version,
5 Mr. Lacovara.

6 MR. LACOVARA: Yes, your Honor, I will be brief.

7 In its simplest terms, my two clients, affiliates of
8 Exxon and Royal Dutch, have a venture with a Nigerian state oil
9 company for exploration and production in Nigeria. There was a
10 dispute that arose among the parties. There was an arbitration
11 that resulted in an award of approximately two and a quarter
12 billion dollars including interest in the fall of 2011.

13 Proceedings were commenced almost immediately in the
14 High Court of Nigeria to confirm the award and to vacate the
15 award, as well as some collateral proceedings which are
16 described in both our papers and the papers filed by
17 predecessor counsel for respondents. I don't think they are
18 germane to this discussion, so I will omit further discussion
19 of them.

20 At the present moment, the award was vacated by the
21 High Court in Nigeria and is subject to an appeal. Our
22 clients, of course, believe the appeal is meritorious and the
23 award will be vacated. We were faced with the running of the
24 statute of limitations under the Federal Arbitration Act last
25 fall to confirm the award here.

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1 It is the position of petitioners that this court both
2 has jurisdiction to confirm the award and the power to enforce
3 the award, including assets maintained by the respondent in New
4 York. We filed a summary petition and a motion to stay
5 essentially to protect our rights and then to stop the clock on
6 the theory that having the matter stayed pending the results in
7 Nigeria would either mean that the court would never have to
8 have litigation here or that the litigation would be done on a
9 complete record.

10 As your Honor will recall, the respondent initially
11 was represented by Hughes Hubbard. They had to withdraw
12 because of a conflict and new counsel were appointed. I think
13 we confirmed that new counsel is essentially adopting the
14 papers of the predecessor firm, so we have, I think, both a
15 fully briefed request for a stay which were prepared to address
16 if your Honor wish to today, and then the pre-motion conference
17 on the motion to dismiss that the respondents have indicated
18 they intend to file.

19 THE COURT: The defendants raised the question of
20 jurisdiction and whether that question is decided now or later,
21 it would have to be addressed, wouldn't it?

22 MR. LACOVARA: I think the court can stay the matter
23 without prejudice to jurisdiction as to the substantive claims.
24 I think the court has the discretion in the Federal Arbitration
25 Act to do that.

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1 THE COURT: Even if I don't have jurisdiction?

2 MR. LACOVARA: I think the question of jurisdiction is
3 not waived until the court substantively rules on the
4 allegation in the petition. Certainly petitioner would not
5 contend that it was waived by virtue of the court granting a
6 stay. There would be no prejudice to any argument I think
7 respondents would make. That would be the essence of our
8 motion was that we didn't conceive of any potential prejudice
9 that would flow to any party that would create any potential
10 disadvantages.

11 We understand from the letters that Hughes Hubbard
12 submitted the bases for the jurisdictional arguments of the
13 respondents. We laid out in our responsive letter what we
14 believe the responses to those are, including the court is
15 likely to have *quasi in rem* jurisdiction based on assets
16 maintained by the respondent in New York, including but not
17 limited to bank accounts. We have continued to investigate
18 that issue and we believe there is a very solid basis for the
19 court maintaining jurisdiction.

20 THE COURT: If there were a need for limited
21 jurisdictional discovery, what discovery would the petition, in
22 other words, want to take?

23 MR. LACOVARA: I want to reserve a little bit on that,
24 your Honor, because I want to see exactly what arguments were
25 in the motion. Presumably we would want discovery as to assets

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1 maintained in New York, other contacts with the forum, business
2 transacted in New York. I do think, as I think your Honor's
3 question implies, is focused discovery would not take a long
4 time. I should add, however, that if we are going to have a
5 motion that goes to the merits of the petition as well as to
6 jurisdiction and forum issues, we would also intend to
7 introduce expert declarations which will go to some of the
8 merits issues as to the Nigerian forum, both from a *forum non*
9 *conveniens* perspective and also the substantive claim as to
10 whether the court should confirm the award.

11 THE COURT: In thinking about this matter in
12 preparation for the conference, I wondered why the parties
13 haven't simply agreed to some tolling agreement, if I am
14 appreciating the reason why you had to file the petition to
15 confirm in the first place.

16 MR. LACOVARA: Your Honor, I am in an awkward position
17 because I have asked that question and I am not sure what the
18 answer is. Because as a litigator, I had exactly the same
19 reaction. I just do not know as a matter of fact whether the
20 issue was raised, whether the parties decided they would not
21 agree. But if it is the court's disposition, I am perfectly
22 happy to talk to counsel for the respondent and see if they are
23 willing. I would recommend it to my client. I think, as your
24 Honor suggests, it accomplishes the fundamental goals, which is
25 the preservation of rights in this forum.

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1 THE COURT: Let me hear from Ms. Moss.

2 MS. MOSS: Yes, your Honor.

3 THE COURT: Your name is differently recorded on the
4 docket, isn't it?

5 MS. MOSS: It is, your Honor. I changed my name about
6 13 years ago.

7 THE COURT: I think it is time to bring a petition in
8 Part 1 to have your name changed on the roll of attorneys.

9 MS. MOSS: Yes. Well, it is changed in state court.
10 For some reason it hasn't happened in federal court. I am
11 certainly going to look into that. I was surprised to see it
12 this morning, your Honor.

13 THE COURT: All right.

14 MS. MOSS: The way our client looks at this, your
15 Honor, is the reason we are here before you is you have got
16 three Nigerian corporations that entered into a contract in
17 Nigeria relating to the exploration and production of oil in
18 Nigeria. Disputes arose under that contract.

19 There was an arbitration in Nigeria that was governed
20 by Nigerian substantive and arbitration law. Petitioners moved
21 to confirm the arbitration award in Nigeria. Our clients
22 cross-moved to have it set aside. The Nigeria courts set it
23 aside based on an issue of Nigerian tax law. Essentially, the
24 court determined that the arbitration tribunal didn't have
25 jurisdiction to rule on these specific issues of Nigerian tax

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1 law. You are faced with a situation where the arbitration
2 award has been set aside at the seat and there is no basis for
3 confirmation of an award that has been set aside at the seat.

4 THE COURT: But it may be reinstated later on appeal,
5 right?

6 MS. MOSS: It is certainly possible, your Honor.

7 THE COURT: Have you thought about just having a
8 tolling agreement?

9 MS. MOSS: When you mentioned a tolling agreement, we
10 have not considered a tolling agreement. A tolling agreement
11 has not been raised to us.

12 THE COURT: All right.

13 MS. MOSS: I don't think that a tolling agreement
14 would be appropriate just off the cuff, your Honor, because my
15 understanding is that if the intermediate appellate court,
16 whichever way it rules, my expectation is that the loser would
17 appeal to the Nigerian Supreme Court. I also understand that
18 the Nigerian Supreme Court today is hearing appeals that were
19 filed in 2005. We are talking about the possibility of ten,
20 12, 15 years.

21 It doesn't seem appropriate for three Nigerian
22 corporations to be sitting here on a suspense docket or
23 otherwise waiting out that situation on the remote possibility
24 that this award, which a court of competent jurisdiction at the
25 seat has determined to be set aside on an issue of the law of

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1 the seat of the arbitration.

2 It doesn't make sense to our client to have to sit
3 around and wait for that to be hauled into court in the United
4 States, where my understanding is we have no contacts, we have
5 no assets, we conduct no business here. There is really no
6 reason for us to be here and no reason to wait to make a
7 decision about our grounds for a motion to dismiss.

8 THE COURT: You anticipated my question about what the
9 potential timelines are in Nigeria.

10 Mr. Lacovara, do you have any reason to doubt
11 Ms. Moss's prediction?

12 MR. LACOVARA: I don't know if it was a prediction or
13 a speculation. The Nigerian courts are not a model of
14 alacrity, your Honor. We can stipulate to that.

15 I would make two observations. One, it is not clear
16 that either party would necessarily have an appeal as of right.
17 I would also offer that we are talking about two and a quarter
18 billion dollars plus interest here. I understand it could be a
19 goodly amount of time, but it is a goodly amount of money.

20 If it is the case, as we believe we can demonstrate on
21 a competent record, that the respondent here does maintain
22 assets on a regular basis sufficient to satisfy an award, then
23 I don't think the fact that the mere passage of time, although
24 it is not convenient for anyone and I hope to be close to
25 retirement in ten years, it still doesn't mean we shouldn't

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1 have a chance to seek relief particularly on a matter of this
2 magnitude.

3 The final thing that I would just offer, it is always
4 in the parties' mind and probably in the courts, is that how
5 our client, my client's, and the respondents here have an
6 ongoing commercial relationship. This is not the only place
7 where they do business or talk about their overall
8 relationship. One of the reasons maybe to hold this matter in
9 abeyance whether through tolling or a stay is that through
10 natural commercial processes, we may be able to reach an
11 accommodation that is possible and wouldn't take ten or more
12 years.

13 THE COURT: Look, I am going to fix a briefing
14 schedule on the defendants' motion to dismiss. I think that I
15 will hear argument both on the motion to stay and the motion to
16 dismiss at the same time. Just reading the briefs, they are
17 really intertwined. I am amenable to the petitioners'
18 suggestion that there is a need to conduct jurisdictional
19 discovery.

20 Having said all of that, I am going to suggest that
21 the respondents propose a date that they can file their motion
22 and then I will permit a period of time -- actually, maybe we
23 should conduct the jurisdictional discovery first, but I am
24 thinking that you might want to see their motion papers.

25 MR. LACOVARA: Certainly, your Honor, I would prefer

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1 to see the papers and then discuss it with the parties first
2 and then bring it to the court with potentially an agreed
3 schedule for the discovery. We might even want to exercise our
4 right under 15(a)(1)(B) to amend our petition, having seen so
5 we can add more facts before the court even before discovery
6 commences.

7 THE COURT: When would the respondents be prepared to
8 file their motion?

9 MS. MOSS: Four weeks, your Honor. April 17.

10 THE COURT: April 17 it is, because the clock starts
11 ticking on my calendar once the motion is filed. I would be
12 inclined to say that you should be able to certainly initiate
13 some discovery even in advance of the filing of the motion,
14 because there are certain things you would know that you would
15 want. I would hope that you would be able to complete your
16 discovery, your jurisdictional discovery, by let's say June 5.

17 MR. LACOVARA: Your Honor, unfortunately, I have some
18 commitments between now and then. We will do our best. It
19 will depend, to some extent, obviously on the respondents'
20 cooperation, including potentially bringing people here.

21 THE COURT: I understand all that. If they are
22 working in good faith and are accomplishing something, we can
23 all always tinker it.

24 MR. LACOVARA: Thank you, your Honor.

25 THE COURT: My view would be that then you would

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1 submit your opposition to the motion let's say by June 26.

2 Give you a few more weeks.

3 MR. LACOVARA: Okay, your Honor.

4 THE COURT: Any reply by July 10. Then I will put the
5 matter down for an oral argument on July 24. We might shift
6 that. We will see where we all are at that time. Hopefully it
7 won't be snowing. I will put it down for 11:00 o'clock on July
8 24 for oral argument.

9 MS. MOSS: Your Honor, may I comment?

10 THE COURT: Yes, Ms. Moss. Go ahead.

11 MS. MOSS: Two points, just because in terms of what
12 we have heard with respect to the schedule and specifically the
13 notion of bringing people here. I am not sure what
14 Mr. Lacovara is referring to. We wouldn't think that would be
15 appropriate.

16 THE COURT: You know what, I would await to abide the
17 event. If there is a dispute, just raise it with me in a short
18 letter pursuant to my rules, a joint letter, and I will take it
19 up.

20 MS. MOSS: One other question, your Honor.

21 THE COURT: Sure.

22 MS. MOSS: Based on the petition before us, there
23 really are no allegations of contacts of my client in the
24 United States or assets of my client in the United States.
25 Conducting jurisdictional discovery based on the petition as it

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1 stands seems inappropriate to me. I think at the very least
2 petitioners should be required to replead, and if they are
3 going to replead, I think our motion should be based on that.
4 Otherwise, we are going to potentially go through this process
5 again.

6 MR. LACOVARA: Well, it is a little bit of a chicken
7 and egg question, your Honor. We don't, in principle, object
8 to repleading on a reasonable schedule with the notion that we
9 may wish to supplement the record or supplement the petition
10 with leave based on what discovery shows. If the court would
11 like to adjust the schedule so that we can replead a more
12 fulsome petition based on what we know now, I don't think it is
13 an unreasonable request of respondent, your Honor.

14 THE COURT: It strikes me that it is not much of a
15 burden. Within two weeks can you file an amended petition?

16 MR. LACOVARA: The only issue, your Honor, is the
17 Easter holiday. Could we have the beginning of the week after
18 Easter, your Honor?

19 THE COURT: That will be simultaneous with the date
20 for their motion.

21 MR. LACOVARA: I took it as implicit, if we were to
22 file an amended petition, they would conceivably wish to have
23 more time on the whole schedule.

24 THE COURT: We can do that too.

25 MS. MOSS: We are flexible on schedule, your Honor.

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1 We just want to make sure that we are not subject to a fishing
2 expedition based on no allegations.

3 THE COURT: File your amended petition on April 17. I
4 will reset the schedule. File your motion on May 15. File any
5 opposition by July 24. I will take a reply by August 5. I
6 will put the matter down for an oral argument on August 21 at
7 11:00 o'clock. That may change.

8 MS. MOSS: Your Honor, I know that I am not going to
9 be in New York on August 21. I don't know if we need to decide
10 that now. Would you prefer that we consult with opposing
11 counsel?

12 THE COURT: Why don't you consult. We will fix an
13 oral argument date when we get closer.

14 MS. MOSS: Thank you, your Honor.

15 MR. LACOVARA: Thank you, your Honor.

16 THE COURT: Given that it is falls at the end of the
17 summer. I also think that the parties should take the
18 opportunity to confer about a tolling agreement that might
19 obviate the need for a lot of this, if not all of it.

20 MR. LACOVARA: Yes, your Honor.

21 THE COURT: Anything else?

22 MR. LACOVARA: Not for petitioners.

23 MS. MOSS: Not for respondents, your Honor.

24 THE COURT: Thank you. Thank you for coming in. Have
25 a good afternoon.