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Nigeria v P&ID—Must the Court Safeguard the Rule of Law in Arbitrations?

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In *Nigeria v P&ID*, the English Commercial Court upheld a challenge to a multi-billion dollar award in favour of an investor, on the basis of a 'serious irregularity' under section 68 of the Arbitration Act 1996. Nigeria successfully alleged that the arbitral award was procured by bribery and corruption and was contrary to public policy.

> 'Regardless of my decision, I hope the facts and circumstances of this case may provoke debate and reflection among the arbitration community, and also among state users of arbitration, and among other courts with responsibility to supervise or oversee arbitration. The facts and circumstances of this case, which are remarkable but very real, provide an opportunity to consider whether the arbitration process, which is of outstanding importance and value in the world, needs further attention where the value involved is so large and where a state is involved'.
> (per Mr Justice Robin Knowles in *Nigeria v P&ID*)[1]

Introduction

The arbitral community rightly prides itself on, among other things, the benefits of fair, reliable and confidential awards being issued following a consensus-based procedure and enforced across the world. But the comments of the English judge (Knowles J) in this case show that there may be extreme examples where judicial intervention is needed to do justice. The award appeared to give a US$11 billion windfall to a company where neither party performed the key obligations necessary to generate revenue from an energy infrastructure project. The specific allegations that led to the setting aside of the Award were far-reaching. They took some eight weeks of court time to try. While not all were accepted, Knowles J was satisfied that Nigeria's case on fraud and conduct contrary to public policy succeeded in light of at least three factors:

1. P&ID provided evidence to the arbitral tribunal that was false and P&ID knew it was false. This was the evidence of one of P&ID's co-founders (Michael Quinn), which sought to explain how the underlying agreement (the Gas Supply and Processing Agreement for Accelerated Gas Development, 'GSPA') came about but omitted any reference of this being procured by fraud.
2. P&ID paid bribes (or corrupt payments) to a Nigerian civil servant (Grace Taiga) in order to suppress from the Tribunal and Nigeria the fact that Ms Taiga had been bribed when the GSPA was executed.
3. P&ID received and improperly retained Nigeria's internal legal documents (many of which were privileged and disclosed Nigeria's strategy in the arbitration) that it had received during the arbitration. The Judge found that this showed an intention for P&ID to monitor Nigeria's position.

1 [2023] EWHC 2638 (Comm) at [582].

This decision is an important contribution to questions over corruption in international arbitration—particularly where sovereign states are involved, and a negative outcome can have significant ramifications for a national budget. It appears that the transgressions extended not only to corrupt actions by a party, but also potentially unethical conduct by that party's legal representatives in the course of the arbitration. The impact of such corruption compounded the problems the arbitral tribunal faced where a party's counsel failed to put forward that party's case competently. Finally, at a more parochial level, it engaged the English court in a fine balancing act over a challenge regarding 'serious irregularity'—requiring avoidance of the temptation to enquire into the merits of the disputes while also maintaining the rule of law.

1. Background

P&ID (a British Virgin Islands company) and Nigeria entered into a 20-year agreement for Gas Supply and Processing Agreement for Accelerated Gas Development (GSPA) whereby Nigeria undertook to supply 'wet' gas to facilities constructed by P&ID, which were to strip the wet gas into 'lean gas' to be delivered to Nigeria to be used for power generation. This agreement was governed by Nigerian Law and included an arbitration clause which stipulated that the 'venue of the arbitration shall be London, England' unless otherwise agreed by the parties.

Nigeria did not supply any wet gas to P&ID and P&ID did not construct any gas processing facilities. Notwithstanding this, in the third year of the GSPA, P&ID started an arbitration against Nigeria pursuant to the arbitration clause in the GSPA. P&ID alleged that Nigeria was in repudiatory breach of contract for failing to provide the wet gas. The arbitration was in London and the Tribunal was described as having the 'greatest experience and standing' and included Lord Hoffman[2] as the President.

The Tribunal delivered a part final award on liability in 2015, finding that Nigeria had committed a repudiatory breach of the GSPA which P&ID had accepted. The Tribunal then delivered a final award on quantum ordering Nigeria to pay damages of $6.6 billion, plus interest at the rate of 7%. By 2023 Nigeria's total liability stood at around $11 billion.

There were no allegations of bribery before the Tribunal. The allegations of corruption later transpired during the enforcement and post-award challenge proceedings.

Subsequently, P&ID began enforcement proceedings, including in 2018 in England. In September 2019 an English judge of the Commercial Court made an order on the enforcement application allowing P&ID to enforce the award on liability, but granting Nigeria permission to appeal on certain grounds.

Also in September 2019, Grace Taiga—a Nigerian civil servant who featured prominently in the case—was detained in Nigeria and charged with a number of offences including corrupt practices and intent to defraud. Nigeria then made applications for discovery orders with the courts in the US, which led to discovery of documents that showed payments from a company in the same group as P&ID to Ms Taiga's daughter. Evidence of other allegedly corrupt payments to Ms Taiga that could be linked to P&ID subsequently came to light.

In December 2019, Nigeria applied to the English Commercial Court under sections 67 and 68 of the Arbitration Act 1996 to set aside the awards (on liability and quantum) on the grounds that they were procured by fraud and/or other conduct that is contrary to public policy, and that the Tribunal lacked jurisdiction. Nigeria first had to satisfy the Court that it should be allowed to bring this challenge out of time, through an application for extension of time and relief from sanctions to rely on new evidence to resist P&ID's application to enforce. This application was granted in September 2020.

Subsequently, Nigeria also obtained documents that showed that its internal legal documents were leaked to P&ID during the arbitration. In fact, P&ID's solicitors in the English litigation were obliged to disclose these privileged documents.

The hearing of the substantive challenge came before Knowles J who ruled in Nigeria's favour.

2 At [9]. Lord Hoffmann is a former judge of the House of Lords, the UK's highest court, which has since been renamed the UK Supreme Court.

2. Decision

The 140-page decision deals in great detail with the multitude of allegations against P&ID. Essentially, the Judge found that there was evidence of the following:

> P&ID provided knowingly false information to the Tribunal. In particular, it failed to mention the bribes to Ms Taiga that were intended to procure the GSPA and the witness statement of a Mr Quinn also falsely asserted that P&ID had all the project financing in place.
>
> P&ID bribed Ms Taiga, including throughout and after the conclusion of the arbitration. It was said that the later payments were intended to 'buy her silence'.
>
> P&ID (including its English solicitor and counsel) improperly retained Nigeria's privileged documents. These included a note of a post-negotiation meeting which disclosed that Nigeria was advised to settle for $1.1 billion.

This evidence was enough to meet the high burden of a challenge for serious irregularity and substantial injustice. The Judge was alive to the limits of his jurisdiction, highlighting that:

> [It is not for me as a Judge of the Court where the parties have chosen arbitration to resolve their dispute, to decide the merits of the dispute. That task and responsibility has been given by them to the Tribunal.[3]

Furthermore, the Judge held that Nigeria had not lost its right to object under section 73 of the Arbitration Act 1996. This provision states that if a party continues to take part in arbitral proceedings, it may not later raise objections (including as to irregularity affecting the tribunal or proceedings) unless it shows that, at the time it took part or continued to take part in the proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objection. Essentially, the Judge rejected the various 'red flags' that P&ID argued should have alerted Nigeria as to the possibility to challenge the awards. The fact that the GSPA was on its face deeply suspicious and entered into with a BVI company, the fact that corruption was widespread in Nigeria and the fact that P&ID failed to meet procurement or authorisation proceedings were not enough to suggest bribery in this case. Crucially, Nigeria did not (at the time alleged) have knowledge that 1) Mr Quinn—the co-founder of P&ID, who died before the hearing on 1 June 2015—was giving untruthful evidence; 2) that Ms Taiga was being bribed; and 3) that P&ID had retained its internal legal documents.

3 At [313].

3. The 'postscript'

After setting out the reasons for the decision and the outcome, the Judge made *obiter* but highly important general comments when reflecting on the GSPA, the arbitration and the awards. He highlighted the risk that absent supervision, arbitration as a process becomes less reliable and more vulnerable to fraud. He drew attention to four points:

1. The importance of carefully drafting major commercial contracts involving a state. This underlines the importance of professional standards and ethics and shows the valuable pro-bono contribution of some major law firms assisting states challenged for resources.
2. The need for disclosure of documents.
3. The importance of participation and adequate assistance to the tribunal by parties' legal representatives.
4. The dangers of the lack of public scrutiny in arbitrations involving states due to the confidential nature of the proceedings.

Conclusion

First, the points on which Knowles J founded his decision cover apparently unethical conduct by the lay party and its legal representatives. Indeed, the Judge noted he would pass a copy of his decision on to the relevant regulatory bodies and we draw no further conclusions in those circumstances. While this is an extreme set of facts, it reinforces the principle that parties and tribunals expect that all participants will conduct themselves in good faith. It can be very expensive and difficult to unpick carefully concealed corruption.[4]

Second, as we have noted, the Judge rejected the allegation that P&ID also bribed the lawyers that represented Nigeria during the arbitration. However, the Judge highlighted a number of failings from Nigeria's counsel in the arbitration, including a failure to put the necessary points to expert during the quantum hearing. He questioned whether the Tribunal should have taken the initiative and be more direct and interventionist.

4 Contrast the recent decision in Contax Partners Inc v Kuwait Finance House [2024] EWHC 436 (Comm) where the Court set aside on a summary basis a supposed Kuwaiti arbitration award that had been fabricated.

Notwithstanding this, the Judge exonerated the Tribunal by observing that it 'did what it did with what it had'. This reignites the debate as to whether tribunals are doing enough to obtain fair outcomes especially where parties' relative quality of representation is unequal. Section 33 of the Arbitration Act 1996 imposes a general duty on a tribunal to act fairly and impartially between parties and requires that each party be given a reasonable opportunity to put its case and deal with that of the opponent. Moreover, the tribunals often have authority to call for evidence, whether under national laws or, where incorporated/agreed, the 2020 IBA Rules on the Taking of Evidence in International Arbitration.[5] Can more be done to raise the quality of legal debate (where necessary) without arbitrators risking to be accused of bias by 'improving' a parties' case?

Third, the decision tests the limits of a challenge for serious irregularity. Counsel for P&ID pointed out that section 68 is not there to give you a remedy if you instruct an honest lawyer who makes a mess of it—but that did not reflect the facts of this case. However, it is difficult to argue against the outcome in this case. Section 68 challenges appear to be one of the only safeguards for the rule of law. One may speculate as to whether the Judge would have accepted the Section 68 challenge if no dishonest conduct had been unearthed. The obiter comments are arguably directed at how the tribunal might have discovered that conduct itself.[6]

Fourth, as Knowles J observed, without court intervention 'the population of an entire federation of states would have suffered from the economic consequences, and fundamental damage would have been left to the integrity of arbitration as a process'. Thanks to the existence of a strong judicial second-level review, *Nigeria v P&ID* narrowly avoided an outcome where arbitral proceedings and subsequent court enforcement provided legitimacy to an agreement and award obtained by corruption. This both confirms the system 'works' in the context of this English-seated arbitration, but reinforces the need for some form of judicial oversight—difficult as that may be for an arbitration 'purist' to contemplate. A strong statutory and judicial framework is necessary to allow arbitration to operate as efficiently as we all wish.

5 E.g. Arts 3(7) and (9) (on document production if tribunal approves party requests), 6(1) (tribunal-appointed expert), 8(1) (Party/tribunal can request attendance of witness to give testimony at evidential hearing),

6 At [398]-[399].