

Successful section 68 Arbitration Act 1996 challenge to \$11 billion dollar award procured by fraud: The Federal Republic of Nigeria v Process & Industrial Developments Limited [2023] EWHC 2638

By Hannah Fry

Commercial and Construction

17TH NOV 2023

Arbitration , Commercial , Fraud



In *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm), Mr Justice Robin Knowles CBE, sitting in the Commercial Court, handed down a seminal judgment concerning arbitration, fraud, and public policy. This case concerns a challenge by The Federal Republic of Nigeria (“Nigeria”) to three arbitration awards under section 68 of the Arbitration Act 1996 (“AA 1996”) for serious irregularity.

In summary, Mr Justice Knowles found that Nigeria established that the arbitration awards had been obtained by fraud and contrary to public policy within the meaning of section 68(2)(g) AA 1996.

This judgment is significant, not only for its application and findings in relation to sections 68 and 73 AA 1998, but also for Mr Justice Knowles’ reflections concerning the arbitration process in high-value cases involving a State.

“[582] 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."

The Key Facts

Background

In January 2010, the Federal Government of Nigeria ("**Nigeria**") and Process & Industrial Developments Limited ("**P&ID**"), a company registered in the British Virgin Islands, entered into a twenty page document entitled "Gas Supply and Processing Agreement for Accelerated Gas Development" ("**GSPA**").

Under the GSPA, Nigeria was to supply specified quantities of "wet" gas to Gas Processing Facilities constructed by P&ID. P&ID was to strip the wet gas into "lean" gas to be delivered to Nigeria to be used for power generation. The stated duration of the GSPA was 20 years. In the event, Nigeria did not supply any wet gas to P&ID, and nor did P&ID construct any Gas Processing Facilities.

The Arbitration

In the third year of the GSPA, the arbitration was commenced by P&ID against Nigeria. The Tribunal was "of the greatest experience and standing" (at [9]). Sir Anthony Evans was nominated to the Tribunal by P&ID, Chief Bayo Ojo SAN was nominated by Nigeria and Lord Hoffman was appointed Chairman.

The Tribunal rendered three awards, upholding its jurisdiction; finding Nigeria had committed a repudiatory breach of the GSPA, that the GSPA was terminated on P&ID accepting that repudiatory breach and Nigeria was liable in damages; and in January 2017, awarding damages which required Nigeria to pay P&ID US \$6.6 billion with interest at a rate of 7%.

The Decision

The Issues

Before the Commercial Court in London, Nigeria challenged all three awards under section 68(2)(g) AA 1996 which provides:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the grounds of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy."

The key issues were:

1. Was the award obtained by fraud or the award or way in which it was procured contrary to public policy, as to amount to an irregularity within section 68(2)(g) AA 1996?
2. Was the irregularity serious and caused substantial injustice within section 68(2)(g) AA 1996?
3. Did Nigeria lose the right to object by virtue of section 73 AA 1996?

1. Awards obtained by fraud

Knowles J held that there were three aspects that brought the case within section 68(2)(g) AA 1996 as an "irregularity". Each amounted to fraud by which the awards were obtained, and by reason of them the awards or the way in which the awards were procured was contrary to public policy:

- First, P&ID's providing to the Tribunal – and relying on – evidence that was material but that P&ID knew to be false. Specifically, the evidence of Mr Michael Quinn, a co-founder of P&ID, that he was "*explaining how the GSPA came about*" when he did not do that because he did not mention that Mrs

Grace Taiga, a Nigerian official, had been paid a US\$ 5,000 bribe at the end of December 2009 and a £5,000 bribe on 29 March 2010.

- Second, P&ID's continued bribery or corrupt payment of Mrs Grace Taiga in order to suppress from the Tribunal and Nigeria the fact that she had been bribed when the GSPA came about. These were bribes or corrupt payments on 14 July, 14 August and 30 September 2015 totalling NGN 220,000 (US \$900), a bribe or corrupt payment on 14 September 2015 of US \$1,000 and a bribe or corrupt payment on 14 June 2016 of US \$3,000.
- Third, P&ID's improper retention of Nigeria's Internal Legal Documents that it had received during the arbitration which it retained to monitor Nigeria's position and awareness as the arbitration continued. This included monitoring whether Nigeria had become aware of the deception being practised by P&ID on the Tribunal and on Nigeria as a party before the Tribunal. There was a flow of over 40 of Nigeria's Internal Documents to P&ID during the period of arbitration from 22 August 2012 to 31 January 2017.

2. Serious irregularity which caused substantial injustice

The Privy Council held in *RAV Bahamas v Therapy Beach Club* [2021] UKPC 8 that there will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different.

Applying such test, Mr Justice Knowles concluded that there was no question in his mind that the arbitration would have been completely different, and in ways strongly favourable to Nigeria, had the fact of bribery of Mrs Grace Taiga when the GSPA was being made been before the Tribunal. It would have brought in the issue whether the GSPA was procured by fraud, and as a result voidable. Discovery of the concealment would have completely altered the Tribunal's approach to the rest of Mr Michael Quinn's evidence.

Also regarding P&ID's actions concerning Nigeria's Internal Documents, Mr Justice Knowles concluded that had the Tribunal known, its approach would have been very different. The nature and contents of the documents, and the scale, continuity and circumstances of P&ID's conduct was such that Nigeria's right to confidential access to legal advice was utterly compromised throughout all or most of the arbitration.

3. Nigeria did not lose the right to object

Section 73 AA 1996 provides that:

"(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection -

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

Mr Justice Knowles stated that the requirement under section 73 is *"could not with reasonable diligence"*. The reasonable diligence he was concerned with was confined to reasonable diligence that would *"have discovered the grounds for the objection"*, that is of the *"award being obtained by fraud or the award or the way in which it was procured being contrary to public policy"* because of bribery or corrupt payments, false evidence in connection with them and what happened with Nigeria's Internal Legal Documents.

In his judgment, nothing began that path until after the arbitration and until Nigeria first began to acquire knowledge of the bribery of Mrs Grace Taiga and that P&ID had Nigeria's Internal Legal Documents. Nigeria first began to acquire knowledge of the bribery of Mrs Grace Taiga when she was interviewed by and gave a statement to the Nigerian Economic and Financial Crimes Commission in September 2019 and that P&ID had Nigeria's Internal Legal Documents on 29 October 2021, when that was disclosed to it by Kobre & Kim.

Mr Justice Knowles concluded that under section 73 AA 1996, Nigeria, at the time it took part or continued to take part in the arbitration, did not know and could not with reasonable diligence have discovered the grounds for its objection under section 68(2)(g) AA 1996 and therefore, did not lose its right to object under section 68(2)(g) AA 1996.

4. Wider Reflections

Therefore, Nigeria succeeded on its challenge to the awards under section 68 AA 1996 and the awards were found to be obtained by fraud and the awards were procured contrary to public policy.

Mr Justice Knowles concluded with four points of reflection:

- 1. Drafting major commercial contracts involving a State It was a complete imbalance in the contributions of the parties that enabled the GSPA to be in the form it was and this happens in other contracts involving a State where experience, expertise or resources are grossly unequal. This underlines the important of professional standards and ethics in the work of contract drafting and why the contributors of pro bono work by leading law firms to support some States challenged for resources is so valuable.
- 2. Disclosure or discovery of documents Disclosure or discovery of documents enabled the truth to be reached in this case, in particular disclosure orders made by courts securing disclosure from P&ID and third parties. This case is a strong example that disclosure matters.
- 3. Participation and representation in arbitrations over major disputes involving a State This case showed examples where legal representatives did not do their work to the standard needed, experts failed to do their work and where politicians and civil servants failed to ensure Nigeria as a State participated in the arbitration. The result was that the Tribunal did not have the assistance that it was entitled to expect and which makes the arbitration process work. But what is the arbitral Tribunal to do? Could and should the Tribunal have been more direct and interventionist when it was so clear throughout the arbitration that Nigeria's lawyers were not getting instructions, or when at the quantum hearing, Nigeria's then Leading Counsel, Chief Ayorinde, was failing to put necessary points to experts to test their opinion and Nigeria's own experts (for whatever reason) had not done the work required? Should the Tribunal have taken the initiative to encourage exploration of new bounds of contract law and the law of damages that may today be required where major long term contracts are involved?
- 4. Confidentiality in significant arbitrations involving a State The privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was being done. When courts are concerned it is often said that the "open court" principle helps keeps judges up to the mark and it allows scrutiny of the process as a whole. An open process allows the chance for the public and press to call out what is not right. Unless accompanied by public visibility or greater scrutiny by arbitrators, how suitable is the process in a case as this where what is at stake is public money amounting to a material percentage of a state's GDP or budget? Is greater visibility in arbitrations involving a State or State owned entities part of the answer?

It should also be noted that Mr Justice Knowles referred a copy of the judgment to the Bar Standards Board in the case of the two counsel instructed by P&ID in relation to the improper retention of Nigeria's Internal Legal Documents.

Comment and Conclusion

The judgment shines a light on "*the reputation of arbitration as a dispute resolution process*"(at [14]) and brings to the forefront at least key three takeaways for those of us involved in large arbitrations, in particular involving a State entity, and also fraud trials more generally:

- *Disclosure in large fraud cases.* The importance of disclosure of documents, in particular in cases involving fraud. Disclosure orders, whether against the opposing party or third parties, are a key tool in the toolbox to unveil the truth of a case.

- *Intervention by Tribunals.* This judgment may encourage Tribunals to take initiative and be more interventionist in their approach where there is not proper participation and representation by a State in a major dispute. However, what are the boundaries of a Tribunal intervening and potential consequences to enforceability of the award?
- *Confidentiality of arbitrations involving a State entity.* Arbitration, like any other dispute resolution mechanism, has to strike a balance between transparency and confidentiality. In order to achieve accountability, in particular in cases which are high value and involve a State-entity, does the arbitration process require more openness? Or can it be achieved through other means, such as publication of awards? For example, the new rules under the ICSID Convention deem that a party has given consent to publish awards unless it objects in writing within 60 days after it is issued.

To an extent, this may be an exercise in maieutics. What is clear is that *Nigeria v P&ID* has put such questions centre stage and firmly on the agenda for practitioners moving forward.

London

81 Chancery Lane,
London
WC2A 1DD
Tel: +44 (0)20 7832 1111
DX: London/Chancery Lane 298
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester
M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
28 Maxwell Road,
WC2A 1DD
04-03 & 04-04, Maxwell Chamber
Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR

#02-9, Bangunan Sulaiman
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur,
Malaysia
Tel: +60 32 271 1085

BARRISTERS • ARBITRATORS • MEDIATORS

clerks@39essex.com • DX: 298 London/Chancery Lane • 39essex.com