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INTERNATIONAL ARBITRATION IN THE DOCK; LESSONS TO BE LEARNED FROM NIGERIA V P+ID

This was a quite extraordinary matter in which an offshore, "briefcase" investor (P&ID) took advantage of corrupt government officials in Nigeria to obtain a 20-year concession in respect of a gas project on very favourable terms. When Nigeria defaulted under the concession agreement the investor commenced an international arbitration claim and was ultimately awarded USD 6 billion plus interest by a distinguished majority comprising Lord Hoffman and Sir Anthony Evans. Steps were then taken by P&ID to enforce the arbitration award via the English Commercial Court. There followed a series of applications for disclosure by Nigeria, in various jurisdictions around the world (including in the US, the Cayman Islands, Cyprus, the England, and the BVI).

[Case commentary – The Federal Republic of Nigeria v Process & Industrial Development Limited [2023] EWHC 2638 (Comm)]

Introduction

The documents and information that were obtained ultimately culminated in Nigeria's successful challenge to the arbitration award in the English Commercial Court pursuant to section 68 of the Arbitration Act 1996 (s68AA96) (on the grounds of a serious irregularity). The judge, Mr Justice Knowles, found that the arbitration award had been obtained by fraud and the way in which it had been obtained was contrary to public policy. The Judgment is substantial and runs to 127 pages and some 595 paragraphs.

Given the fact that corruption is, sadly, seen as endemic in Nigeria (a fact recognised by Nigeria itself in the English Commercial Court proceedings), the initial corruption that P&ID took advantage of to obtain the concession is not the striking feature of this saga and indeed was not what later proved determinative in the s68AA96 challenge. What makes this matter quite extraordinary, and what was determinative in the challenge, is what followed both during the arbitration itself and following the award.

In the s68AA96 challenge it emerged that the key factual witness for P&ID had lied in his witness statement, that P&ID had continued to bribe an ex-government official to maintain her silence whilst the arbitration was continuing and, shockingly, was regularly being provided with Nigeria's confidential and privileged legal advice. This included documents relating to Nigeria's assessment of the merits, strategy, and the various failed attempts at settlement. The two key lawyers who were acting for P&ID, Mr Seamus Andrew and Mr Trevor Burke KC, were alleged to stand to make up to £3 billion and £850 million respectively if the award had been successfully enforced[1]. Knowles J found their behaviour in relation to reviewing obviously privileged documents and confidential information to be "indefensible"[2], and so said that he was going to refer a copy of his judgment to the Solicitors Regulation Authority and the Bar Standards Board.

Following Knowles J's decision, the behaviour of P&ID and its lawyers has been, rightly, condemned. However, the distinguished members of the Tribunal who issued the majority award have also come in for some degree of criticism including from Knowles J himself. The efficacy of the international arbitration process, as a whole, has also been questioned and this case is fuel for the fire for those that argue that international arbitration is not the appropriate forum to resolve disputes between investors and sovereign states.

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[1] para 207, [2023] EWHC 2638 (Comm)

[2] ibid para 215

The criticism of Lord Hoffman and Sir Anthony Evans and the questioning of the efficacy of the international arbitration process, as a whole, seems, to the writer at least, to be slightly unfair and does not take account of the role that Nigeria played in the process. Nigeria must take some blame and their conduct during the arbitration is an abject lesson to all respondents in how not to mount a defence to a major international arbitration claim. If Nigeria had acted prudently from the outset and had devoted the resources that, one would expect, a claim for USD 6 billion would warrant then the outcome of the arbitration could well have been very different and there would have been no need for Nigeria to incur the very significant costs (over £20 million[3]) and associated risk in attempting to rescue the situation by way of a s68AA96 challenge.

In this commentary we look at two aspects of Knowles J's decision: (1) the fact that Nigeria was able to establish that the concession agreement had been procured through corruption was not sufficient, in and of itself, to succeed in the s68AA96 challenge; and (2) the degree to which Nigeria prejudiced its own defence in the arbitration and that if Nigeria had acted more responsibly then perhaps the many steps that it had to take to rescue the situation post the award would not have been necessary.

Initial fraud to secure the concession agreement was not determinative

s68AA96 allows an arbitration award to be challenged in circumstances in which the party seeking to challenge the award can establish that there was a serious irregularity affecting the tribunal, the proceedings or the award and that serious irregularity caused substantial injustice to the applicant. What amounts to a serious irregularity is set out in s68 (2) (a) to (i) AA96 and in this case the key provision was s68 (2) (g) AA96. s68 (2) (g) AA96 states *"the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy"*.

To anyone unfamiliar with s68 AA96 challenges you may be forgiven for thinking that if the applicant can establish that the contract that gives rise to the arbitration was obtained by corruption then that is likely the end of the matter and the application will succeed. However, what is apparent from Knowles J's decision, and indeed the wording of s68 (2) (g) AA96 itself, is that what matters is how the award was obtained. The analysis is confined to the arbitration itself or the tribunal's decision making process in the arbitration. Even if the party seeking to challenge the award is able to show that the concession agreement giving rise to the arbitration was obtained by fraud, that, in and of itself, is not determinative. Whilst that factor is or would have been relevant to the defence of the claim in the arbitration, come the challenge application the question that the court is considering is - was the award obtained by fraud or the way in which the award was obtained contrary to public policy?

In the judgment, Knowles J, expressly states in regard to his analysis of whether there was bribery - "*I shall not reach a final conclusion about a claim in bribery concerned with the [concession agreement]. This is because where the parties have agreed to arbitration that may not be for this Court to decide*"[4] . He also went on to say "*the parties agreed that the Tribunal, and not this Court, should decide their dispute over the [concession agreement]. The question whether the [concession agreement] was procured by bribery, and the consequences for the [concession agreement], was for the Tribunal*"[5] .

In its application, Nigeria had sought to argue that there was *"a real and direct link*" between the bribery that was used to procure the concession agreement and the outcome of the award. Once it was able to demonstrate that then it argued that was sufficient for s68AA96. However, Knowles J said that he could not accept that approach as in almost every case in which an award is based on a contract procured by bribery that would apply and it would involve the court reaching a conclusion about the contract rather than the award. s68AA96 is concerned about the award and how it was obtained.

On the facts in this case, what was highly relevant to the s68AA96 challenge, and indeed was determinative, was that Knowles J found that: (1) the key factual witness for P&ID had submitted knowingly false evidence in the arbitration; (2) post the commencement of the arbitration P&ID had continued to bribe at least one corrupt former government official in order to secure her silence; and (3) P&ID was regularly being supplied with Nigeria's confidential and privileged documents during the arbitration. Having found that those three matters were a series of irregularities, Knowles J then went on to consider whether they amounted to serious irregularities as required unders68AA96, which he did. In terms of whether those serious irregularities caused substantial injustice to the applicant (again, as required by s68AA96) then the key question was said to be - if it had been known by the tribunal, would it have likely led to a different result? Knowles J said he had no hesitation in concluding that Nigeria suffered substantial injustice within the meaning of s68AA96. In his view, the Tribunal would have likely reached a different award if they had known the three key factors that he found to be decisive.

The case is a useful reminder that what matters when looking at s68AA96 is how the award was obtained. The analysis is confined to the arbitration itself or the tribunal's decision-making process in the arbitration. How the contract giving rise to the arbitration was obtained may not matter.

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[3] See the article that appeared in GAR on 21 December 2023 reporting on the leave to appeal decision

[4] ibid para 160

[5] ibid para 480

Nigeria's degree of responsibility

One of the unique features of the arbitration was that P&ID were, shockingly, throughout the arbitration being supplied with privileged and confidential information that belonged to Nigeria. This information gave a valuable insight into what was going on behind the scenes within the Nigerian defence team (both legal and experts). Knowles J refers to numerous examples of this in the Judgment and it is through those documents that the outside world is given a unique insight into what was happening vis-a-vis the conduct of the defence.

It actually makes for pretty uncomfortable reading and it is the antithesis of how one runs a successful defence. The position seems to have been complete and utter chaos. The legal team were regularly missing key procedural deadlines and seeking instructions from the relevant ministries at the last minute and then, to compound matters, not receiving a response from those ministries. Time after time Nigeria was given extensions for the various procedural steps by the Tribunal but even that was often not enough. By way of example, having chosen to challenge the jurisdiction of the Tribunal, Nigeria did not appear to file an expert report or indeed make any submissions. The documents also reveal that the legal team were constantly chasing for payment, seeking instructions and requesting budgetary approval in respect of experts required to rebut or counter P&ID's experts, which were then not provided. Knowles J, expressly noted *"Behind the scenes, Nigeria's position had been beset by issues over legal fees and expenses and their payment"*. He also noted *"It is very clear that the Tribunal had met with many, and many inexcusable, delays and failures properly to engage, all on the part of Nigeria"*.

Having lost on the jurisdiction challenge and then on liability, Nigeria changed its legal counsel for the quantum stage. Once again deadlines appear to have been missed and the proper attention was not given. This was in circumstances in which the Tribunal had found Nigeria was liable and so it was facing the potential of a USD 6 billion award if no successful quantum defence was put forward. Various exchanges from the transcript are quoted verbatim in the Judgment in which Leading Counsel for Nigeria put forward his arguments and it makes for painful reading with fundamental points being missed. It is evident from the transcript that the Tribunal were doing what they reasonably could to help him and to give him a steer but, once again, Nigeria's Leading Counsel (like with the liability phase) appeared to be significantly out of his depth. Knowles J also noted in the Judgment that Nigeria's expert witnesses did not, in the view of the Tribunal, appear to have even been shown P&ID's key factual witness statement and simple points in relation to causation and what interest rate to apply, were not challenged or argued.

In his reflection at the end of the Judgment, Knowles J said:

"*...I have not found Nigeria's lawyers in the Arbitration to be corrupt. But the case has shown examples where legal representatives did not do their work to the standard needed, where experts failed to do their work, and where politicians and civil servants failed to ensure that Nigeria as a state participated properly 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. And Nigeria did not in the event properly consider, select and attempt admittedly difficult legal and factual arguments that the circumstances likely required. Even without the dishonest behaviour of P&ID, Nigeria was compromised*."[6]

When one reads the Judgment, one cannot help but form the impression that if Nigeria had engaged with the arbitration claim with the attention that it deserved, from the outset, then even if the dishonesty and corruption had not been discovered it may well have been able to defeat the claim on its merits. There were obvious causation points that were available, and had been heavily hinted at by the Tribunal, that do not appear to have been developed at all. Those instructing the legal defence team failed to give instructions on time and/or if at all and a similar approach was adopted with respect to the experts. There were serious budgetary issues with the buck being passed from ministry to ministry and with the ultimate result being that no one took responsibility. At no point did Nigeria appear to grasp just how serious the claim and its potential financial consequences were – until it was almost too late.

One hopes that Nigeria's experience on this matter proves to be a lesson learned and it forms the basis of a salutary lesson for any other respondent state that finds itself in the same position. The handling of the defence reads like a horror show and one never to be repeated.

[6] ibid para 587

Conclusion

As stated at the outset, the behaviour of P&ID and its lawyers has been rightly condemned. Nothing can excuse bribery and corruption and, in the awards on liability and quantum being set aside in whole, justice has ultimately been done. However, what is clear from the Judgment is that it was a bullet dodged and the result could well have been different. As Knowles J himself stated in his concluding remarks, *"I end the case acutely conscious of how readily the outcome could have been different, and of the enormous resources ultimately required from Nigeria as the successful party to make good its challenge. I highlight the possible consequences if Mr Andrew [P&ID's lawyer] had drafted Mr Michael Quinn's witness statement a little more cautiously and if P&ID had not retained Nigeria's Internal Legal Documents during the Arbitration*". [7]

To be an effective dispute resolution mechanism, international arbitration relies on both parties taking their respective responsibilities seriously. International arbitration claims involving sovereign states are typically for substantial amounts of money. They must be taken seriously. If one party chooses to appoint a legal and expert team that are wholly out of their depth and/or incompetent, then compounds that initial error by failing to provide the legal and expert team with documents, information, timely access to factual witnesses and the basic instructions necessary to mount a defence, then it is unfair to subsequently blame the tribunal or the arbitration system as a whole. Any saving made by choosing to use lawyers or experts that are, putting it at its most generous, out of their depth, is likely to be completely dwarfed by the possible damages award if the defence proves unsuccessful. The parties need to help themselves and they cannot rely on the tribunal to do their job for them – or indeed roll the dice on a challenge in the supervisory court.

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[7] Ibid para 581

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