A NIGERIAN TRAGEDY: HOW TO SET ASIDE A US$11 BILLION ARBITRAL AWARD

ANALYSIS OF THE FEDERAL REPUBLIC OF NIGERIA V PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED [2023] EWHC 2638 (COMM)

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Nigeria v P&ID concerned a document, signed between two parties, one a state and one a company, just twenty pages long. The document was a Gas Supply and Processing Agreement ("**GSPA**") whereby Nigeria would supply quantities of "wet" gas to P&ID to be stripped into "lean" gas which would then be delivered to Nigeria for power generation. P&ID accused Nigeria of a repudiatory breach under the GSPA and the dispute was referred to the arbitral tribunal.

The resulting arbitral award rendered Nigeria liable to P&ID US$6.6 billion. With interest awarded by the arbitral tribunal, the amount stood above US$11 billion. The sum was so substantial that, as the judge noted, it was material to Nigeria's entire federal budget.

Aside from the inverse correlation between size of award and length of contract, the decision is notable for laying down the relevant principles on the legal effect of bribery on an arbitral award, the requirements for setting aside an arbitral award for serious irregularity, and the circumstances where a party may lose the right to challenge an arbitral award.

Bribery and All Things Naughty

Knowles J made various findings of impropriety and misfeasance:

- The GSPA was had been secured through a bribe paid by P&ID to the legal director of Nigeria's Ministry of Petroleum Resources;
- Important witnesses were kept 'on-side' and silent during the arbitration process through bribery by P&ID;
- Nigeria's internal legal documents which were subject to legal privilege were passed on to and retained by the P&ID's legal team during the arbitration; and
- P&ID's witnesses gave knowingly false evidence on the inception of the GSPA, especially in concealing the existence of the bribe.

Nigeria relied on s. 68(2)(g) of the Arbitration Act 1996 as a gateway to challenging the arbitral award, i.e. 'the way in which [the award] was procured being contrary to public policy'. If respect for the arbitration process is based on respect for the parties' freedom to determine the forum for resolving their dispute, then where an award is obtained by fraud or contrary to public policy, that cannot be what the parties have agreed to when they agreed on arbitration; as the judge puts it, '[t]his architecture meets the requirements of justice'.

One argument advanced by Nigeria under s. 68(2)(g) was that since the underlying contract was procured by a bribe, the arbitral award was procured in a way contrary to public policy. The court rejected this submission holding that:

- Under English law, a contract which has been procured by bribes is not unenforceable as a matter of public policy: ***Honeywell v Meydan Group LLC*** [2014] EWHC 1344 (TCC) (per Ramsey J).
- The fact that the contract was procured by bribery does not mean that there is a 'real and direct link' between the bribe and the arbitral award. There were too many steps in between: Nigeria's failure to perform, P&ID's acceptance of the repudiation and the entire arbitral process leading to the award.
- However, where it could be shown that the whole underlying contract was an overall fraudulent enterprise from the start to procure an award, that would certainly fall within s. 68(2)(g). Yet, Nigeria could not show that this was an overall fraudulent scheme.

Setting Aside an Award for Serious Irregularity

The judge, however, found in favour of Nigeria that there were serious irregularities in the arbitral process which caused substantial injustice for the purposes of s. 68, citing the statements of law in ***RAV Bahamas v Therapy Beach Club*** [2021] UKPC 8 (at [30]-[37]) with approval.

In ***RAV Bahamas,*** the Privy Council considered s. 90 of the Bahamas Arbitration Act 2009 (which is modelled on s. 68 of the English Arbitration Act 1996). Substantial injustice requires something which 'has happened [that] is so far removed from what could reasonably be expected of the arbitral process…[it is] only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.

The threshold is very high. Two further points should be noted from the ***Nigeria*** judgment:

- The focus is not on whether the decision reached by the Tribunal is a correct one; rather, the court is concerned with the question of due process.
- The court will also consider whether the irregularities would have made a difference to the outcome of the case; there will be no substantial injustice if it could be shown that the outcome of the arbitration would have been the same regardless of the irregularities: Africa ***Sourcing Camerous Ltd v LMBS [2023] EWHC 150*** (Comm).

On this analysis, the judge concluded that the outcome of the arbitration would have been completely different and in ways strongly favourable to Nigeria had the bribery and the various impropriety been uncovered. There was indeed substantial injustice.

Speak Now or Forever Hold your Peace

P&ID also relied on s. 73 whereby a party who continues to take part in proceedings without making any objection on any irregularities is barred from raising those objections unless if it could be shown that the irregularities could not be discovered with reasonable diligence.

One of the questions before the judge was how the provision interacts with the Supreme Court decision in ***Takhar v Gracefield Developments Ltd*** [2019] UKSC 13 (16-year litigation which members of Wilberforce Chambers continue to act in).

In ***Takhar,*** at [54] it was said: 'where it can be shown that a judgment has been obtained by fraud […] a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment'. The judge held that while ***Takhar*** states the general position under common law, it cannot have the effect of altering the statutory bar under s. 73.

However, what ***Takhar*** does lay down is the general presumption that a reasonable person is 'entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that the other persons are dishonest'; the same presumption applies when the court looks at s. 73.

In this case, the judge placed considerable emphasis on the fact that since there was a deliberate concealment of bribery and something must have happened to cause the concealment to start to breakdown; no such event could be identified and there was nothing on the facts to suggest that Nigeria should have looked for bribery. As a result, s. 73 did not bite.

A Health Warning

The judgment is also worth reading as the judge laid down four points as food for thought for legal practitioners:

- Professional standards in drafting major commercial contracts
- The importance of disclosure in litigation in allowing the underlying impropriety to be discovered
- The possibility of a more interventionist Tribunal where there is clearly no equality of arms
- The unintended effect of confidentiality in arbitrations involving states and significant sums of money where there is no public scrutiny or visibility