Balancing the Principle of Finality of Arbitration Awards and the Public Policy of Censuring Illegality: The Case of Nigeria v. P&ID

By:

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Introduction

In Federal Republic of Nigeria v. Process & Industrial Developments Limited (‘***Nigeria v. P&ID***’),[1] the English court was faced with an application for extension of time to challenge an arbitration award delivered well over two years before the application. The court granted the application despite the delay, on the basis that there was a strong *prima facie* case of fraud involved. This paved the way for a thorough inquiry into the allegations of fraud, which if proven, would upset the validity and finality of the arbitration award. This article will review the judgment of the court in *Nigeria v. P&ID* and highlight its

contribution to jurisprudence on determining the point at which an allegation of illegality will be allowed to threaten the finality of an award.

Background

On 11 January 2010, Nigeria and P&ID entered a 20-year Gas Supply and Processing Agreement ('**GSPA**'), for the supply and processing of natural gas. The GSPA contained an arbitration clause referring parties to ad hoc arbitration under the Nigerian Arbitration and Conciliation Act 2004, in the case of disputes. The venue of arbitration was London.

The GSPA was not implemented, therefore P&ID commenced arbitration against Nigeria, alleging that Nigeria had repudiated the GSPA and claiming US$ 6.6 billion as loss of profit. On 31 January 2017, the tribunal delivered its Final Award granting P&ID's claim with pre-award and post-award interest of 7 percent.

Two years after the Final Award was delivered, P&ID filed an application to enforce it in England. On 16 August 2019, the court granted P&ID's application for enforcement of the award which had increased to US$ 9.6 billion due to the interest on the award. However, on 26 September 2019, the court granted Nigeria permission to appeal against its decision and stay enforcement considering Nigeria's investigations into P&ID, and suggestions of fraud, tax evasion, or conspiracy involved.

Thereafter, on 5 December 2019, Nigeria commenced challenge proceedings under Section 67 and 68(2) (g) of the English Arbitration Act 1996 ('**the Act**') and filed an application for extension of time to bring the challenge. Nigeria based its application for extension of time on investigation and evidence of alleged briberyfrom procurement of the contract to arbitration proceedings resulting in the award.

The Judgement

The court in determining the application, took note of the *Kalmneft* factors,[2] which are factors to be considered material in exercising discretion to extend the time limits for challenging an award. These include: the strength of the

application, the length of the delay, whether the respondent contributed to the delay, and whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined. The strength of Nigeria's case on the merit was particularly relevant to the court's discretion.

I. The Issue of Fraud in the GSPA and in the Arbitration.

The court held that there was a strong *prima facie* case of bribery involved in procurement of the contract and in the arbitration proceedings. Payments were made to senior officials of Nigeria's Federal Ministry of Petroleum Resources whose positions ensured the approval of the GSPA notwithstanding its deficiencies. Although some of the payments were explained as payments for medical expenses or bonus payments for unrelated projects, the court found that there was no evidence to support these assertions.

Regarding the arbitration proceedings, the court found that there was a strong *prima facie* case that one of the witnesses for P&ID - Mr. Quinn - had given perjured evidence. It further stated that there is a possibility that Nigeria's counsel at the jurisdiction and liability stages of the arbitration had been corrupted. Payments were made by counsel to government officials involved with the GSPA and the court accepted Nigeria's submission that these payments were made to buy their silence in relation to the arbitration and settlement negotiations.

II. Investigating the Fraud and Length of the Delay in Raising Challenge

On this issue, the court found that Nigeria had made a good case that "it did not know and could not with reasonable diligence have discovered the grounds it now advances."[3] Although the court admitted that Nigeria's investigation of P&ID proceeded with a stronger sense of urgency after August 2019 when enforcement of the award was granted, it ultimately found from the circumstances, that the alleged fraud was deliberately concealed and that Nigeria had exercised reasonable diligence in its investigation and pursuit of settlement. The court noted that although the delay in this case was extraordinary and weighs heavily on the side of the balance against extension of time, other factors bring down the balance in favour of granting the

extension.

Addressing the public policy of finality and non-intervention, the court stated that there is no rule of law which automatically prioritises the finality of arbitral awards over the public policy of refusing to endorse illegal conduct. It stated that “not only is the integrity of the arbitration system threatened, but that of the court as well, since to enforce an award in such circumstances would implicate it in the fraudulent scheme.”[4] The court therefore granted Nigeria’s application for extension of time**.**

Comments

According to section 70(3) of the Act, a challenge of an arbitration award under section 67, 68 or 69 must be filed within 28 days of the date of the award. This is based on the overriding principle of finality captured in section 1(a) of the Act. Although by reason of section 80(5) of the Act, the court has a discretionary power to extend the time limits, this discretion is not easily exercised in favour of an extension even where procedural irregularities such as fraud is alleged.

The English court generally takes a ‘non-intervention’ stance on arbitration awards and only in exceptional circumstances will the court depart from the timetable laid down for challenging an award under the Act. In fact, out of the eight cases cited by counsel involving an application for extension of time to challenge an award where fraud was alleged, 5 of them were refused either because the applicant was aware of the fraud and/or the fraud allegation was weak.

As the court pointed out while relying on precedence, an apparently strong case would positively assist an application. In the present case the strength of the bribery allegations including the through-going character of the alleged fraud and the court’s finding of reasonable diligence on the part of Nigeria, weighed heavy enough to tilt the balance in favour of an extension of time, notwithstanding what the court described as an ‘unprecedented delay’. On this point, it noted that the deliberate concealment of the alleged fraud by P&ID contributed to this delay, thus reducing the weight of the length of delay factor.

The court's judgement does not make it easier for fraud allegations to override the time limitations placed for challenging award. However, it confirms that the court, when faced with a time extension application, would be willing to give up the principle of finality in the exceptional circumstances where strength of the fraud allegations and other circumstances of the case warrants.

The judgement allows Nigeria to proceed with its challenge and paves the way for a more detailed inquiry into the fraud allegations. 'Finality of awards' still has a fighting chance as there is a high standard for proving fraud, and a strong *prima facie* case is not tantamount to a finding of fraud. Therefore, time will tell whether Nigeria has merely postponed the enforcement and accumulated interest on the award or whether the public policy of not sanctioning illegal contract will rescue Nigeria from its significant judgement debt, which currently stands at some USD$10 billion. The enforcement of the award in England remains suspended pending a decision on the challenge.

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[1] *Federal Republic of Nigeria v. Process & Industrial Developments Limited*, [2020] EWHC 2379 (Comm), available at https://www.premiumtimesng.com/features-and-interviews/412548-pid-full-judgment-court-grants-nigeria-extension-of-time-to-challenge-10billion-arbitration-claim.html

[2] The Kalmneft factors were adoted from Colman J's judgement in *AOOT Kalmneft v Glencore* [2001] 2 All E.R. (Comm) 577, [2002] 1 Lloyd's Rep 128, available at https://www.casemine.com/judgement/uk/5a8ff75960d03e7f57eab97b accessed on 5 October 2020

[3] *Nigeria v. P&ID*, n. 1, paragraph 233.

[4] Ibid., paragraph 273.

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