Lessons from Nigeria and Process & Industrial Developments Limited (P&ID)

By:

Ohio Omiunu
Oludara Akanmidu

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Background context

A protracted legal dispute between Nigeria and Process & Industrial Developments Limited (P&ID) over a purported repudiation by Nigeria of a Gas Supply and Processing Agreement ('GSPA') entered into on the 11th of January 2010 has attracted significant attention in both domestic and international media. The legal dispute dates back to March 2013 when P&ID commenced an arbitration action against the Nigerian government before a London tribunal. In 2017, the tribunal awarded damages in favour of P&ID to the sum of $6.6 billion with interest at the rate of 7% starting from the 20th of March 2013. The sum now stands at about $9.6 billion. As noted by Oludara Akanmidu in her Explainer piece, published in The Conversation, this award poses a significant threat to the nation's economy as it amounts to about 20% of the country's

foreign reserves.

The recent developments in the case follow a judgment for enforcement of the arbitral award granted by a London High Court in August 2019. Following that, in December 2019, Nigeria applied to the court for an extension of time to challenge the initial arbitral award. Nigeria's key argument was that it has a *prima facie* case of fraud against P&ID, which justifies the extension of time required to challenge the arbitral award. In an interesting turn of events, on the 4th of September 2020, the High Court granted Nigeria an unprecedented extension of time to bring challenges under sections 67 and 68(2)(g) of the English Arbitration Act 1996 ("the 1996 Act"). The ruling on the application for extension of time by the English High Court case raises several important issues, some of which have been addressed in Chizaram Uzodinma's excellent piece published on Afronomicslaw.org on the 7th of October, 2020. Uzodinma, in her contribution, reviewed the judgment of the Court highlighting *'...its contribution to jurisprudence on determining the point at which an allegation of illegality will be allowed to threaten the finality of an award.'*

In this piece, we follow up on Uzodinma's arguments, especially as it relates to the broader significance of the *prima facie* case put forward by Nigeria that *'the GSPA, the arbitration clause in the GSPA and the awards were procured as the result of a massive fraud perpetrated by P&ID.'* Nigeria further argued that *'to deny them the opportunity to challenge the Final Award would involve the English court being used as an unwitting vehicle of the fraud.'* In the first part, we reflect on the importance of the fraud allegations in the reasoning of the English High Court. In the second part, we explore some economic justice themes arising from Nigeria's reliance on fraud as a basis for challenging the arbitration award. In particular, we argue that the investigation by the Nigerian government into allegations of fraud in the procurement of the GSPA contract is a 'knee jerk' reaction motivated by a growing realisation that the US$ 9.6 billion awards may be enforced against Nigeria.

More importantly, drawing on the Mozambique Constitutional Council Decision discussed extensively by experts and key stakeholders on Afronomicslaw in June/July, we argue that there are parallels and opportunities for learning, especially as it pertains to the role of civil society organisations (CSOs) in

holding public officials accountable and exposing odious deals with corrupt foreign conspirators. We end our reflections with questions, whether the approach of Sir Cranston in the Nigerian Case is perhaps a glimmer of hope that English Courts are willing to adopt a holistic approach to the interpretation of contracts that are tainted by or procured by corruption? If not, we suggest that it is time to rethink the 'hidden costs' of arbitrating in 'arbitration-friendly' jurisdictions (see also Latham & Watkins, 2017: 22 ff 23).

Part one: The importance of fraud and public policy considerations in the Nigeria v P&ID outcome.

Section 68 (2) (g) of the Act has fraud and public policy considerations as criteria for challenging an arbitration award for serious irregularity. However, the significant delay by Nigeria in bringing this challenge within time (28 days) was a significant hurdle to surmount. This is especially so, considering that speed and finality are deemed to be essential features of London arbitration (see Eder, 2014: 28).[i] Indeed P& ID argued that given the length of time since the final award was issued, it would be 'unprecedented' for the courts to grant the extension of time requested by Nigeria.

The English Courts have generally been less inclined to grant extensions,[ii] even in cases involving fraud. For example, Uzodinma points out that *'…of the 8 cases cited by counsel (in the Nigeria v P&ID case) 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.'* ***[iii]*** These statistics underscore the significance of the decision reached by Sir Ross Cranston in this case.

Drawing on the seven *Kalmneft* factors which are used as a test to determine whether to extend time limits for challenging an arbitration award[iv], Cranston J appears to have been swayed by factor vii. This particular *Kalmneft factor* stipulates that the courts should take into consideration *'whether, in the broadest sense, it would be unfair to the applicant for him to be denied the opportunity of having the application determined.'*[v]

Nigeria's application would perhaps have had an unfavourable outcome if it was

premised on the ‘so-called’ primary *Kalmneft* factors, i.e. factors (i)–(iii) discussed by the Court of Appeal in *Nagusina Naviera v Allied Maritime Inc*.[vi] However, while not fully discrediting Nagusina, Cranston J agreeing with the judgment of Carr J in *Ali Allawi v The Islamic Republic of Pakistan,* ***[vii]*** noted that the weight to be given to each *Kalmneft* factor needs to vary with context. Hence the first three factors are not necessarily of greater significance than the others. Overall then, the court’s decision in this application was based on the fact that Nigeria successfully established a ‘strong *prima facie* case’ that the GSPA was procured by fraud. The broader significance of this judgment is perhaps the fact that the court would not endorse illegal activity, nor would it allow the justice system to be implicated in a fraud scheme. More importantly, it also means that Nigeria put forward an exceptional case to convince the court to depart from its conventional stance on extension requests. This last point is the focus of our reflections in part two of this piece.

Part two: Any lessons learned by Nigeria?

The details establishing the allegations of fraud in the procurement of the GSPA by P&ID are persuasive, to put it mildly. The facts of the alleged fraud point to a series of underhanded practices perpetuated by Nigerian senior government officials and public civil servants. What is intriguing, however, is that the government is keen to expose these corrupt practices to overturn the arbitration award. The obvious question is, why were these investigations not carried out earlier? Allegations of complicity and connivance of Nigeria’s lead counsel with P&ID during the arbitration proceedings have been partly blamed for these delays. The comprehensive investigation eventually carried out by government anti-fraud agencies when the situation had escalated to the point of a substantial arbitral award against Nigeria was impressive albeit very late in the day! The level of detail uncovered in support of Nigeria’s application remind us that anti-graft institutions can function effectively in Nigeria with the right motivation. In this case, the threat of a US$ 9.6 billion award has provided the motivation for uncovering the perpetrators and accomplices to fraud perpetrated against the Nigerian people.

More importantly, with these unfolding incidents which could have further twists, are we likely to see greater accountability from government officials?

Will perpetrators of fraud against the Nigerian people be exposed and brought to justice? Or are the culprits in the P&ID case 'scapegoats', exposed because they are dispensable? In essence, has Nigeria exposed the allegations of fraud solely to overturn this arbitration award without any learning or change in attitude towards the broader issues of economic injustice which led to this mess in the first place? The P&ID scandal might be a watershed moment which tilts the scale in favour of the vulnerable masses who have suffered the consequences of flagrant abuse of public finances by government officials. However, any meaningful and lasting change will require greater vigilance from the general public and CSOs. In part three of this piece, we look to another example of a fraud-tainted international contract involving an African country which is currently before English Courts.

Part three: Parallels and lessons from Mozambique?

Afronomicslaw recently held a webinar focusing on the landmark Mozambique Constitutional Council Decision which overturned odious loan agreements between Mozambique and foreign creditors valued at approximately $2.2 billion. Although the contexts of both cases differ, there are some important points of convergence from which we can draw useful parallels.

First, like the Nigeria GSPA scandal, the loan contract between Mozambique and the foreign creditors, including Credit Suisse and VBT Bank were procured by fraud and disregard of due process. A significant difference in outcomes, however, is that the allegations of fraud in Nigeria's Case have only recently come to light after the better part of a decade and as a litigation strategy. In Mozambique, although there were also attempts to hide the shady transaction which took place in 2013, CSOs were instrumental in uncovering the transactions and instituting public interest litigation against the culprits. Denise Namburete who played a prominent role in the public interest litigation that ensued reports that *'Pressure from different actors, such as civil society, development partners and the media, led the Attorney General in Mozambique to commission an audit on the three loans in 2017.'*

The Mozambique case is significant in that it demonstrates the potency of CSOs in holding government officials accountable. Could a similar approach have

helped uncover the fraud in the Nigerian scenario? This is an important question because there is no guarantee that the Nigerian government will expose other similar shady deals if it has no strategic interest to meet. Perhaps this is a key learning point for CSOs in Nigeria and other African countries. Stakeholders in academia, CSOs and other advocacy groups must work collaboratively to facilitate more proactive interventions across the continent.

Second, both scenarios involve English law and require determination by English Courts. Although the premise and substance of the disputes are different, ultimately, English Courts will play a crucial role in determining the outcomes of contractual disputes involving African states and foreign investors with a fraud element.

If the recent decision in Nigeria v P&ID is anything to go by, the posture of the English court towards issues of fraud and public policy could be crucial in the outcome of the Mozambique case. However, Bradlow argues, that it is *'…not easy to predict the outcome of this case'* mainly because existing English precedence *'…suggests that the courts in England will uphold the Credit Suisse contract'*. Again, the approach of Cranston J in the Nigerian Case raises a glimmer of hope that English Courts are willing to adopt a broader approach to the interpretation of contracts that are tainted by or procured by fraud. However, it is still hard to escape from Bradlow's realist estimation of the potential outcomes.

Conclusion: An African approach to dispute settlement?

We will be observing the deliberation of these crucial cases before English courts with keen interest. The uncertainty about how these cases (including Nigeria's main challenge against the P&ID arbitral award) will be decided raises more fundamental issues about the dependence of African countries on foreign courts and arbitration tribunals as a forum for settling disputes with foreign investors. With over 80 arbitration centres/institutions across Africa, it is unfortunate that African countries do not insist on local or at least neutral arbitration forums within the African continent. In the Nigeria v P&ID scenario, for example, one of the issues raised by Nigeria's Attorney General was that ' *the form of the arbitration agreement [in the GSPA contract] did not match the*

model reflected in a government circular in force at the time providing for arbitrations with their seat in Nigeria.' In light of this, there have been calls for Nigeria to introduce a national arbitration policy. It has been argued that a national arbitration policy would serve to protect the country's national interests in its commercial relations with foreign investors.

While protecting a country's interests in international transactions goes beyond having an arbitration policy, the utilisation of African based arbitration hubs/regional courts will allow African countries and advocacy groups to develop an African centred approach and jurisprudence for dispute settlements that take cognisance of the economic injustice that comes with fraudulent or unfair contract terms. We cannot rely on foreign courts to adjust their parameters for interpreting contractual terms, considering that we do not play by the same rules. Corruption in the African context requires an African approach, supported by African adjudication mechanisms.

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[i] Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi [2012] EWHC 3283 (Comm), [2013] 1 Lloyd's Rep 86 par 27 (per Popplewell J).

[ii] See AOOT Kalmneft v Glencore [2001] 2 All ER (Comm) 577, [2002] 1 Lloyd's Rep 128 (per Colman J at para 52).

[iii] Hon Mr Justice Eder speaking in December 2014, consider statistics for the period 2012-2014, pointing out that: '*Under s68 ("serious irregularity"): in 2012, there was a total of 7 challenges all of which were rejected; in 2013, there was (again) a total of 7 challenges of which only 1 was allowed and the remaining 6 were rejected; in 2014, there was a total of 8 challenges of which 2 were allowed and the remaining 6 were rejected' (p. 4)*

[iv] The Seven factors established by Colman J in AOOT Kalmneft v Glencore (n 2) are: *'(i) the length of the delay; (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances; (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay; (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed; (v) whether the arbitration has continued during the period of delay and, if so,*

what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have. (vi) the strength of the application; (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined' (paragraph 59).

[v] The strength of the application (factor vi) can also be cobbled into this unfairness point because Nigeria adduced more than sufficient evidence to establish a *prima facie* case of fraud. Thirty-four bundles of documents with hundreds of pages of evidence and thousands of pages of exhibits were submitted in this case and the related application for relief from sanctions to adduce new evidence in response to an enforcement application.

[vi] [2002] EWCA Civ 1147, [2003] 2 CLC 1. See in particular the elucidations of Mance LJ at para 39. See also L Brown & Sons Ltd v Crosby Homes (North West) Ltd [2008] EWHC 817 (TCC), [2008] BLR 366 (per Akenhead J). In Nigeria v P&ID,

[vii] [2019] EWHC 430 (Comm)

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