

Rethinking Safeguards in Arbitration?

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In *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm) the Commercial Court determined that arbitration awards against Nigeria had been obtained by fraud and were contrary to public policy. This decision is of the utmost importance to Nigeria given the sums involved. However, it will also be of interest to companies and state entities which have provided for arbitration in their contracts, as it raises questions as to the efficacy of arbitration as a dispute resolution process.

Background

In 2010, the Federal Government of Nigeria (**Nigeria**) and Process & Industrial Developments Limited (**P&ID**) entered into a long-term Gas Supply 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 at Calabar. Nigeria failed to supply any wet gas, and P&ID failed to construct the Gas Processing Facilities.

An arbitration followed, and the Tribunal found that Nigeria had committed a repudiatory breach of the GSPA, that the GSPA was terminated on P&ID accepting that repudiatory breach, and that Nigeria was liable in damages. Consequently, in 2017, following a hearing on quantum, P&ID was awarded US \$11 billion in damages (including interest).

Nigeria challenged the awards on liability, quantum and jurisdiction. It made allegations of bribery, corruption and perjury before, after and at the time the parties entered into the GSPA. P&ID described Nigeria's case against it as false and dishonest.

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Decision

Nigeria succeeded in its challenge. Robin Knowles J concluded the arbitral awards had been obtained by fraud. P&ID had obtained the awards through severe abuse of the arbitral process.

The case fell within the high threshold of section 68(2)(g) of the Arbitration Act 1996 (the **Act**). It showed serious irregularity because (a) P&ID relied on witness evidence known to be false; (b) it paid continuous bribes or corrupt payments during the arbitration; and (c) it kept internal, confidential, and privileged legal documents that it was not, and should have known it was not, entitled to see.

P&ID's abusive conduct throughout the arbitration led Knowles J to conclude that Nigeria had suffered substantial injustice. He also held that section 73 of the Act, which restricts parties' ability to make objections of irregularity which could have been raised in arbitration, did not preclude Nigeria's objection to the arbitral awards because, at the time of the arbitrations, it did not know and could not with reasonable diligence have discovered the grounds for its objection under the Act.

The full consequences of the Commercial Court's decision will be determined following further submissions by the parties.

Comment

While the facts of this case are, of course, the exception rather than the rule, the judgment will, no doubt, provoke debate among the arbitration community as to whether the arbitration process required further attention where values involved are large and where a state is involved. Appointing an experienced tribunal was not enough in this case to protect the process from a party that was determined to abuse the process and commit fraud.

The judgment raises questions over the adequacy of disclosure and discovery of documents. It asks whether tribunals should be more direct and interventionist. And it comments on whether more scrutiny of the process might be desirable in arbitrations involving a state or state-owned entities. This will all be food for thought at a time when the Act is being reviewed. Some comfort, at least, can be taken from the protections already enshrined in the Act and the ability of parties to seek the support of the English courts in appropriate cases.