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# High Court upholds Nigeria's serious irregularity challenge to \$11 billion award

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## Introduction

In *The Federal Republic of Nigeria v Process & Industrial Developments Limited*,<sup>(1)</sup> the High Court upheld a challenge to arbitral awards that had been obtained by fraud. The Court identified that extraordinary circumstances, which included the bribery of Nigerian officials and provision of false evidence in the arbitration, had amounted to a serious irregularity that had caused substantial injustice. At the date of the judgment, the total owed by Nigeria under the awards had amounted to \$11 billion. The judge found that Nigeria had not waived its right to challenge the awards by failing to raise its objections at the appropriate juncture.

While the facts of the case were highly unusual, the judgment demonstrates the high standard that challenges under section 68 of the Arbitration Act 1996 must meet in order to succeed. Similarly, it serves as a reminder that challenges must be brought promptly upon discovery of grounds for objection.

## Background

Section 68 of the Arbitration Act 1996 (the Act) allows challenges to awards on the ground of serious irregularity which has caused or will cause substantial injustice to the claimant – in this case, Nigeria. Under section 68(2)(g), an application may be upheld where an award is obtained by fraud or an award, or the way in which it is procured, is contrary to public policy.

Under section 73 of the Act, a party that takes part, continues to take part in proceedings without making a serious irregularity objection will be precluded from doing so later, either before the tribunal or the court, unless "at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

## Facts

In 2010, Nigeria entered into a gas supply and processing agreement (the GSPA) with Process & Industrial Developments Limited (P&ID). Under the terms of the GSPA, Nigeria undertook to build gas pipelines and supply quantities of wet gas while P&ID agreed to construct the gas processing facilities and process the wet gas to lean gas.<sup>(2)</sup> The contract was governed by Nigerian law and provided for arbitration seated in London.

The project did not progress and, by 2012, neither Nigeria nor P&ID had performed their obligations. Neither the pipelines nor the processing facilities had been built. The parties sought to renegotiate the GSPA, but P&ID alleged subsequently that Nigeria had repudiated the GSPA and claimed damages in an arbitration.

The tribunal issued awards on jurisdiction, liability and quantum, with its final award on quantum of 31 January 2017 ordering Nigeria to pay P&ID \$6.6 billion in damages, plus 7% interest. At the date of judgment, the amount owed by Nigeria under the final award exceeded \$11 billion, which was equivalent to nearly a third of Nigeria's budget for 2023.

In February 2016, Nigeria had called upon its Economic and Financial Crimes Commission to investigate P&ID and further pushed for a thorough investigation of the GSPA in 2018. The investigations led Nigeria to allege that P&ID had committed a fraud by procuring the GSPA through bribery and in its conduct of the arbitration. In light of these allegations, on 5 December 2019, Nigeria applied to the High Court for an extension of time to bring challenges against the awards under 68(2)(g) of the Act. The High Court found that Nigeria had established a strong prima facie case of fraud affecting both the GSPA and the arbitral proceedings, of which it had reasonably been unaware.<sup>(3)</sup> This, along with other factors, resulted in the court granting an unprecedented extension of time for the challenge, despite the 28-day statutory time limit having expired in 2017 (for further details, see "[High Court grants unprecedented extension of time for challenges to arbitral awards where fraud alleged](#)").

## Decision

### ***Serious irregularity***

In his judgment, Knowles J considered whether, for the purposes of section 68(2)(g):

- the awards were obtained by fraud or if the way in which they were procured was contrary to public policy; and
- substantial injustice had been or would be caused to Nigeria.

Notably, Knowles J found that even if the GSPA had been procured by bribery, it did not follow from this that the award had been obtained by fraud, or that the manner in which it was obtained was contrary to public policy.<sup>(4)</sup> He considered that the question of whether the GSPA was void for having been procured by bribery was a matter for the Tribunal, not for the Court. While Knowles J made clear that he

would have found section 68(2)(g) to be engaged had the GSPA been a wholly fraudulent enterprise from the outset, he found that P&ID did genuinely intend to perform the GSPA, at least initially, and rejected Nigeria's allegation that the GSPA was entered into solely to obtain an arbitral award.<sup>(5)</sup>

Instead, Knowles J identified three matters regarding P&ID's conduct in the arbitration that amounted to the awards having been obtained by fraud or in a manner that was contrary to public policy.<sup>(6)</sup>

#### **Knowingly false evidence**

Knowles J found that P&ID has provided to the Tribunal and relied on evidence that was material and that P&ID knew to be false.<sup>(7)</sup>

Knowles J specially referred to the witness statement of Michael Quinn, P&ID's founder. In his witness statement which purported to "explain how the GSPA came about", Quinn did not mention that P&ID had made numerous payments to a former legal director at the Ministry of Petroleum Resources who negotiated the GSPA on behalf of Nigeria (GT), and also represented that but for Nigeria's breach, P&ID had been in a position to comply with its own obligations, when in reality it was not.

#### **Continued bribery**

Knowles J found that P&ID had continued to pay bribes to GT during the arbitration. Knowles J found that the corrupt payments were made by P&ID to keep GT "on-side", to "buy her silence about the earlier bribery" and to suppress "the fact that the contract had been passed through with no proper scrutiny".<sup>(8)</sup>

#### **Retention of Nigeria's internal legal documents**

P&ID had been provided with and retained improperly Nigeria's internal legal documents during the course of the arbitration. Among the 40 or so legal documents that P&ID had obtained, were internal letters or reports outlining Nigeria's consideration of the merits, strategy and settlement. Rather than returning the documents immediately, P&ID took the benefit of the information to monitor Nigeria's strategy and its awareness of the deception. Ultimately, Nigeria had been deprived of its right to obtain confidential legal advice during the arbitration.

Unsurprisingly, Knowles J had "no hesitation" in finding that each of the above matters caused substantial injustice to Nigeria; the outcome in the arbitration would have been different and favourable to Nigeria had the truth been available to the tribunal during the proceedings.

#### **Loss of right to object**

Nigeria was required to demonstrate that it could not with reasonable due diligence have discovered the grounds it relied on for its section 68(2)(g) challenge sooner and, therefore, raised the objections at an earlier point.

Knowles J noted that the test was not whether Nigeria "should have" discovered the fraud, but whether it "could have". Further, the test in section 73 did not require that the grounds for objection be discovered "by any means", but instead "with reasonable diligence". Knowles J dismissed P&ID's arguments that Nigeria failed to use reasonable diligence to uncover the irregularities in light of several "red flags", such as endemic corruption in Nigeria, the suspiciously demanding contractual obligations on Nigeria and the fact that P&ID had no apparent assets, industry experience or credentials.

Knowles J found that none of those points would have enabled an allegation of bribery to be raised, let alone to identify P&ID's concealment of the bribery in false evidence and misuse of Nigeria's internal legal documents. Evidence showed that Nigeria first began to acquire knowledge of the bribery of GT when she was interviewed by the Nigerian authorities in September 2019. Further, Nigeria first began to acquire knowledge that P&ID had obtained the internal legal documents only on 29 October 2021. As such, Nigeria's serious irregularity was not precluded by section 73.

At a further hearing on 8 December 2023, the judge formally set aside the awards.

#### **Comment**

Reflecting on the scale of the injustice that Nigeria had faced, the judge posed some questions as to the suitability of using arbitration to resolve significant commercial disputes involving state parties. In the words of Knowles J, this particular arbitration was a "shell that got nowhere near the truth". In particular, he questioned whether it was appropriate for such significant commercial arbitrations to be held confidentially without the scrutiny of press and public. Certain commentators have questioned whether this judgment was a broader challenge to the integrity of the arbitration process.

However, the circumstances surrounding this case were exceptional, featuring uncommon and extreme facts. Most commentators would argue that the benefits of arbitration – not least the enforceability of arbitral awards – continue to make it the most attractive means of resolving commercial disputes involving state parties.

The case also serves as a reminder of the safeguards that section 68 of the Act offers against egregious abuses of the arbitral procedure. Where the integrity of the arbitration system is threatened, as exemplified in this case, the English courts will investigate thoroughly the relevant allegations and, where justified, uphold a challenge to an award.

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Elaine Ren, trainee solicitor, assisted in the preparation of this article.

#### **Endnotes**

(1) [2023] EWHC 2638 (Comm).

(2) Paragraphs 136-151.

(3) *Federal Republic of Nigeria v Process and Industrial Developments Ltd* (No. 1) [2020] EWHC 2379 (Comm).

(4) Paragraphs 480-487.

(5) Paragraphs 488-294.

(6) Paragraphs 493-496.

(7) Paragraph 494.

(8) Paragraph 404.