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Recent Developments in International Arbitration: English Court Sets Aside Arbitral Awards in Landmark Nigeria Case

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In this article series, we look at key arbitration related decisions from the past year and draw out the key lessons for users of arbitration.

Arbitral awards are rarely set aside by national courts but the 2023 English case of The Federal Republic of Nigeria v Process & Industrial Developments Ltd. involved an extraordinary and successful challenge to an US $11bn award for serious irregularity, despite the high threshold applied by English law. The judgment expressly invited the arbitration community to reflect on best practice for disputes involving states and large sums to ensure fairness and the visible integrity of the process.

Background

The dispute arose out of a 20-year contract for the supply and processing of gas (the Gas Supply and Processing Agreement or GSPA) entered into between the Nigerian Ministry of Petroleum Resource and Process & Industrial Developments Ltd (P&ID) in 2010.

The GSPA contained an arbitration clause and P&ID commenced arbitration proceedings in 2012, alleging that Nigeria had not performed under the contract.

The Tribunal issued its final award in January 2017 in favour of P&ID, awarding US $6.6bn damages for lost profits and interest at 7% (by the time of the challenge proceedings totalling US $11bn).

Nigeria applied to set aside the award under section 68(2)(g) of the Arbitration Act 1996 (the 1996 Act), on the basis that "*the award[s] [had been] obtained by fraud or the award or the way in which was procured being contrary to public policy*".

Nigeria alleged that P&ID had (a) bribed a public official to obtain approval of the GSPA and then to keep quiet during the arbitration and (b) illegally accessed privileged documents from the lawyers representing Nigeria using them to further its own position.

Decision

The Court identified three main factors that brought the case within s 68 of the 1996 Act and demonstrated "*the most severe abuses of the arbitral process*":

1. P&ID provided and relied on evidence in the arbitration that was material but which it knew was false.
2. P&ID continued bribing a public official to keep her "on-side" and buy her silence in the arbitration about the earlier bribery.
3. P&ID improperly retained Nigeria's internal legal documents that it had received during the arbitration. It did so to monitor Nigeria's position and awareness as the arbitration continued (including whether Nigeria had become aware of the deception practiced by P&ID).

The fraud and conduct contrary to public policy were "serious irregularities" in the arbitral process that had caused substantial injustice to Nigeria very likely to have affected the outcome of the arbitration. The Court concluded that Nigeria's right to confidential access to legal advice was "*utterly compromised*" and that had it known of P&ID's actions, the Tribunal's approach to the case "*would have been very different*".

Judge's address to the arbitration community

The Court noted that arbitrations involving state parties and such huge sums may make a case more vulnerable to fraud and, as in this case, a tribunal of the greatest experience and expertise may not be enough effectively to guard against such risks. It hoped there would be wider discussion in the arbitration community about the arbitration process in such circumstances including:

1. The "*remarkable and crucial*" importance of the disclosure process and a court's ability to enforce disclosure, including third-party disclosure orders. It was only through court-ordered disclosure from banks and other third parties in England and other jurisdictions that much of P&ID's misconduct came to light.
2. The importance of ensuring that all parties including the state party can properly participate in the arbitration, and the role of tribunals in this.

3. Whether greater visibility in arbitrations involving a state or state-owned entities is part of the answer. The Court noted that the confidentiality of arbitration meant that there was no public or press scrutiny of what was going on to allow for the public and press "*to call out what is not right.*"

Some of these issues cut across what can be seen to be key benefits of arbitration, namely the ability to have targeted disclosure orders and for proceedings to be confidential. That said, arbitration processes can be flexible and bespoke, with Tribunals typically being given broad procedural discretion. The correct balance will differ for each case but this judgment adds further factors to be considered in ensuring that the arbitral process is fair and is seen to be fair.

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