Kluwer Arbitration Blog

Tackling Corruption in the Arbitral Process: Reflections on Nigeria v Process and Industrial Developments Limited

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On 23 October 2023, the English High Court handed down a landmark decision setting aside a USD 11 billion arbitral award (the final award) obtained by a British Virgin Islands ("BVI") company, Process and Industrial Developments Limited ("P&ID"), against the Federal Republic of Nigeria.

The Judge upheld Nigeria's challenge of the arbitral award on the basis that P&ID had procured the final award through fraud and in a manner contrary to public policy under Section 68(g) of the English Arbitration Act 1996 (the "Act").

This post considers the mechanism of a Section 68 challenge, reflects on arbitration as an alternative dispute resolution method, and outlines some practical considerations for arbitration users.

The Section 68 Challenge

Section 68 is one of only a handful of narrow grounds on which arbitral awards can be set aside (or remitted to the tribunal) under English law. Successful challenges on this basis are rare: the English Commercial Court data recorded that in 2020-2021, only one out of 26 applications succeeded – a success rate of 4%. This is consistent with the intention behind the Act: Section 68 was "designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

The Court had no difficulty in concluding that this was such an extreme case.

There is a very high threshold for a Section 68 challenge. To succeed on the grounds of fraud and issues of public policy under Section 68(g), the Court must be satisfied that there is a causal link between the alleged fraud and the award, and that the tribunal would have reached a different decision if the fraud had not occurred.

In Nigeria v P&ID, the Judge found "*without reluctance*" that the awards were obtained only by "*practising the most severe abuses of the arbitral process*" (paragraph 516 of the Judgment). It was concluded that the three central issues that establish the causal link between the fraud and the award were as follows:

Firstly, P&ID's legal team had improperly obtained and retained privileged and confidential legal documents, which enabled P&ID and its lawyers (including an English solicitor and a King's Counsel) to track Nigeria's case strategy during the arbitration. The Judge observed that P&ID recognised that this was "less than honest […] but their attitude was that this was the sort of thing you took advantage of if it happened". He described P&ID's lawyers' handling of the privileged material as "indefensible", further noting that they were each due to receive "life-changing sums of money" (up to £3 billion to the solicitor and up to £850 million to the King's Counsel) if P&ID's claim succeeded.

Secondly, P&ID presented and relied on evidence that it knew to be false. P&ID's Chief Executive Officer, Mr Quinn, had conducted himself dishonestly in giving evidence at the Court of which parts were knowingly false, namely that P&ID had procured the contract with Nigeria through corrupt payments to a Nigerian official.

Thirdly, P&ID bribed a Nigerian official throughout the arbitration to "buy her silence" about the fact that she had accepted their bribes at the time the underlying contract was made. The Court highlighted that the corruption involved in procuring the contract alone was not sufficient to warrant the award to be set aside under Section 68, rather it was the process in which the awards were obtained (by fraud) during the arbitration.

It was found that the Tribunal had not known of any of these issues and, if it had, "the entire picture would have had a different complexion" (paragraph 316).

The Judge concluded that these matters constituted "serious irregularity" causing "substantial injustice" to Nigeria within the meaning of Section 68, in that the award had been obtained by fraud and in a manner contrary to public policy under Section 68 (g).

A Call for "Debate and Reflection"

The Judge invited the arbitration community to "consider whether the arbitration process, which is of outstanding importance and value in the world, needs further attention where the value involved is so large and where a state is involved". He identified four particular issues for further reflection, which we briefly consider below.

Drafting Major Commercial Contracts Involving a State

Given the potential exposure of States (and hence public funds) under these contracts, the Judge reiterated the importance of proper professional standards and ethics in the drafting of major commercial contracts involving a State.

The Judge reminded the legal community of the benefits of contributing through "pro bono work by leading law firms to support some states challenged for resources […] in the interests of their, often vulnerable, people" (paragraph 585). This will ensure that the rights of the state are not only represented, but also robustly protected.

Disclosure or Discovery of Documents in Arbitration Proceedings (And Related Ethical Obligations)

Highlighting that it was the disclosure of documents that enabled the truth to come out in this case, the Judge noted the importance of robust document production in arbitral proceedings.

However, the nature of the corruption being what it was in this case, the difficulty remains that even if additional disclosure had been ordered in the arbitration, the relevant documents may not have been discovered as P&ID deliberately sought to conceal the truth.

These issues can be difficult for tribunals to grapple with, in particular, because there is no standardised set of ethical obligations applicable to counsel from different jurisdictions. While valuable 'soft' guidelines (such as those adopted by the International Bar Association in 2013) already exist, it will be important to consider going forward how such standards can be given real teeth and arbitrators given a means to enforce them.

Inadequate Representation: Should a Tribunal Do More?

The Judge found that even without the dishonest behaviour of P&ID – the failings of Nigeria's legal representatives, experts, politicians, and civil servants put Nigeria at a significant disadvantage compared to the well-resourced legal team of the claimant. The Judge noted, "[t]he result was that the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work" (paragraph 587).

This raises the question, should a tribunal intervene if it is clear that there is a lack of instructions (or weak instructions), such as a legal team's failure to test the expert's opinions, leading to a compromised presentation of the case? Where it does, to what extent?

This is a thorny issue on which judgment calls will need to be taken on a case-by-case basis. Arbitrators have a difficult line to tread between ensuring a "fair fight" and making a party's case for them. Clear guidance (perhaps at an institutional level) would be welcome.

Is More Transparency Necessary to Ensure the Integrity of the Process?

The final issue flagged is already heavily debated in the arbitration community (and among commentators in the mainstream media): does the confidential nature and the lack of public scrutiny of awards put arbitration at risk of corruption by its users?

According to a recent survey by the Singapore International Dispute Resolution Academy and the Queen Mary University of London, 81% of respondents considered confidentiality as "absolutely crucial" or "important" when deciding to resolve a dispute through arbitration emphasising that confidentiality is repeatedly identified by users as one of the principal benefits of arbitration.

While confidentiality is a significant advantage for arbitration users, the issues plainly become more acute when a state is a party to an arbitration dispute and the outcome may have a significant public impact, whether by the imposition of a large financial obligation on the State or by the

impugning of domestic legislation.

A number of measures have been introduced by arbitral institutions and bodies in response to these concerns. For example, since 2019, there has been a presumption that ICC awards may be published (albeit with parties having an opportunity to object or require anonymisation), and a similar presumption was introduced in last year's amendments to the ICSID Rules. These reforms represent an attempt to strike a balance between the preference of many users of arbitration for a confidential procedure and call for more 'open justice', particularly in cases where the public interest is engaged.

Another example of promoting transparency in arbitral proceedings is reflected in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (key signatories include countries such as Canada, Australia, and Singapore). States have an opportunity to dictate the level of transparency in Investor-State Dispute Settlement (ISDS) procedures to which they may be subject by including provisions dealing with this issue in the treaty containing the arbitration agreement. Where such provisions exist, the tribunal will be bound to apply them.

Practical Considerations for Arbitration Users

As well as shining a light on broader areas for reform, the Nigeria v P&ID case underscores the importance of the careful selection of both the applicable rules and the seat of the arbitration. If a less effective seat had been selected in these proceedings, it is possible that P&ID's abuses of process may have remained undetected.

Arbitral rules that empower tribunals to take the steps necessary to police the proceedings to the best of their ability are a crucial safeguard against abuses of the process. Where a tribunal does not (or cannot) prevent due process violations from occurring, the selection of a strong arbitral seat allows recourse to a robust court system with judges who are empowered to act and will exercise their powers appropriately.

This judgment affirms that, while England & Wales remains a pro-arbitration jurisdiction, the English court is committed to investigating allegations of fraud and will not tolerate corruption of the arbitral process.

P&ID's Leave to Appeal Refused

In December 2023, P&ID sought leave to appeal which was refused by the Judge (Ruling on Leave to Appeal) who stated that "P&ID has had a fair trial and it has lost" (paragraph 42).

The Judge also refused to remit the award to the Tribunal stating "there is, in my judgment, no real prospect of justice being done by the Tribunal upon reconsideration […] [not] because of the conduct of the tribunal. It is because of the behaviour of P&ID" (paragraph 45). Citing Merkin and Flannery's work on the Arbitration Act 1996, the Judge considered that "the irregularity really goes to the root of the award" and "it would be inappropriate to remit the matters […] to the Tribunal for reconsideration" (paragraph 46).

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