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Nigeria Given Extension of Time to Challenge Multibillion-dollar Arbitration Award:

Analysis of the English High Court's Decision

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The Federal Republic of Nigeria has succeeded in obtaining an extension of time for its challenge of a US$6.6 billion arbitral award made against it in 2017.[1] The award now stands at US$10 billion, including interest. It was given in favour of Process and Industrial Developments Limited (P&ID), a BVI-incorporated company controlled by two Irish citizens, in London-seated arbitral proceedings concerning a gas processing contract.

Nigeria is seeking to challenge the awards under sections 67 and 68(2)(g) of the Arbitration Act 1996 (the Act).[2] The thrust of its arguments is that the award was procured as a result of an extensive and long-running fraudulent scheme perpetrated against it by P&ID. Nigeria alleged that the contract itself had initially been procured through bribery and that, subsequent to that, Nigeria's defence in the arbitration had been fraudulently sabotaged such that the Tribunal had no choice but to find against it.

Time Limit for Challenging an Award

Under the Act, the time limit for a challenge is 28 days from the date of the award.[3] However, English courts do have a discretion to extend this time limit.[4] The factors a court will consider when deciding whether to exercise this discretion were outlined in *Kalmneft v Glencore*.[5] They are:

- The length of the delay
- Whether in delaying, the challenging party was acting reasonably
- Whether the respondent or arbitrator caused the delay
- Whether the respondent would suffer irremediable prejudice in addition to mere loss of time if the application were permitted to proceed
- Whether the arbitration has continued during the period of delay
- The strength of the challenge
- Whether "in the broadest sense it would be unfair" to the challenging party for him to be denied the opportunity of having the challenge determined[6]

Nigeria issued its application to challenge in early December 2019. Being far outside the time limit, it was forced to apply for a parallel extension of time to allow its challenge to be heard.

The substantial delay of almost three years since the award represented the biggest obstacle for Nigeria. Courts have frequently emphasised the importance of upholding the 28-day period as a means of delivering finality to parties who choose to arbitrate.[7] This is reflected in the first *Kalmneft* factor.

Investigation of the Alleged Fraud

On the facts, the Nigerian Economic and Financial Crimes Commission had begun actively investigating P&ID in June 2018 following the handing down of the award, but the pace of the investigation appeared to intensify after August 2019, after P&ID successfully applied to the High Court for permission to enforce the award.[8] In the months following September 2019, the investigation seemingly began to bear fruit, obtaining interview evidence and bank records showing various payments being made by entities linked to P&ID to Nigerian officials involved in the procurement of the original contract and Nigeria's unsuccessful defence in the arbitration.

This was enough to persuade Sir Ross Cranston, hearing the present application, of the *prima facie* existence of the long-running fraud alleged by Nigeria, and its subsequent concealment by P&ID.[9]

1 *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm).

2 Section 68(2)(g) allows a party to challenge an award on the grounds of serious irregularity, specifically "*the award being obtained by fraud or the way in which it was procured by contrary to public policy*." Section 67 allows challenge for want of substantive jurisdiction on the part of the tribunal. Nigeria's section 67 challenge is based on the contract's arbitral agreement itself being procured by fraud: [186].

3 Arbitration Act 1996, Section 70(3).

4 By the effect of Section 80(5) of the Arbitration Act 1996.

5 [2001] 2 All E.R. (Comm) 577.

6 *Ibid.*, [59]. The relative weight attached to these factors is the source of some debate: *see e.g. Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm), where Popplewell J (at [27]) suggested that (i) to (iii) were the primary factors. Weighing up different approaches taken by courts on this issue, the judge here held that the weight given to each factor should vary depending on the context: see also Ali Allawi v The Islamic Republic of Pakistan [2019] EWHC 430 (Comm), [47].

7 *See e.g. Kalmneft*, [52]; *Terna Bahrain*, [27]-[28]; *Daewoo Shipbuilding and Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm), [78].

8 *Process & Industrial Developments Limited v The Federal Republic of Nigeria* [2019] EWHC 2241 (Comm).

9 Although the judge was careful to point out that it was not his function at this stage to decide whether the fraud actually took place: [4].

Application of Kalmneft Factors

Crucially, the court disagreed with P&ID's submissions that Nigeria had unreasonably delayed in only challenging the award now. It found that until the judgment in the enforcement proceedings, in August 2019, Nigeria had had "no specific information" such that it "ought to have become aware of the building blocks of the [alleged] fraud".[10] The delay between then and early December 2019, when Nigeria issued its application, was reasonable in the circumstances; observing that "allegations of fraud cannot be lightly made", the judge accepted that Nigeria "needed to see the different building blocks to what they now allege as a massive fraud before proceeding with the current claims."[11]

Then applying the *Kalmneft* factors, the court ultimately came down in favour of Nigeria. The length of the delay was, the judge said, "unprecedented" and "extraordinary", but there was a *prima facie* case of fraud and concealment by P&ID, which meant that there had been nothing that Nigeria ought to have been aware of that would have triggered its discovery. The "public policy goals of finality, non-intervention and adherence to time limits" in arbitration challenges were not sufficient to override considerations of fairness "where there is strong *prima facie* evidence of fraud, certainly of the through-going character alleged in this case."[12] Consequently, Nigeria was granted the extension of time. Subject to any appeals, its substantive challenge will now be heard.

Comment

This decision – which represents a notable twist in one of the most prominent arbitration sagas of recent years[13] – provides an interesting insight into how the ordinarily-stringent time periods for arbitration challenges may be loosened in a case of *prima facie* fraud. The 28-day period is often strictly enforced and parties receiving an adverse arbitral award may simply fail to realise this until it is too late. However, the existence of fraud, as is often said, seemingly "unravels all".[14] It is perhaps not surprising that the court was unwilling to prejudice a challenging party that it considered could not have known of the fraud perpetrated against it until long after the 28-day period had expired. The concealment of the alleged fraud meant that Nigeria had not acted unreasonably by not uncovering it sooner.

More notable perhaps is the court's willingness to forgive the several months Nigeria appears to have taken to "see the different building blocks" of the fraud.[15] This may raise questions over what a party who uncovers a suspected fraud should do. The judgment suggests that it is undesirable that a party feels constrained to rush to court to issue a challenge without having obtained the full picture. At the same time, a party waiting months, or even years, to amass evidence of alleged fraud, will presumably run the risk of having failed to act reasonably in delaying (as per the second *Kalmneft* factor). The underlying principle of finality – acknowledged by the court[16] – must also undoubtedly continue to play a role.

Overall, it would seem sensible for a party who uncovers or suspects fraud to not delay in considering the implications with its legal advisors. It is clearly better to be inside the time limit than out of it, if possible. However, in the latter case, deciding how to proceed will often involve a fine balancing act.

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10 [254].
11 [257], [259].
12 [272]-[273].
13 K Beioley, N Munshi, *The $6bn judgment pitting Nigeria against a London court,* Financial Times, 12 July 2020, https://www.ft.com/content/91ddbd53-a754-4190-944e-d472921bb81e.
14 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [15].
15 [259].
16 *Nangusina Naviera v Allied Maritime Inc* [2002] EWCA Civ 1147, [42] *per* Mance LJ.