ARBITRATION & ADR - UNITED KINGDOM

High Court grants unprecedented extension of time for challenges to arbitral awards where fraud alleged

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Introduction

In *The Federal Republic of Nigeria v Process & Industrial Developments Limited,*(1) the High Court granted an extension of time to bring challenges to arbitral awards made under Sections 67 and 68 of the Arbitration Act 1996.

The applications were striking as it had been several years since the awards were made. The court found that Nigeria had established a strong *prima facie* case of fraud affecting both the underlying contract and the arbitral proceedings, of which it had reasonably been unaware. This, along with other factors, merited the grant of an unprecedented extension.

Background

Section 67 of the Arbitration Act allows a party to an arbitration seated in England to apply to the courts to challenge an award on the basis that the tribunal lacked substantive jurisdiction.

Section 68 of 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 70(3) of the act, challenges under Sections 67 and 68 must be brought within 28 days of the award or, if there has been any arbitral process of appeal or review, within 28 days of the date on which the claimant is notified of that process's result.

Section 80(5) of the act provides the court with a discretion to extend the deadlines for applications or appeals made pursuant to the act.

Facts

On 11 January 2010 Nigeria and Process & Industrial Developments Limited (P&ID) entered into a contract for gas processing over a 20-year period. The contract was governed by Nigerian law and provided for arbitration seated in London. After disputes arose, P&ID commenced arbitral proceedings in London. 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.

However, in February 2016 Nigeria had called upon its Economic and Financial Crimes Commission to investigate P&ID. Investigations into the company intensified and the Nigerian police became involved after an English court judgment was handed down in August 2019 permitting P&ID to enforce the final award (the enforcement judgment).

The investigations led Nigeria to allege that P&ID had committed a fraud by procuring the contract through bribery and in its conduct of the arbitration.

In light of these allegations, on 5 December 2019 Nigeria applied to the court for an extension of time to bring challenges to the final award under Sections 67 and 68(2)(g) of the Arbitration Act.

Decision

In *AOOT Kalmneft v Glencore*,(2) Justice Colman emphasised that the relatively short period for making an application under Sections 67 and 68 reflects the principle of finality, as parties must live with an award unless they move with great expedition.

In the current case, the judge (Sir Ross Cranston) referred to the factors that were identified by the court in *Kalmneft* as likely to be material to the court's exercise of its discretion to extend time limits under Section 80(5) – namely:

- the length of the delay (Point 1);
- whether the applicant has acted reasonably in all of the circumstances (Point 2);
- whether the respondent to the application or the arbitrator caused or contributed to the delay (Point 3);
- whether the respondent would suffer irremediable prejudice if the application were permitted to proceed (Point 4);
- whether the arbitration has continued during the period of delay (irrelevant in the current case) (Point 5);
- the strength of the application (Point 6); and
- whether, in the broadest sense, it would be unfair to the applicant to be denied the opportunity of having the application determined (Point 7).

Significant to the judge's application of the *Kalmneft* factors was whether Nigeria had established a strong *prima facie* case of fraud against P&ID and, as the authorities indicated that Points 1 to 3 above were primary, whether the application ought to have been brought sooner.

Was there a clear prima facie case of fraud against P&ID?
The judge concluded that Nigeria had established a strong *prima facie* case of fraud against P&ID in respect of the allegations that:

- P&ID had procured the contract by paying bribes to Nigerian officials;
- one of P&ID's witnesses had given perjured evidence to the tribunal, giving the false impression that P&ID was able and willing to perform the contract; and
- Nigeria's counsel in the arbitration had colluded dishonestly with P&ID to sabotage Nigeria's case.

Had Nigeria previously been aware of the circumstances relating to the alleged fraud, such that the application ought to have been brought sooner?
P&ID argued that Nigeria could not adequately explain the significant delay of nearly three years from the date of the final award to the commencement of the Section 67 and 68(g) challenges.

The judge considered three time periods:

- November 2015 to the issue of the final award in January 2017;
- January 2017 to the handing down of the enforcement judgment in August 2019; and
- August 2019 to the issue of the Section 67 and 68(g) challenges in December 2019.

On the first period, the judge held that Nigeria had made a good case that, when it had taken part or continued to take part in the arbitration, it had not known and could not with reasonable diligence have discovered the grounds that it advanced in the Section 67 and 68(g) application. It could not reasonably be expected, for example, that the alleged key fraudsters would have revealed their own fraud. Further, the initial Economic and Financial Crimes Commission reports had given no indication of bribery and corruption. As such, Nigeria could rightly claim that it could not with reasonable diligence have ascertained the fraud.

On the second period, the judge held that there was nothing to suggest that, as alleged by P&ID, a deliberate decision had been taken not to investigate fraud. There was also nothing to suggest that there had been a deliberate decision to proceed slowly. The "basic point" was that there was no specific information such that Nigeria ought to have become aware of the fraud that it alleged in the application before the court.(3)

On the third period, P&ID submitted that there was no explanation as to why, given that it had pleaded guilty to numerous counts relating to the alleged fraud on 19 September 2019, it had taken Nigeria until 5 December 2019 to make the Section 67 and 68(g) application. The judge accepted that Nigeria had needed to see the building blocks of the massive alleged fraud before proceeding with the application. The time taken between September 2019 and December 2019 was "modest in the circumstances and Nigeria's behaviour reasonable". (4)

Kalmneft factors

The judge found that while the length of the delay was extraordinary and weighed heavily on the side of the balance against an extension, other factors brought it down in favour of an extension.

As outlined above, the judge held that Nigeria had established a strong *prima facie* case of fraud in its Section 68(g) challenge (Point 6).

On the length and reasonableness of the delay (Points 1 and 2), P&ID had concealed the alleged fraud for many years and there was nothing of which Nigeria ought to have been aware that would cause a reasonable person, exercising reasonableness diligence, to have discovered the fraud. Nigeria had established a strong *prima facie* case of fraud which P&ID had *prima facie* covered up, thus contributing to the delay (Point 3).

As to the possible prejudice to P&ID in being subject to a full inquiry into the fraud at trial (Point 4), the judge held there can be no such prejudice where a strong *prima facie* case has been made out.

Further, the judge held that it would be unfair in the broadest sense to Nigeria to be denied the opportunity of having the application determined, notwithstanding the considerable delay (Point 7). The judge noted that there is no rule of law which automatically prioritises the finality of arbitral awards over the public policy of refusing to endorse illegal conduct.

Comment

While the extension granted by the court was exceptional, so too were the circumstances of the case. Although not a primary factor, fairness in the broadest sense was found to favour an extension of time. However, it is well established that the English courts will strive to uphold the principle of finality. Parties should assume that the court will not exercise its discretion to extend deadlines for challenge applications by months or years in anything other than the most exceptional of circumstances. Here, the integrity of both the arbitration system and the court were threatened and this public policy concern outweighed the principle of finality.

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Walter Myer, trainee solicitor, assisted in the preparation of this article.

Endnotes

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

(2) *AOOT Kalmneft v Glencore* [2001] 2 All ER (Comm) 577.

(3) *The Federal Republic of Nigeria*, at 254.

(4) *The Federal Republic of Nigeria*, at 259.