Claim No: CL-2019-000752
CL-2018-000182

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

IN AN ARBITRATION CLAIM

AND IN THE ARBITRATION

B E T W E E N: -

THE FEDERAL REPUBLIC OF NIGERIA

Claimant / Respondent in the Arbitration

- and -

PROCESS AND INDUSTRIAL DEVELOPMENTS LIMITED

Defendant / Claimant in the Arbitration

SKELETON ARGUMENT OF THE DEFENDANT ("P&ID") FOR HEARING ON 24 JANUARY 2020

References in the form [volume/tab/page number] are to the Hearing Bundles supplied by the Claimant ("**Nigeria**").

If time permits, the Court is respectfully invited to read the following:

- The Skeleton Arguments for both parties
- The Arbitration Claim Form dated 5 December 2019 at [4/17]
- Nigeria's Application Notice dated 5 December 2019 at [1/11]
- Nigeria's Draft Orders at [4/16 at §1)], [4/23 at §1] and [1/5]
- Fifth Witness Statement of Mark Richard Anthony Griffiths ("**Griffiths 5**") at [4/24]
- Fourth Witness Statement of Abubakar Malami ("**Malami 4**") at [1/12]
- Second Witness Statement of Shaistah Akhtar ("**Akhtar 2**") at [4/14]

Time estimate for pre-reading: 3 hours.

INTRODUCTION

1. In an award on quantum dated 31 January 2017, a tribunal comprised of Sir Anthony Evans, Chief Bayo Ojo SAN, and Lord Hoffmann (presiding) ("**the Tribunal**") awarded P&ID damages of over US $6.5 billion plus interest against Nigeria ("**the Final Award**") [5/61]. The Tribunal had previously issued two awards in P&ID's favour: an award on jurisdiction dated 3 July 2014 ("**the Jurisdiction Award**") [4/58] and an award on liability dated 17 July 2015 ("**the Liability Award**") [4/59].

2. Nigeria did not pay the Final Award and, on 16 March 2018, P&ID applied to this court (CL-2018-000182) under s.66 of the Arbitration Act 1996 ("**the 1996 Act**") for permission to enforce the Final Award ("**the Enforcement Proceedings**") [1/6]. Following a contested hearing, on 26 September 2019 P&ID obtained the permission of the Court to enforce the Final Award [1/8], subject to a conditional stay of execution on the terms of the Order at [4/52]. The Final Award, including damages and interest, currently stands at approximately US$10 billion. Nigeria has still not paid any part of the Final Award and, as is evident from the factual background set forth below, has sought at every turn to delay P&ID's enforcement of the Final Award.

3. On 5 December 2019, Nigeria issued a suite of further claims and applications in the Commercial Court. In particular:

   3.1. Nigeria filed a fresh arbitration claim (CL-2019-000752) attempting to challenge the Jurisdiction, Liability and Final Awards on the grounds of fraud/corruption under ss. 67 and 68(2)(g) of the 1996 Act (the **"Set Aside Claim**") [4/17].

   3.2. An application for an extension of time to bring the Set Aside Claim – required because the statutory deadline for an application under s. 67 or s. 68 of the 1996 Act is 28 days after the date of the award: see s. 70(3) ("the **Extension Application**") [4/17 at §13].

   3.3. An application for permission to rely on new evidence and grounds for resisting the existing Enforcement Proceedings ("the **Late Enforcement Objection Application"**) [1/11]. This raises the same allegations as the Set Aside Claim (but as a basis for purporting to resist P&ID's s.66 application for enforcement of the Final Award).[1]

[1] Accordingly, reference is made for convenience to the Set Aside Claim solely below, unless otherwise appropriate.

3.4. An application for relief from sanctions, so that it may bring the Late Enforcement Objection Application (the **"Sanctions Application**") [1/11].

3.5. An application to have its Extension Application and Sanctions Application determined at the same time as the substantive Set Aside Claim and Late Enforcement Objection Application [4/14 at §13]. This is referred to below as the "**Rolled-Up Application**".[2]

4. On 22 November 2019, Butcher J. directed that this hearing should take place for the case management of these various arbitration claims and ancillary applications [4/53].

5. Unless Nigeria is successful on the Extension Application and the Sanctions Application, it cannot succeed on its Set Aside Claim or the Late Enforcement Objection Application. The key case management decision for the Court to determine on the present hearing is therefore whether to grant the Rolled-Up Application, *i.e.* whether the Extension and Sanctions Applications should (as P&ID contends), be heard and determined as threshold preliminary issues; or whether (as Nigeria contends) they should be "rolled up" and determined along with, and at the same time as, the substantive Set Aside Claim and Late Enforcement Objection Application. Consequential directions will then flow from that primary decision.

FACTUAL BACKGROUND

6. These proceedings arise from an arbitrated dispute between the parties under a Gas Supply and Processing Agreement ("**the GSPA**") dated 11 January 2010 [2/13/1-20]. Under clause 20 of the GSPA [2/13/15], disputes were to be resolved by arbitration in London, to be conducted under the rules of the Nigerian Arbitration and Conciliation Act 1988 *"except as otherwise provided herein"*.

7. The arbitration was commenced by a notice served by P&ID on 22 August 2012. On 3 October 2013, Nigeria served a Notice of Preliminary Objection, alleging that the GSPA was void under Nigerian law and that the Tribunal lacked jurisdiction because (inter alia) (i) the Ministry of Petroleum ("**MPR**") lacked legal capacity to contract or (ii) P&ID had failed to comply with Nigerian corporate legislation that required a company carrying on business in Nigeria to first establish a local entity. On 3 July 2014, the Tribunal unanimously rejected Nigeria's arguments and issued the Jurisdiction Award [4/58].

[2] Nigeria also issued a parallel application to the Court of Appeal to add a new ground of appeal, to rely on fresh evidence, and to have its fraud claims remitted to the Commercial Court for determination. Flaux LJ issued that Court's decision on 20 January 2020, refusing that application as being misconceived [4/57A].

8. On 17 July 2015, following a hearing, the Tribunal issued its unanimous Liability Award [4/59], in which it found that Nigeria had repudiated the GSPA and was liable to P&ID in damages.

9. The Nigerian Attorney General, Abubukar Malami ("**Mr Malami**"), was appointed on 11 November 2015. On 23 December 2015, Nigeria applied to the Commercial Court to set aside the Liability Award under s.68 of the 1996 Act (on grounds which did not allege any fraud/corruption) [4/46A]. Given that this challenge was issued over four months late, Nigeria also sought an extension of time. Its evidence in support of that application stated at §§28-29: "*one of the first matters the new AGF* [Attorney General of Nigeria] *addressed upon assumption of office was this matter. He and his team had to be briefed on the detail of the matter, the outcome of the Arbitration and to take advice on the available options and suggested next steps. Following his review of the relevant documents in the Arbitration… the AGF gave his approval for the Ministry to instruct U.K. solicitors"* [4/46B]. On 10 February 2016, Phillips J. dealt with the extension of time as a preliminary issue and dismissed the application, stating that "*Compelling reasons would have to be shown to justify an extension of over four times the statutory limit"* but that no such reasons were given; and that the s.68 challenge had *" no merit"* [4/48A].

10. Following an oral hearing on quantum, the Tribunal issued the Final Award dated 31 January 2017 [5/61]. On 16 March 2018, P&ID issued the Enforcement Proceedings under s. 66 of the 1996 Act [1/6]. On 24 May 2018, service of the Enforcement Proceedings was effected on Nigeria through diplomatic channels.

11. On 28 June 2018, Mr Malami informed Nigeria's Economic and Financial Crimes Commission ("**the EFCC**") that Nigeria's President Buhari had directed the EFCC to conduct a thorough investigation into the circumstances surrounding the GSPA and subsequent events (see Malami 4 at §59 [1/12/134]) whilst also directing the MPR and Mr Malami to "*seek ways of protecting the interest of the Federal Government in enforcement proceedings*" and "*reopen negotiations with [P&ID] with a view to arriving at a settlement in the neighbourhood of $250 million in line with the recommendation of the Nigerian appointed arbitrator*" (see [3/389 at §2(a)-(b)]).

12. On 15 August 2018, the deadline for Nigeria filing an acknowledgement of service in the Enforcement Proceedings expired, and on 7 September 2018 the deadline for Nigeria filing written evidence also expired. On 12 October 2018, Nigeria belatedly filed an acknowledgement of service and applied for relief from sanctions. On 21 December 2018,

Bryan J. granted Nigeria relief from sanctions (awarding costs in favour of P&ID on an indemnity basis) and directed that Nigeria file and serve any further evidence in the Enforcement Proceedings on or before 18 January 2019 [4/50].

13. On 14 June 2019, there was a substantive hearing in the Enforcement Proceedings before Butcher J. Nigeria made no mention of the investigation that President Buhari had directed one year earlier. On 16 August 2019, Butcher J. handed down judgment in the Enforcement Proceedings [1/8], granting the s.66 application but ordering no steps to be taken to enforce the judgment until a consequentials hearing took place, which was deferred to a later date [4/51].

14. Almost immediately thereafter, the EFCC investigation went into overdrive: Griffiths 5 at §17 [4/24/186]. In particular, on 20 August 2019 the Solicitor General of Nigeria wrote a letter to the Inspector-General of Police stating at §2 that he would "*recall the recent ruling of a British court delivered on Friday 16th August, 2019*" and at §5 requesting the Inspector General to "*swiftly commence full scale criminal investigation into all the direct and indirect activities and roles played by private individuals, corporate entities and Government officials*" [4/25/214-215]. This request was said at §6 to be "*extremely urgent*" because of the "*possible seizure of Nigerian assets abroad*", amongst other matters. Mr Malami says at §64 that this request was made "*to broaden the investigation beyond the EFCC's remit, which is limited to financial and related matters*" [1/12/136].

15. On 26 September 2019, there was a hearing before Butcher J. regarding consequential matters in the Enforcement Proceedings following his 16 August 2019 judgment.[3] In its skeleton argument for that hearing, Nigeria made the Court *"aware"* of the EFCC investigation, however noting that: *"The Court is not asked to act on these investigations or convictions at the present hearing"*. This position was affirmed by Nigeria's Leading Counsel in oral submissions at that hearing (and noted in the judgment of Butcher J. on 26 September 2019 at §15 [1/9/92]).

16. On 17 October 2019, Nigeria filed its Appellant's Notice in respect of the Enforcement Proceedings [4/26]. Again, in that Appellant's Notice (Section 5), Nigeria stated that the appeal was being pursued *"without prejudice to any and all rights… in the light of any current or*

[3] Butcher J. granted P&ID permission to enforce the Final Award, but ordered a stay of execution pending the determination of Nigeria's appeal to the Court of Appeal, subject to the interim payment by Nigeria of P&ID's costs and the payment by Nigeria of US $200 million security into court by 25 November 2019. He also granted Nigeria permission to appeal his August judgment on certain grounds - none of which is related to the matters raised by the Set Aside Claim [4/52]. On 26 November 2019, Flaux LJ rejected Nigeria's application for permission to appeal the judgment on further grounds, and directed that so far as possible the case should be heard before Easter 2020: [4/55/402].

further investigations and/or criminal or civil court process…". On 12 November 2019, Nigeria filed its Appeal Skeleton Argument [4/42]. In that skeleton argument, Nigeria stated that: *"The Court should be aware that the [EFCC] has recently commenced investigations into the circumstances surrounding the award of the GSPA and related matters…*" [4/42/314].

17. On 15 November 2019, there was a change in Nigeria's legal team in the Enforcement Proceedings. Its new Counsel subsequently told Butcher J. at a hearing on 22 November 2019 that: *"the effect of that change of team was the decision was made to allege fraud"*.[4]

18. On 18 November 2019, Nigeria then issued two applications in the Enforcement Proceedings.[5] Mr Malami gave evidence of the purportedly fresh evidence unearthed by the EFCC investigation. Mr Malami also stated: *"On this basis, FRN intends to issue applications shortly, and in any event by 27 November 2019, seeking to set aside the Final Award and/or resist its enforcement on grounds that the Award and the GSPA were procured by fraud and corruption. These applications will be accompanied by full evidence of the alleged fraud. I am willing to undertake that those applications will be issued with all reasonable expedition*" [1/11A]. Butcher J. heard Nigeria's applications on 22 November 2019. At that hearing, Butcher J. noted that the evidence before him was evidence which had been available for the consequentials hearing on 26 September 2019: *"MR JUSTICE BUTCHER: I've looked at it. If you would like to identify any part of that evidence which wasn't available on 26 September I would be interested. MR HOLLANDER: I haven't identified precisely which parts were and weren't. MR JUSTICE BUTCHER: I did the exercise last night. I couldn't see anything significant which wasn't"*.[6]

19. In his judgment following the hearing on 22 November 2019, and when referring to the purported change of circumstance based on the allegedly new evidence of fraud, Butcher J. found that the allegation had not been advanced with reasonable diligence and "*could and should have been made earlier*".[7] His Lordship duly rejected the application for an extension of the deadline to provide security.

[4] Transcript of 22 November 2019 hearing at internal page 6, lines 10-11 [5/63/548].
[5] Nigeria sought, on the purported grounds of a change in circumstance, (i) to vary or revoke the order of Butcher J. of 26 September 2019 that Nigeria pay US $200 million into court by 25 November 2019 [4/47], and (ii) to extend the deadline of 25 November 2019 until the said variation application could be heard and determined.
[6] Transcript of 22 November 2019 hearing internal page 4, lines 9-15 [5/63/547].
[7] At §§12-14 [1/10/101].

20. Despite raising its new fraud case with the Court in September 2019, and being prepared to undertake to file that challenge by 27 November 2019, Nigeria only issued its Set Aside Claim and other applications on 5 December 2019.

NIGERIA'S NEW FRAUD CASE

21. P&ID submits that the Court should dismiss the Rolled-Up Application, and direct that the Extension and Sanctions Applications be dealt with as threshold preliminary issues. This is the appropriate course both as a matter of principle and for the sensible case management of these proceedings.

22. In order to explain why this is so, the Court will also need to consider the nature of Nigeria's Set Aside Claim, and in particular how that Set Aside Claim would need fairly to be dealt with if it were to be dealt with on a "rolled-up" basis. P&ID submits that such a hearing would be unlikely to take place before **early 2021**, at the earliest, for the reasons set out below.

23. By its Set Aside Claim, Nigeria has issued ss. 67 and 68 applications which it describes as alleging a *"very serious"* case of fraud.[8] It contends that the GSPA,[9] the arbitration proceedings, and each of the Jurisdiction, Liability, and Final Awards themselves,[10] were the product of fraud and corruption. As best as P&ID can presently gather from reading Mr Malami 4, Nigeria's case appears to be that: (i) Ministers and/or other officials within the MPR were bribed by P&ID to enter into a sham contract (the GSPA), which contained a sham arbitration clause; (ii) this sham contract in turn led to a sham arbitration (which was allegedly kept in-house by MPR and very thinly defended until the quantum phase, when it was taken over by the Ministry of Justice); and (iii) that those same corrupt MPR officials (somehow) stood to make an illicit gain from this arrangement. P&ID makes a number of initial observations about this fraud case.

24. **First**, the fraud case as currently presented is extremely wide-ranging in its intended scope. Nigeria itself contends that: "*Investigations and allegations of fraud and corruption at government level are extremely complex and time-consuming*"[11] and that its investigation spans "*…multiple jurisdictions and analysis of more than forty entities and transactions*

[8] Akhtar 2 at §16(d) [4/14/155].
[9] Malami 4 at §27-48 [1/12/121-130].
[10] Malami 4 at §49-58 [1/12//130-134].
[11] Malami 4 at §61 [1/12/135].

relating to them, as well as interviewing more than thirty witnesses to date". Even then, Mr Malami was at pains to "*emphasise that the EFCC investigations are ongoing"*[12].

25. Mr Malami's fourth witness statement is itself over forty pages long and accompanied by over 600 pages of exhibits. It veers into material which is plainly intended to be prejudicial, rather than of any direct relevance to the matters in issue, but Nigeria appears to rely on everything stated in Mr Malami's statement as being relevant to its central fraud case: Malami 4 at §99 [1/12/147]. On its face, therefore, if the Set Aside Claim were permitted to proceed, the Commercial Court would have to grapple with a host of issues, spanning a period of over 10 years, and including at least the following points raised in the Malami evidence:

    25.1. Nigeria's battle with endemic corruption;[13]

    25.2. The background to P&ID and its principals;[14]

    25.3. The history of P&ID's selection by MPR, and of the negotiations over and entry into the GSPA;[15]

    25.4. The manner in which officials within the MPR represented the GSPA internally within the Nigerian government, and whether they were in breach of any laws or regulations in the manner in which they operated;[16]

    25.5. Whether the GSPA was granted to P&ID in breach of Nigerian laws or regulations on procurement;[17]

    25.6. The performance of the GSPA;[18]

    25.7. Whether officials within MPR specifically and the Nigerian government more generally were involved in the alleged corruption (including, in particular, whether this included Dr Lukman, Ms Alison-Madueke, Ms Grace Taiga, Mr Tijani[19] and/or others who are presently unidentified);[20]

[12] Malami 4 at §67 [1/12/138].
[13] Malami 4 at §99.3 and §§20-26 [1/12/148 and 1/12/117-121].
[14] Malami 4 at §99.1 §§28-31 [1/12/147 and 1/12/121-124].
[15] Malami 4 at §99.1 and §§32-38 [1/12/147 and 1/12/124-127].
[16] Malami 4 at §99.2 and §§43-48 [1/12/148 and 1/12/128-130].
[17] Malami 4 at §44 [1/12/129].
[18] Whilst not expressly identified as suspicious by Mr Malami, in circumstances where he contends that the GSPA was procured by fraud, and the arbitration proceedings were themselves suspicious, this is plainly an issue which will need to be investigated/considered.
[19] Malami 4 at §§68-82 [1/12/138-142]
[20] As Mr Malami says at §§81-82 [1/12/142], the EFCC investigations are ongoing.

25.8. The role of Mr Kuchazi;[21]

25.9. Whether payments were made by or on behalf of P&ID to these or other officials and the purpose of said payments;[22] and

25.10. The entire history of the arbitration (of nearly 5 years in length), and in particular whether the manner in which it was conducted (in an allegedly *"unusual and suspect way"*) supports Nigeria's case.[23]

26. **Second,** in addition to those examples of the factual issues which would need to be covered, the Court would also need to grapple with a host of legal matters, including but not limited to: (i) whether any of the matters raised by Nigeria meant that the GSPA was procured by fraud, corruption or illegal conduct; (ii) the effect of that alleged conduct on the validity of the GSPA and its arbitration agreement; (iii) issues of waiver/estoppel (including the operation of s.73 of the 1996 Act, which would require a detailed investigation into whether the matters alleged by Nigeria could with reasonable diligence have been discovered earlier); (iv) whether Nigeria's case meets the high threshold for court intervention under s.68; and (v) whether the alleged fraud caused substantial injustice to Nigeria, in the sense of having had an important influence on the result of the arbitration.

27. **Third,** the Court will note that, despite the wide-ranging nature of the fraud claim and the alleged seriousness of the allegations now being raised, there is no pleading filed by Nigeria and signed by its new Counsel team in support of its case. To date, Nigeria has only filed a four page Arbitration Claim Form [4/17/168] (attested to by a Statement of Truth from Mr Malami himself), which simply states at §6: *"Details of the Nigerian authorities' investigations and discoveries are set out in the Fourth Witness Statement of [Mr Malami]*". This is wholly unsatisfactory. In any s.67 (or s.68) case which gives rise to complicated issues of fact or law, a party seeking to challenge an award ought to file pleadings. Indeed, this was the view of Colman J. over 20 years ago in *Azov Shipping Co v Baltic Shipping Co* [1999] 2 All ER (Comm) 453 at 480 (a s.67 case which did not raise issues of fraud) where his Lordship stated that: *"In cases under s 67 of the 1996 Act which raise complex issues of fact and foreign law, serious consideration should in future be given to agreeing or, absent such agreement, to ordering, the exchange of pleadings as with any other action of similar complexity*".

[21] Malami 4 at §§79-80 [1/12/141]
[22] Malami 4 at §§71-78 [1/12/139-141]
[23] Malami 4 at §53 and §99.4 [1/12/131 and 148]

28. The position is *a fortiori* where that ss. 67/68 challenge does raise issues of fraud. As stated in Chantiers de L'Atlantique SA v Gaztransport & Technigaz SAS [2011] EWHC 3383 (Comm) (a case under s.68(2)(g) of the 1996 Act):

> "*...**fraud (that is dishonest, reprehensible or unconscionable conduct) must be distinctly pleaded and proved,** to the heightened burden of proof as discussed in Hornal v Neuberger Products Ltd [1954] 1 QB 247 and Re H (Minors) [1996] AC 563. This was emphasised by Rix LJ in The Kriti Palm, at paragraphs 256-259, a case which provides a salutary reminder to any judge of the importance of being satisfied to the necessary heightened standard of proof that what is involved is dishonesty and of the fact that the explanation for something is much more likely to be human error than dishonesty*" (emphasis added).

29. Once Nigeria's case has been properly pleaded out, a case management conference would then need to be fixed in the usual way to consider the need for and scope of: (i) disclosure; (ii) factual evidence; (iii) expert evidence (whether on Nigerian law or other topics), and (iv) further directions/scheduling for a hearing at which the parties' cases can be tested via submission and cross-examination.

30. Whilst P&ID's position on these matters will inevitably be informed by the pleadings, it is clear that, in the event that the Set Aside Claim were to proceed to a full trial, a substantial disclosure exercise would be required in order fairly to test Nigeria's case. Further, whilst some of the alleged protagonists (such as Dr Lukman, the Petroleum Minister who signed the GSPA on behalf of Nigeria, and Mr Quinn, one of the founders of P&ID) are deceased, it is also likely that factual evidence (and, possibly, expert evidence) would also be required to be served by both parties. Thus, in these circumstances, it is evident that a fully contested hearing in this matter would be a lengthy undertaking, possibly occupying a number of weeks of Commercial Court time. Further, in light of Nigeria's "no holds barred" approach to resisting enforcement, and the sums at stake, it is also likely to be very expensive. Given that pleadings and disclosure are certainly required, further factual evidence is likely to be required, and expert evidence is possibly required, it is very difficult to see how this case could sensibly be ready for a trial until **early 2021** at the earliest.

31. **Fourth,** Nigeria's current position on these matters, as set out in its draft order for directions [1/5], is completely unrealistic. Notwithstanding the nature of its own fraud claim, it does not appear to envisage any pleadings phase, or disclosure. It simply invites the Court as a next step to order P&ID to file responsive factual evidence to its statements, whilst also seeking permission to adduce expert evidence in the broadest and most generalised of terms, at a time when the specific issues remain undefined, and without regard to the relevant provisions of

CPR.[24] That is plainly unsatisfactory. Indeed, only yesterday Nigeria served a further (fifth) witness statement from Mr Malami, of 16 pages, accompanied by over 200 pages of exhibits, in which he says at §34 "*how difficulty and lengthy a task it is proving to get to the bottom of the fraud"*[6/87/672]. If the substantive issues raised by the Set Aside Claim are ever to be determined by the Commercial Court, P&ID has to be given a fair opportunity to test that case. In these circumstances, it is hard to resist the conclusion that Nigeria has framed its proposals in this way in an attempt to detract from the obvious case management appeal of having the Extension Application and Sanctions Application dealt with as threshold issues.

32. With that background in mind, P&ID turns to consideration of the merits of the Rolled-Up Application.

THE ROLLED-UP APPLICATION

33. Nigeria accepts that it must obtain an extension of time in order to challenge the Awards. It follows that, if its application for an extension of time is not granted by the Commercial Court, its fraud challenge under ss. 67 and 68 of the 1996 Act will be dismissed. That will leave it with its extant appeal to the Court of Appeal (in which the fraud allegations play no part) as the only means of resisting enforcement of the Final Award.

34. Ms Akhtar, in Akhtar 2 at §13(a) [4/14/153], suggests that the Extension Application *"is not a matter that can or should be decided as a preliminary issue in the abstract"*. The chief reason given by Nigeria for a rolled-up hearing, as opposed to addressing the Extension Application as a threshold issue, is because it considers that the outcome of the Extension Application itself turns on the merits of Nigeria's fraud case. For example, in its letter to the Court dated 13 December 2019, Mishcon de Reya contends that the Court will need to "*determine"* at a hearing "*with full evidence*" the credibility of the fraud allegations, in order to decide whether time should be extended [5/75/620]. There are a number of flaws in that reasoning.

35. **First**, it is critical to appreciate at the outset that Nigeria's application to set aside three arbitral awards on the grounds of fraud, pursuant to s.68(2)(g) of the 1996 Act (and s.67) brings into play three important aspects of English arbitration policy:

[24] For example, no estimate of the costs of the proposed expert evidence have been provided, contrary to CPR 35.4(2).

35.1. The goal of speedy finality under the 1996 Act, as set out in s.1(a): *"*[T]*he object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense…"*

35.2. The principle of non-intervention by the Court. In matters governed by Part I of the 1996 Act (in which ss. 67 and 68 are contained), "*the court should not intervene except as provided by this Part*".

35.3. Finally, the separate principle that a s.68 application involves *"a high threshold"* and the Court ought only to intervene where the tribunal has gone so wrong that *"justice calls out for it to be corrected"*.[25]

36. In his seminal judgment in *Kalmneft v Glencore International AG* [2001] 2 All ER (Comm) 577 ("**Kalmneft**"), Colman J. drew these threads together at [50]-[52], emphasising that "*the starting point must be to take into account the fact that the 1996 Act is founded on a philosophy which differs in important respects from that of the CPR*"; in particular, because "*the twin principles of party autonomy and finality of awards which pervade the Act tend to restrict the supervisory role of the court and to minimise the occasion for the court's intervention in the conduct of arbitrations. Nowhere is this more clearly demonstrated than in s 68 itself*", which in turn meant that: "*Once an award has been made the parties have to live with it unless they move with great expedition. Were it otherwise, the old mischief of over-long unenforceability of awards due to the pendency of supervisory proceedings would be encouraged*".

37. Much more recently, in rejecting an application for an extension of time to challenge an award under section 67 of the 1996 Act, Burton J. similarly stated in *State A v Party B* [2019] 1 Lloyd's Rep. 569 ("**State A**") at [53] that: *"The very fact that, if permitted to proceed, a section 67 application would be a rehearing, and allow fresh evidence underlines the greater need* ***for a proper threshold, a sensible and properly controlled gateway, before it can be allowed to go further***" (emphasis added).

38. The requirement to apply for an extension of time to challenge an award is the *"sensible and properly controlled gateway"* to which Burton J. referred. In circumstances where (as here) the Set Aside Claim would require a hearing of considerable length and expense, it is

[25] See Popplewell J. in *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi and others* [2013] 1 Lloyds' Rep 86 ("**Terna**") at [85]. See also *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221 at [27] and [28].

imperative that the Court address the threshold issue of timing on a preliminary basis, before allowing the action to proceed any further.

39. **Second**, the merits of the challenge are usually only one factor amongst many at play in determining whether an extension of time is justified. The relevant factors were identified by Colman J in *Kalmneft*, who listed the strength of the challenge as the sixth in his list of seven at [59]:

> "*Accordingly, although each case turns on its own facts, the following considerations are, in my judgment, likely to be material:*
> *(i) the length of the delay;*
> *(ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;*
> *(iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;*
> *(iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;*
> *(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have;*
> *(vi) the strength of the application;*
> *(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.*"

40. Nigeria's Rolled-Up Application therefore incorrectly seeks to turn the merits of its fraud case into the only relevant factor in deciding whether or not to grant an extension. Whilst it is correct to say that the merits question is likely to play an important role if the extension question is joined to the substantive ss.67/68 challenge itself, that does not mean that the Court *should* direct the extension question to be joined to that substantive challenge.[26] In fact, the opposite is the case, as Popplewell J. made clear in *Terna*. Having identified at [31] that "*the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises*", he said at [34] that:

> *"The greater prominence which the merits of the application may play when the court is considering the application for extension of time at the same time as the substantive challenge application* ***should not usually be seen as a reason for the two matters to be listed and heard together. On the contrary, in many cases that would itself frustrate the policy of speedy finality underpinning the Act.*** *It is not uncommon for challenges under s 68 to require a lengthy investigation into the issues in the arbitration, and into the detail*

[26] As it happens, in *Terna*, Popplewell J stated at [84] that, whilst he rejected the actual challenge on the merits, he would also have exercised his discretion to refuse an extension even if he had concluded that the challenge to the award would have succeeded, in light of the substantial delay *"which was a result of a deliberate choice for perceived tactical advantage"*.

of the procedural course of the reference, requiring a substantial hearing for that purpose. In such cases ***it should be the exception, rather than the norm,*** *for the extension of time application to be postponed to a full hearing of the challenge application*" (emphasis added).

41. This practice is encapsulated in paragraph O9.5 of the Commercial Court Guide, which states, in relation to time limits for an arbitration challenge, that: "*An application to vary the period of 28 days will normally be determined… prior to the consideration of the substantive application*". Accordingly, if Nigeria's position were correct that assessment of the extension requires the Court to "*make* ***findings*** *on the credibility of the fraud allegations*" [5/75/620] it would mean that every application for an extension of time to bring a fraud claim under s.67 and/or s.68(2)(g), even if made years after the award, would require to be joined to the merits. That would render nugatory the important gateway function that the statutory deadline for bringing a challenge (and having to obtain an extension in the event of delay) is meant to represent. The Court should therefore be very slow to depart from the usual practice, informed by orthodox principles under the 1996 Act, that extensions of time should be dealt with as preliminary issues prior to consideration of the substantive application.

42. **Third**, there are, in any event, no reasons for departing from usual practice in the instant case. On the contrary, there are very strong case management reasons to deal with the Extension and Sanctions Applications as preliminary threshold issues. This is because: **(1)** they can be dealt with speedily and cost-effectively, before the Summer vacation; whereas a "rolled-up" hearing would be very expensive and unlikely to take place before early 2021; and **(2)** at present, it is very difficult to see how Nigeria will possibly justify the requisite extension of time, if the matter is dealt with on a preliminary basis.

43. As to **point (1),** P&ID has set out how a rolled-up hearing would have to work at §§27-30 above. In contrast, the Extension and Sanctions Applications could sensibly be addressed over one (or possibly two) days in June or July 2020. It is presently unclear whether further exchanges of evidence will be necessary (and any such evidence would likely be focused on the application of the *Kalmneft* factors), so a hearing of those issues will take place far more quickly and cheaply than any rolled-up hearing. Apart from being consistent with the arbitration principles identified above, this approach carries the great benefit that, if Nigeria's applications are unsuccessful, that will be the end of the matter, and a full contested trial on the merits of the fraud issues will not be required. The concomitant saving of time and expense (including for other Court users) is a powerful factor in favour of rejecting the Rolled-Up Application. This is particularly so once the difficulties that Nigeria has on these preliminary threshold matters are appreciated (as to which see below).

44. As to **point (2),** even at this juncture it is clear that Nigeria will have (at its lowest) very serious problems in persuading the Commercial Court to grant an extension of time.[27] Whilst this will be a matter for fuller submissions in due course, P&ID makes the following observations by reference to the *Kalmneft* factors**.**

45. **Length of delay.** The length of delay in this case is extraordinary - Nigeria seeks an extension of around **5 ½ years** to challenge the Jurisdiction Award, around **4 ½ years** to challenge the Liability Award, and nearly **3 years** to challenge the Final Award. As Popplewell J said in *Terna* at [28]: "*the length of delay must be judged against the yardstick of the 28 days provided for in the 1996 Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial*".[28] The length of delay in this case will make an extension exceptionally hard - if not impossible - for Nigeria to justify.

46. **Was Nigeria acting reasonably in permitting the time limit to expire?[29]** Far from it. Without rehearsing the arguments at any level of detail, it is submitted that Nigeria's own evidence is consistent with it having taken a deliberate and informed decision not to challenge the Awards within the statutory time period, or (at the very least) demonstrates that it has not been acting reasonably in this regard. By way of example only:

    46.1. Mr Malami suggests that the GSPA (executed on 11 January 2010) is "*on its face"* a suspect contract (Malami 4 at §27 [1/12/121]), and that the conduct of the arbitration itself was suspicious prior to the quantum phase. However, he does not explain why no attempt to challenge the Jurisdiction or Liability Awards was made on this basis, even after Mr Malami personally became involved in the case in or around November 2015 or when the Ministry of Justice (which he accepts at §53 were formally instructing

[27] At §17 of Akhtar 2 [4/14/156], Ms Akhtar explains that she will rely on broadly the same factors for both the Sanctions Application and the Extension Application.

[28] In *State A,* Burton J. noted at [35] that a delay of over 2 years was "*very exceptional"* and identified that, in the eleven cases cited to him, the delays ranged from 18 days to 14 months. In only one case (a 'rolled-up' hearing) the extension was granted (albeit the actual s.68 challenge was dismissed on the merits).

[29] Nigeria raises a question as to whether these principles will apply given the Supreme Court decision in *Takhar v Gracefield Developments Ltd and others* [2019] 2 WLR ("**Takhar**"). P&ID will say that *Takhar* does not apply given that: (i) it is a case addressing the circumstances in which a first instance judgment should be set aside for fraud at common law, and was not a case of seeking to set aside an award for fraud under the 1996 Act; (ii) the context under the 1996 Act is very different, with different principles are at play (see above, and s.73 of the 1996 Act, which imposes an express statutory requirement on a s.68 applicant who was a "*party to and took part in the arbitral proceedings*" (as Nigeria did here) to demonstrate that "*he did not know and could not with reasonable diligence have discovered the grounds for the objection …"* ; and (iii) the one Judge to date to consider the impact of *Takhar* to a claim to set aside an award for fraud, Cockerill J in *ZCCM Investments Holdings Plc v Kansanshi Holdings Plc* [2019] 2 Lloyd's Rep. 29, observed at [219] (obiter) that it was by no means clear that *Takhar* applied in this context.

counsel throughout the arbitration) is said to have taken over the conduct of the case from the MPR in *"early 2016"*.[30]

46.2. In fact, Mr Malami fails to provide any proper explanation as to why it took until June 2018 for Nigeria to commence an investigation. Instead, he says in Malami 4 at §59.3 [1/12/135] that, following the Final Award, the Ministry of Justice focused on attempts to settle the litigation with P&ID, *"which would allow it to draw a line under the long-running litigation*" and that it was only when that approach failed that it resorted to different methods. He then says in terms at §60 that: *"Once the settlement discussions broke down, I was prompted to take action by the magnitude and scope of the Final Award which I knew could have far-reaching implications for Nigeria as a whole*". It is notable that he also positively accepts at §61 that by this time he himself had "*strong suspicions about the genuineness of the GSPA*". His evidence is therefore consistent with a deliberate and informed decision by Nigeria not to investigate the GSPA, or the conduct of the arbitration proceedings, or to challenge the Awards, but to pursue a strategy of attempted settlement with P&ID instead.[31]

46.3. The investigation which was eventually commenced was, in Mr Malami's own words, *"limited to financial and related matters"* (Malami 4/§64 [1/12/136]), and it is clear from the Solicitor General's instruction to the police (see §14 above) that Nigeria only chose to begin *"to broaden the investigation"* on 20 August 2019, i.e. immediately after the (negative) Butcher J. decision of 16 August 2019.

46.4. In sum, the obvious conclusion to draw from these matters is that Nigeria took a conscious decision to fight the Enforcement Proceedings on the merits, and not to pursue a wider investigation of alleged corruption until it had lost before Butcher J. Once it had lost before Butcher J., it then decided to change its legal team and to allege a new case of fraud (see §17 above), which itself appears to have been delayed pending the instruction of that new team. In doing so, it made deliberate tactical decisions for its own perceived advantage and, having taken that risk, cannot now fairly seek the indulgence of this Court to grant it what would amount to a monumental extension of time to challenge three separate arbitral awards.

[30] Malami 4 at §54.8 [1/12/133].
[31] As Popplewell J noted in *Terna* at [29]: *"…where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter".*

47. **Contribution to delay?** Further, there is no evidence at all to establish that P&ID or the Tribunal contributed to these delays. On the contrary, the relevant factual background discloses the extent of Nigeria's dilatory conduct. For example, Nigeria's difficulties in advancing credible explanations to justify an extension of time and relief from sanctions are typified by the contradictory nature of Mr Malami's own evidence. Referring to the alleged difficulties in unravelling the fraud and corruption, Malami 4 explains at §11.7 that: "[t]*hese difficulties were exacerbated by the deaths of several key actors and suspects (including Dr. Rilwanu Lukman and Messrs Quinn and Hitchock* [sic.])*...*" [1/12/113-114]. Eight lines later, however, Mr Malami says that *"...it is only since the corrupt individuals departed or died, and since the institution of a new approach to fraud and corruption, that it has become possible to put in place a process of investigation..."* The allegedly corrupt individuals who died were Dr Lukman (who died on 21 July 2014) and Michael Quinn (who died in February 2015). Neil Hitchcock died in December 2015. Given that Mr Malami has been personally involved with this case since around November 2015, and the fact the Ministry of Justice took over the file in early 2016 (around one year after President Buhari's election and the 'new approach' to corruption), his evidence therefore fails to provide any explanation for the delay in bringing the present fraud challenge since at least that time.

48. Mr Malami also tries to explain away the delays by referring to the difficulty of extracting relevant documents. The primary example of timing issues chosen by him, at §11.8 of Malami 4 [1/12/114] is the alleged delay in the production of Ms Taiga's bank statements.[32] He says that "*it was only in October of this year* [i.e. 2019] *that bank statements of Ms Grace Taiga were produced*". The clear impression intended to be given to the reader is that this was a delay for which Nigeria cannot be held responsible. What he does not say there, and only reveals in passing much later on in his statement (at §69 [1/12/138]), is that the investigation into her role commenced in late 2018, because (amongst other reasons) she was a witness to the signing of the GSPA. This is something that Nigeria had known for years, and yet Mr Malami's own evidence at §69 discloses that documents were only requested by the EFCC from her bank on 20 September 2019 (i.e. very shortly before the consequential hearing before Butcher J.) No explanation is given as to why, if it was known that she had witnessed the signature of the GSPA in January 2010, and was (in his words) "*profiled*" by the authorities in late 2018, it took until 20 September 2019 to ask for these documents.

49. In conclusion, based on Mr Malami's own evidence the obvious (indeed, irresistible) inference to draw is that Nigeria's delay in bringing its Set Aside Claim is one of its own making and

[32] Ms Taiga is a retired government lawyer who witnessed the signing of the GSPA.

entirely for a perceived tactical advantage – first, to see what happened in respect of the settlement negotiations; second (when those talks failed) to see what the outcome of the hearing before Butcher J. might be; and third (and finally), when that approach failed, to then ramp up its investigations when it considered that it had no option left but to attempt (belatedly) to set aside the Awards.

50. **Irremediable Prejudice to P&ID.** A rolled-up hearing would cause P&ID very significant prejudice. It would force P&ID to engage in a further lengthy and hugely expensive piece of unnecessary litigation in England, which would require the parties to trawl over the entire history of their dealings, and at a time when the principal actors on both sides are deceased. Moreover, an extension might result in a delay to the Court of Appeal hearing which Flaux LJ had indicated ought to take place before Easter 2020 if possible[33], and might have a negative consequential impact on any attempts by P&ID to enforce the Final Award under the New York Convention in other jurisdictions where Nigeria's assets are located – the "*old mischief"* which Colman J. warned against in *Kalmneft* (see §36 above). Further, whilst Nigeria has provided some security by way of a bank guarantee, that would not remedy the above prejudice and the US$200 million provided for would in any event be wholly insufficient given that interest accrues on the Final Award at the rate of approximately US $460 million per annum.

51. **Merits.** As to the merits of the fraud case, the key point for present purposes is that Nigeria would need to demonstrate that the new evidence it wishes to rely upon in support of its fraud theory is a "game-changer" or "transformational" in nature, and it cannot do so. As Mr Justice Burton recently stated in *State A* at [53-54]:

> "***…The longer -- the more 'colossal' -- the delay or passage of time, the more transformational or seismic must be the fresh evidence sought to be relied upon***. *It may be that, in a case in which there is a short delay and the parties have not, as they have in this case, steam-rollered through at enormous expense to a further hearing, then the strength of the case required for an extension may be less, or the role of factor (vi) may not be 'primary'. However:*
>
> *(i) The very fact that, if permitted to proceed, a section 67 application would be a rehearing, and allow fresh evidence underlines the greater need for a proper threshold, a sensible and properly controlled gateway, before it can be allowed to go further.*

[33] Flaux LJ's Order of 20 January 2020 defers his decision on the listing of Nigeria's appeal and Nigeria's stay application until after the hearing on 24 January 2020: see [4/57A]. He has required that the Order made on this occasion and a transcript or agreed note of any judgment be provided to him by 29 January 2020 at the latest; and that the Judge at this hearing should have a copy of his Order.

> ***(ii) In my judgment, factor (vi) must be one of the primary factors where there has been substantial delay,*** *and Mance LJ's dicta in Nagusina should, in my judgment, be so interpreted. To that extent I would disagree with the words of Eder J and Popplewell J…*
>
> *In my judgment, in this case where the delay has been 'colossal' and there would undoubtedly be prejudice to the respondents by virtue of the costs which would be wasted,* ***the strength of the case must be the greater, and the fresh evidence must indeed be transformational***" (emphasis added).

52. Whilst this point will be dealt with by P&ID fully in due course, here we have delay that can properly be described as "colossal", but there is nothing in Mr Malami's evidence that can accurately be described as coming close to the "transformational" or "seismic" evidence required.

CONCLUSION

53. Accordingly, given that: (i) Nigeria's substantive claim depends upon it succeeding on its Extension/Sanctions Applications; (ii) those applications can fairly be dealt with on a preliminary basis, and far more quickly and with less cost and inconvenience (including to other Court users) than a rolled-up hearing; and (iii) Nigeria's case for such an extension or relief faces very serious (indeed, probably insuperable) difficulties, it makes obvious sense for the Court to decide those points first, before determining whether any further substantive hearing is even going to be necessary.

54. P&ID therefore respectfully invites the Court to dismiss the Rolled-Up Application and make consequential directions (which will be the subject of oral submissions) down to a hearing in June or July 2020 of the Extension/Sanctions Applications.

23 January 2020

IAN MILL QC

SIDDHARTH DHAR