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UPTURNING THE $9.6 BILLION ARBITRAL AWARD GRANTED P&ID:

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INTRODUCTION

A BREWING STORM

1.1 A little storm has been brewing since the $9.6 billion arbitral award against Nigeria in favour of P&ID. The processes leading up to the GSPA agreement subject of the award have been intensively reviewed by the EFCC and by various committees of the present government. New facts suggesting acts of fraud by agents of both parties in the course of negotiations and bureaucratic processes leading up to the GSPA emerge daily. The Nigerian government has made it clear that it would not submit to the attachment of its international assets in satisfaction of that judgement without a fight. President Buhari was emphatic when he used the word "fraud" to characterize the GSPA agreement in his address at the 74th Session of the United Nations General Assembly held in New York.

2.0 BUILDING A CASE FOR FRAUD

2.1 Recent events show that Nigeria is aggressively building a case to challenge the judgement of the Commercial Court of England which affirmed the award on grounds of fraud. On 19th September 2019, the EFCC arraigned P&ID Ltd domiciled in the Virgin Islands and its Nigerian affiliate P&ID Nigeria on 11 counts of fraud and tax evasion. The companies were accused of fraudulently acquiring land from the Cross-river's state government in 2010 for the purpose of constructing facilities further to the GSPA. The EFCC also contended that P&ID had no license to sell petrol in Nigeria, and that the company failed to comply with its tax obligations under Nigerian law. It is interesting to note that the "representatives" of P&ID presented before the court pleaded guilty to all the counts, and the court convicted the companies accordingly. Further to this conviction, the Federal High Court per Justice Inyang Ekwo ordered the winding up of both companies, and a forfeiture of their assets to the Federal Government.

2.2 The Attorney General of the Federation, Abubakar Malami characterized the verdict of the Federal High Court as establishing that the GSPA agreement is rooted in fraud and corruption. He stated;

"The implication of today's conviction is that Nigeria has a judicial proof of fraud and corruption as a foundation of the relationship that gave rise to a purported liability in the arbitral award. A liability that is rooted in fraud and corruption cannot stand judicial enforceability; Nigeria now has a cogent ground for setting aside the liability. Where Nigeria is expected to review its strategy in view of unfolding developments as it relates to conviction of some of the suspects that have admitted fraud and corrupt practices in the transaction that gave rise to purported award."

3.0 NIGERIA GRANTED LEAVE TO APPEAL

3.1 The Nigerian government has applied for, and has been granted leave to appeal the judgement of the Commercial Court of England by the Court of Appeal England. The court also granted a stay of execution of the judgement, which in the interim prevents the seizure of Nigeria's foreign assets in satisfaction of the award. However, as condition precedent to the effectiveness of the order, the Nigerian government is ordered to deposit the sum of $200 million dollars to the court within 60 days. It is also ordered to pay some court costs to P&ID within 14 days.

3.2 The Nigerian government challenges the judgement of the Commercial Court on grounds that the court erred when it held the seat of arbitration to be England. The government also contends that the arbitral award is "manifestly excessive". It argues that the GSPA agreement is rooted in fraud and corruption hence, it is unenforceable, and should be set aside.

4.0 CHALLENGING ARBITRAL AWARDS AND THE AFFIRMING JUDGEMENT OF THE HIGH COURT OF ENGLAND (COMMERCIAL COURT DIVISION)

4.1 The English Arbitration Act 1996 (the Act) applicable in England, Wales and Northern Ireland, makes extensive provisions for the procedure to challenge an arbitral award, a process which involves an initial challenge at the High Court of England and Wales and a possible appeal to the Court of Appeal.

By Section 67 of the Act, a party to a Arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court (a) challenging any award of the tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

4.2 The provisions of Section 68 also empowers a party to an arbitral proceedings to challenge the award for serious irregularities, it provides; a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. Upon a successful challenge on grounds of jurisdiction or irregularity, the court may; (a) remit the award to the tribunal in whole or in part for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part.

4.3 Section 68(2)(g) of the Act provides specifically for the challenge to the arbitral award on grounds of fraud or public policy. Section 68(2)(g) provides; Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.

4.4 The viability of challenging the arbitral award on grounds of fraud and public policy is further explored in below.

5.0 LEGAL REGIME FOR ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

5.1 Enforcement of international arbitral awards are well provided for in the laws of England and Nigeria. Section 54 of the Arbitration and Conciliation Act of Nigeria provides;

where the recognition and enforcement of any award arising out of an international commercial arbitration are sought, the Convention on the Recognition and Enforcement of Foreign Awards (hereafter referred to as "the Convention") set out in the Second Schedule to this Act shall apply to any award made in Nigeria or in any contracting state.

provided that such contracting state has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention;

5.2 By this provision, the Arbitration and Conciliation Act of Nigeria incorporates the Convention on the Recognition and Enforcement of Foreign Awards also known as the New York Convention which is applicable to international arbitral awards. Article 1 of the convention which is reproduced in the Second Schedule to the Act provides;

This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such award are sought, arising out of difference between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

5.3 The implication of this provision is that where an international arbitral award is made in the territory of a state which is also a party to the New York Convention, and such award is sought to be enforced in Nigeria, the New York Convention would apply to regulate its enforcement in Nigeria. A similar provision exists in the English Arbitration Act 1996. The English Act also incorporates the New York Convention, Section 100 of the Act provides;

a "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

6.0 SETTING ASIDE AN ARBITRAL AWARD ON GROUNDS OF PUBLIC POLICY

6.1 Fraud and public policy concerns are valid grounds upon which the enforcement of an international commercial arbitration award (New York Convention award) may be challenged. Section 103 of the English Arbitration Act 1996 provides grounds on which the enforcement of an arbitral award may be refused. Subsection 3 of 103 provides that the recognition and enforcement of an arbitral award may be refused on grounds of public policy;

Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

6.2 Section 52 of the Nigerian Arbitration and Conciliation Act contains a similar provision. The Nigerian Act provides that the court may refuse the recognition or enforcement of an international arbitral award where it finds that the recognition or enforcement of the award is against the public policy of Nigeria. It must be noted that generally, the courts are always very reluctant to refuse the recognition or enforcement of an award on public policy grounds. As the English Court stated in Tongyuan (USA) Int'l Trading Group v. Uni-Clan Ltd. per Moore-Bick J.:

"there is a very strong public policy consideration in favour of enforcing awards, whether awards published in this country or published abroad, and it would require a very strong and unusual case to render the enforcement of an award in circumstances of this kind contrary to public policy."

6.3 The desire to preserve England as the preferred seat of arbitration for international commercial arbitration has also influenced the legal restrictions placed on challenges to arbitral awards within the country.

7.0 THE PUBLIC POLICY GROUND ENVELOP FRAUD

7.1 Neither the English or the Nigerian Act defines the term public policy. However, the English court of Appeal in Deutsche Schachtbau v. National Oil, captured its essence and perception under English law in the following words;

"Considerations of public policy can never be exhaustively defined, but they should be approached

with extreme caution. ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or,
possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."

7.2 The public policy ground envelops fraud and illegality. However, the experience has been that the British courts have placed a very high burden of proof on persons seeking to set aside the enforcement of an arbitral award on account of public policy or fraud. Over time, the courts have by judicial pronouncement shaped the principles that should be considered in an application to set aside an arbitral award on grounds of public policy, and same are set out below;

a. The public policy exception in Section 103(3) of the English Arbitration Act is confined to the public policy of England (as the country in which enforcement is sought) in maintaining fair and orderly administration of justice.

b. When addressing the question whether an award has been obtained by fraud or the award or the way in which it was procured is contrary to public policy the Court will normally look to see whether "some form of reprehensible or unconscionable conduct has contributed in a substantial way to the obtaining of the award".

c. It may be sufficient to show that a party "had deliberately and dishonestly failed to disclose material in the arbitration and made submissions or called evidence which deliberately and dishonestly continued that concealment and misled the tribunal" and that the material would have had "an important influence on or would probably have affected the result of the arbitration".

d. "Considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution"

e. For the English Court to permit a party to proceed to a trial of the issues on allegation that a New York Convention award was obtained by f raud, normally two conditions will require to be fulfilled;

i. "that the evidence to establish the fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators".

ii. "there is a prima facie case of fraud which is sufficient to overcome the extreme caution of the court when invited to set aside an award on the grounds of public policy".

7.3 In Anatolie Stati and others v Republic of Kazakhstan the claimants were investors who had invested in a liquefied petroleum gas plant (LPG) in Kazakhstan. The LPG gas plant was subsequently acquired by the defendant. Arbitral proceedings arose as a result of a dispute between both parties over the value of the LPG plant. At the end of the arbitral proceedings, claimants were awarded $199million in damages, an amount which was arrived at after valuation of the LPG plant. The respondent disagreed with the valuation as i t alleged that the claimant had fraudulently generated evidence to inflate the value of the LPG gas plant.

7.4 The respondent alleged that the claimant "created a number of illegitimate contractual documents with related parties for the parties for the purpose of artificially inflating the construction costs of the LPG plant". Further to the leave of court obtained by the claimant to enforce the award, the respondent filed an application to the English Court to set aside the award on grounds of fraud. In granting the application to set aside the award, the court held that allegations that an arbitral award was obtained by fraud are generally permitted to trial when both

(a) the evidence establishing the fraud was not available to the party alleging the fraud at the time of the initial arbitration; and

(b) there is a prima facie case of fraud sufficient to overcome the extreme caution of the court.

7.5 The court held that there was a sufficiently strong prima facie case that the documents had been fraudulently withheld from the arbitration, which materially affected its outcome, and therefore the issue should be allowed to proceed to trial.

7.6 In Westacre Investments Inc. v. Jugo import-SDPR Holding Co. Ltd Westacre is a consultancy firm which had been contracted by jugo import to procure contracts for the procurement of military equipment in Kuwait on its behalf. Westacre initiated arbitral proceedings to recover its consultancy fees when dispute arose. At the conclusion of the arbitral proceedings, the arbitral tribunal found Jugo-import in breach, and made an award in favour of Westacre. Jugo-import had argued during the arbitral proceedings that the agreement was fraudulent as it involved Westacre bribing Kuwaiti officials to exert influence in securing the contracts.

The tribunal found that there was no evidence of corruption, and the lobbying of officials was not illegal under Swiss law which was the governing law of the contract. When Westacre sought to enforce the award in England, Jugo-import filed new affidavit evidence in support of its allegations of fraud. In refusing to set aside the award, the Court of Appeal England held that

a party seeking to set aside an award at the enforcement stage on grounds of fraud must establish that;

i. the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and

ii. the evidence was not available or reasonably obtainable either

a. at the time of the hearing of the arbitration; or

b. at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available.

The English Court of Appeal per Colman J. held further that;

A party seeking to rely on evidence of fraud in an application to set aside leave to enforce an arbitral award must establish "that the evidence to establish fraud was not available to the party alleging the fraud at the time of the hearing before the arbitrators;" and "where perjury is the fraud alleged, i.e. where the very issue before the arbitrators is whether the witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result."

7.7 The court held that Jugo-Import had not sufficiently established the fraudulent nature of the contract with Westacre. The court held that even if fraud was sufficiently established, the new evidence Jugo-import was presenting was available to it at the time of the arbitral proceedings, and that Jugo-import had ample opportunity to put the fresh facts before the tribunal. The court refused the application to set aside the award.

8.0 BURDEN ON NIGRIA AND PECULIAR FACTS

8.1 From the authorities reviewed, the burden on Nigeria is clear if it hopes to succeed in moving the English Court of Appeal to set aside the $9.6 billion arbitral award.

1. It must lay sufficient facts to establish that the GSPA is underlined by fraud, hence it would be contrary to England's public policy to enforce it. The government must show evidence of positive acts of fraud especially on the part of principal officers of P&ID involved in negotiating the contract. It need not be said that the evidence must be cogent and compelling.

2. Nigeria must establish that the evidence of fraud was not available to it the time of the arbitral proceedings. This point is particularly important because the issue of fraud was never raised during arbitration, neither was it raised in the proceedings before the commercial court of England. Representatives of the country must show cogent reasons why fraud was not raised timeously to dispel the notion that it is an afterthought. They must also establish that the fresh evidence of fraud was not available at the time of the arbitral proceedings.

3. Finally, they must establish that new evidence available to them is so strong and potent that if the tribunal were seized of it, the tribunal would have decided differently.

9.0 CONCLUSION

9.1 Moving the English Court of Appeal to set aside the arbitral award is going to require grit on the part of the Country's representatives and deep attention to every detail. As case law shows, setting aside an arbitral award on public policy grounds is not impossible, though very difficult. At this point all cards must be on the table. While proceedings in the English Courts continue, the country should not rule out negotiations. The strategy has to be direct, methodical, and multidimensional.

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