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The naughty list – our view on Nigeria v P&ID

By Robert Blackett

For whom is it well, for whom is it well? There is no one for whom it is well.

Chinua Achebe *Things Fall Apart* (1958)

Readers may already have heard something of *The Federal Republic of Nigeria* v *Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm). In 2017 a distinguished arbitral tribunal ordered Nigeria to pay billions of dollars to a BVI company called Process and Industrial Development Limited ("**P&ID**"). From 2018 Nigeria sought to challenge the awards in England under section 68 of the Arbitration Act 1996. British Home Secretary Priti Patel felt compelled to write an article for the City AM newspaper opining that Nigeria "*must honour its obligations to companies like P&ID*" and "*pay $9 billion*" (the sum then due) describing Nigeria's challenge to the awards as a "*scandal*" "*flouting international law and convention*". Patel wrote further articles supportive of P&ID as recently as 2022.

On 23 October 2023 in a nearly 600 paragraph judgment the Commercial Court (Knowles J) set aside the awards (worth, by that time, $11 billion with interest) under section 68 of the Arbitration Act 1996 because Nigeria had proved them to have been obtained by fraud. The judgment has exposed some eye-catching details which have not been lost on the mainstream press - not least the fact that the solicitor and barrister who represented P&ID in the arbitration had stood to be paid up to £3 billion and up to £850 million respectively had the award been upheld and enforced. Many reports of the case have quoted the Judge as saying that "*the matter touches the reputation of arbitration as a dispute resolution process*". Such quotes, headlines and soundbites give the impression that the case is something of a critique or even a condemnation of the practice of arbitration. The truth is more complex and (as this article hopes to demonstrate) the case repays closer scrutiny.

Flaring

With oil comes gas - less valuable and more difficult to store, transport and use. Producers, unless prevented by law, commonly rid themselves of this gas by flaring (i.e. burning) it. The World Bank says gas wasted by flaring each year could power all sub-Saharan Africa. The world's biggest gas flarer is Nigeria. 223.8 million people live there, a third below the poverty line and 40% with no access to electricity.

Wet and dry gas

Raw gas is a mix of different molecules. Most is CH_4 (methane) which has a low boiling point (i.e. it only becomes liquid at very low temperature or very high pressure). Present too, however, will be certain amounts of propane, butane, pentane and other compounds which form liquids at or near room temperature or under much lower pressures. If too much of this near-liquid material is present, the gas is unsuitable for power generation, domestic cooking and heating and is known as 'wet' or 'rich' gas. To produce 'dry' or 'lean' gas suitable for power generation, it is necessary to strip-out a proportion of the 'wet' compounds. Once separated from the raw gas and from one another, these natural gas liquids ("**NGL**") can be used as fuels and/or have various industrial uses.

1979 - Quinn, Cahill and ICIL

Michael Quinn and Brendan Cahill were entrepreneurs from the Republic of Ireland who, in 1979, founded a company called Industrial Consultants (International) Limited ("**ICIL**"). A bewildering number of other companies followed, incorporated in various offshore jurisdictions, many with similar names, and which together formed what might be termed Quinn and Cahill's "**ICIL Group**". Through these companies Quinn and Cahill undertook, or consulted on, a range of projects in Nigeria. These included several projects to refurbish vehicles and supply communications equipment for Nigeria's police and military, deliver HIV testing facilities, carry out geological surveys, install fibre optic cabling, upgrade a container port and supply gas pressure vessels.

2005-2008 Project Alpha

In 2005 Quinn and Cahill formed P&ID for a project with a company called Tita-Kuru, owned by a Nigerian politician called General Danjuma. Tita-Kuru retained P&ID to carry out the front-end engineering design for a petrochemical plant to be constructed near Lagos and known as "**Project Alpha**". The intention was to obtain wet gas which was being flared from the nearby Aje field, treat it to produce dry gas, propane and a butane/condensate mix, and dehydrogenate the propane to produce propylene (a starting product for various polymers).

In 2008 Project Alpha ran into difficulty, however, when the operator of the Aje field sold its interest to Chevron. Where the previous operator had expressed a willingness, in principle, to sell wet gas to Tita-Kuru for Project Alpha, Chevron was now interested in taking the wet gas itself. To that point, Tita Kuru and P&ID had apparently already spent $37 to $40 million on engineering for Project Alpha.

February 2009 – 'Gas Master Plan' and 'Accelerated Gas Development Project'

In 2007 Nigeria announced a 'Gas Master Plan' to address issues in the domestic gas supply market. In February 2009, as part of this initiative, Nigeria embarked upon an 'Accelerated Gas Development Project'. Investors were invited to propose projects by which gas which was being wasted by flaring would instead be treated and delivered to Nigeria's gas grid to generate electrical power. There appears to have been a huge political pressure to progress this initiative, leading Nigeria to rapidly negotiate and enter into multiple contracts for substantial projects in a very short space of time. The stated selection criteria for involvement in the project had included "*demonstrable ability to deliver dry gas to the grid within 12 months*". Each prospective investor was thus essentially being asked to propose, finance, engineer, procure, construct, commission, test and start operating some form of gas treatment plant within the space of 12 months.

P&ID approached the Nigerian government to discuss including Tita-Kuru's Project Alpha in this initiative. Nigeria expressed interest in that project being relocated from Lagos to Calabar in South East Nigeria to take advantage of new infrastructure called the Adanga pipeline which Nigeria was planning to build in that area. In the ensuing discussions the proposed Calabar project rapidly evolved to become something quite different to Project Alpha. In the interest of delivering the project quickly, the propylene plant was to be omitted and the gas processing divided into two 'trains', one to be constructed first and the other later. These changes meant the engineering for Project Alpha was no longer relevant. And, whereas Project Alpha had been Tita Kuru's project, P&ID saw this new project as an opportunity to own the plant itself, not simply to be project manager. P&ID also saw the possibility of a commitment from Nigeria to supply the wet gas required as very attractive after its experience with Project Alpha.

11 January 2010 - GSPA

On 11 January 2010 Nigeria and P&ID made a short (20 page) contract called the "*Gas Supply and Processing Agreement for Accelerated Gas Development*" ("**GSPA**"). The GSPA was signed on Nigeria's behalf by Dr Rilwanu Lukman, Nigeria's Minister of Petroleum Resources.

The GSPA was subject to Nigerian law, and provided for disputes to be determined by arbitration under the ICC Rules with the venue to be London.

Nigeria undertook to make available to P&ID at the boundary of the Calabar site a continuous supply of a certain quality of wet gas. From Q3 2011 Nigeria was to make available 150 MMSCuFD of wet gas. From Q3 2012 Nigeria was to make available a further 250 MMSCuFD. Nigeria was to continue to supply this wet gas for the 20-year duration of the agreement.

Article 6(b) said:

> "*b. The Government shall ensure that all necessary pipelines and associated infrastructure are installed and all requisite arrangements with agencies and/or third party are in place to ensure the supply and delivery of Wet Gas in accordance with Article 3 so as to facilitate the timely implementation of gas processing by the GPFs as provided for in this Agreement.*"

Article 8(g) said:

> "*g. The Parties are aware that the 24 inch Adanga Pipeline presently under construction from the Addax [Petroleum] operated [field] OML 123 directly to Calabar and due for completion in 2010 will have a throughput capacity of 600 MMSCuFD and can adequately provide the required first delivery of 150 MMSCuFD of Wet Gas to the Site and that an additional pipeline of up to 70km in length may be required to link up to the Adanga pipeline in order to facilitate the delivery of the remaining 250 MMSCuFD of Wet Gas to the Site from other sources to be chosen by the Government. If such a requirement is necessary, P&ID undertakes to build and install the said additional pipeline to provide for the delivery of the remaining 250 MMSCuFD of Wet Gas to the Site, at no cost to the Government, and P&ID will retain the ownership and provide the maintenance for the pipeline.*"

P&ID agreed to use its "*best endeavours*" to construct at the Calabar site, and entirely at P&ID's cost, Gas Processing Facilities ("**GPF**") capable of processing up to 400 MMSCuFD (400 million standard cubic feet per day) of wet gas. P&ID was to process the wet gas received, strip out the near-liquids, and supply the resulting 'dry' gas to the Government at no cost at the site boundary. P&ID would retain the natural gas liquids as its payment for providing this service. As to when this was to be done, Appendix A said:

> "***Delivery of Lean Gas to the Government***
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> *Phase 1: During the last quarter of 2011 following supply of the 150 MMSCuFD of Wet Gas to the Site, P&ID will process the gas and return to the Government, at the Site, a continuous supply of Lean Gas amounting to approximately 85% by volume of the Wet Gas provided. …*
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> *Phase 2: On or before the third quarter of 2012 following supply of the additional 250 MMSCuFD of Wet Gas to the Site, P&ID will process the gas and return to the Government, at the site boundary, a continuous supply of Lean Gas amounting to approximately 85% by volume of the Wet Gas provided. …*"

July 2010 - Nigeria's failure to supply wet gas

Nigeria's intention had been to source wet gas for the Calabar project from a field called OML 123 operated by Addax Petroleum. By mid-2010, however, within a few months of the GSPA, it became apparent that Addax could only supply 100 MMSCuFD of the total 400 MMSCuFD required, and that Addax would be unable even to begin supplying that until 2014. P&ID and Nigeria proceeded to discuss possible alternatives, and changes to the project, but nothing was agreed. P&ID did not build the plant. The Q3 2011 deadline for Nigeria to begin supplying wet gas passed without Nigeria having made any wet gas available.

The arbitration

On 22 August 2012 P&ID started arbitration proceedings against Nigeria.

The Q3 2012 deadline for Nigeria to begin supplying the balance of the wet gas passed without Nigeria having made any wet gas available.

P&ID nominated Sir Anthony Evans (who had been a Commercial Court judge from 1984 to 1992 and then a Lord Justice of Appeal until 2000). Nigeria nominated Chief Bayo Ojo SAN (who had formerly been Nigeria's Attorney-General). The honorific SAN means "*Senior Advocate of Nigeria*" and is analogous to KC. On 29 January 2013 Lord Hoffmann (who was, of course, a Law Lord from 1995 to 2009) was appointed as chairman. It thus took a little over five months from the commencement of the proceedings to appoint the tribunal.

On 20 March 2013 P&ID served notice purporting to terminate the GSPA for repudiatory breach by Nigeria.

On 28 June 2013 P&ID served its statement of claim. Nigeria's Defence was due on 31 July 2013, but Nigeria failed to produce it. The tribunal granted Nigeria an extension to 4 October 2013. On 3 October 2013 Nigeria instead raised an objection to the tribunal's jurisdiction, claiming the arbitration agreement was void. The tribunal made directions for jurisdiction to be decided as a preliminary issue.

On 14 February 2014 P&ID served written submissions on that issue, an expert report from Justice Alfa Belgore (Nigeria's former Chief Justice) on the Nigerian law issues raised by the challenge to jurisdiction and a witness statement from P&ID's Michael Quinn "*to explain how the GSPA came about*". Though filed in connection with the jurisdiction issue, this witness statement from Michael Quinn ended up being P&ID's only factual evidence in the arbitration.

Importantly, Michael Quinn's evidence included statements to the effect that: (i) P&ID had obtained finance for the project; and (ii) P&ID had already done the vast majority (90%) of the engineering design work and expended US$40 million preparing to perform. It would later transpire that both these statements were false, though they were accepted to be true by the tribunal.

On 3 March 2014 Nigeria served a Reply on the issues of jurisdiction. Nigeria obtained an extension of time to 25 April 2014 to serve expert evidence on that issue but then served none. Nigeria's lawyers wrote to the tribunal that they were unable to serve a written argument on jurisdiction or attend a hearing on jurisdiction, due to lack of instructions. On 9 May 2014 P&ID filed its written argument on jurisdiction. Nigeria failed to file any written argument.

On 3 July 2014 (almost two years after P&ID commenced the arbitration) the tribunal handed down an award on jurisdiction having decided the issue on paper absent any written submissions or expert evidence from Nigeria. The tribunal found it had jurisdiction.

Nigeria's defence on the substance of the claim was then due on 19 September 2014. Nigeria failed to file any defence prompting P&ID to apply for a peremptory order.

From the outset of the arbitration there seems to have been a dispute ongoing between Nigeria's Ministry of Petroleum Resources and the Nigerian National Petroleum Corporation ("**NNPC**"), Ministry of Justice and Ministry of Finance over whether and to what extent Nigeria's lawyers should be paid anything to defend the claim, who would be responsible for paying them and what means each had available with which to do so. The result appears to have been that Nigeria paid its lawyers nothing in respect of the arbitration for over two years from its commencement, with a first payment being made only on 7 November 2014. In this period, Nigeria's lawyers were struggling to obtain any documents, evidence or instructions from Nigeria or to identify any relevant witnesses. There is a ring of desperation to the lawyers' correspondence with Nigeria officials (quoted extensively in the judgment).

On 27 February 2015 (five months late) Nigeria filed a Defence. P&ID filed a Reply within a few days, on 6 March 2015. The Tribunal ordered Nigeria to serve any further documents and other evidence on which it wished to rely in relation to liability by 17 April 2015. Nigeria sought a three-month extension. The tribunal granted two weeks extension, to 1 May 2015. On 4 May 2015 Nigeria filed a short witness statement from NNPC's general counsel. On 6 May 2015 the tribunal ordered Nigeria to serve within 48 hours a "*statement of any primary facts alleged in the evidence of Mr Michael Quinn which are challenged and of any other facts alleged to be relevant to the question of liability*". Nigeria served a list of six points in Michael Quinn's evidence which were not admitted. The logic of the six points which Nigeria chose to dispute is hard to follow and Nigeria did not dispute Michael Quinn's evidence that the P&ID had obtained the requisite finance to build the plant and done 90% of the engineering work at a cost of $40 million.

Each side made written submissions. Relying on the six-point list, P&ID made its submissions on the basis that there were no relevant facts in dispute. A half-day oral hearing on liability took place on 1 June 2015. The judgment notes that counsel who appeared for Nigeria at that hearing "*had got off the plane from Nigeria only that morning*".

At the hearing, Nigeria's argument focused on the fact that P&ID had been allocated and offered the site where the plant was to be built at Calabar by the regional government, but had never paid the required fee.

17 July 2015 - Award on liability

On 17 July 2015, the Tribunal made an award on liability, holding that Nigeria had repudiated and P&ID had validly terminated the GSPA. The Tribunal said:

> "*63. Mr Shasore* [Nigeria's counsel] *submits that the Government had no obligation to deliver gas until there was a plant to receive it. That, no doubt, is true, but the Government's obligations were not confined to the delivery of gas. By Article 6b) it was also obliged to –*
>
> > *"ensure that all necessary pipelines and associated infrastructures are installed and all requisite arrangements with agencies and/or third party are in place to ensure the supply and delivery of*

> *Wet Gas in accordance with Article 3 so as to facilitate the timely implementation of gas processing by the GPFs as provided for in this Agreement."*
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> *64. There is nothing in the GSPA to suggest that these obligations were conditional upon the completion by P&ID of the construction of the GPFs. It would have been commercially absurd for P&ID to go to the expense of building GPFs when the Government had done nothing to make arrangements for the supply of the Wet Gas.*"

As for P&ID not having paid the fee to acquire the site, the tribunal elsewhere said: "*the evidence shows a high degree of likelihood that if the Government had been willing to perform, P&ID would have acquired the site and built the plant*".

Knowles J's questioning of the tribunal's reasoning on repudiatory breach

Eight years later the English court would hear Nigeria's challenge to the tribunal's awards under section 68 of the Arbitration Act 1996 "*on the ground of serious irregularity affecting the tribunal, the proceedings or the award*". Ultimately (as discussed in more detail below) Nigeria would rely on P&ID having paid bribes to obtain the GSPA on the terms that it did, and Michael Quinn having told the tribunal in his evidence that he was "*explain*[ing] *how the GSPA came about*" but then omitting to mention that bribery. Challenges under section 68 are not appeals – the court is not concerned with the question of whether the tribunal was right on the law.

It is quite striking, therefore, that in his judgment Knowles J was prepared to hint at some criticism (albeit diffident and indirect) of the tribunal's substantive reasoning regarding Nigeria's breach and P&ID's right to terminate. The Judge said:

> "*I admit that I do not find it easy to follow, even in the classic setting of one party having accepted as repudiatory the conduct of another, how the Tribunal identified the sequencing of obligations with the apparent confidence it did. … But it is not for me as a Judge of the Court where the parties have chosen arbitration to resolve their dispute, to decide the merits of the dispute.*"

It is interesting to try to look at the 'sequencing of the obligations' and consider what this criticism might have been directed at.

Nigeria had undertaken to "*ensure that … all requisite arrangements … are in place to ensure the supply and delivery of Wet Gas in accordance with Article 3 so as to facilitate the timely implementation of gas processing by the GPFs as provided for in this Agreement*", with Nigeria to provide wet gas at the site boundary from Q3 2011. Before that date, Nigeria communicated that it would not and could not do that. It seems uncontroversial to characterise that as a repudiation of the GSPA by Nigeria, with P&ID having, at that point, become entitled to accept that, terminate the contract and claim damages to place it in the position it would have been in had the contract been performed.

When P&ID learned of this in 2010, however, P&ID did not serve notice terminating the contract. The orthodox analysis would be to say that GSPA remained in effect. Nigeria remained obligated to make arrangements to supply wet gas by Q3 2011. P&ID remained obligated to use its "*best endeavours*" to build the plant by Q3 2011.

The tribunal's statements that "*if the Government had been willing to perform, P&ID would have acquired the site and built the plant*" and "*It would have been commercially absurd for P&ID to go to the expense of building GPFs when the Government had done nothing to make arrangements for the supply of the Wet Gas*." suggest that the

tribunal might have taken a different view – that once Nigeria had made clear it was not going to supply the wet gas by Q3 2011, P&ID's obligation to build the plant was suspended. Though, if that was the tribunal's view, it never said so in terms.

Such reasoning would have been at odds with *Fermometal SARL* v *Mediterranean Shipping Co SA ("The Simona")* [1989] A.C. 788 HL. That case (largely) resolved two problems in this area which Lord Mustill famously said had, prior to that case, "*caused generations of contract lawyers to quail*".

One problem was that some cases had suggested that the innocent party would not be entitled to terminate unless that party was, itself **ready, willing and able** to perform the contract (the so called "**RWA**" requirement).

The second problem concerned the situation where the innocent party does not terminate. To what extent do they remain bound to perform the contract themselves, in circumstances where the other party is not going to perform? Can the innocent party simply suspend their own performance, and resume performance when / if the other party changes their mind and becomes willing to perform?

In *The Simona* a charterer had chartered a vessel called the Simona to transport steel. The charterers had a contractual right to cancel if the ship was not ready to load on or before 9 July, but this option could only be exercised from 10 July onwards, and no sooner. The owner told the charterer the vessel would not be ready to load until 13-16 July. The charterer purported to cancel, but the right to do so had not yet arisen so this was a repudiatory breach by the charterer. Fortunately for the charterer, the owner did not serve notice of termination. The contract continued and the owner remained obligated to supply the vessel. The charterer meanwhile arranged for the cargo to be loaded onto a different vessel, so the charterer was no longer ready, willing and able to tender the steel for loading. On 9 July the Simona was not ready to load the steel, so the charterer became entitled to terminate, and served notice doing so.

The House of Lords held that, when the charterer repudiated and the owner chose not to terminate, but to affirm, the owner remained bound to perform. The owner's obligation to provide the vessel was not suspended. Thus, when 9 July came and the vessel was not ready, the charterer became entitled to cancel. When one party repudiates, the other must either terminate or else affirm and remain bound to perform itself. Per Lord Ackner:

> "*There is no third choice, as a sort of via media, to affirm the contract and yet to be absolved from tendering further performance unless and until* [the repudiating party] *gives reasonable notice that he is once again able and willing to perform.*"
>
> "*The anticipatory breaches by the charterers not having been accepted by the owners as terminating the contract, the charterparty survived intact with the right of cancellation unaffected. The vessel was not ready to load by close of business on the cancelling date viz. 9 July and the charterers were therefore entitled to and did give what on the face of it was an effective notice of cancellation.*"

The charterer was entitled to terminate for breach even though the charterer (at the time of the owner's failure to be ready to load) was not itself ready, willing and able to perform because it had loaded the relevant cargo onto a different ship – suggesting there to be no RWA requirement to be permitted to terminate. The RWA factors seem therefore to be relevant to *damages*, not the right to terminate. Damages seek to place a party in the position they would have been in if the contract had been performed.

It sometimes happens that party A lacks the ability to perform its obligations, but the time for party's A performance has not yet come. Party B then repudiates the contract. Party A seizes on that opportunity and terminates the

contract. Party A is relieved of the future obligation it could never have performed, and escapes having to pay B damages for failing to perform that obligation. But, if A claims damages in these circumstances, any damages should be calculated on the basis of what A would have received if A had not, itself, performed the contract. One does not calculate A's damages on the assumption that A would have found the means to perform, if that would not have been the case.

How does that apply to the situation in the present case? Nigeria was in repudiatory breach because it had made clear that it would not and could not provide the essential wet gas from Q3 2011. P&ID did not accept that repudiation and did not terminate the contract. The contract thus remained in effect and P&ID remained obligated to use its "*best endeavours*" to build the plant by Q3 2011.

P&ID took no steps to build the plant either by Q3 2011 or at all. Was that a breach of the "*best endeavours*" obligation? It seems natural to say that doing nothing cannot be using one's best endeavours to do anything, so it is a breach of this obligation. Is there any contrary argument? One might try to argue (either as a matter of construction or by way of an implied term) that P&ID's obligation to use its "*best endeavours*" only required that P&ID endeavour to finish the plant by the predicted gas-in date and, until there was a predicted gas-in date P&ID was not required to do anything. But, if that was the tribunal's reasoning, it is not stated in the award, at least in the parts which are set out in the judgment.

There will have come a point, sometime before Q3 2011, where Nigeria's and P&ID's breaches were both equally irretrievable. P&ID was in repudiatory breach because it could not build the plant by Q3 2011 and Nigeria was in repudiatory breach because it would and could not provide wet gas by Q3 2011. P&ID and Nigeria each had the right to serve notice of termination on the other.

If P&ID serves notice first, what is the correct position with respect to damages?

- Assume P&ID and Nigeria are both in repudiatory breach of contract – P&ID for not having built the plant by Q3 2011 and Nigeria for not having supplied gas from Q3 2011 – and both have a right to terminate. Alternatively, assume that Nigeria is in repudiatory breach and P&ID's obligation to build the plant is suspended. Either way, P&ID has the right to terminate.

- P&ID serves notice of termination on 20 March 2013.

- Each party is entitled to claim damages for the breaches the other party has already committed up to 20 March 2013.

- If P&ID is in breach of contract by having failed to build the plant in Q3 2011, Nigeria can claim damages to place it in the position it would have been in if P&ID had built the plant in Q3 2011. If P&ID had built the plant in Q3 2011 there would have been no wet gas for P&ID to process, so Nigeria would have received nothing. Nigeria gets no damages for the period Q3 2011 to 20 March 2013.

- P&ID can likewise claim damages to place it in the position it would have been in if Nigeria had supplied gas from Q3 2011.

- The tribunal found as a matter of fact that "*if the Government had been willing to perform, P&ID would have … built the plant".* Nigeria's breach was causative of P&ID's failure to build the plant. But for Nigeria's breach would have built the plant and received the NGLs as from Q3 2011. P&ID is entitled to damages to place it in the position it would have been in if it had received NGLs from Q3 2011.

- The result is the same whether one treats P&ID's obligation to build the plant as having been suspended or treats P&ID's failure to build the plant as a breach of contract. But for Nigeria's precedent breach P&ID's breach would not have happened, and the plant would have been built.

- Clearly that is how the tribunal thought causation worked. Nigeria had made clear that it would not provide the gas so P&ID did not progress the plant. It was not the other way around – there was no suggestion that Nigeria refrained from taking steps to provide the gas because P&ID was not building the plant: "*The Government could not actually deliver gas until there was a Site and, as we have said, until there was a plant to receive it. But that does not excuse the Government's failure to comply with 6 b). There is no suggestion that its failure to comply with those obligations was caused by uncertainty as to where the Site was going to be. It was assumed by everyone that it would be on the land allocated in Calabar*."

The tribunal's analysis appears correct, then, on the facts as they found them to be. What difference does it make if one instead assumes that P&ID never had the means to build the plant by Q3 2011? So far as termination is concerned, the position is unchanged. Nigeria's failure to provide the gas was still a repudiation and P&ID was still entitled to have terminated. The fact that P&ID lacked the means to have performed its own obligations would not prevent P&ID terminating for Nigeria's repudiation (there being no RWA requirement).

The difference would be with respect to damages. Following termination, P&ID would be entitled to damages to place it in the position it would have been in if Nigeria had provided the wet gas by Q3 2011. Since P&ID could not have built the plant by that date, P&ID would not have received NGLs from that date. The question would then be – when if at all, could P&ID have built the plant by if Nigeria had been willing and able to supply the wet gas? If, in that scenario, P&ID could have built the plant by some later date then P&ID would be entitled to damages for the NGLs it would have received from that date. If P&ID could never have built the plant, it would have no entitlement to any damages.

That may have been the correct position as a matter of fact, and that may be what Knowles J had in mind, but Nigeria does not seem to have been arguing that P&ID could never have built the plant and did not challenge Quinn's (perjured) evidence that P&ID had the requisite finance.

Other comments concerning the liability award

In discussing the liability award, Knowles J made some other comments which are of interest.

> "*… by the point of the Award on Liability in my judgment these questions stand out:*
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> *(1) Why was the GSPA so brief? On the face of things, this attracted no discussion from the Tribunal. Of course commercial parties are entitled to contract in the detail they choose. But the skeletal terms of the GSPA are truly striking in the context of a multi-billion dollar long term project of national significance. Arcadia's* [P&ID's prospective lender's] *reaction when it saw it was a "Project Scoping Document" rather than a Gas Processing Contract.*"

To describe the brevity of the GSPA as "*truly striking*" seems hyperbolic. The law reports are brimming with cases where parties embark on substantial, long-term ventures and spend enormous sums either with no contracts in place at all or based on contracts which are skeletal, badly-drafted and vague. Lawyers cringe to read them, but one suspects many readers of the Arbiter will not think the GSPA an obvious outlier and can probably recall comparable (or worse) contracts which they have encountered. In fact, one does not have to look very far to find

other contracts like the GSPA, since Nigeria, as part of its Accelerated Gas Development Initiative, entered into nine very similar contracts with other parties at around the same time as it entered into the contract with P&ID.

Knowles J's next comment was:

> "*(2) If the Tribunal's conclusion on liability was correct, how did Nigeria come to agree a GSPA in such catastrophic terms? The Tribunal's finding was that the Government's obligations under Article 6 b) were not conditional upon P&ID having constructed the GPFs. How did Nigeria come to allow itself to agree obligations that were not conditional in that way, especially where, as the Tribunal itself said, reflecting a submission of Mr Shasore:*
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> *"Of course the Government could not actually deliver gas until there was a Site and, as we have said, until there was a plant to receive it".*"

It is all very well with the benefit of hindsight to suggest that the tribunal should have been suspicious concerning this particular contract and pondered how Nigeria might have come to agree to something so imprudent. Quite what it is being suggested the tribunal should have done differently – or what it is being suggested a court would have done differently - is entirely unclear. Again, the case law is replete with contracts which seem, with the benefit of hindsight, very imprudent and which have worked out very badly for one party and very auspiciously for another. The law counsels against seeking to relieve a party of the consequences of inauspicious contracts. Per Lord Neuberger *Arnold* v *Britton and Others* [2015] UKSC 36 at [20]:

> "*The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.*"
>
> "… *when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*"

As for how people come to agree such contracts, per Flaux J in *Chantiers de L'Atlantique SA* v *Gaztransport Technigaz SAS* [2011] EWHC 3383 (Comm) at [56]:

> "… *the explanation for something is much more likely to be human error than dishonesty*"

In asking why Nigeria committed itself to such an ill-judged contract, it is relevant to bear in mind the political pressure and the haste with which the Accelerated Gas Development Project was being undertaken. Nigeria entered into nine other contracts for similar projects at around the same time, several of which committed Nigeria to supply wet gas on similar terms:

> "*The GSPA was not the only contract entered into under the Accelerated Gas Development Project. Each of the other contracts is different but with similarities. Neither party made comprehensive submissions at the trial on all differences and similarities. But an obligation on Nigeria to deliver a quantity of gas without cost (see Article 6(b) of the GSPA) is to be found in a number of them: with Petrolog, with Global, with Davubic, with a consortium led by Drake and with Octopol. The expert evidence further showed that this is relevant and important to the ability to finance. Within the contracts there are examples of recitals similar to those in the GSPA.*"

It was plainly an error to have committed to supply wet gas at Calabar without first having made absolutely sure that the requisite gas could definitely be obtained from Addax's OML 123 field. But governments make big, expensive mistakes, and this is not unique to Nigeria or any other government around the world. It also seems relevant to note that P&ID and Tita-Kuru had previously made a very similar error themselves – investing $40 million in the front-end engineering for their Project Alpha without first having secured the requisite wet gas.

Knowles J's next point was:

> "*(3) On what it had been told, the Tribunal found itself expressing the view that:*
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> *"[i]t would have been commercially absurd for P&ID to go to the expense of building GPFs when the Government had done nothing to make arrangements for the supply of the Wet Gas."*
>
> *Why was Nigeria not arguing, or arguing more forcefully, that the reverse also required consideration as part of the process of interpretation of the GSPA? ... I am left wondering how the Tribunal would have answered the question (if it could be persuaded of its relevance) whether it was also commercially absurd for the Government to install pipelines and associated infrastructure and make arrangements when P&ID had not built the GPFs?*"

Again, it is not obvious what the tribunal should have done differently. One might have thought that this comment was intended to suggest that the tribunal should have suspected Nigeria's advocate in the arbitration was complicit with P&ID and deliberately putting up a poor defence. But that was, in fact, one of the claims Nigeria had sought to advance in challenging the award before Knowles J and which the court (with the benefit of hindsight, extensive disclosure, witness evidence and argument) dismissed:

> "*Mr Shasore SAN has not, in my judgment, been shown to be corrupt. His actions are inconsistent with Nigeria's theory that he was. Four examples suffice: … First, his advice to Nigeria to investigate, and allow expert evidence to be obtained, and to proceed in a timely fashion, was sound and constant. Second, he assisted Nigeria to succeed in its applications to the Nigerian Court. Third, his participation in the various settlement discussions helped reduce the figures. Fourth, a review of the transcript of the hearing on liability shows repeated robust challenges by him of P&ID, and indeed of the Tribunal; and it is impossible to read pages 55-59 and 68-71 of that transcript as other than properly attempting through argument to secure an outcome in favour of Nigeria. … the account given in this judgment shows that responsibility for failures to obtain evidence and to avoid delay lay rather with many ministers and officials, whom Mr Shasore SAN … pressed repeatedly*."

It is hard to see what the arbitral tribunal was supposed to have done regarding the quality of Nigeria's legal representation. And, as P&ID's counsel put it in oral closing: "*Section 68 is not there to give you a remedy if you instruct an honest lawyer who makes a mess of it or doesn't take an available point. That is just tough. You have made your arbitration bed and you lie on it*". Knowles J called that "*blunt and correct*".

Knowles J next commented:

> "*(4) I fully appreciate that P&ID was the one to allege and accept repudiatory breach first. But I question whether there is no room for argument that the law of damages today (and then) requires more than a race between the parties with a contract of this importance framed with such brevity.*"

It is unclear what this question about "*whether the law of damages requires more than a race between the parties*" is driving at. There was no race to terminate. Nigeria repudiated the contract in 2010. If P&ID's failure to build the plant was a repudiation, then that happened sometime prior to Q3 2011 yet P&ID did not terminate until 2012.

> "*(5) Given the vast sums of public money at issue why was Nigeria struggling to meet deadlines and bring forward evidence, factual and expert?*"

The implication is, perhaps, that the tribunal should have suspected that government officials were conspiring with P&ID to sabotage Nigeria's defence. But there is no finding concerning that in the judgment and no suggestion as to what the arbitrators should have done differently. The fact is that parties devote varying resources and exhibit varying degrees of competence in defending and pursuing disputes, the quality of representation is not always commensurate to the sums in issue and the approach taken in arbitration is far less consistent than in litigation. The suggestion is that the quality of Nigeria's defence and legal representation should have prompted the tribunal to do something, but what is unclear.

2015- 2017 the quantum stage

Following the award on liability, the arbitration moved to consider the quantum of P&ID's claim. Again the case was beset by delay on Nigeria's side. Nigeria instructed experts late and failed to provide them with all the relevant material and presented limited expert evidence. The judgment quotes extensively from the transcript of the hearing, which makes for difficult reading. Nigeria's counsel's submissions are very hard to follow and (per Knowles J) "*it was clear that* [he] *did not understand what the Tribunal was putting to him*", did not effectively challenge P&ID's experts, or put Nigeria's case (such as it was) to them. Knowles J said:

> "*… when I look at what was argued and what was not argued I struggle to accept what happened in a dispute of this importance and magnitude. This is even allowing for the fact that the Tribunal was entitled to rely on the parties' professional legal representatives to take the points that their clients wished to take, and even accepting that the conduct and effort of Nigeria's government, administration and lawyers at this quantum stage of the Arbitration was deserving of severe criticism …* [Knowles J listed several lacunae] *… I do not know whether those of these points that were known to the Tribunal troubled the Tribunal. I respectfully anticipate they would have. I appreciate that views on what a Tribunal should do in this situation will differ. Respectfully, I do not consider the Tribunal did all that it could to find out more about the points, by questions of Nigeria's legal representatives.*"

It is not clear what asking more questions of Nigeria's counsel would have achieved, in circumstances where Nigeria's counsel appeared not to understand those questions which the tribunal did ask him.

On 31 January 2017 the Tribunal issued its Final Award, requiring that Nigeria pay P&ID $6.6 billion and interest on that amount at 7% in the event of late payment.

Nigeria's challenge

From March 2018 P&ID sought to enforce the awards against Nigeria in England and the US. Nigeria sought to challenge the awards first in Nigeria, and then, when the seat of the arbitration was held to have been England, in England under section 68(2)(g) of the Arbitration Act 1996. The process proved convoluted (as attested to the fact that the judgment setting aside the awards was not handed down until October 2023, around four and half years after P&ID began the enforcement proceedings) involving several steps with Nigeria seeking extensive

disclosure from ICIL Group and those associated with it. In parallel, Nigeria pursued criminal investigations and prosecutions in Nigeria.

Nigeria raised many allegations of bribes having been paid by ICIL Group and others to numerous Nigerian officials. Some of these complaints were upheld, some were not.

They key point which emerged was as follows. Mrs Grace Taiga was a lawyer who formerly worked for Nigeria's Ministry of Defence. Whilst at the Ministry of Defence she had some involvement in several contracts entered into between the Ministry and ICIL Group companies during 2004 and 2005. During the same period Quinn, Cahill and their ICIL group companies made several payments to her and to members of her family. She later worked for Nigeria's Ministry of Petroleum Resources and was involved in the drafting and negotiation of the GSPA and in advising the minister who signed it, Dr Lukman, regarding it. In 2008, 2009 and 2010 ICIL Group made several payments to Ms. Taiga and members of her family including just before and after the signing of the GSPA. Knowles J found that these were bribes paid to Grace Taiga for her role in assisting P&ID to obtain the GSPA in the terms that it did.

Nigeria alleged that several other Nigerian government lawyers were corrupt too, pointing to unexplained wealth, large cash deposits and payments they had received from Michael Quinn and alleging that they had been bribed by ICIL Group to lobby their superiors to settle P&ID's claim for a high value. As to these allegations the Judge observed that they were: "*matters of concern*" but, in the end, they were not instrumental to the challenge to the award.

Section 68(2)(g) of the Arbitration act 1996 provides:

> "***68 Challenging the award: serious irregularity.***
>
> *(1) 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. …*
>
> *(2) 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; …*
>
> *(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may— …*
>
> *(b) set the award aside in whole or in part, or*
>
> ***73 Loss of right to object.***
>
> *(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection— …*

> *(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.*"

In the end, Knowles J held there were three relevant "*irregularities*" bringing the case within section 68(2)(g), each amounting to a fraud by which the Awards were obtained, and by reason of which the Awards or the way in which the Awards were procured was contrary to public policy.

- Michael Quinn stated in terms that his witness statement was to "*explain how the GSPA came about*". That statement was false since he knew that bribery of Mrs Grace Taiga was involved in bringing the GSPA about but his explanation deliberately excluded that fact.

- ICIL Group continued to make payments to Grace Taiga periodically during the arbitration in order to suppress from the Tribunal and Nigeria the fact that she had been bribed when the GSPA came about. This continued bribery or corrupt payment was fairly described by Nigeria as bribery "*to keep her 'on-side', and to buy her silence about the earlier bribery*".

- Throughout the course of the arbitration, P&ID regularly obtained and its legal representatives regularly had sight of, read and retained Nigeria's internal legal documents and did not return them to Nigeria unread. This allowed P&ID and its legal representatives to monitor Nigeria's position and awareness of the issues.

The Court also held that a recital to the GSPA that "*h) P&ID possesses the requisite finance, … for the fast track development of the Project*" was untrue and Michael Quinn's evidence, that 90% of the engineering design had been completed at a cost of $40 million and that all the project finance was in place, was untrue. Any reliance on these facts, though, as grounds for challenge faced the difficulty that Mr Quinn's evidence on these points had, at least to some limited extent, been challenged before the arbitrators. In the end, Nigeria did not need to rely on these points. The court was satisfied that the three irregularities above were serious, had caused substantial injustice to Nigeria and could not with reasonable diligence have been discovered by Nigeria at the time of the arbitration. The awards were thus set aside.

Knowles J's closing remarks

In a postscript to the judgment, Knowles J made four points:

> "*(1) <u>Drafting major commercial contracts involving a state</u>*
>
> *It was a complete imbalance in the contributions of the parties that enabled the GSPA to be in the form it was. Many reading this judgment will recognise that, although in the present case bribery and corruption were behind that imbalance, it happens in other cases without bribery and corruption but simply where experience, expertise or resources are grossly unequal. This underlines the importance of professional standards and ethics in the work of contract drafting, including in the approach to other parties to the proposed contract. It is why some contributions of pro bono work by leading law firms to support some states challenged for resources (this is not to say, one way or the other, that Nigeria is one of those) is so valuable, in the interests of their, often vulnerable, people. In the present case there were other contracts too, with different counterparties. Their terms and circumstances are not identical, but the overall risk could have been a multiple of the US$11 billion now involved in the present case.*"

The suggestion that leading firms offer *pro bono* support to under-resourced states to assist in drafting high-stakes contracts has an immediate attraction. This seems like an intervention which has the potential to prevent considerable harms.

> "*(2) Disclosure or discovery of documents*
>
> *It has been disclosure or discovery of documents that has enabled the truth to be reached in this case. I highlight the disclosure orders made by courts in this and other jurisdictions. The disclosure secured from P&ID and third parties through court processes has been remarkable and crucial. And but for disclosure orders the Sunrise episode would not have been revealed from Nigeria. In all the recent debates about where disclosure or discovery matters, this case stands a strong example for the answer that it does.*"

(The Sunrise episode was a reference to the fact that, at the very same time that it was seeking to argue before the English court that Nigeria's lead counsel in the arbitration had conspired with P&ID to sabotage Nigeria's defence, Nigeria was instructing him to represent it in another substantial arbitration, demonstrating that this argument was not a sincere one on Nigeria's part).

> "*(3) Participation and representation in arbitrations over major disputes involving a state*
>
> *Notwithstanding Nigeria's allegations, I have not found Nigeria's lawyers in the Arbitration to be corrupt. But the case has shown examples where legal representatives did not do their work to the standard needed, where experts failed to do their work, and where politicians and civil servants failed to ensure that Nigeria as a state participated properly in the Arbitration. The result was that the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work. And Nigeria did not in the event properly consider, select and attempt admittedly difficult legal and factual arguments that the circumstances likely required. Even without the dishonest behaviour of P&ID, Nigeria was compromised.*
>
> *But what is an arbitral tribunal to do? The Tribunal in the present case allowed time where it felt it could and applied pressure where it felt it should. Perhaps some encouragement to better engagement can be seen as well. Yet there was not a fair fight. And the Tribunal took a very traditional approach. But was the Tribunal stuck with what parties did or did not appear to bring forward? Could and should the Tribunal have been more direct and interventionist when it was so clear throughout the Arbitration that Nigeria's lawyers were not getting instructions, or when at the quantum hearing Nigeria's then Leading Counsel, Chief Ayorinde, was failing to put necessary points to experts to test their opinion and Nigeria's own experts (for whatever reason) had not done the work required? Should the Tribunal have taken the initiative to encourage exploration of new bounds of contract law and the law of damages that may today be required where major long term contracts are involved?*"

The suggestion that the tribunal could have taken it upon itself to 'explore new bounds of contract law and the law of damages' in order to construct some defence for Nigeria, which Nigeria did not itself propose, is one of the least attractive points raised in the judgment. The tribunal's decision appears consistent with the legal position given the facts known and determined by the tribunal. There is much truth in the adage that hard cases make bad laws, and much force in the case law that counsels time and again against succumbing to the temptation to re-write bad bargains.

> "*(4) Confidentiality in significant arbitrations involving a state*
>
> *The privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was not being done. When courts are concerned it is often said that the "open court principle" helps keep judges up to the mark. But it also allows scrutiny of the process as a whole, and what the lawyers and other professionals are doing, and (where a state is involved) what the state is doing to address a dispute on behalf of its people. An open process allows the chance for the public and press to call out what is not right. …*
>
> *And Lord Wolfson KC* [Nigeria's counsel] *will forgive my quoting his submission for his client in oral closing argument: "Section 68 is not there to give you a remedy if you instruct an honest lawyer who makes a mess of it or doesn't take an available point. That is just tough. You have made your arbitration bed and you lie on it". Blunt and correct. But, unless accompanied by public visibility or greater scrutiny by arbitrators, how suitable is the process in a case such as this where what is at stake is public money amounting to a material percentage of a state's GDP or budget? Is greater visibility in arbitrations involving a state or state owned entities part of the answer?*"

There is force in the argument that the privacy of arbitration is less apt, and potentially even harmful to the public interest, in cases involving state parties where public money is at stake and the conduct of elected officials is to be subject to scrutiny. There is inevitably the suspicion that governments might use arbitration to do their dirty laundry in private in a way which undermines to some degree the democratic process and the rule of law. But there are counterarguments to be made. There is value in arbitration as a neutral forum when state courts proposed are perceived to be unsuitable by the contracting parties as either too sympathetic or too hostile to the state actors. There are some areas of government business (e.g. defence) where the privacy of arbitration seems more legitimate. The value of public scrutiny also must not be overstated. How many people ever hear of, let alone read, judgments in substantial disputes concerning their governments? Any suggestion that poor performances by lawyers acting for governments might be detected and prevented at the time by the press or public if only the hearings were public seems particularly doubtful. Mistakes tend to be made and the damage done there and then. So far as lawyers' errors are concerned the reporting of legal proceedings aids recrimination, but seems unlikely to do much in terms of prevention.

Conclusion

While there are points to ponder in *Nigeria* v *P&ID*, one view might be that, far from demonstrating some wide-ranging systemic tip of the iceberg problem with arbitration, the case is in some sense a reassuring one. The system demonstrably worked and the section 68 safety net caught an arbitral award which had been affected by serious irregularity. It took a lot of time and money, and it could have gone differently and injustice resulted, but that is true of almost all litigation and is not particular to arbitration or to section 68 challenges. In the end, when the stakes were high enough, Nigeria was motivated to allocate the necessary resources and pursue the matter diligently.