The $11 Billion Dollar Question in The Federal Republic of Nigeria v. Process & Industrial Development: A Cultural Analysis

By:

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"*You want to tell us you don't want to sow, you want to reap*" asked the Nigerian appointed arbitrator, Chief Bayo Ojo, during oral argument in the arbitration proceedings, to which Nigerian counsel, Chief Ayorinde, responded: "*You cannot reap where you do not sow. That is a very Nigerian saying.*" (***Nigeria v. Process & Industrial Development***, para. 360). The Chair of the Tribunal, Lord Hoffmann, then intervened with his own cultural reference and said: "*There is a passage in I think it is Shakespeare's Henry VI where one of the rebels says: 'Isn't it terrible that people should be able to get into such trouble just by signing a document? Let's kill all the lawyers.'*" (***Nigeria v. Process & Industrial Development***, para. 360). Perhaps, underneath all the arbitral extravagance and incalculable network of disturbing corruption lurks a least appreciated cultural milieu worth $11 billion dollars.

On October 23, 2023, in the Federal Republic of *Nigeria v. Process & Industry Developments Limited*, the Honorable Judge Robin Knowles of the High Court of Justice King's Bench Division of the Commercial Court of England and Wales found that the arbitral "awards were obtained by fraud and the Awards were the way in which they were procured was contrary to public policy." (***Nigeria v. Process & Industrial Development***, para. 360).

In his 140-page judgment, he painstakingly documents the evidence and legal arguments and finds plausible Section 68 of the English Arbitration Act grounds for potential set-aside or remission. For purposes of Section 68, the serious irregularities range from sustained and pervasive bribery of government officials and their lawyers to the Claimant's owners' perjured testimony to their lawyers' unauthorized access to legally privileged government documents. (***Nigeria v. Process & Industrial Development***, paras. 158-80, 228-306). The nature and extent of the corruption and malpractice that Judge Knowles brings to light is so pervasive and disturbing that a Hollywood movie could be made of his opinion rated "matured audience only."

Unfortunately, however, no matter how dreadful the influence peddling and raw pecuniary corruption might have been, it is not even the gravest of the English High Court's revelations – nor is it the real answer to the $11 billion dollar question. The Court revealed a more profound force that has not only tainted this case but also continues to ail the whole international arbitration system, and that is cultural bias – although the court does not give it a name.

Judge Knowles cannot be called a man of limited words for he wrote 140 pages, but consistent with the dignity of his office, he used his words carefully whenever he addressed the most distinguished of arbitrators: Lord Hoffmann and Sir Anthony Evans. He rightfully acknowledges that a Section 68 challenge does not permit him to review their award on the merits but could not resist showing his puzzlement over how the Tribunal failed to notice the serious irregularities and chose to allow the Claimant to reap $6 billion dollars plus exorbitant interests from where it did not sow. His frustrations with the majority of the Tribunal repeatedly punctuate his long judgment. He addresses his concerns relating to both matters of substance and process, each with cultural connotations. As explained further in the following sections, the Tribunal applied a rule of decision developed in the context of the 1854 case of *Hadley*

v. Baxendale, in which the amount in controversy was 25 pounds in lost profits under a common law legal process that did not require the judge to do his own investigation and defer the determination of the question of foreseeable damages to the jury.

Cultural Bias Relative to Matters of Substance

The most important passage in the whole opinion is the one contained in paragraph 314. No level of careful paraphrasing can preserve Judge Knowles's message:

"*314. It is very clear that the Tribunal had met with many, and many inexcusable, delays and failures properly to engage, all on the part of Nigeria. Of course, it is understandable that the Tribunal should manage the Arbitration firmly in response. But looking at things as they were, by the point of the Award on Liability in my judgment these* ***questions stand out****:*

(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.*

(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: "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".*

(3) On what it had been told, the Tribunal found itself expressing the view that: "[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? The point is further reference above. ***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?***

(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."***

(***Nigeria v. Process & Industrial Development***, para. 314) (emphasis added).

Judge Knowles further observed: *"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."* (***Nigeria v. Process & Industrial Development***, para. 313).

The majority of the Tribunal appears to have had a blinding and immutable fidelity to tradition. They could neither see the fantastic drama of corruption play in front of their eyes nor could they resist the temptation of applying an archaic rule of law that resulted in the award of $6 billion dollars plus interests for an unperformed and "suspicious contract" as the Claimants themselves called it. (***Nigeria v. Process & Industrial Development***, para. 551). This lack of concern for the consequences of the decision prompted the learned Judge Knowles to surmise: *"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?"* (***Nigeria v. Process & Industrial Development***, para. 588).

Did the Tribunal really think that at the time of contracting the Parties thought that if one of them failed to even start the project, the penalty would be $6 billion dollars to the other? Beyond the corruption, one can think of another

reason why Nigeria's defence during the arbitration was abysmal. No reasonable person in government would have thought that this was a $6 billion dollar case for paperwork that got nowhere.

The classic response from the Tribunal would probably be Holmesian social Darwinism that does not consider the judge's duty to do justice – as eloquently expressed in Justice Holmes' famous exchange with Learned Hand – "doing justice is not my job." But then the justification there lies in the separation of powers. But of course, no such concern existed in the Nigerian case.

In overriding the exchange between Chief Ojo and Chief Ayorinde, it probably did not occur to Lord Hoffmann that perhaps these Nigerian jurists, although trained in the common law, held a slightly different conception of contracts, a Nigerian and most logical conception of contract that says: "*you don't reap what you don't sow*." Perhaps that was the law that Nigeria selected in the contract. Perhaps the majority of the Tribunal is too unconsciously biased that such a possibility did not even occur to it. The Tribunal cites Nigerian case law applying *Hadley v. Baxendale* but goes on applying its own cultural understanding of the rule without much thought or discussion about whether Hadley's first prong of the damage flowing naturally required the examination of the second prong of whether it was in the Parties' contemplation. It seems to have mixed up the standard of proof for the foreseeability of the damages with the foreseeability of the Claimant's ability to perform when it held: "*Consequently, the Tribunal finds on a balance of probability that P&ID would have performed its obligations under the GSPA and therefore did suffer loss. Furthermore, such loss flowed naturally from the Government's repudiation and was not too remote. The next step is the quantification of that loss.*" (*P&ID v. Ministry of Petroleum of Nigeria*, Final Award, para. 56). All of these substantive issues required thorough exposition in a case of this size but the Tribunal had unthinking cultural fidelity to the rule that it reproduced in its Final Award: "*The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*." (*P&ID v. Ministry of Petroleum of Nigeria*, Final Award, para. 46).

Cultural Bias Relative to Matters of Procedure

Judge Knowles expressly acknowledged: "*[y]et 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? Indeed, the Tribunal's "traditional approach" in both substance and process is the $11 billion dollar question. The Court's conclusion is frightening: "*But the fact is that the Arbitration was a shell that got nowhere near the truth.*" (***Nigeria v. Process & Industrial Development***, para. 588).

The Tribunal's traditional approach is not limited to accepting a rule of law that found unilateral liability for both sides' non-performance. It is also not limited to its acceptance of the valuation experts' unadulterated fiction of expectancy damages in the amount of $6 billion dollars for a 16-page contract that is not worth the paper it is written on. To use Judge Frankel's description of the traditional Common Law Judge, the Tribunal was simply "*a blind and blundering intruder*." "The ignorance and unpreparedness of [the traditional common law judge]" according to Judge Frankel, "[is] an intended axioms of the [adversarial system.] The 'facts' are to be found and asserted by the contestants. The judge is not to have investigated or explored the evidence before trial. No one is to have done it for him. The judicial counterpart in civil law countries, with the file of the investigating magistrate before him, is a deeply 'alien' conception . . .." (p. 1042).

The Tribunal was given perjured witness testimony and it considered it credible without scrutiny or documentary corroboration. (***Nigeria v. Process & Industrial Development***, Testimony of Michael Quinn, paras. 228-36). It based its findings of fact on the testimonies. Cultural bias might have played a role in whom the Tribunal considered credible and persuasive.

Conclusion

The outcome of the arbitral proceeding was by and large a function of the Tribunal's cultural bias that its traditional notions of contract and undiluted adversarial process was what the Parties wrote into the arbitration clause. The cultural bias may also have contributed to a preference in the outcome. Outcome preference is known to be the most important determinate of choice in ambiguity. If the Tribunal had preferred the opposite result, it would have

had no difficulty justifying it.

Perhaps, and just perhaps, the grandmother of all corruptions is not the hush money that the in-house counsel referred to in the judgment as “poor Grace” received from time to time, but it is the cultural bias and immutable fidelity to traditional notions of law and process that afflicts too many arbitrations today: a sense that one’s cultural belief is the governing law even when the result makes no common sense whatsoever. Indeed, the rendition of this type of decision requires impossible bias and condescending courage. Judge Knowles has kindly invited the international arbitration community to reflect and comment. Others have already commented on different aspects of the case focusing on the corruption (for an overview, see here).

This post has highlighted an aspect of the decision least explored – the Tribunal’s role – and is based on initial comments within the arbitration community.

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