Nigeria v P&ID and its Effect on UNCITRAL Model Law Arbitration

By:

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Introduction

Justice Robin Knowles' decision in the Nigeria v. P&ID [1] case has received, rightly so, its fair share of international attention from arbitrators, scholars, legal practitioners and commentators alike. The decision has had a seismic effect, if not drawing significant attention, on the international arbitration landscape, for two reasons. Firstly, while the subject award is not the first to be set aside on account of fraud and/or breach of public policy of the seat of arbitration, such decisions are rare and far in between. One would have to go back years, if not decades, to find an award set aside on these grounds[2]. Secondly, the decision has significantly redefined arbitration as we understand it, shaking it to the core, reigniting discussions on its viability and suitability, particularly in matters regarding investor-state disputes. Principles such as party autonomy, finality and confidentiality, that form the cornerstone of arbitration, have had greater spotlight on them than ever before. If not anything else, the decision has fueled discussions around reform of ISDS[3].

Thus, to the keen observer, student and practitioner of arbitration, the decision presents an opportunity to reflect on international arbitration, and arbitration generally, as system of dispute resolution and take stock of its current and future standing.

While the UK is not regarded, *strictu sensu*, as a UNCITRAL Model Arbitration Law jurisdiction, however, as the home to arbitration in its modern form, as we understand it; and as a leading seat of international arbitration, its Arbitration Act, 1996, and decisions of its courts on arbitration matters, have far reaching implications and regard beyond its territories and realms given the UK's status as a global financial and legal center.[4] 122 jurisdictions have adopted the UNCITRAL Model Arbitration law, with or without modifications and permutations. These are generally referred to in arbitration parlance as Model Law Jurisdictions. It is with the foregoing in mind that a reflection on the decision of the English commercial high court is undertaken.

Issues and Findings, in Brief

The High Court's decision turned on two key points. First, the judge found that Nigeria's professional privilege had been breached throughout the arbitration since the P&ID's legal team had unlawful access to its confidential legal documents. Second, that the tribunal had been misled on how the underlying GSPA came about. In essence that the underlying contract had been procured through bribery and fraud. The court found that the fraud did not stop at the procurement of the underlying contract but extended to the conduct of the arbitration by officials of key Nigerian entities, its counsel in the arbitration and those of P&ID. The Court conclusively found that had the tribunal been appraised of all material facts leading to the coming into force of the underlying agreement, it would have come to a different conclusion.

The Model Law v UK Law: A juxtaposition

From its origins in the early 1980s, the Model law was necessitated by the need for a unified and modern legal framework for international commercial arbitration as cross-border trade and investment activities expanded. It consists of a set of comprehensive provisions addressing key aspects of international commercial arbitration which have since been widely recognized and adopted by numerous jurisdictions around the world. It was further amended in 2006 to

further enhance the effectiveness of international commercial arbitration and to align the model law with contemporary practices and developments in the field of international arbitration, including issues related to interim measures, confidentiality, and the use of electronic communication in arbitral proceedings.

Although the principles, characteristics and language of arbitration are universal, governing statutes in seats of arbitration, even those that subscribe to of consubstantially draw from the model law, are not always congruent. For example, article 34 of the Model law, enacted variously by adopting states, deals diametrically differently with the grounds for setting aside arbitral awards, say with its English law equivalent, section 68 of the UK Arbitration Act. English law is more expansive on the grounds on which an arbitral award can be set aside, with a permissive or discretionary phraseology that an award can be set aside on account of "serious irregularities." This has the effect of granting a wider latitude to courts in the UK to set aside awards that are deemed to have serious flaws. There are those who view this discretion as being too intrusive to the award and its finality, yet others see it as an important safeguard against real, potential and far reaching abuse of finality by rogue arbitral tribunals.

On the other hand, in most model law jurisdictions, based on article 34, at best, the discretion of courts to set aside awards is found in under an umbrella provision allowing courts in seats to set aside awards for breach of "public policy". These "public policy" considerations have not always generally been helpful since courts in many Model law jurisdictions have interpreted this window in favour of finality with a restricted, circumspect or circumscribed and limited possibility of pushing its limits. In effect a strict and high threshold for setting aside awards has been achieved by interpreting the public policy consideration narrowly and restrictively, with the effect of setting aside applications, more often than not failing, rather than succeeding.

Three key issues emerge from the decision in the *Nigeria v P&ID* case that warrant reflection, especially for jurisdictions based on the Model Law; the standard of proof for fraud and/or corruption in international arbitration, the judge's discretion to review and remit the award back to the tribunal for reconsideration; and the role of the tribunal in an adversarial system.

The Standard of Proof for fraud in International Arbitration

The traditional approach, and indeed the prevalent threshold for proof of fraud and bribery in civil proceedings, has always been a high one, but not as high as "beyond reasonable doubt" as applied in the context of criminal trials. This test has been described as an "intermediate test", requiring proof higher than the basic civil cases requirement of proof on "a balance of probabilities", but not as high as proof "beyond reasonable doubt" as applied in criminal cases.

Until the Nigeria and P&ID case, the leading decision in international arbitration on the question of procurement of the subject contract through bribery was the *World Duty Free Company Limited v. Republic of Kenya[8]*. In that case, the ICSID tribunal dismissed the claim on account of the underlying contract being tainted with bribery and corruption in its procurement. The tribunal's approach in the World Duty Free case was simple; the tribunal first sought to ascertain the existence and payment of a bribe, and secondly, whether the underlying contract was procurement by the said bribe. In essence, there ought to be a clear connection between the bribe paid and the resulting contract. The test applied in that case was the intermediate one.

In the P&ID case, the Judge, holds that "*I am asked to make many findings of dishonesty…This is civil and commercial litigation, and the standard of proof is on the balance of probabilities. That said, to be satisfied of dishonesty to that standard requires convincing evidence*." (Paragraph 23)

Furthermore, while setting his standard, he notes that;

> *"At various points I am asked to accept there is a case to answer on an issue, and to draw adverse inferences from the absence without good reason of a witness who could otherwise have given material evidence. I approach the question whether it is appropriate to draw such an inference as one requiring judgment based on "common sense" and depending on the circumstances of this individual case…*" (Paragraph 21)

For instance, the conclusion that the moneys paid to Mrs. Taiga during the arbitration was to keep her silent and on "their side" seems to be a very

problematic conclusion to make from the evidence produced in that regard. In fact, the judge consumes acres of the decision to paint methodically, almost deliberately, a picture of Nigeria as a haven of corruption and its state entities and officers as chronically, irredeemably and irretrievably corrupt to the core.

Arbitration is a private and consensual process, only available to persons who have a valid arbitration agreement in writing or evidence in writing. While the judge may be right in his ultimate conclusions, to draw serious conclusions on the basis of innuendo, inferences, hunches, and suppositions made against persons who were neither parties to the underlying contract, the arbitration proceedings or the application before the judge, and, therefore, clearly bereft of opportunity to defend themselves or offer repudiatory evidence in their defence, is to fall below the yardstick of fair trial and natural justice. The court, though expressly stating otherwise, both covertly and overtly passes judgement on the characters, intentions and actions of many individuals and entities who had no opportunity to participate in the proceedings.

By applying a balance of probabilities threshold to assess the bribery allegations and evidence, and by drawing such inferences therefrom, the judge seems to depart from and lower the traditional long held test which was test was always understood in arbitration circles to have served to insulate the arbitral process and ultimate award from unwarranted assault through lengthy appeals and challenge proceedings. The shift in threshold is likely to play out extensively in many set-aside proceedings in the days to come. The real effect of this new approach will unfold in the days to come.

Remission of Awards back to the Arbitrator for Reconsideration

Both section 68 of the UK Arbitration Act and article 34(4) of the Model Law give a wide discretion to the judge considering a set aside application to remit an award back to the tribunal for reconsideration in light of the findings made. In particular, section 68(3) allows for remission unless the judge is “satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration”. It is important to note that the court found no wrongdoing on the part of the tribunal.

In fact, the judge observed in various passages the helplessness of the tribunal;

> - If the Tribunal had known of bribes around the time of the GSPA the entire picture would have had a different complexion. And so too if the Tribunal had known that Nigeria was not, during the Arbitration process itself, enjoying confidentiality of advice within the legal professional privilege to which it was entitled. (Para. 316) -
>
> Further the Tribunal did not know that Mr Michael Quinn's evidence was knowingly false in representing that "all the project finance was in place" and that (for the GSPA rather than Project Alpha in 2008) "90% of the engineering designs had been completed". (Para 317)
>
> - But in any event among the things the Tribunal did not know and could not be expected to know was that the receipt and retention by P&ID of Nigeria's Internal Legal Documents continued. (Para 400)

The passages foregoing, among others, demonstrate the material relating to the procurement of the underlying contract by bribery were not known to the arbitral tribunal, and that the tribunal was best placed to evaluate those matters. After all, parties had agreed to arbitration as the forum for resolving all their disputes and differences. In the judge's considered opinion, which is sound in all respects, if the tribunal had been appraised of all materials before him, "the entire picture would have had a different complexion."[9]. This view alone should have been sufficient for the court to default to its discretion under section 68(3) of the Act and exercise its discretion in favour of remission of the award to the tribunal for a reconsideration of the merits based on the new material discovered in the post award proceedings. This would not only speak confidence into the independence of arbitral proceedings, but also cement the notion of English courts as being arbitration friendly or supportive. It would also underwrite the doctrine of party autonomy, which is expressed in the consensual nature of arbitration, by allowing parties to an arbitration agreement to resolve dispute with finality in the forum of their choice.

The Role of the Tribunal in an Adversarial system

The judge also takes issue the role of the arbitrators when faced with the circumstances of this particular case. He notes that "the Arbitration was a shell that got nowhere near the truth." In other instances, he poses rhetorical

questions geared towards the suggestion that the tribunal should have taken a more interventionist role;

> - 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? (Para 588)
>
> - 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? (Para 588)
>
> - 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? (Para 588)
>
> - 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. (Para 588)

Whether or not an arbitrator's role in an adversarial system should be rethought is a question that will continue to elicit debate on both sides of the divide. However, the arbitrator being a third party to the dispute cannot descend into the arena of disputation, lest he is accused of bias. Perhaps there is consolation in the judge's remarks that the tribunal allowed time where it could to allow parties to present their respective cases to the best of their abilities.

Conclusions and Lessons Learnt

Several lessons can be drawn from the decision under review. Firstly, it is noteworthy that instances in which a court has interfered with an award on the basis of corruption and fraud as the case was in the *Nigeria v P&ID* case have been few and far apart. This rarity demonstrates that arbitration, by and large,

is still alive, well and effective. Secondly, and perhaps more critical, is the fact the decision demonstrates that arbitration principles and values are universal. Thirdly, while the events leading to the decision are most unfortunate, there is clear evidence to challenge the notion that corruption and bribery are an exclusive phenomenon that resides in Africa, the global south which often occupy the periphery of the international world order and discourses. The court was treated scenarios in which parties, and their senior and celebrated counsel, from capitals of western or “the global north” engaged in corrupt conduct not only to procure investment but also to unfairly direct the course of the arbitral proceedings so as to procure a favourable award. Finally, Justice Knowles also shows that Courts play a significant role in safeguarding the integrity of the arbitration process, and that court intervention remains a critical and integral part of the arbitration process.

The decision in the *Nigeria v. P&ID case* will continue to elicit debate among all stakeholders for the foreseeable future. While it irrefutably demonstrates that the arbitration system largely works, the decision will continue to provide useful lessons not only for reforms in the arbitration arena, but also for reflection in the drafting of contracts and party representation in arbitration proceedings.

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[1] [2023] EWHC 2638

[2] In Carpatsky Petroleum Corporations v PJSC Ukrnafta [2018] EWHC 2516 (Comm) the Court refused to set aside an award on grounds of fraud. Also, in BVU v BVX [2019] SGHC 69 the Singapore High Court refused to set aside an ICC award alleged to have been procured by fraud or that it offended public policy; in this case because of the decision not to call upon a particular witness. The Court found that in order to find fraud it was necessary to demonstrate three requirements; (1) deliberate concealment aimed at deceiving the tribunal; (2) an absence of a good reason for the non-disclosure and; (3) a causative link between the concealment and the decision favoring the concealing party. In the Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, again the tribunal found grounds of alleged fraud were unsubstantiated hence failed.

In World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, 4 October 2006 the Tribunal found that the underlying contract had ben procured by bribery hence the claims could not stand.

[3] David Orta, Brian Lowe and Lucas Loviscek, 'Allegations of corruption in investment treaty arbitration: The need for reform', Expert Guides, 2019; John Nyanje, 'Match fixing' in Investor State Arbitration: Process and industrial Development Limited v Federal Republic of Nigeria' (2023) 12(1) African Journal of Commercial Law 221-235

[4] Yarik Kyrvoi, 'London as the world's leading dispute resolution hub: numbers and challenges' (17th May, 2023)

[5] Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I

[6] For example Section 35 of the Kenyan Arbitration Act 1995 (2009); Section 55 of the Nigerian Arbitration and Mediation Act 2023

[7] Geo Chem Middle East v Kenya Bureau of Standards [2020] eKLR; Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR; Lesotho Highlands Development Authority v Impregilo SpA and others [2005] UKHL 43

[8] *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006

[9] Ibid n1, Paragraph 316

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