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Nigeria v P&ID: A Plague on Both Your Houses

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Mercutio's curse is apt: no one comes out of the P&ID saga well. Not P&ID, the arbitration claimant who, after securing an award worth over USD 11 billion with interest, has been found to have engaged in widespread corruption, including both with regard to procuring the underlying contract and in obtaining the arbitral award. Not Nigeria, whose conduct as the arbitration respondent demonstrated, in Knowles J's words, "*incompetence and neglect throughout*". Not the arbitrators, with Knowles J remarking that he "*struggle[s] to accept what happened in a dispute of this importance and magnitude*". And not the system of international arbitration, in relation to which the Judge expressed the view that the case "*touches the reputation of arbitration as a dispute resolution process*" and calls for debate and reflection on this. This note considers the Court's treatment of corruption and its impact on the review it conducted under the serious irregularity standard for setting aside arbitral awards enshrined in s. 68 of the English Arbitration Act 1996, as well as Knowles J's broader questioning of the system of international arbitration.

An arbitral process marked by corruption and incompetence

At the heart of this case is a tale of extraordinary and widespread corruption that tainted the arbitration process. Knowles J found that "*the Awards were obtained by fraud and [...] the way in which they were procured was contrary to public policy.*" The Judge found that P&ID had bribed a Nigerian government official to obtain the contract at the heart of the arbitration and, linking this to the obtention of the award, had continued to bribe her during the course of the arbitration and had concealed the bribery from the arbitral tribunal when explaining the origin of the contract. The Judge further found that P&ID had received and retained more than 40 of Nigeria's internal legal documents (many of which were privileged), allowing P&ID to monitor the advice Nigeria was receiving during the course of the arbitration and related settlement discussions. The Judge found that corruption of Nigeria's lead counsel was not made out and that he lacked sufficient detail to find the corruption alleged of other members of Nigeria's legal team or officials, but observed that "*legal representatives did not do their work to the standard needed, [...] experts failed to do their work, and [...] politicians and civil servants failed to ensure that Nigeria as a state participated properly in the Arbitration*", with the consequence that the tribunal did not receive the assistance it was entitled to expect from the parties during the arbitral process.

The evidence on which the Judge found corruption appears robust and P&ID equally had no legitimate explanation for its possession of Nigeria's internal legal documents. The Court's decision to set aside the award as having been obtained by fraud and contrary to public policy appears sound.

Before the English court, Nigeria advanced far more extensive allegations of corruption, including of its own arbitration lawyers, presumably to distance itself from its systematic failings in the arbitration and to ensure the widest possible review by the Court. Knowles J highlights the "*enormous part that allegations of bribery have played in this case*".

In rejecting Nigeria's broader allegations of corruption, a recurrent theme of Knowles J's judgment is Nigeria's incompetence throughout the course of the arbitration. This is reflected in State officials arguing about whether to pay Nigeria's lawyers and which government department should cover the cost, against the backdrop of repeated warnings that the State was facing a catastrophic loss – classic "fiddling while Rome burns" – as well as routinely failing to provide instructions needed for Nigeria's legal team to take positions, timely file submissions or participate in hearings. The damages phase of the arbitration features prominently in this discussion, reflecting officials failing, against advice, to engage suitable experts or provide instructions needed to timely file quantum evidence, as well as failures by Nigeria's lawyers to address relevant questions to P&ID's experts or to understand the Tribunal's questions. Knowles J's judgment equally reflects that Nigeria was frequently allowed second and third chances to deal with P&ID's submissions and evidence, but still failed to use these opportunities to advance a coherent defence.

Audit

Faced with Nigeria's case alleging widespread corruption, Knowles J's judgment setting aside the P&ID award conducted, in effect, an audit of both P&ID's project giving rise to the dispute, and of the subsequent arbitral process. While the Judge acknowledges the limited scope of review for serious irregularity under s. 68 of the 1996 Arbitration Act and that "*[t]he focus is on due process, not the correctness of the decision reached*" , he also considers that P&ID was "*highly unusual in the context of the proper limits to the role of the court where the parties have chosen arbitration*" and that his blow-by-blow assessment of the project and the arbitration was the result of "*Nigeria having made almost every allegation it could*", including alleging corruption of its own former lawyers. In the event, while the Judge ultimately found that the Awards had been procured by fraud, many of Nigeria's broader allegations of corruption were not made out, including many of those that had triggered the unusually wide-ranging review of the arbitral process.

The arbitrators

Knowles J makes clear that Nigeria's failure to mount a coherent defence in the arbitration resulted from its own failings, repeatedly citing the "*many, and many inexcusable, delays and failures properly to engage, all on the part of Nigeria*". Nonetheless, even "*accepting that the conduct and effort of Nigeria's government, administration and lawyers at this quantum stage [...] was deserving of severe criticism*", Knowles J also remarks with respect to both the liability and the quantum phases that "*there was something very wrong*" and "*how unsatisfactory things were*", and goes on to make pointed comments on the arbitrators' conduct and reasoning, which he describes as "*not ... easy to follow*" and states "*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*". A particular question that Knowles J cites is the disparity between the magnitude of P&ID's claim of USD 6 bn and the "skeletal" 20-page contract on which it was based. Although Knowles J acknowledges that there are divergent views on how arbitrators should approach a situation where a party is inadequately represented, it is clear that he views the Tribunal's handling as wanting.

Arbitrators have the discretion to choose to act "inquisitorially" under most modern arbitration legislation (including the UNCITRAL Model Law and the English Arbitration Act) and under the leading sets of arbitration rules. Even so, raising lines of argument that a party has not raised may run the risk of creating an appearance of bias, and it is somewhat novel to criticise arbitrators for not raising a question, which is regarded by some arbitrators as a safer course. While it has repeatedly been observed that arbitrators often do not engage as fully as they might do with the quantum aspects of a case, this is equally an area where it is particularly important to have the assistance of properly prepared expert evidence on both sides. It is important to have in mind that that arbitral awards are often a product of multiple separate views and the reasoning often therefore reflect elements of compromise.

Merits

Knowles J acknowledges the DAC Report's explanation of the limitations of the serious irregularity standard and the impermissibility of reviewing the merits of the arbitration. However, the Court's discomfort with the arbitration and the awards ran considerably further than the matters within the scope of review under s. 68. Knowles J's obiter comments on the arbitral tribunal's handling of parts of the arbitration is an example, where the Judge was troubled by substantive matters which he considers should have been handled differently, including a substantial list of questions he thinks should have been raised of P&ID. While the judge resolves the matter by noting that the arbitrators would have acted differently had they been aware of the corruption that he had found, it could be argued that the judgment incorporates elements of an impermissible review of the merits.

Will P&ID have implications for international arbitration?

Is P&ID an instance of hard cases making bad law?

If the arbitration was (as the Judge found) tainted throughout by corruption, then undoubtedly the party behind that corruption should not benefit to the tune of some USD 11bn, and the right result has now been reached. Lord Hoffman, chair of the arbitral tribunal in the underlying arbitration, has commented on the "*great miasma of dishonesty*" that can cloud cases, with the

arbitrators deciding them being wholly unaware of what is going on in the background to an arbitration.

By any standards, the facts of P&ID are extreme. Is it right that such an extreme case should lead to questions being asked of the long-established and well-trusted system of arbitration? In his judgment, Knowles J raises questions regarding the system of arbitration after describing the P&ID arbitration as *"a shell that got nowhere near the truth"*, and expresses a hope that the case would provoke *"debate and reflection among the arbitration community, and also among state users of arbitration"*. He adds that the case provides *"an opportunity to consider whether the arbitration process [...] needs further attention where the value involved is so large and where a state is involved"*.

The judgment is, perhaps, in places implicitly critical of the tribunal, the crux of the concern being that it had only addressed the arguments put to it and had not taken an interventionist approach even when it was clear that Nigeria was making a poor job of challenging P&ID's case on quantum. Observing that it *"did what it did with what it had"* (of which it might be said that it was not to blame for that), the Judge goes on to comment that *"the Tribunal took a very traditional approach"* and asks *"[c]ould 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 [...] 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?"*.

The adversarial system relies heavily on the parties testing the case against them; when that falls down should the tribunal step in, and is that the Tribunal's role? Should the Tribunal have been more alert in light of the "red flag" that the claimant company lacked experience in building gas processing plants? Is an inquisitorial approach more appropriate in cases where there is corruption, and how should those cases be identified when the respondent is not itself pleading corruption? The answer to these questions is not straightforward. The Judge is clear that a significant miscarriage of justice was narrowly averted, and while a large part of the problem was Nigeria's consistent failure to defend the arbitration effectively, Knowles J appears also to lay blame on a combination of the arbitral process itself and this very experienced tribunal's application of it.

A further legacy of the case is that Nigeria's widespread allegations of corruption triggered an unusually extensive review of the underlying contract and the arbitration and led Knowles J to comment, albeit obiter, on issues of procedure and the merits that arguably lie beyond the scope of review under s. 68. While Knowles J appears to consider that the systemic concerns he raised justified this approach, allegations of fraud should not become a Trojan Horse leading to a review of the merits of an arbitration generally. As well, where Knowles J's finding that the awards were obtained by fraud is based on material omissions from P&ID's testimony, this could potentially have repercussions for the finality of arbitration if allegations of untruth or incomplete testimony, or even incompetence by its legal representatives, can be used by a dissatisfied party to have the English court undertake a full-scale review of the arbitration. It is best that P&ID is viewed as an exceptional case.

P&ID will stir debate among many segments of the arbitration community for some time to come, including on the treatment of corruption, representation of States as well as the role of arbitrators. It bears noting however that the system of arbitration has ultimately operated to achieve the right result and that the respondent itself bears a large measure of responsibility for the fact that it did not do so sooner.

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