Kluwer Arbitration Blog

Is the Conclusion "the Tribunal did what it did with what it had" Enough? Comments on Nigeria v P&ID

Maciej Jamka (DWF) · Friday, December 22nd, 2023

A recent decision, Nigeria vs P&ID, issued by the English High Court of Justice, has drawn significant global public attention. This decision is notable for several reasons. It is rare for English courts to overturn arbitration awards. However, it is the exceptional circumstances underlying the dispute that were truly extraordinary and render this case newsworthy. As explained below, this saga sheds light on how businesses operate in developing countries and how an arbitration concerning such a matter may unfold. It could be a ready screenplay on bribes, greed, and indifference to be shot in the Lagos plenaries and London's private clubs for Lords and King's Counsels, a perfect sequel to Oliver Stone's *Wall Street*. This blog post presents details about the arbitration award that was procured through fraud, its subsequent challenge in the English court, and the duties of arbitrators during the adversarial procedure. It further attempts to address whether arbitrators should always be satisfied and limited by the evidence put in front of them by the parties.

When Business Went Wrong

The main actors in this story are two Irish individuals with meaningful experience and apparent savvy in how to do business in Africa, acting through a BVI vehicle (P&ID). They were presented with an opportunity connected with Nigerian political ambitions to develop Nigeria's gas resources, listed among the ten globally most significant, which could boost the country's income. It could have been a good business plan, but Nigeria did not perform its obligation to deliver gas, which was probably unrealistic from the start since Nigeria did not dispose of available gas at the planned location of the facility. Meanwhile, P&ID did not do anything concrete to build the facility, but rather, demanded that Nigeria perform its obligations, and when Nigeria failed, it commenced arbitration proceedings. The tribunal consisted of a Nigerian lawyer, who was the former Attorney General of Nigeria, and two English lawyers "of the greatest experience and standing" whose names are preceded by the titles "Sir" and "Lord." Here on the Kluwer Arbitration Blog, Professor Won Kidane has already analyzed the cultural clashes present within the tribunal that oversaw the arbitration proceedings and rendered the award.

After four years of proceedings in 2017, the arbitration award was issued and required Nigeria to pay $6.6 billion plus 7% interest to P&ID. By the time the matter was presented to the English High Court of Justice, Nigeria's obligation, which originally arose from a 20-page agreement,

reached $11 billion and amounted to nearly a half of Nigeria's entire budget for 2023 and far more than what had been allocated for its health and education services, combined.

The Subsequent Set-aside Decision

Mr Justice Robin Knowles set aside this award in the Judgment of 23 October 2023 invoking that the award violated public policy (§574) and alarmingly stated that "the matter touches the reputation of arbitration as a dispute resolution process." (§14)

Justice Knowles concluded that the award obtained by P&ID was fraudulent and against public policy. (§574) This conclusion was based on three crucial findings. Firstly, P&ID presented false evidence to the tribunal regarding the GSPA by concealing the bribing of a Nigerian official (§493 *et seq*.). Secondly, P&ID continued to bribe during the arbitration process to hide the previous corrupt payments to the same individual (§509). Finally, P&ID unlawfully obtained over 40 privileged internal legal documents from Nigeria, which provided insight into its decision-making process (§511 *et seq.*).

Justice Knowles directed most of his criticisms toward the individuals standing behind P&ID and their legal representation during the arbitration process. The latter will need to provide an explanation to the ethical committees of their respective barristers' and solicitors' bars since the judge sent a copy of his award to these regulators. (§593) However, the judge's most essential and thought-provoking reflections are on the role of the arbitration tribunal in this matter. This role is not unambiguous. Justice Knowles clearly noticed the red flags that the arbitrators had in front of them. These included the usage of an offshore legal vehicle (BVI), an inadequate 20-page agreement underlying the dispute with a missing schedule of works initially envisaged, no performance of it by P&ID, the constant inability of Nigeria to adequately present its case during the arbitration, and finally, a total mismatch between the actual real investment of investors and the magic of DCF (discounted cash flow valuation method) which enabled the calculation of a $6.6 billion damages over the next 20 years putting no attention to actual cost incurred. Justice Knowles saw and pronounced all of that, and his powerful "j'accuse" in the judgment deserves major respect. However, he is also sympathetic to the tribunal and concludes, "The Tribunal did what it did with what it had". (§580) The question remains: is this really a valid excuse?

Adversarial versus Inquisitorial Arbitration Proceedings

One of the textbook key differences between common law and civil law approaches to dispute resolution is the division between the adversarial and inquisitorial models of court proceedings. The common law "adversarial" model puts the judge in the position of a passive observer before whom active parties present their pleas and evidence. A judge shall not intervene because it may be considered as support of one of the parties. The truth is supposed to be a finding after a dialectical clash of opposing parties. However, that truth is rather perceived as a score of the proceedings as opposed to an objective reality. In the civil law "inquisitorial" model, the judge is responsible for seeking out the objective truth. This places the judge in the role of an active manager of the process in general and as a master of evidence, specifically.

A brief review of the procedural rules of intranational arbitration institutions demonstrates that

arbitrators have wide-ranging authority to gather evidence. According to Article 25.1 of the 2021 ICC Rules, the arbitral tribunal must establish the facts of the case as quickly as possible through any appropriate means. Subsequent articles permit the tribunal to call witnesses, request documents, or appoint expert witnesses. The tribunal possesses similar authority to call for evidence under the rules of most, if not all arbitration institutions, and in the 2021 UNCITRAL Arbitration Rules, and the 2020 IBA Rules on the Taking of Evidence in International Arbitration. However, it should be noted that these provisions relate to the arbitrator's authority and not their duty.

Arbitrators Sitting Tight

In his research, Phillip Landolt identified several issues that need to be considered when arbitrators take the evidentiary initiative. Firstly, the arbitrator's initiative may infringe on the parties' autonomy, which includes their independence from the tribunal. Secondly, it may impact the efficiency of the process and increase the cost. Thirdly, it could discourage the parties from taking the initiative in presenting evidence. Landolt argues that the inquisitorial model of arbitration goes against the principle of avoiding a person acting as both prosecutor and adjudicator, and he raises concerns about whether the arbitrator's motives are always well grounded and not rooted in their ego.

These are all well-taken points, indeed discouraging an arbitrator from manifesting initiative. But Landolt goes further and presents arguments going beyond the technical aspects. He suggests that parties do not expect the award to be "fair" or comply with laws, but rather one consonant with their submission, and, unlike in litigation, the only interests that matter in arbitration are those of the parties. All state interests (like justice or fairness) are abstracted; consequently, any actions of the tribunal that would be based on the attempt to realize those values must fall. He continues that arbitrators generally have no valid interest in rendering an award based on evidence beyond the parties' submission. For that reason, the arbitrators may feel that their awards do not reflect a deeper existential or legal reality, but it is not their job to have it do so. There is generally no professional embarrassment for arbitrators in this situation since they are not asked to meet this standard.

Truth and Justice – the Missing Elements?

But doesn't that sound false when confronted with facts of the Nigeria v. P&ID case? Should we simply accept the outcome and allow Nigeria to face the consequences of its actions? This is the stance taken by Justice Knowles, albeit reluctantly, who absolves the tribunal by stating that "In the Arbitration the Tribunal did what it did with what it had." (§580)

Even if we fully embrace the adversarial model of proceedings, this saga exemplifies the limitations of this approach. It is widely accepted that an arbitration tribunal has the obligation to render an enforceable award, which is their major duty. If there is a need to take the initiative to avoid major flaws that could lead to unenforceability, the tribunal should do so. The prevailing opinion now is that if there are any indications of bribery, the tribunal must be extremely vigilant and consider taking evidentiary initiative. Unfortunately, in this case, the tribunal failed to take such measures.

But perhaps this case is a good reason to start discussing the duties of the tribunal once again and recognize that arbitration is not like a boxing match where the parties exchange blows and the referee counts whose punches were stronger. Maybe the basic axiological foundation of truth and justice cannot be totally deterred from arbitration.

W.W. Park once poetically said:

> "*Often underrated or misjudged, truth has dispatched more than one mind beneath the intellectual storm waves of a giant analytic sea, and anyone venturing to explore its contours must do so with fear and trembling. Yet truth-seeking lies at the core of what arbitration is about, and cannot long be avoided in any serious discussion of the subject".*

The investment treaty arbitration arena has recently faced significant crises of legitimacy, which have led it to the verge of basic change, if not dismantling. The different expectations that people around the world have about what is good and bad, vice and virtuous, including their beliefs about protecting the environment and the rights of local communities impacted by big global investments, have created a major disagreement with how investment treaty tribunals operate. This disagreement has ultimately weakened the entire system.

It is illusory to think that commercial arbitration is immune from similar criticism. While the adversarial system can clearly show what it is designed for in most cases, with the proliferation of arbitration, there are instances where disputes arise where the equality of arms is critically unbalanced. In such circumstances, arbitrators must be vigilant and ensure that arbitration does not become just another tool for those wealthy, powerful, and ruthless individuals to exert their power over those who are poorer, weaker, and helpless. The excuse that "the Tribunal did what it did with what it had" will not suffice.

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