Kluwer Arbitration Blog

Hong Kong Arbitration Week 2024: Guarding the Integrity of Arbitration – Reflections on the Landmark English Decision in Nigeria v P and ID

Kristin Au, Gabriel Yu (Mishcon de Reya in association with Karas So LLP) · Wednesday, October 23rd, 2024

On the second day of Hong Kong Arbitration Week 2024, Mishcon de Reya in association with Karas So LLP hosted a panel discussion titled "Guarding the integrity of arbitration – Reflections on the landmark English decision in Nigeria v P&ID".

The panel examined the English Commercial Court's landmark decision to set aside a USD 11 billion award against Nigeria in *Federal Republic of Nigeria v Process & Industrial Development Ltd* ("***Nigeria v P&ID***"), delving into the ways in which fraud and corruption are addressed in arbitration and how public policy is upheld across jurisdictions.

The panel consisted of Greg Falkof (Partner and Head of International Arbitration, Mishcon de Reya LLP), Lijun Cao (Equity Partner, Zhong Lun Law Firm), and Jane Willems (International Arbitrator, BW Arbintl Ltd). The panel discussion was moderated by Stella Hu (Special Counsel, Karas So LLP in Association with Mishcon de Reya).

Introduction to *Nigeria v P&ID*

Ms. Hu opened the session by introducing the *Nigeria v P&ID* case. In 2010, Nigeria entered into a Gas Supply and Processing Agreement ("**GSPA**") with P&ID. Two years after entering into the GSPA, P&ID commenced arbitration proceedings against Nigeria for failing to perform the GSPA. The London-seated Tribunal, consisting of Sir Anthony Evans, Chief Bayo Ojo SAN, and Lord Hoffmann, found in favor of P&ID, awarding USD 6.6 billion in damages (equivalent to USD 11 billion in value). Consequently, Nigeria challenged the award under Section 68 of the Arbitration Act 1996 ("**Arbitration Act**").

Mr. Falkof shared insights on the English Commercial Court's decision on 23 October 2023 to set aside the arbitral awards in full (the "**Judgment**"). Under Section 68 of the Arbitration Act, the Court has discretion to set aside an award obtained on certain grounds where (1) there has been a serious irregularity and (2) that serious irregularity has caused substantial injustice. In this case, Mr Justice Robin Knowles held that the following were determined to be "serious irregularities" in the terms of Section 68 of the Arbitration Act:

- P&ID presented and knowingly relied on false evidence: The witness evidence produced by P&ID to the tribunal purported to "explain how the GSPA came about" but concealed the fact that it had procured the contract through corrupt payments to a senior Nigerian lawyer working for the Ministry of Petroleum Resources.
- Ongoing bribery of an official during the arbitration: P&ID had also bribed the senior lawyer during the arbitration and while she was giving witness evidence, to ensure that she remained silent about the earlier bribery, throughout the arbitration process.
- Improper retention of privileged and confidential legal documents: P&ID improperly obtained, retained, and misused Nigeria's privileged and confidential legal documents, and used these to monitor whether its corruption had been uncovered and to track Nigeria's case strategy throughout the arbitration.

The Court concluded that these serious irregularities amounted to a "substantial injustice" to Nigeria, and that the awards had been obtained by fraud and in a manner contrary to public policy under Section 68 of the Arbitration Act. The awards were therefore set aside.

Points of Reflection from the Judgment

Arbitral Interventionism

Ms. Hu highlighted that Mr. Justice Knowles' judgment gives rise to key points of reflection for the arbitration community. One point concerns whether arbitral tribunals should adopt a more direct and interventionist approach, particularly in cases where a party lacks adequate legal representation and fails to appoint qualified experts.

Mr. Cao observed that arbitrators typically adopt an inquisitorial approach in civil law jurisdictions. While he supports a more interventionist role for arbitrators, Mr. Cao highlighted that at the same time, a key consideration for arbitrators is whether intervening may result in challenges to their decision. In Mainland China, arbitrators engage more proactively with factual issues compared to legal issues. For example, where a party fails to present its legal arguments or claims accurately, arbitrators are hesitant to exercise their interpretation rights ("???") to avoid challenges of unfairness.

Ms. Willems added that there is tension between the tribunal's duty to provide parties with the opportunity to present their cases and its duty to treat the parties equally, especially where a party's legal representation is inadequate. While tribunals are not obligated to cross-examine witnesses, it has a duty to put forward questions to ascertain all relevant facts, including how a contract was formulated or procured and why a particular witness has not been cross-examined on matters that may arouse suspicion of fraud.

Mr. Falkof explored the proposed amendments to the Arbitration Act, including the introduction of a general duty on the tribunal to safeguard the arbitration proceedings against fraud and corruption. He observed that enforcing such a duty would be subject to a number of practical challenges, especially considering that doing so may expose arbitrators to potentially extensive liabilities. He noted that, during the legislative debates, Lord Hoffman had publicly emphasized the limitations that arbitrators would face by complying with the proposed duty to ensure the absence of fraud or corruption, given the distinct constraints of tribunals compared to courts and the consensual nature of arbitrations.

Transparency in Arbitral Proceedings

In his judgment, Mr. Justice Knowles also raised the potential need for greater transparency in certain types of arbitration. Mr. Cao suggested that transparency is less of a concern in investor-state arbitrations due to established frameworks such as the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in commercial arbitrations, institutions such as the ICC have made growing efforts to publicize arbitrations with the parties' consent. Nonetheless, as confidentiality remains a cornerstone of commercial arbitration, Mr. Cao proposed for greater transparency to be adopted in selective cases only, such as in cases involving state entities.

Importance of Ethical Standards and Disclosure of Documents

It is frequently the case that lawyers from multiple jurisdictions are involved in an arbitration where the rules and standards of professional ethics are not the same. For instance, the rule against English lawyers coaching witnesses is different from the professional duty of US-qualified lawyers to prepare their witness. However, Mr. Falkof observed that in most situations, such conflicts can be resolved by the arbitral tribunal.

The rules regarding document production obligations also varies greatly in different jurisdictions. Mr. Cao shared his insights that in Mainland China, there are no similar rules of professional conducts such as the Bar Association Code of Conduct for the Bar of Hong Kong and the Model Rules of Professional Conduct in the United States, which regulate ethical issues. There is also no obligation on the parties to produce documents. In institutions such as CIETAC, guidelines on evidence were published containing similar rules as the IBA Rules on the Taking of Evidence. Due to the lack of a systematic regime governing document productions as well as any explicit professional conduct rules in Mainland China, there have been strong proposals on implementing soft laws to address the concern of ethical standards, aiming to reaching a common understanding among the international legal society within China.

Different Approaches in the Assessment of Arbitral Awards Contaminated by Corruption

Ms. Willems shared that there is an ongoing discrepancy between the case law in different jurisdictions according to the different tests applied in assessing the awards on the issue of public policy. A key question is whether the court should: (1) engage in such retrospective analysis by putting itself in the place of the arbitrators to decide whether it was reasonable for the arbitrator to uncover corruption or (2) make a separate assessment of facts with new evidence which was only available after the arbitral awards were rendered. The French court has adopted a so-called "red flags" test to assess whether there are serious, specific, and consistent indicators of corruption in procuring the contract, in order to scrutinize the arbitral awards on international public policy grounds. This is distinguished from the English court's approach of not investigating whether there was fraud and corruption in the formation of the contract if that argument had already been addressed by the tribunal. Mr. Falkof observed that the French court appears to be privileging the public policy of avoiding corruption over the public policy of arbitral finality, whereas the English court has taken the opposite position.

Ms. Willems pointed out that in the case of *Alexander Brothers Limited v Alstom*, the arbitral awards were challenged at Swiss, French, and UK courts on the issue of corruption. The Swiss

Federal Court refused to annul the arbitral awards, holding that it lacked jurisdiction to investigate the facts concerning the allegation of corruption advanced by one of the parties to the proceedings. When the enforcement of the arbitral awards was appealed in France, the French court overruled the enforcement order, and upon hearing the contemporaneous evidence, it found serious, precise and consistent indicators of bribery of public officials. However, when the party sought to challenge the awards in the UK, the English court dismissed the same arguments on public policy grounds.

Conclusion

This panel discussion provided valuable insights into the complexities and challenges faced in international arbitration, particularly when dealing with issues of fraud and corruption. The panelists shared extensive views on issues such as adopting a more interventionist approach by arbitral tribunals, the need for greater transparency in certain arbitration cases, and maintaining high ethical standards across jurisdictions. This discussion has underscored the evolving landscape of international arbitration and the critical measures needed to continuously uphold its integrity.

This article is part of our "live" coverage of Hong Kong Arbitration Week. More coverage from the week is available here.

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This entry was posted on Wednesday, October 23rd, 2024 at 8:12 am and is filed under Arbitration, Arbitrators, Corruption, Fraud, HK Arbitration Week
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