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A Case with No Winners: Lessons from *Nigeria v. Process & Industrial Developments Ltd.*

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I. INTRODUCTION[1]

Following over a decade of arbitration and court proceedings, a long-running saga between the Federal Government of Nigeria ("Nigeria") and the British Virgin Islands company, Process & Industrial Developments Limited (P&ID), appears to be coming to an end. A 140-page judgment issued by Mr Justice Robin Knowles ("Justice Knowles" or the "Judge")[2] of the English Commercial Court[3] in November 2023 (the "2023 Nigeria Decision") laid bare the extraordinary facts with which the court was confronted—including perjured witness evidence, bribery of Nigerian officials in the course of the arbitration, and improper access to and retention of Nigeria's privileged documents by P&ID and its legal representatives.[4] As it turned out, all of those matters were rooted in the fact that the underlying contract, on which the arbitral tribunal had made its determinations, had been procured by corruption. In a subsequent decision issued in December 2023, the Judge found the case to be so "serious" as to merit setting aside the U.S. $11 billion arbitral award that had been issued against Nigeria.[5]

The facts underlying the 2023 Nigeria Decision are extraordinary because of the extremity of the fraud that had infected the arbitral process: the court found that the underlying contract had been procured by bribery, as shown by bank deposit records of a former government official;[6] that the bribery had continued during the arbitration to ensure the prior bribery was not discovered;[7] that P&ID's principal had committed perjury in failing to reveal the bribery;[8] and that its arbitration counsel had received privileged documents from Nigeria during the arbitration that enabled it to track whether the bribery and fraud had been discovered.[9] In the words of Justice Knowles, the individuals who perpetrated these acts gave "no thought to what their enrichment would mean in terms of harm for others," who in this case included the people of

1. Some sources cited in this Article are written in languages other than English; text from such authorities has been translated into English for the reader's convenience.

2. The formal title for judges in the English Commercial Court is "Justice." *See High Court Judges*, Cts. & Tribunals Judiciary, https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judges/high-court-judges/ (last visited Apr. 22, 2024). This Article uses the terms "Justice" or "Judge" to refer to such individuals and other English judges.

3. The English Commercial Court, established over 125 years ago, is a specialist court that handles complex national and international commercial disputes. *Commercial Court*, GOV.UK, https://www.gov.uk/courts-tribunals/commercial-court (last visited Apr. 22, 2024).

4. *See generally* Federal Republic of Nigeria v. Process & Indus. Devs. Ltd. [2023] EWHC (Comm) 2638 (Eng.) [hereinafter *2023 Nigeria Decision*].

5. Federal Republic of Nigeria v. Process & Indus. Devs. Ltd. [2023] EWHC (Comm) 3320 [45]–[47] (Eng.) [hereinafter *Set-Aside Decision*].

6. *2023 Nigeria Decision*, *supra* note 4, paras. 493–497.

7. *Id.* paras. 495, 509.

8. *See id.* paras. 494, 510.

9. *See id.* paras. 496, 511–512.

Nigeria, "already let down in so many ways."[10] Faced with such facts, the Judge used his judgment as an opportunity to encourage the international arbitral community to reflect on important considerations ranging from the need for professionalism in drafting major commercial contracts involving a state, to participation and adequate representation in arbitrations over significant disputes involving states and state-owned entities.[11]

This article sets out a short timeline of the events leading to the 2023 Nigeria Decision[12] and then examines the legal aspects and implications of Justice Knowles' decisions in more detail through the lens of international arbitration.[13] The final section discusses the Judge's broader reflections for the arbitral community, in particular those that concern—whether directly or indirectly—the exchange of evidence in arbitration.[14] This article offers three broad conclusions: (i) that this case is a useful reminder of the importance of evidence, and document production in particular, to uncovering the truth; (ii) that even if there is no affirmative duty of disclosure in an arbitration, even a seemingly innocuous undertaking to "explain how the [contract] came about"[15] may be regarded as a half-truth if material facts are omitted, with important implications for counsel in drafting and questioning a witness's statements; and (iii) that the English court's veiled criticism of the degree of inquiry and testing of the evidence undertaken by the tribunal should be remembered in considering how far a tribunal should go on its own, even in an adversarial process.

As P&ID's Leading Counsel observed, this case is potentially "the most important case about international arbitration to be heard in London for a very long time."[16] It thus merits careful consideration by arbitration practitioners, in particular if the "deeply unhappy"[17] matters that came before the English court in this instance might be avoided in the future.

II. TIMELINE OF THE EVENTS LEADING TO THE 2023 NIGERIA DECISION

In 2010, Nigeria (through the Nigerian Ministry of Petroleum Resources) entered into a Gas Supply and Processing Agreement for Accelerated Gas Development (GSPA) with P&ID for a stated duration of twenty or more years.[18] Under the

10. *Id.* para. 592.

11. *Id.* paras. 578–591.

12. *See infra* Section II.

13. *See infra* Section III (examining the English Arbitration Act 1996 provisions considered by Justice Knowles concerning "serious irregularity," the requirement for "substantial injustice," and timing of applications to set-aside). Section III also deals with the Judge's finding that this case merited a full set-aside of the award (as opposed to a partial set-aside or remittance of the award to the arbitral tribunal) and reflects on the scope of the *2023 Nigeria Decision*. *See id.*

14. *See infra* Section IV.

15. *2023 Nigeria Decision*, *supra* note 4, para. 247.

16. *Set-Aside Decision*, *supra* note 5, para. 42.

17. *2023 Nigeria Decision*, *supra* note 4, para. 594.

18. *Id.* paras. 1–8.

GSPA, Nigeria was required to supply "wet" gas to processing facilities constructed and operated by P&ID.[19] P&ID was supposed to transform the wet gas into "lean" gas and deliver it to Nigeria to be used for power.[20] Neither occurred.[21] The GSPA provided for arbitration under the rules of the Nigerian Arbitration and Conciliation Act 2004 ("2004 Nigeria Arbitration Rules"),[22] with London as the venue (later also held to be the seat[23]).[24] P&ID commenced arbitration in August 2012; in January 2017, following separate awards on jurisdiction and liability, the distinguished arbitral tribunal—composed of Sir Anthony Evans; Chief Bayo Ojo, SAN; and Lord Leonard Hoffman as chairman—issued its final award, ordering Nigeria to pay damages of U.S. $6.6 billion plus interest to P&ID (the "Final Award").[25]

In February 2016, during the course of arbitration and prior to the issuance of the Final Award, the Nigerian Economic and Financial Crimes Commission (EFCC) conducted certain investigations into P&ID[26] and thereafter recommended an inquiry into the circumstances surrounding the 2010 awarding of the GSPA, including an investigation of the key parties to the contract.[27] In June 2018, at the request of Nigeria's Attorney General, the EFCC commenced a further investigation into the GSPA, the arbitration, and the awards that had been issued.[28]

19. *Id.* para. 7.

20. *Id.*

21. *Id.* para. 8.

22. The act has since been replaced by the Nigeria Arbitration and Mediation Act 2023. Timi Balogun & Letizia Ceccarelli, *Nigeria Reform of Arbitration Law: A Closer Look at the Major Legislative Changes*, Squire Patton Boggs (June 2023), https://www.squirepattonboggs.com/en/insights/publications/2023/06/nigeria-reform-of-arbitration-law-a-closer-look-at-the-major-legislative-changes.

23. The seat of the arbitration can be of critical importance in international arbitration. 1 Gary B. Born, International Commercial Arbitration § 14.01[A] (3d ed. 2021). The seat of arbitration is not a geographical reference, but rather, is a choice-of-law concept which determines the domicile of the arbitration. *Id.* This choice submits the arbitration to the procedural law of the seat. *Id.*

24. Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria [2019] EWHC (Comm) 2241 [108] (Eng.) [hereinafter *English Enforcement Order*]. The arbitration agreement, in relevant part, stated: "[t]he venue of the arbitration shall be London, England or otherwise as agreed by the Parties." *Id.* para. 6. The parties disputed whether England was the seat of the arbitration. *See id.* para. 4.

25. *2023 Nigeria Decision*, *supra* note 4, paras. 9–10. By the time of the *2023 Nigeria Decision*, the total liability including interest was approximately U.S. $11 billion. *Id.* para. 4. *See also infra* note 174 (providing information about the arbitral tribunal).

26. *See id.* para. 338. The EFCC is a statutory body under the Nigerian Economic and Financial Crimes Commission (Establishment) Act 2004, with the power to investigate potential economic and finanical crimes. *See The Establishment Act*, EFCC, http://www.efcc.gov.ng/efcc/about-us-new/the-establishment-act (last visited Apr. 22, 2024).

27. *2023 Nigeria Decision*, *supra* note 4, para. 349. The EFCC noted insofar as the arbitration was concerned that "[t]he Arbitral panel that adjudicated the matter relied on documents and at face value, it acted in accordance with the law" and that "[t]o investigate the panel might not be expedient for the difficulties of jurisdiction and would prejudice a judicial process." *Id.*

28. *Id.* para. 409. *See* Ohio Omiunu & Oludara Akanmidu, *Reflections on* Nigeria v. Process and Industrial Developments Limited, *See* Ohio Omiunu & Oludara Akanmidu, *Reflections on* Nigeria v. Process and Industrial Developments Limited, 53 N.Y.U. J. Int'l L. & Pol. Online Forum 110, 118–19 (May 2021),

In August 2019, Mr Justice Christopher Butcher of the English Commercial Court[29] granted P&ID leave to enforce the Final Award.[30] After the EFCC began interviewing public officials involved with the signing of the GSPA in September 2019, it received bank records showing that P&ID had made payments to several Nigerian officials over a period of years.[31] Shortly afterwards, various individuals—including Grace Taiga, who became Legal Director at the Ministry of Petroleum Resources shortly before the GSPA was entered into—and P&ID were charged with a number of offenses under Nigerian law, including corrupt practices and intent to defraud in connection with events surrounding the formation of the GSPA.[32] P&ID was ultimately convicted of money laundering, tax evasion, and trading without proper authorizations.[33]

In December 2019, Nigeria challenged the arbitral awards in the English Commercial Court on substantive jurisdiction grounds and on the ground that the award was obtained by fraud or in a manner that was otherwise contrary to public policy.[34] Both grounds are laid out in England's arbitration statute, the Arbitration Act 1996 (the "1996 Act").[35] However, Nigeria's challenge was made nearly three years after the Final Award, and thus well beyond the 28-day time limit established in the 1996 Act.[36] It fell to the English court to determine whether Nigeria should be granted an extension of time.[37]

That issue was determined in Nigeria's favor in 2020 (the "2020 Nigeria Decision").[38] P&ID argued that Nigeria could not explain the "massive delay" in challenging the award, and that Nigeria had failed to "discharge [its] burden of

https://www.nyujilp.org/wp-content/uploads/2021/07/1-Online-Ohio-Oludara110-127-1.pdf (noting that English court decisions prior to the *2023 Nigeria Decision* have stated that the EFCC's investigations were comprehensive "albeit delayed," and asking whether Nigeria had "exposed the allegations of fraud solely to overturn this arbitration award without any significant lesson learned or change in attitude towards the broader issues of economic injustice which led to the scandal in the first place").

29. *Mr Justice Butcher*, Cts. & Tribunals Judiciary (Mar. 14, 2022), https://www.judiciary.uk/guidance-and-resources/mr-justice-butcher/.

30. *English Enforcement Order*, *supra* note 24, paras. 102, 108, 110.

31. *See 2023 Nigeria Decision*, *supra* note 4, para. 412.

32. *Id.* paras. 413–414. The individuals charged included Mrs. Taiga, Alhaji Mohammed Kuchazi (a former representative of P&ID), Brendan Cahill (co-founder of P&ID along with Michael Quinn), James Nolan (a P&ID employee), and Adam Quinn (one of Michael Quinn's two sons). *See id.* paras. 5, 33, 52, 112, 413–414.

33. *Id.* para. 413.

34. *Id.* para. 415.

35. Arbitration Act 1996, c. 23, §§ 67, 68(2)(g) (Eng.) [hereinafter *1996 Act*].

36. *Id.* § 70(3).

37. *2023 Nigeria Decision*, *supra* note 4, para. 416. The court has discretion to extend the time limit pursuant to section 80(5) of the *1996 Act*. *1996 Act*, *supra* note 35, § 80(5).

38. Federal Republic of Nigeria v. Process & Indus. Devs. Ltd. [2020] EWHC (Comm) 2379 [277] (Eng.) [hereinafter *2020 Nigeria Decision*].

establishing that it did not know and could not with reasonable diligence have discovered the alleged fraud."[39] However, in exercising the judicial discretion afforded by the 1996 Act,[40] and considering the factors applicable to the exercise of that discretion set forth by the English Commercial Court in *AOOT Kalmneft v. Glencore International AG*,[41] Sir Ross Cranston sitting in the English Commercial Court held that Nigeria's conduct in relation to investigating the alleged fraud had been reasonable.[42]

In particular, the court found that: (i) P&ID had successfully concealed its fraud during the arbitration and for several years afterwards; (ii) there was nothing Nigeria ought to have been aware of that would have caused a reasonable person to have discovered the alleged fraud; (iii) Nigeria had established prima facie that the fraud had been concealed; and (iv) the integrity of the arbitration system and the English court system would both be threatened by enforcing an award that could implicate those systems in a fraudulent scheme.[43] The strong prima facie case that the court found Nigeria had established evidenced that (i) the GSPA was procured by bribery, and (ii) perjured evidence had been given in the arbitration proceedings that P&ID had relied on despite knowing of its falsities.[44] Based on evidence obtained during the EFCC's investigations, the court further found that the jurisdiction and liability stages of the arbitration had been tainted by the conduct of Nigeria's lead counsel, who had made payments to senior Nigerian public servants.[45]

The 2020 Nigeria Decision also dealt with documents obtained pursuant to an application by Nigeria to the U.S. District Court for the Southern District of New York under 28 U.S.C. § 1782 to obtain discovery of bank accounts of P&ID's

39. *Id.* para. 227. In particular, P&ID argued that Nigeria had ignored recommendations from its legal representatives and officials to investigate the circumstances surrounding the GSPA (in light of the EFCC's concurrent investigations) and had thus taken a "deliberate decision" not to investigate the fraud. *See id.* paras. 240–242.

40. *See 1996 Act*, *supra* note 35, § 80(5) (detailing that "any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of [the] court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement").

41. Some of these factors include: (i) the length of delay, (ii) the reasonableness of the applicant's conduct, (iii) whether the respondent contributed to or was prejudiced by the delay, (iv) the strength of the application, and (v) principles of fairness. *See* [2001] 2 All ER (Comm.) 577 (QB) [59] (Eng.).

42. *2020 Nigeria Decision*, *supra* note 38, paras. 260, 263–273, 275–276. The English Commercial Court recently applied the same *Kalmneft* factors, yet arrived at a different conclusion than the one reached in the *2020 Nigeria Decision*. *See* STA v. OFY [2021] EWHC (Comm) 1574 [18]–[24] (Eng.) (finding that the changes in government and the effects of bureaucracy could not in and of themselves justify the delay, and that the government had failed to provide evidence of any specific impact caused by the pandemic, such that the government's conduct could not be considered reasonable).

43. *2020 Nigeria Decision*, *supra* note 38, paras. 260, 263–273, 275–276.

44. *Id.* paras. 196–199, 210, 226.

45. *See id.* paras. 221–226 (containing the Judge's conclusions); *id.* paras. 102–105 (dealing with the evidence of payments obtained in the EFCC's investigations).

affiliates.[46] Those documents showed payments to Mrs. Taiga's daughter in December 2009, shortly prior to formation of the GSPA, and in January 2012, shortly before P&ID commenced arbitration proceedings.[47] These findings effectively laid the groundwork for Justice Knowles' 2023 Nigeria Decision.[48]

Following the 2020 Nigeria Decision, additional discovery orders were made in New York, England, the Cayman Islands, Cyprus, and the British Virgin Islands following applications by Nigeria.[49] A further important development occurred in October 2021, when P&ID's legal representatives—who were appointed subsequent to the arbitration proceedings—wrote to Nigeria disclosing that they had identified documents held by P&ID over which Nigeria might seek to assert privilege ("Internal Legal Documents").[50] As explained below, these documents, which reflected the confidential opinions and advice of lawyers representing Nigeria in connection with the GSPA, had been provided to P&ID during the arbitration.[51]

III. THE FINAL AWARD SET-ASIDE

Under England's 1996 Act, an award may be set aside where there has been a "serious irregularity affecting the tribunal, the proceedings or the award."[52] Awards that were "obtained by fraud" or in a manner that is "contrary to public policy," as was claimed in this case, constitute one of the specifically enumerated "serious irregularit[ies]" in the 1996 Act.[53] A "serious irregularity" alone is insufficient for a successful set-aside challenge—the challenging party must also demonstrate that the

46. *Id.* para. 111. Under 28 U.S.C. § 1782(a), a U.S. district court may grant a petition for judicial assistance to foreign litigants or tribunals. 28 U.S.C. § 1782(a); *see also* Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015) (explaining that § 1782(a) requires: "(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign [or international] tribunal, and (3) the application is made by a foreign or international tribunal or any interested person" (alteration in original) (quoting Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d Cir. 2012)); *Brandi-Dohrn*, 673 F.3d at 80 ("The goals of the statute are to provide 'equitable and efficacious' discovery procedures in United States courts 'for the benefit of tribunals and litigants involved in litigation with international aspects,' and to 'encourag[e] foreign countries by example to provide similar means of assistance to our courts.'") (alteration in original) (citations omitted).

47. *2020 Nigeria Decision*, *supra* note 38, paras. 20, 27, 124.

48. *2023 Nigeria Decision*, *supra* note 4, para. 595. Justice Knowles credited the *2020 Nigeria Decision* delivered by Sir Ross Cranston for "the acuity, independence, and courage involved." *Id.* Justice Knowles observed that "[w]ithout that decision and judgment an injustice would have remained, the population of an entire federation of states would have suffered from the economic consequences, and fundamental damage would have been left to the integrity of arbitration as a process." *Id.*

49. *2023 Nigeria Decision*, *supra* note 4, paras. 420–421.

50. *Id.* para. 419.

51. *See infra* Section III.B.

52. *1996 Act*, *supra* note 35, § 68(1), (3).

53. *Id.* § 68(2)(g). In total, there are nine "serious irregularit[ies]" listed in the *1996 Act*. *Id.* § 68(2)(a)–(i).

alleged irregularity has caused "substantial injustice."[54] Additionally, the court must be satisfied that the party seeking to set aside the award has not lost its right to object.[55]

A. The Fraud and Public Policy Grounds for Set-Aside

The focus of the fraud and public policy ground for set-aside in the 1996 Act is the parties' conduct during arbitration and the process by which an award is obtained.[56] As Justice Knowles explained, this basis for challenging an award is "of fundamental character to the arbitration process because it goes to the integrity of that process."[57] When an arbitral award is obtained by fraud, the integrity of the

54. *Id.* § 68(2).

55. *See id.* § 68(1) (providing that "[a] party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)"). The *2023 Nigeria Decision* contains a useful summary of the operation of these provisions.

56. *2023 Nigeria Decision*, *supra* note 4, para. 474. Similarly, the UNCITRAL Model Law on International Commercial Arbitration provides that an award may be set aside when it is "in conflict with the public policy of [the] State." U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on International Commercial Arbitration 1985 With Amendments as Adopted in 2006, at 22, art. 34(2)(b)(ii), U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008) [hereinafter 1985 UNCITRAL Model Law]. "The question of whether to add additional grounds for setting aside an award [to the Model Law] was raised . . . during the Commission's deliberations on Article 34," following comments from the United Kingdom that article 34(b)(ii) might not fully capture certain situations, such as potentially perjured evidence submitted in the arbitration; yet, despite the concern, the Commission declined to add any new grounds. Howard M. Holtzmann & Joseph Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary 913 (1989). *See also* United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5(2)(b), June 10, 1958, 21 U.S.T. 2517 [hereinafter Convention on the Recognition and Enforcement of Foreign Arbitral Awards] (providing for non-recognition or enforcement of arbitral awards where such "would be contrary to public policy"). The Federal Arbitration Act provides for vacatur of an award "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). In France, domestic awards are subject to review based on "French standards of morality and justice (*ordre public interne*), [whereas] international awards—regardless of where they were rendered—are subject to a presumably narrower standard of review under internationally recognised norms (*ordre public international*)." *See* Joseph D. Pizzurro, Robert B García & Juan O Perla, *Substantive Grounds for Challenge*, Glob. Arb. Rev. (June 8, 2021), https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/substantive-grounds-challenge [hereinafter Pizzurro et al.] (first citing Code de Procédure Civile [C.P.C.] [Civil Procedure Code] arts. 1492 5º, 1520 5º (Fr.) [hereinafter *French Civil Procedure Code*]; and then citing Frank-Bernd Weigand, Practitioner's Handbook on International Commercial Arbitration § 1.159 (2nd ed. 2010)); *see also* Lei No. 9.307, de 23 de Setembro de 1996, Col. Leis Rep. Fed. Brasil, 188 (9): 4281, Setembro 1996 (Braz.) (stating that an award may be set aside if it is proven to have been rendered due to misfeasance or active or passive bribery); Código de Comercio [CCom], art. 1457(II), Diario Oficial de la Federación [DOF] 13-12-1889, últimas reformas DOF 13-06-2014 (Mex.) (noting that an award may be set aside if it conflicts with public policy).

57. *2023 Nigeria Decision*, *supra* note 4, para. 476. The Judge observed that the serious irregularity ground concerning fraud and public policy is founded on the principles set out in section 1 of the *1996 Act*, which provides that: "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; . . . ." *See id.* para. 475.

process is compromised,[58] and to stand by such an award "in the name of supporting arbitration as a process achieves the opposite."[59]

B. Not One but Three Serious Irregularities

Justice Knowles identified three "serious irregularit[ies]" in the Nigeria case, each of which "amounted to fraud by which the Awards were obtained, and by reason of them the Awards or the way in which the Awards were procured was contrary to public policy."[60] These were: (i) provision of false witness evidence ("Irregularity 1");[61] (ii) ongoing bribery of an official during the arbitration ("Irregularity 2");[62] and (iii) improper retention of the Internal Legal Documents received during the arbitration ("Irregularity 3").[63]

As to Irregularity 1, the Judge examined the witness statement of the co-founder of P&ID, Michael Quinn, which Nigeria alleged was perjured.[64] The statement was prepared by P&ID's former legal representative and purported to explain "how the GSPA came about."[65] However, the statement omitted mention of the bribery of Nigerian government officials at the time of the GSPA, which Justice Knowles found

58. *Id.* para. 476.

59. *Id.* Generally, as with all claims of fraud, a high threshold applies to establishing this basis for set-aside. *See, e.g.*, *id.* para. 477 (citing Lesotho Highlands Dev. Auth. v. Impregilo SpA [2005] UKHL 43, [2006] 1 AC 221 (HL) [28] (appeal taken from Eng.) (Eng.)). "Fraud (that is dishonest, reprehensible or unconscionable conduct) must be distinctly pleaded and proved, to the heightened burden of proof . . . ." *Id.* para. 477 (quoting Chantiers de l'Atlantique SA v. Gaztransport & Technigas SAS [2011] EWHC (Comm) 3383 [56] (Eng.)). Similarly, English courts have taken the view that public policy considerations "should be approached with extreme caution." *See id.* para. 478 (suggesting that the court "has to be shown that there is some illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised" (quoting Cuflet Chartering v. Carousel Shipping Co. Ltd. [2001] 1 All ER (Comm.) 398 (QB) [10] (Eng.))). *See also* Nigel Blackaby et al., Redfern and Hunter on International Arbitration § 10.81–10.82 (7th ed. 2023) (explaining that an award may be contrary to public policy if it is repugnant to fundamental notions of justice or morality, or if it contravenes important national interests).

60. *2023 Nigeria Decision*, *supra* note 4, para. 493.

61. *See id.* paras. 168–177, 247–254, 417, 494.

62. *See id.* paras. 401–405, 495.

63. *See id.* paras. 209–217 (discussing transmission of Nigeria's Internal Legal Documents to P&ID at the outset of the arbitration proceedings, and P&ID's legal representatives' knowledge of such documents); *id.* paras. 256–300 (analyzing the context of the examination of the liability phase of the arbitration proceedings); *id.* para. 419 (discussing events after the issuance of the Final Award); *id.* paras. 428, 430–431, 444, 453 (discussing individuals against whom allegations of bribery and corruption were made); *id.* paras. 493–499, 511 (concluding that the retention of Nigeria's Internal Legal Documents by P&ID constituted a "serious irregularity").

64. Mr. Quinn's statement was originally relied on in the dispute over the Tribunal's jurisdiction. *Id.* para. 250. Ultimately, the statement also served as P&ID's factual evidence in the arbitration as a whole (notwithstanding Mr. Quinn died prior to the arbitral hearing on liability). *See id.* paras. 228, 247–254.

65. *Id.* paras. 228–230, 247, 494.

to have been proved by Nigeria.[66] In particular, the court found that Mr. Quinn had known that the bribery of Mrs. Taiga was "involved in bringing the GSPA about but his explanation deliberately excluded that fact."[67]

As to Irregularity 2, the Judge found that P&ID had continually paid the same former government official, Mrs. Taiga, *during* the arbitration to buy her maintained silence about the fact that she had been bribed when the GSPA was formed.[68]

Finally, regarding Irregularity 3, the Judge found that there had been "a flow of over 40 of Nigeria's Internal Legal Documents to P&ID" during the course of the arbitral proceedings.[69] At least some of those documents were "plainly subject to legal professional privilege" and their transmission was "not the result of incompetence."[70] Access to these documents "enabled P&ID to track Nigeria's internal consideration of merits, strategy and settlement during the Arbitration," and also "to monitor whether Nigeria had become aware of the fact that the Tribunal and Nigeria were being deceived."[71]

Although the Judge made separate findings on each of these irregularities, he observed that they were ultimately interrelated and that at their core was the critical fact that P&ID had bribed a Nigerian government official at the time the GSPA was created.[72] In particular, it was "the fact of that bribery that Mr Michael Quinn falsely concealed by the words of his witness statement" (Irregularity 1),[73] "and that the continued bribery or corrupt payments sought to suppress" (Irregularity 2).[74] It was

66. *Id.* para. 494. The Judge further found that such conduct was "dishonest by the standards of ordinary decent people" and that while he did not consider it necessary to determine whether P&ID appreciated that they were being dishonest, in his view they did. *Id.* paras. 252–254. Mr. Quinn's false statements were that project financing was in place as required under the GSPA and that engineering designs had been completed for the project contemplated by the GSPA with resulting sunk costs of U.S. $40 million. *Id.* paras. 243–246.

67. *Id.* para. 249.

68. *Id.* para. 495. In particular, the Judge referred to various payments made in 2015 and 2016. *Id.*; *see also id.* paras. 402–405.

69. *Id.* para. 496.

70. *Id.* paras. 210–211. P&ID's former legal representatives had received the Internal Legal Documents. *Id.* para. 214. Having heard testimony from those individuals, the Judge found that as legal professionals they "appreciated that these at least included documents that were privileged" and that "[t]heir decision not to put a stop to it, at least by informing Nigeria or immediately returning the documents they knew were received, was indefensible." *Id.* paras. 214–215. Even recipients of the documents that were not legal representatives "appreciated that P&ID should not have the documents" and "that the receipt and use of [them] was 'less than honest.'" *Id.* para. 215.

71. *Id.* para. 217. The Judge later held that the documents were "material" in that "they showed to P&ID that Nigeria had no awareness" that a government official had been bribed when the GSPA came about, "and that [the] bribery or corrupt payments continued to buy [Mrs. Taiga's] silence." *Id.* para. 496.

72. *Id.* para. 509.

73. *Id.*

74. *Id.*

that underlying bribery "that P&ID was monitoring (among other things) by its retention of Nigeria's Internal Legal Documents" (Irregularity 3).[75]

C. Absent the Serious Irregularities the Outcome Would Have Been Different

Under English law, identifying a "serious irregularity" is not sufficient for an arbitral award to be set aside.[76] The court must also conclude that the irregularity in question "caused or will cause substantial injustice to the applicant."[77] On this point, Justice Knowles relied on the Privy Council[78] case, *RAV Bahamas Ltd. v. Therapy Beach Club Inc.*, which considered section 90 of the Bahamas Arbitration Act 2009—a section modeled on and materially identical to section 68 of the 1996 Act, at issue in the Nigeria case.[79] There, Lords Nicholas Hamblen and Andrew Burrows explained that "substantial injustice" means more than merely "some injustice."[80] In particular, "[t]here will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different."[81] This does not mean "that the outcome 'would necessarily or even probably be different.'"[82] Rather, the applicant must show that its position is reasonably arguable, and that had the tribunal found in its favor, a different conclusion may have been reached.[83]

Justice Knowles expressed "no hesitation" in concluding that Nigeria has suffered substantial injustice on the basis of Irregularities 1 and 2.[84] For example, on Irregularity 1, the Judge stated "that the [a]rbitration would have been completely different, and in

75. *Id.*

76. *1996 Act*, *supra* note 35, § 68(1)–(2).

77. *Id.* § 68(2). As Justice Knowles explained, "when section 68 refers to seriousness its focus is on the consequences, and specifically the consequences for justice." *2023 Nigeria Decision*, *supra* note 4, para. 499.

78. The Privy Council is an advisory body which advises England's monarch on various executive, legislative, and judicial matters. David Torrance, *The Privy Council: History, Functions and Membership*, UK Parliament: House of Commons Libr. (Nov. 15, 2023), https://commonslibrary.parliament.uk/research-briefings/cbp-7460.

79. [2021] UKPC 8 [1] (appeal taken from Bah.) (Eng.) [hereinafter *RAV Bahamas*].

80. *2023 Nigeria Decision*, *supra* note 4, para. 500 (citing *RAV Bahamas*, *supra* note 79, para. 33).

81. *Id.* (quoting *RAV Bahamas*, *supra* note 79, para. 34).

82. *Id.* (quoting *RAV Bahamas*, *supra* note 79, para. 34).

83. *See id.* ("The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected." (emphasis omitted) (quoting *RAV Bahamas*, *supra* note 79, para. 30)). *See also* HL Deb (28 Feb. 1996) (569) col. 18GC (UK).

84. *2023 Nigeria Decision*, *supra* note 4, para. 511.

ways strongly favourable to Nigeria, had the fact of bribery . . . been before the tribunal."[85] This "would have brought in the issue whether the GSPA was procured by fraud, and as a result voidable."[86] The tribunal's approach to the rest of Mr. Quinn's evidence would, as a result, have "completely altered."[87] Irregularity 2, the ongoing bribery of a Nigerian official during the arbitration, also created a substantial injustice.[88] On Irregularity 3, the improper retention of Internal Legal Documents, the Judge found that the "nature and contents of the documents, and the scale, continuity and circumstances of P&ID's conduct were such that . . . Nigeria's right to confidential access to legal advice was utterly compromised."[89] The "effects of P&ID's abusive conduct" meant that "[i]f this was a fight it was not a fair one, and could not lead to a just result," such that "justice calls out for correction."[90]

D. Nigeria's Delays Excused

As explained above, Nigeria had already successfully sought an extension of time to challenge the Final Award in the 2020 Nigeria Decision, notwithstanding a delay of some three years.[91] However, Justice Knowles was still required to determine whether Nigeria had lost its right to object on the basis that it could have discovered the facts giving rise to its objections had it exercised reasonable diligence.[92] Though the burden of proof was on Nigeria in this regard, Nigeria did not call witnesses "as to its knowledge [or] any factual circumstances bearing on what reasonable diligence

85. *Id.* para. 510.

86. *Id.* As discussed further below, *infra* Section III.F, a contract procured by fraud is not *void ab initio* under English law (in contrast to certain other jurisdictions). Rather, it is voidable at the instance of the innocent party. A contract that is *void ab initio* is "[n]ull from the beginning, as from the first moment when a contract is entered into." *See Void*, Black's Law Dictionary (11th ed. 2019).

87. *2023 Nigeria Decision*, *supra* note 4, para. 510.

88. *See id.* paras. 510–511.

89. *Id.* para. 512. On this point, the Judge distinguished authority from a litigation context. *See id.* para. 513 (discussing an appeal that contemplated "whether the purchase of stolen privileged documents had given 'any significant procedural advantage' at the trial," but found that it had not (citing Hamilton v. Al Fayed [2001] EMLR 15 (AC) [122] (appeal taken from Eng.) (Eng.))). He observed that in a litigation context, "[i]t was realistically possible to enquire into the question of tactical advantage and effect on verdict," whereas in a set-aside inquiry into arbitration proceedings, "[t]here are limits to the feasibility and reliability of an attempt to capture the advantages" obtained. *Id.* para. 514.

90. *Id.* paras. 516–517 (internal quotation marks omitted).

91. *See* discussion *supra* Section II.

92. *See 1996 Act*, *supra* note 35, § 68(1) (providing that "[a] party may lose the right to object (see section 73(1)) and the right to apply is subject to the restrictions in section 70(2) and (3)"). *See also id.* § 73 (stating that "[i]f a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making . . . any objection . . . that there has been any other irregularity affecting the tribunal or the proceedings . . . [they] may not raise that objection later . . . unless [they] show[] that, at the time [they] took part or continued to take part in the proceedings, [they] did not know and could not with reasonable diligence have discovered the grounds for the objection").

required."[93] Nonetheless, the Judge found that during the course of the arbitration, Nigeria had not known, and could not with reasonable diligence have discovered, the grounds for the objections raised in Nigeria's set-aside application.[94]

The Judge distinguished cases where "the possibility of dishonest evidence should be in the mind of a party who asserts a case which is . . . 'flatly inconsistent' with the evidence of an opposing party's witness" from those "where the opposing party's witness is further concealing bribery."[95] In the latter category of cases, discovery depended on something happening to cause the concealment to become apparent.[96] While P&ID claimed that there were a number of "red flags" that should have put Nigeria on notice, Justice Knowles was unpersuaded.[97] He emphasized that "reasonable diligence" did not require Nigeria to actively "look for bribery."[98] Rather, Nigeria was responsible only for diligence that would have uncovered that the award had been obtained by fraud or in a manner contrary to public policy because of the perjured evidence, the ongoing bribes, and the receipt and retention of Nigeria's Internal Legal Documents.[99] Because the Judge did not believe that there was anything that would have put Nigeria on a path to such discovery until after the arbitration, Nigeria's right to object was not lost.[100]

E. A Case So Serious as to Merit Set-Aside

In the event of a successful 1996 Act, section 68 application, an English court will not exercise its powers to set aside an arbitral award "unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."[101] Set-aside is "reserved for the most serious cases, where there is no real prospect of justice being done by the same tribunal upon reconsideration, and where the irregularity really goes to the root of the award (and where there is a real sense of the tribunal having behaved very badly indeed)."[102]

In a short judgment issued in December 2023, in which P&ID's application for permission to appeal was also rejected,[103] the Judge held that "this case is on any view

93. *2023 Nigeria Decision*, *supra* note 4, para. 540.

94. *Id.* para. 573.

95. *Id.* para. 547.

96. *Id.*

97. *Id.* paras. 548, 564.

98. *Id.* para. 564.

99. *Id.* para. 569.

100. *Id.* paras. 569, 573.

101. *1996 Act*, *supra* note 35, § 68(3). Pursuant to that provision, the English court also has the option to set aside an award in part or to remand the case back to the tribunal. *Id.*

102. *See Set-Aside Decision*, *supra* note 5, para. 44 (describing P&ID's argument).

103. *Id.* paras. 1–5, 7–42. *See 1996 Act*, *supra* note 35, § 68(4) (providing that leave to appeal any set-aside decision must be obtained). To succeed in an application for permission to appeal, the applicant must demonstrate that the appeal has a real prospect of success, or that there is another compelling reason for

one of the most serious" such that there was "no real prospect of justice being done by the Tribunal upon reconsideration."[104] The Judge made clear that this finding was not connected to the behavior of the tribunal, which in this case "ha[d] been caused to consider and reach and publish to the parties its substantive conclusions on liability and quantum on foundations that were false."[105] But things had gone "so far and so deep" that this was not a case where remittance[106] would be appropriate.[107]

F. Reflections on the Scope of the Fraud and Public Policy Basis for Set-Aside

It would be a mistake to characterize the 2023 Nigeria Decision as expanding the narrow approach that English courts have traditionally taken with respect to review of arbitration awards for "serious irregularity."[108] The extraordinary facts of this case put it in the category of "remarkable" cases where the English courts are compelled to intervene.[109] What transpired in this case was "so far removed from

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the appeal to be heard. *1996 Act*, *supra* note 35, § 69(3). P&ID contended that the court had erred in: (i) failing to correctly identify and apply the test of causation under section 68(2)(g); (ii) concluding that Nigeria had discharged its burden of showing that it could not with reasonable diligence have discovered the grounds for its objection (namely perjury and bribery) during the course of the arbitration; and (iii) holding that Mr. Quinn's witness statement contained an express representation capable of amounting to perjury. *Set-Aside Decision*, *supra* note 5, paras. 10–37. The Judge rejected all three arguments. *Id.* paras. 10–37. P&ID also advanced five "compelling reasons" why the appeal should be heard, namely: (i) the value of the proceedings; (ii) its public importance due to the applicant's statehood; (iii) important public policy and arbitration practice questions and their implications for arbitrators and other participants in arbitral proceedings; (iv) the importance of the questions or law raised (in particular with respect to the "substantial injustice" test, the test for perjury and the duty to disclose adverse facts or defenses on pain of perjury); and (v) the potential professional consequences of the *2023 Nigeria Decision* for P&ID's legal representatives during the course of the arbitration. *Id.* para. 38. Justice Knowles did not agree that these reasons were compelling enough to grant leave to appeal. *See id.* paras. 39–42.

104. *Set-Aside Decision*, *supra* note 5, para. 45.

105. *Id.* paras. 45–46.

106. According to the *1996 Act*, a court may remit the award back to the tribunal for reconsideration. *See 1996 Act*, *supra* note 35, §§ 68(3), 69(7) (stating that "[t]he court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration"). Article 68(3) reflects "the principle of minimal court intervention in the arbitral process, because (i) it points out the presumption of the remission of the award back to the tribunal, (ii) it allows for preserving the healthy part of the award not affected by the alleged default." Piotr Wilinski, Excess of Powers in International Commercial Arbitration: Compliance with the Arbitral Tribunal's Mandate in a Comparative Perspective 187 (2021).

107. *Set-Aside Decision*, *supra* note 5, para. 46.

108. During the 2021–2022 Court year, the English Commercial Court received forty section 28 applications (a 54 percent increase from twenty-six applications in the previous year). Cts. & Tribunals Judiciary, The Commercial Court Report 2021–2022, at 12 (2023), https://www.judiciary.uk/wp-content/uploads/2023/04/14.244_JO_Commercial_Court_Report_WEB.pdf. Of those, five were dismissed without a hearing, one was dismissed at hearing, two were discontinued and one was transferred out, with thirty-one applications pending as of March 2023. *Id.* In the previous reporting period (2020–2021), only 4 percent of applications made were successful. *Id.* at 12–13.

109. *2023 Nigeria Decision*, *supra* note 4, para. 582.

what could reasonably be expected of the arbitral process that" it could not realistically be expected that the court would not take action.[110]

Generally, and as set out further above, the Judge took care to emphasize that taking action in this context was for the purpose of supporting—as opposed to interfering with—the arbitral process.[111] However, and while accepting that it was not his role to decide the merits of the dispute and that the tribunal had been met with "many inexcusable delays and failures [by Nigeria] properly to engage," Justice Knowles nonetheless expressed surprise at certain conclusions that the tribunal had reached.[112] In particular, he noted that the brevity of the GSPA—twenty pages—was "truly striking in the context of a multi-billion dollar long term," complex infrastructure "project of national significance" for Nigeria;[113] however, the GSPA's length had "attracted no discussion from the Tribunal."[114] In dealing with the tribunal's quantum findings, the Judge was more critical, observing that he "struggle[d] to accept what happened in a dispute of this importance and magnitude," even allowing for the difficulties that Nigeria's conduct created.[115]

Although it is not for a judge of the court to decide the merits of an arbitral dispute,[116] the fraud and public policy ground for set-aside—along with non-recognition and enforcement of awards—may afford courts some greater latitude when it comes to overturning "infirm awards."[117] Even when decisions are carefully crafted to express concern with protecting against fraud on the arbitral *process*, as the 2023 Nigeria Decision was, any decisions brought on this ground are inevitably concerned at least in part with the *substance* of the award.

In this case, for example, the ongoing bribes throughout the course of the arbitration were connected to the fact—evidenced in part through post-arbitration court discovery—that the GSPA itself had been procured through bribery.[118] Had that finding underlying the 2023 Nigeria Decision been made by the tribunal, that

110. *Id.* para. 517 (referring to the phrase adopted by Mr Justice Cresswell in "The 'Petro Ranger' [2001] EWHC 418 (Comm); [2001] 2 Lloyd's Rep 348 at 351"); *see also* HL Deb (28 Feb. 1996) (569) col. 18GC (UK) (providing that the *1996 Act* includes a clause that enables a party to challenge an arbitration award on the grounds of "serious irregularity" affecting the tribunal).

111. *See, e.g.*, *2023 Nigeria Decision*, *supra* note 4, paras. 476, 517, 574, 595.

112. *See, e.g.*, *id.* paras. 312–317.

113. *Id.* para. 314.

114. *Id.*

115. *Id.* para. 397. *See also infra* note 175.

116. *2023 Nigeria Decision*, *supra* note 4, para. 397.

117. Pizzurro et al., *supra* note 56.

118. Indeed, Justice Knowles observed that all three serious irregularities were ultimately interrelated because of the bribery at their core. *See 2023 Nigeria Decision*, *supra* note 4, para. 509. However, the Judge did not go so far as to say that the GSPA was an entirely fraudulent enterprise in the sense that it had been negotiated by P&ID to procure an award. *Id.* para. 490. The Judge found himself satisfied that P&ID had intended "to perform the GSPA when it entered into it, and that there were means by which it could have done so." *Id.* para. 490.

might not have rendered the GSPA *void ab initio*, since, under English law at least, there is no public policy that refuses to enforce a contract procured by bribery.[119] However, assuming English law had applied to the issue or that Nigerian law, if applicable, would reach the same result, the contract would have at least been voidable at Nigeria's election, and the tribunal's approach to the evidence would have been "completely altered."[120] In a sense, therefore, the 2023 Nigeria Decision can be characterized as akin to a substantive challenge in certain respects.

Cases from the law of other jurisdictions more directly contemplate that contracts procured by fraud or corruption cannot be enforced and that awards enforcing them are subject to set aside on grounds of public policy.[121] In a recent Paris Court of Appeal decision that annulled an ICC award based on an investment secured by defrauding government authorities, the court ruled that it had the power to review an award "in law and in fact" to determine whether it had violated international public order.[122] Another Paris Court of Appeal decision set aside two ICC awards rendered in favor of a French construction company against Libya on the basis of fraudulent collusion in the procurement of the underlying contract.[123] The Hague Court of Appeal adopted a similar approach, refusing to enforce an award on the basis of "strong indications" of corruption at the contract procurement stage.[124] As that court observed, the general premise that enforcement proceedings must not amount to disguised appeals should not prevent compliance with a fundamental rule of law, such as the prohibition against corruption.[125]

U.S. courts, applying the public policy ground for non-enforcement set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[126] have been more ambivalent. For example, the Second

119. Contracts to commit an illegal act and contracts procured by illegality are distinct. While the former are void, the latter are only voidable at the election of the innocent party with counter-restitution and can accordingly be enforced. Nat'l Iranian Oil Co. v. Crescent Petrol. Co. Int'l Ltd [2016] EWHC (Comm) 510 [49(1)]–[49(2)] (Eng.). In this instance, the substantive governing law of the GSPA was Nigerian law. However, Justice Knowles (perhaps on the assumption that English law would have applied to the issue) found that had the evidence of bribery in connection with the GSPA been before the tribunal, and had the tribunal found that the GSPA was indeed procured by fraud, the contract would have been voidable. *2023 Nigeria Decision*, *supra* note 4, para. 510.

120. *2023 Nigeria Decision*, *supra* note 4, para. 510.

121. Pizzurro et al., *supra* note 56 (first citing Société MK Grp. v. S.A.R.L. Onix, Paris, Jan. 16, 2018, No. RG 15/21703, para. 8 [hereinafter *Société MK Grp.*]; then citing Alstom Transp. SA v. Alexander Brothers Ltd., Paris, Apr. 10, 2018, No. 16/11182; then citing Libya v. Sorelec, Nov. 17, 2020, No. RG 18/02568 [hereinafter *Sorelec*]; and then citing Bariven SA v. Wells Ultimate Serv. LLC, Oct. 22, 2019, ECLI:NL:GHDHA: 2019:2677 [hereinafter *Bariven*]).

122. *Société MK Grp.*, *supra* note 121, para. 16.

123. *Sorelec*, *supra* note 121, para. 7. In this case, allegations of corruption had not been made before the tribunal itself (even though the facts that could have established such corruption were before it). *Id.*

124. *Bariven*, *supra* note 121, para. 5.8.

125. *Id.* para. 5.6.

126. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 56.

Circuit Court of Appeals has suggested that fraud in the underlying contract is "a matter to be determined exclusively by the arbitrators."[127] On the other hand, other Circuit Courts have made clear that "the fundamental equitable principle preventing courts from being made parties to fraud or other criminal acts"[128] applies with equal force under the New York Convention's public policy exception to enforcement and extends to awards obtained by fraud in underlying contracts.[129] Thus, though courts generally shy away from scrutinizing the merits of arbitral awards, some courts use the fraud and public policy basis for set-aside as a vehicle for protecting fundamental notions of justice.[130]

IV. LOOKING BEYOND THE DECISION: REFLECTIONS FOR THE ARBITRAL COMMUNITY

At the close of the 2023 Nigeria Decision, Justice Knowles reflected that while "[p]olicy, worldwide, properly limits challenges to arbitration awards," he found himself "acutely conscious of how readily the outcome could have been different, and of the enormous resources ultimately required from Nigeria as the successful party to make good its challenge."[131] In an unusual step, the Judge encouraged reflection by the arbitral community, state users of arbitration, and courts designated to supervise or oversee arbitration, highlighting the risk that "arbitration as a process [may] become[] less reliable, less able to find difficult but important new legal ground, and more vulnerable to fraud."[132]

Two of the Judge's reflections focused on the importance of disclosure and discovery of documents as enabling "the truth to be reached,"[133] and on the importance of legal representatives and other party appointees performing their work to an adequate and ethical standard—particularly when state parties are involved, or inequality of resources is a concern.[134]

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127. Europcar Italia, S.P.A. v. Maiellano Tours, Inc., 156 F.3d 310, 315 (2d Cir. 1998).

128. Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria, 844 F.3d 281, 287 (D.C. Cir. 2016) (internal quotation marks omitted) (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991)).

129. *See id.* at 287–89 (emphasizing that a party should not be allowed to benefit from its own fraud).

130. *See* John Terry, Emily Sherkey, T Ryan Lax & Chris Kinnear Hunter, *Substantive Grounds for Challenge*, Glob. Arb. Rev. (May 17, 2023), https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/substantive-grounds-challenge ("Appeals, where available, are the only meaningful way to challenge the substance of an arbitral award.").

131. *2023 Nigeria Decision*, *supra* note 4, para. 581.

132. *Id.* paras. 582–583.

133. *Id.* para. 586.

134. *Id.* paras. 585, 587–588. The Judge also reflected that "[t]he privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was not being done." *Id.* para. 589. In this regard, he asked the arbitral community to reflect on how suitable the process could be in a case where "public money amounting to a material percentage of a state's GDP or budget" is at stake, unless "accompanied by public visibility or greater scrutiny by arbitrators." *Id.* para. 591.

The remainder of this article briefly addresses these reflections and other comments made by the Judge concerning the tribunal's conduct in the context of the evidence exchange, discussing: (i) the importance of evidence in complex commercial arbitrations, including that obtained in ancillary court proceedings; (ii) ethical considerations for legal representatives in the preparation and presentation of evidence; and (iii) the importance of active evidence management by tribunals.

A. A Reminder of the Importance of Evidence in Reaching the Truth

It has been said that the extent of evidence in international commercial arbitration is more limited than it might be in litigations before national courts.[135] In modern international commercial arbitrations, these contrasts are reduced.[136] "[A]rbitration remains an adjudicative process, with the arbitrators functioning in a quasi-judicial capacity by providing the parties opportunities to be heard and rendering a reasoned, binding decision based on . . . evidentiary proof."[137]

Indeed, complex arbitrations often require extensive evidence, including cross-examination of witnesses, sworn statements, document disclosure or discovery, expert analyses, written and oral submissions, transcripts of proceedings, and similar procedural aspects.[138] Even in less complex disputes, it is not uncommon to encounter

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135. *See* McDonald v. City of W. Branch, 466 U.S. 284, 291 (1984) (explaining that "[the] record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and the rights and procedures common to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath, are often severely limited or unavailable" (alteration in original) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 57–58 (1974))); *see also* Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 592 (7th Cir. 2001) ("[P]arties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena."); Forsythe Int'l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990) ("As a speedy and informal alternative to litigation, arbitration resolves disputes without confinement to many of the procedural and evidentiary strictures that protect the integrity of formal trials.").

136. *See* Michal Malacka, *Evidence in International Commercial Arbitration*, 13 Palacký U. Olomouc Int'l & Compar. L. Rev. 94, 101–03 (2013) *See* Michal Malacka, *Evidence in International Commercial Arbitration*, 13 Palacký U. Olomouc Int'l & Compar. L. Rev. 94, 101–03 (2013), https://intapi.sciendo.com/pdf/10.1515/iclr-2016-0061 (noting that there are four categories of evidence and explaining how each category is commonly used in international commercial arbitrations).

137. Born, *supra* note 23, § 15.01[B] & n.23 (3d ed. 2021) ("[A]rbitration signatories are knowingly demanding judicialized arbitration by contracting to arbitrate under the available judicialized rules." (alteration in original) (first quoting Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39, 62 (1999)); ("[A]s arbitration has been called upon to assume the burden of resolving virtually every kind of civil dispute, it has taken on more and more features of a court trial." (alteration in original) (and then quoting Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. Ill. L. Rev. 1, 6 (2010))) (first citing Rémy Gerbay, *Is the End Night Again? An Empirical Assessment of the "Judicialization" of International Arbitration*, 25 Am. Rev. Int'l Arb. 223, 227–30 (2014); then citing Alan Redfern, *Stemming the Tide of Judicialisation of International Arbitration*, 2 World Arb. & Mediation Rev. 21, 27–28 (2008); and then citing Leon Trakman & Hugh Montgomery, *The "Judicialization" of International Commercial Arbitration: Pitfall or Virtue?*, 30 Leiden J. Int'l L. 405, 405–07 (2017)).

138. Born, *supra* note 23, § 15.01[B].

witness statements and examination, as well as a measure of document disclosure.[139] The proliferation of U.S.-style discovery tactics in international commercial arbitration has been met with some consternation, particularly among practitioners from civil law backgrounds,[140] with criticisms including mounting costs and delays.[141] Indeed, international parties may ask, "Why should they accept lesser evidentiary standards in an arbitration and give up the right to appeal if they will potentially spend as much money, time and resources as one would in court?"[142]

The 2023 Nigeria Decision serves as a timely reminder of the importance of evidence, and perhaps particularly document discovery, as a mechanism that facilitates finding the truth as a means to achieving justice.[143] In the underlying arbitration, very little documentary evidence appears to have been produced, with the tribunal left largely reliant on witness evidence—some consisting of witness statements from deceased individuals—and expert testimony.[144] Although party agreements may ultimately determine the scope of evidence exchange in international arbitration,[145] arbitrators and practitioners should remember that adequate exchange of information and strict adherence to ethical standards in such exchanges are vital to the fair outcome of arbitrations.[146] Of course, the lessons to be learned from the

139. *Id.*

140. *See, e.g.*, White & Case & Sch. of Int'l Arb. at Queen Mary Univ. of London, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World 13 (2021), https://www.whitecase.com/sites/default/files/2023-05/qmul-international-arbitration-survey-2021-web-single-final-v3.pdf (detailing that 27 percent of surveyed interviewees indicated that they would forgo document disclosure to make arbitration cheaper and faster).

141. *See, e.g.*, Steven C. Bennett, *"Hard" Tools for Controlling Discovery Burdens in Arbitration*, 84 Arb.: Int'l J. Arb. Mediation & Disp. Mgmt. 295–96, 296 n.4 (2018) (noting criticisms); Erik Schäfer, Herman Verbist & Christophe Imhoos, *Commission Report – Techniques for Managing Electronic Document Production When It Is Permitted or Required in International Arbitration (2012)*, *in* ICC Arbitration in Practice § 4(A)–4(B) (2d ed. 2015).

142. Hon. Ariel Belen, *No Reason to Fear Discovery in International Arbitration Seated in the United States*, JDSUPRA: JAMS ADR Blog (Mar. 31, 2021), https://www.jdsupra.com/legalnews/no-reason-to-fear-discovery-in-4649454/.

143. *See* Lucas V. M. Bento, The Globalization of Discovery: The Law and Practice Under 28 U.S.C. § 1782, at 22 (2019) (emphasizing the importance of the fact-finding process to uncover the truth and determine justice). *See also* Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."); Davies v. Eli Lilly & Co. [1987] EWCA (Civ) J0122-2 [11] (Eng.) (noting that disclosure reduces the possibility of surprise by putting "all cards face up on the table").

144. *See 2023 Nigeria Decision*, *supra* note 4, paras. 13–22 (indicating Justice Knowles' lack of confidence concerning the completeness of disclosure and his reliance on witness testimony).

145. *See* Gabrielle Kaufmann-Kohler & Philippe Bärtsch, *Discovery in International Arbitration: How Much Is Too Much?*, 2 SchiedsVZ 13, 14 (2004) (noting that national arbitrational laws or institutional evidentiary rules of the place of arbitration apply in the absence of a party agreement).

146. *See generally* Amy C Kläsener & Courtney Lotfi, *Party and Counsel Ethics in the Taking of Evidence*, Glob. Arb. Rev. (Sept. 3, 2021), https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/1st-edition/article/party-and-counsel-ethics-in-the-taking-of-evidence

Nigeria case should not be too readily universalized. The dearth of evidence before the tribunal in this case appears to have been caused primarily by Nigeria's weak defense; indeed, the tribunal was faced with a party that was largely absent.

In this case, it was the EFCC investigations and Nigeria's post-arbitration applications for discovery through court procedures that provided the "remarkable and crucial" evidence that had enabled judges in the English Commercial Court to determine that there had been a fraud in the arbitration that was rooted in the underlying contract.[147] Commenting specifically on the court-ordered discovery in the Nigeria case, Justice Knowles observed that "[t]he documents available through the process of disclosure have illustrated the importance of that process to a fair trial, and to achieving a just outcome."[148]

B. Ethical Considerations for Counsel in the Preparation and Presentation of Evidence

Central to the 2023 Nigeria Decision was the perjured witness evidence prepared by P&ID's legal representative that purported, as set forth in an introductory sentence, to "explain how the GSPA came about" but failed to mention the bribery that had taken place.[149] The startling facts of this case may make it unique.

(discussing the importance of fairness and ethical obligations for the production and testing of evidence in international arbitration).

147. *2023 Nigeria Decision*, *supra* note 4, para. 586.

148. *Id*. para. 15. Justice Knowles placed particular emphasis on the documents obtained through Nigeria's applications pursuant to 28 U.S.C. § 1782. *See generally In re* Application of the Fed. Republic of Nigeria, 20 Misc. 169, 2020 U.S. Dist. LEXIS 81154 (S.D.N.Y. May 7, 2020); Federal Republic of Nigeria v. VR Advisory Servs., 499 F. Supp. 3d 3 (S.D.N.Y. 2020); Federal Republic of Nigeria v. VR Advisory Servs., 27 F.4th 136 (2d Cir. 2022). Nigeria's applications in this regard were putatively concerned with the EFCC's investigations; however, by the time of the issuance of the above rulings, it was apparent that Nigeria was equally using the discovery obtained in the context of the English set-aside proceedings (in particular before Sir Ross Cranston). The U.S. District Court for the Southern District of New York held that given the putative aim of obtaining discovery was the EFCC investigations, Nigeria should have utilized available Mutual Legal Assistance Treaty (MLAT) procedures, and that it was not entitled to § 1782 discovery for the purposes of the English set-aside proceedings because those were of a "post-judgment" character. *VR Advisory Servs.*, 499 F. Supp. 3d at 10, 15–17. The Second Circuit disagreed, finding that the U.S.-Nigeria MLAT did not embody "proof-gathering restriction[s]" and that by suggesting it did, the district court had "erected an impermissible 'extra-statutory barrier[] to discovery' under § 1782." *VR Advisory Servs.*, 27 F.4th at 141, 158 (second alteration in original) (quoting In re Application of Aldunate, 3 F.3d 54, 59 (2d Cir. 1993)). The Second Circuit further held that even if the discovery had been concerned solely with gathering evidence for the English set-aside proceedings, the application should have been granted on the basis that the English court was "unquestionably a foreign tribunal" that had "scheduled a trial, a quintessential adjudicative proceeding, to determine the merits of a contention that an arbitral award should be vacated as fraudulently obtained." *Id.* at 158.

149. *See supra* Section III.B. The *2023 Nigeria Decision* resulted in Justice Knowles taking the extraordinary step of referring the matters dealt with in his judgment to the regulators of the legal profession in England and Wales, namely the Bar Standards Board (applicable to English barristers and specialized legal services businesses) and the Solicitors Regulation Authority (applicable to English solicitors). *2023 Nigeria Decision*, *supra* note 4, para. 593. While the handling of Nigeria's Internal Legal Documents and payment arrangements, which P&ID's English arbitration counsel stood to benefit from, were principal reasons for the referral, the Judge made clear that he was referring the entirety of his judgment to the

Nonetheless, Justice Knowles' reasoning suggests the care that must be taken by legal representatives when preparing evidence on behalf of parties, even around the use of seemingly innocuous introductory language. When a witness statement purports to explain an event but is in fact the product of half-truths, the consequences for parties may be significant.[150]

Importantly, legal representatives should not assume that parties to arbitrations are shielded by the lack of any positive duty to disclose potentially pertinent information. P&ID had made just that assumption with respect to the existence of pre-GSPA payments, arguing that there was no duty of disclosure because the arbitration was adversarial and was governed by the 2004 Nigeria Arbitration Rules, which permit, but do not require, a party to attach to their statement of claim or defense any documents that are relevant or on which they intend to rely.[151] P&ID further argued that no duty of disclosure was owed because: (1) under the 2004 Nigeria Arbitration Rules, the arbitral tribunal could have required the parties to produce evidence at any time;[152] (2) the tribunal did not order any disclosures similar to those required in an English law commercial litigation;[153] (3) the parties did not

applicable regulators (meaning that counsel's preparation of the perjured witness statement may also be dealt with). *Id.*

150. P&ID had submitted in its written closing that "all but one sentence of Mr. Quinn's evidence was accurate." *2023 Nigeria Decision*, *supra* note 5, para. 249. The Judge found that "one sentence is enough, when it said what it did" and that Mr. Quinn and P&ID had known the true position and chose that "one sentence" in order to conceal it. *Id.*

151. Arbitration and Conciliation Act (2004) Cap. (A18), arts. 18(3), 19(2) (Nigeria) [hereinafter *2004 Nigeria Arbitration Rules*]. The earliest version of the *2004 Nigeria Arbitration Rules* was modelled on the UNCITRAL Model Law 1985. *See* Simon Ejiofor Ossai, *Is the Nigerian Arbitration and Conciliation Act Suitable to Construction Disputes? A Critical Analysis*, Int'l Bar Ass'n (Dec. 7, 2021), https://www.ibanet.org/nigeria-arbitration-conciliation-act. On May 26, 2023, the president of the Federal Republic of Nigeria signed into law the Arbitration and Mediation Act 2023 which is modelled on the UNCITRAL Model Law 2006 with certain additions. Elizabeth Oger-Gross & Tolu Obamuroh, *New Arbitration Regime Comes into Force in Nigeria*, White & Case (June 21, 2023), https://www.whitecase.com/insight-alert/new-arbitration-regime-comes-force-nigeria.

152. Article 24(2) provides (somewhat vaguely) that "the presiding arbitrator may, if so authorised by the parties or all the members of the arbitral tribunal, decide questions relating to the procedure to be followed at the arbitral proceedings." *2004 Nigeria Arbitration Rules*, *supra* note 151, art. 24(2).

153. In English commercial litigation, parties owe specific duties to the court with respect to disclosure. *See* Eng. CPR 1996, Practice Direction 57AD, para. 3.1 (including "(1) to take reasonable steps to preserve documents in its control that may be relevant to any issue in the proceedings; (2) . . . to disclose known adverse documents, unless they are privileged . . . regardless of whether or not any order for disclosure is made; (3) to comply with any order for disclosure made by the court; (4) to undertake any search for documents in a responsible and conscientious manner to fulfil the stated purpose of the search; (5) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and (6) to use reasonable efforts to avoid providing documents to another party that have no relevance to the Issues for Disclosure in the proceedings").

exchange Redfern Schedules;[154] and (4) there is no general duty "to advise an opponent of substantive defen[s]es."[155]

In the 2023 Nigeria Decision, Justice Knowles acknowledged that the question of whether there was a general duty to disclose the pre-GSPA payments was "open to debate."[156] Ultimately, however, he held that debate to be irrelevant because P&ID had chosen to "take on the task of disclosing how the GSPA came about" and then had done so dishonestly.[157] In other words, it appears that in the Judge's view, a party that offers to explain an issue—even in a generic manner—is then bound to ensure that the explanation does not deliberately exclude information such that the evidence is rendered false or misleading. While the scope of the Judge's position—potentially broad on its face—is not clearly defined, it is cabined in the context of English set-aside proceedings, because as explained above, the incomplete evidence must amount to a "serious irregularity," absent which the outcome of the proceeding might well have been different.[158]

P&ID challenged this analysis in its application for permission to appeal, contending that Mr. Quinn's witness statement had not contained any "express representation capable of amounting to perjury" and that "[c]orrectly analysed, the case could only have been one of non-disclosure" which, in the absence of any duty of disclosure, could not satisfy the requirements for set-aside on fraud or public policy grounds.[159] P&ID further argued that "[i]f a failure to mention a fact or defence that a party is aware of amounts to perjury . . . then mere introductory sentences or even headings are liable to create a duty of disclosure . . . which applies at all times, regardless of . . . relevant rules or [what] has been ordered by the Court or tribunal."[160] That, P&ID argued, was a troubling finding in terms of its implications for arbitration generally.[161] The Judge disagreed, emphasizing that "[t]here is a world of difference between an intentional misrepresentation (even if in an introduction) designed to conceal the truth, and an introductory statement or heading that does not and is not intended to do that."[162]

Acknowledging the extremity of the facts in this case, the consequences of Justice Knowles' finding of perjury on account of the somewhat pro-forma introductory

154. A Redfern Schedule is a device used to organize requests for production of documents in arbitration. Sam Luttrell & Peter Harris, *Reinventing the Redfern*, 33 J. Int'l Arb. 353, 353 (2016).

155. *2023 Nigeria Decision*, *supra* note 4, para. 251.

156. *Id.*

157. *Id.* para. 252.

158. *1996 Act*, *supra* note 35, § 68(1)–(2). *See also supra* Sections III.B–III.C.

159. *Set-Aside Decision*, *supra* note 5, para. 31. This contention was P&ID's third ground for appeal. *Id.*

160. *Id.* para. 36.

161. *Id.* paras. 36–37.

162. *Id.* para. 37.

language in the witness statement are potentially troublesome.[163] But regardless of whether the implications of the Judge's findings are as expansive as P&ID claimed, the 2023 Nigeria Decision highlights the importance of two uncontroversial propositions: (i) counsel should not invite or submit evidence that they know to be false or misleading; and (ii) where a party (or its counsel) is aware of facts that may call into question the accuracy of evidence already submitted, thought should be given as to whether the evidence in question should be clarified or withdrawn. Both of these propositions find support in institutional rules[164] and International Bar Association (IBA) guidelines.[165]

The 2023 Nigeria Decision also serves as a cautionary reminder that reliance on the lack of any duty of disclosure may not shield a party from the consequences of presenting half-truths. Questioning prior English authority on this issue, Justice Knowles explained that this is an area where "context will be so important."[166] Perhaps the context in this case was sufficient to require disclosure in the absence of a positive obligation to disclose, although the characterization of disclosure duties may in some instances be hard to draw.

C. Proactive Management of Evidentiary Matters by Tribunals

While sympathetic to the plight faced by the tribunal in light of Nigeria's apparent inability to act during the arbitration, the Judge nonetheless gave the clear impression that the tribunal could have done more than it did to test the issues that came before it. Near the close of his judgment, Justice Knowles observed that

163. As P&ID pointed out, "a losing party which later discovers a fact or defence it did not rely on earlier is entitled to parse . . . evidence adduced by the winning party and argue that the failure to mention the fact or defence amounted to perjury—even just because of an introductory statement or heading" with the consequence that the award may be set aside. *Id.* para. 36.

164. *See, e.g.*, London Court of International Arbitration Rules, Annex 1, para. 7 (2020) [hereinafter *LCIA*] (allowing the tribunals constituted under such rules to issue sanctions pursuant to article 18.6).

165. For example, the IBA Guidelines on Party Representation state (somewhat tritely) that "[a] Party Representative should not invite or encourage a Witness to give false evidence." Int'l Bar Ass'n, IBA Guidelines on Party Representation in International Arbitration 14 (2013), https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F. Elsewhere the IBA Guidelines on Party Representation state that "a Party Representative should not submit Witness or Expert evidence that he or she knows to be false" and that where a representative later discovers that the witness evidence in question is false, then "such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so." *Id.* at 9. The comments to IBA Guidelines 9 through 11 clarify that "a Party Representative therefore should not assist a Witness or Expert or seek to influence a Witness or Expert to give false evidence to the Tribunal in oral testimony or written Witness Statements or Expert Reports." *Id.* at 10. Proposed remedial measures include correcting or withdrawing the false evidence (or urging the witness in question to do so). *Id.* at 10.

166. *2023 Nigeria Decision*, *supra* note 4, para. 252. The authority questioned by the Judge in this regard was the observation made by Mr Justice Akenhead in *L. Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC) (Eng.) that "if the arbitrator has not ordered disclosure of the documents which are said to have been withheld, it is difficult to argue that the respondent has acted in a reprehensible fashion by not disclosing them." *Id.*

although the tribunal had "allowed time where it felt it could and applied pressure where it felt it should," it had ultimately taken a "very traditional approach."[167]

Generally, through national arbitration laws and institutional arbitration rules,[168] arbitrators enjoy broad discretion in ordering the production of documents, issuing summons, and taking the initiative to identify issues and ascertain facts.[169] At times—and as may have been the case in the Nigeria-P&ID arbitration—the tribunal's authority to act may be circumscribed to some degree, for example, by party agreement[170] or by the countervailing duty to efficiently manage proceedings.[171] Nonetheless,

167. *Id.* para. 588.

168. *See, e.g.,* U.S. Federal Arbitration Act, 9 U.S.C. § 7; *1996 Act*, *supra* note 35, § 34(2)(a); Arbitration and Mediation Act (2023) Cap. (A18), art. 28(4) (Nigeria); Bundesgesetz über das Internationale Privatrecht [PILA] [Federal Act on Private International Law], Dec. 18, 1987, SR 291, art. 184(1) (Switz.); *French Civil Procedure Code*, *supra* note 56, art. 1467; U.N. Comm'n on Int'l Trade L., UNCITRAL Arbitration Rules art. 27(3) (2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf [hereinafter *UNCITRAL Arbitration Rules*]; Int'l Chamber of Com., 2021 Arbitration Rules art. 25(4) (2021), https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf [hereinafter *ICC Arbitration Rules*]; *LCIA*, *supra* note 164, art. 22.1(v); Int'l Ctr. for Disp. Resol., International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) art. 22(5) (2021), https://icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar; German Arb. Inst., 2018 DIS Arbitration Rules arts. 28.1–28.2. (2018), https://www.disarb.org/fileadmin/user_upload/Werkzeuge_und_Tools/2018_DIS-Arbitration-Rules.pdf [hereinafter *DIS Arbitration Rules*].

169. *See* Reto Marghitola, Document Production in International Arbitration 21–32 (2015); Born, *supra* note 23, § 16.02[B][5]; Teresa Giovannini, *Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?*, *in* Stories from the Hearing Room: Experience from Arbitral Practice: Essays in Honour of Michael E. Schneider 59, 66 & n.38 (Bernd Ehle & Domitille Bazieau eds., 2015); Paul Friedland, *Fact-Finding by International Arbitrators—Sua Sponte Calls for Evidence*, *in* 45 The Arbitrators' Initiative: When, Why and How Should It Be Used?, at 37 (Domitille Baizeau & Frank Spoorenberg eds., 2016); Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 Arb. Int'l 2, 173 (2012).

170. *See* Kaufmann-Kohler & Bärtsch, *supra* note 145 (noting that "[a]ccording to the general principle of party autonomy, the rules on procedure are determined by the parties' agreement"); Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, *in* 19 International Arbitration and the Rule of Law: Contribution and Conformity 225, 225–64 (Andrea Menaker ed., 2017). Certain national laws make the arbitrators' power to investigate subject to the parties' agreement. *See, e.g.*, *1996 Act*, *supra* note 35, § 38(1); Arbitration Ordinance, (2011) Cap. 609, § 56(7) (H.K.); Mauritian International Arbitration Act 2008, § 20(3) (Mauritius). "[I]n the Netherlands, the Supreme Court has held that the tribunal's power to investigate facts *sua sponte* is contingent upon the parties' *prior* express agreement." Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, *in* 19 International Arbitration and the Rule of Law: Contribution and Conformity 225, 241 (Andrea Menaker ed., 2017). In the Nigeria-P&ID arbitration, England was selected as the seat of arbitration only after the arbitration was finished, so the tribunal's recourse concerning evidence gathering pursuant to the *1996 Act's* provisions may not have been considered. The *2004 Nigeria Arbitration Rules* applicable through the parties' agreement were largely silent on disclosure and other evidentiary matters aside from the broad direction at article 24(2). *See supra* note 151 (providing the statutory language of article 24(2)).

171. *See, e.g.*, *LCIA*, *supra* note 164, arts. 14.1(ii), 14.5; *ICC Arbitration Rules*, *supra* note 169, art. 22(1); *UNCITRAL Arbitration Rules*, *supra* note 169, art. 17(1); *DIS Arbitration Rules*, *supra* note 169, art. 27.1.

tribunals seated in London at least should beware of finding themselves in an information vacuum, in particular in high-stakes commercial disputes involving state parties. As Justice Knowles observed, the paucity of information in the Nigeria-P&ID arbitration was all the more striking given the "skeletal" nature of the GSPA, which "attracted no discussion from the Tribunal," and the fact that the consequence of the tribunal's conclusions on liability was that Nigeria would have come to agree to the GSPA on implausibly "catastrophic terms."[172] Even when the applicable arbitration agreement might not be said to permit a tribunal to actively seek evidence, proper testing of the evidence that *does* come before the tribunal is vital to the fair adjudication of the arbitration, and therefore to its integrity.[173]

Without full sight of the arbitration record, it seems fair to say that the tribunal—perhaps influenced by its members' common law backgrounds[174]—may have taken a somewhat passive adversarial approach to the evidence before it, which is not uncommon and often preferred by parties in arbitral proceedings.[175] Whatever the arbitrator's background, and regardless of the truth of that assumption, defaulting to an adversarial approach when establishing facts in international commercial arbitration may not always be substantively justified.[176] Reflecting on challenges that

Evidently, the tribunal in the Nigeria-P&ID arbitration had been faced with severe delays.

172. *2023 Nigeria Decision*, *supra* note 4, para. 314.

173. *See* Stefan M. Kröll, *The Normative Framework on the Taking of Evidence*, *in* Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues 23, 26 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., 2022) (citing 1985 UNCITRAL Model Law, *supra* note 56, at 14, art. 19) (stating that the parties are free to agree on the procedures the tribunal must follow, but that the tribunal has the power to determine the admissibility, relevance, materiality, and weight of any evidence).

174. Two members of the tribunal (Lord Hoffmann and Sir Anthony Evans) are former English Judges (with Lord Hoffmann still holding a position of Non-Permanent Judge of the Hong Kong Court of Final Appeal). *Professor Lord Hoffmann*, Queen Mary Univ. of London, https://www.qmul.ac.uk/ccls/staff/hoffmann.html (last visited Apr. 22, 2024); *Sir Anthony Howell Meurig Evans*, The Com. Ct. of Eng. & Wales, https://www.commercialcourt.london/ahm-evans (last visited Apr. 22, 2024). The third tribunal member, Chief Bayo Ojo, SAN, is the former Attorney General of Nigeria. Biography of *Bayo Ojo, SAN, CON*, Afr. Arb. Ass'n, https://afaa.ngo/page-18086 (last visited Apr. 22, 2024).

175. Justice Knowles (having set forth various extracts from the transcripts and the Final Award) identified a number of points which he felt indicated the unsatisfactory way in which the evidence had been tested at the quantum stage. *2023 Nigeria Decision*, *supra* note 5, para. 398. First, Nigeria's quantum expert had not been shown Mr. Quinn's evidence and had very little time to prepare its report (in a case of a potentially enormous damages award). *Id.* Thus, his function as an independent expert to offer assistance to the tribunal had been compromised (in a manner known to the tribunal). *Id.* Second, it was "clear that Nigeria's Leading Counsel . . . did not understand what the Tribunal was putting to him," with key issues consequently not being put to P&ID's expert. *Id.* Third, no consideration had been given to prospective loss following repudiation. *Id.* Fourth, on interest, no closer analysis had been pressed for, notwithstanding the fact that billions of dollars had turned on the question. *Id.*

176. *See* Julian D.M. Lew et al., Comparative International Commercial Arbitration para. 22-12, at 556 (2003) ("Rigid distinctions that exist between civil law and common law approaches are not imposed upon international commercial arbitration."); Giuditta Cordero Moss, *Tribunal's Powers Versus Party Autonomy*, *in* The Oxford Handbook of International Investment Law 1207, 1213 (Peter Muchlinski et al. eds., 2008); Christian Borris, *Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration*, 60 Arb.: Int'l J. Arb. Mediation & Disp. Mgmt. 78, 84 (1994); William W.

arbitrators were confronted with in the Iran-United States tribunal, Judge Howard M. Holtzmann stated that arbitrators from common law backgrounds "do not appear to be barred from taking such initiatives, which reflect an inquisitorial role as contrasted with the more usual common law adversarial approach."[177] As other commentators have noted, express provisions in the 1996 Act make clear that, subject to the right of parties to agree otherwise, the tribunal may decide all procedural and evidential matters including "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law."[178] It has been suggested that this "enables tribunals to act in an inquisitorial manner"[179] and permits the arbitrators to take initiative in questioning the parties.[180]

When there are sufficient red flags to put a tribunal on notice that corruption may be involved—which is not to say there were in the Nigeria case—the fact that corruption has not been expressly pleaded should not necessarily bar a tribunal from conducting its own investigations sua sponte.[181] Commentators have highlighted

Park, *Truth and Efficiency: The Arbitrator's Predicament*, *in* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman 764–65 (Mahnoush H. Arsanjani et al. eds., 2011).

177. Howard M. Holtzmann, *Streamlining Arbitral Proceedings: Some Techniques of the Iran-United States Claims Tribunal*, *in* Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration 153, 162 (Julian D.M. Lew & Loukas A. Mistelis eds., 2007).

178. *1996 Act*, *supra* note 35, § 34(2)(g). In this regard, the *1996 Act* is unusual insofar as national arbitration statutes are concerned in providing tribunals in English-seated arbitrations with the power to take initiative when establishing the law in addition to the facts. Other laws are similar, albeit more restrictive. *See* Danish Arbitration Act, 2005 (Act. No. 553/2005), § 27(2) (Den.) (permitting a tribunal to call upon the courts to request the Court of Justice of the European Communities to give a ruling on European Union law if the tribunal deems it necessary to render its award); Art. 4:1044 para. 1 Rv (Neth.) (allowing a tribunal to ask for information through the intervention of the Provisional Relief Judge of the District Court at The Hague). In the absence of clear guidance in many instances, the scope of the tribunal's ability to investigate the law sua sponte (*iura novit curia*) is potentially more controversial than its ability to act inquisitorially with respect to facts. Christian P. Alberti, *Iura Novit Curia in International Commercial Arbitration: How Much Justice Do You Want?*, *in* International Arbitration and International Commercial Law: Synergy, Convergence and Evolution 3, 16 (Stefan M. Kröll et al. eds., 2011).

179. Bruce Harris, Rowan Planterose & Jonathan Tecks, The Arbitration Act 1996: A Commentary 175 (Blackwell, 4th ed. 2007). *See also* Audley Sheppard, *English Arbitration Act 1996*, *in* Concise International Arbitration 977, 1032 (Loukas A. Mistelis ed., 2d ed. 2015); David St. John Sutton, Judith Gill & Matthew Gearing, Russell on Arbitration ¶ 4–143 (24th ed. 2015).

180. *See* Sheppard, *supra* note 179; *cf.* Arthur L. Mariott, *England's New Arbitration Law*, *in* 8 The ICC International Court of Arbitration Bulletin 28, 31 (1997) (acknowledging that this provision unquestionably empowers the tribunal to adopt the inquisitorial approach, but also cautioning that "this subsection should not be taken as an invitation to arbitrators always to adopt inquisitorial powers." Instead, the subsection should be viewed as an invitation to determine "whether the adoption of inquisitorial powers is conducive to the economic, expeditious and fair resolution of the dispute before the Tribunal.").

181. *See* Michael Hwang & Kevin Lim, *Corruption in Arbitration—Law and Reality*, 8 Asian Int'l Arb. J. 1, 14–22 (2012) (arguing that arbitral tribunals have a duty to investigate corruption sua sponte). Various authorities and organizations have established lists of red flags for identifying suspicious relationships that

some hesitancy on the part of arbitrators to conduct such investigations, in particular when it comes to the risk of challenges of awards on the basis of *ultra petita*.[182] However, the concern that a tribunal might exceed its mandate may ultimately be misplaced where, for example, the parties have sought a ruling on the rights and obligations under a contract, and the presence of corruption would render that contract void under applicable mandatory principles.[183] In those circumstances, some tribunals have found that they can and should raise the issue themselves.[184] As noted above, however, Justice Knowles proceeded under the English law position that had the GSPA been procured by bribery, then that would have rendered the contract voidable, not void.[185] Therefore, and assuming the basis upon which the Judge proceeded was correct, the tribunal's ability to act sua sponte to further investigate facts in the Nigeria-P&ID arbitration may have been less certain.

That said, if the risk of rendering an award that is vulnerable to set-aside or non-enforcement is what guides some of these decisions, the Nigeria case shows that the risk also exists in the other direction. In other words, at least when it comes to issues of

may disguise bribery. *See, e.g.*, Crim. Div. of the U.S. Dep't of Just. & Enf't Div. of the U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 23 (2d ed. 2020), https://www.justice.gov/criminal/criminal-fraud/file/1292051/dl?inline; Ministry of Just., The Bribery Act 2010 Guidance 26 (2011), https://assets.publishing.service.gov.uk/media/5d80cfc3ed915d51e9aff85a/bribery-act-2010-guidance.pdf; ICC Comm'n on Corp. Resp. & Anti-corruption, ICC Guidelines on Agents, Intermediaries and Other Third Parties 5–6 (2010), https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Respondent%27s%20Counter-Memorial/Pi%C3%A8ces%20juridiques/RL-0051.pdf; Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, para. 293 (Oct. 4, 2013) (providing an example of a red flag list: "(1) an Adviser has a lack of experience in the sector; (2) non-residence of an Adviser in the country where the customer or the project is located; (3) no significant business presence of the Adviser within the country; (4) an Adviser requests urgent payments or unusually high commissions; (5) an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity; (6) an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision" (internal quotation marks omitted) (quoting Woolf Comm., Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems Plc—the Way Forward 25–26 (2008))).

182. Baizeau & Hayes, *supra* note 170, at 243 (citing Giovanni, *supra* note 169, at 72–73). Other concerns commonly raised are due process concerns relating to parties' rights to be heard and tribunals' lack of police powers. *Id.* at 245–48. *Ultra petita* is the principle that an arbitral award can be challenged "if arbitrators award differently than the submissions of the parties." Erdem Küçüker, *Awarding Beyond the Claims of the Parties: The Swiss Perspective*, Kluwer Arb. Blog (July 3, 2020), https://arbitrationblog.kluwerarbitration.com/2020/07/03/awarding-beyond-the-claims-of-the-parties-the-swiss-perspective/.

183. Baizeau & Hayes, *supra* note 170, at 243–44. *See also* Hwang & Lim, *supra* note 181, at 10–12.

184. *See* J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10 Arb. Int'l 277, 280–81 (1994). *See also* K Ltd. v. M S.A., Int'l Comm. Arb., Award, (1989), *reprinted in* 11 Swiss Arbitration Association Bulletin [ASA Bull.] 216, 231–32 (1993) (Switz.) (observing that, as a matter of principle, the arbitrator had the power to rule ex officio that the contract was void due to corruption, but finding that in this case there was no evidence that corruption had occurred). *See generally Metal-Tech Ltd.*, ICSID Case No. ARB/10/3 (seeking additional factual evidence on its own initiative to determine whether corruption had occurred).

185. *See supra* notes 119–20 and accompanying text.

corruption or other fundamental questions, tribunals should be mindful to sufficiently test the evidence that is before them, and if the circumstances require, to consider whether more active management of the evidentiary phase of the arbitral proceedings is appropriate. While tribunals undoubtedly face considerable challenges when balancing the various considerations in this regard—be it the scope of their mandate, due process concerns, the duty to render an enforceable award, or the impact of such investigations on the expeditious resolution of claims—the exercise of probing evidentiary matters appropriately is not something from which arbitrators should shy away.[186] The countervailing risk of refraining from active case management is the arbitration in question being exposed as "a shell that got nowhere near the truth."[187]

V. CONCLUSION

At the end of the decade-long Nigeria-P&ID saga it appears that justice has been served. But at what cost? That outcome was achieved after years of disputes in multiple jurisdictions, with enormous resources ultimately required from Nigeria to make good its challenge. While arbitration is "of outstanding importance and value in the world," it is incumbent on the arbitral community to reflect on how the integrity of the process can be protected, in particular in high-value commercial disputes involving state actors.[188] Without that reflection, "arbitration as a process becomes less reliable, less able to find difficult but important new legal ground, and more vulnerable to fraud."[189]

Though the facts of the Nigeria case are extreme, arbitration practitioners can draw valuable lessons from it, particularly in international commercial arbitrations where state parties are involved or where inequality of arms is a concern. The facilitation of justice requires pursuing and permitting adequate document disclosure. Arbitration counsel should be alert to the risk that witness evidence may be deemed misleading if it does not fulfill its stated purpose. The Nigeria case further serves as a reminder to arbitrators to actively test the evidence that is before them and to consider whether further facts are necessary for them to fulfill their adjudicatory duties. A passive adversarial approach to evidence may not be advisable or justifiable in complex and high-stakes arbitral disputes. A more inquisitorial approach may be appropriate, especially where "red flags" suggest the presence of corruption. In such cases, tribunals should consider whether further sua sponte investigation is needed and can be justified. These lessons are worthy of careful reflection to ensure that the

186. Baizeau & Hayes, *supra* note 170, at 228. The ICC Commission on Arbitration and ADR is "engaged in a multi-track process addressing issues of corruption in international arbitration at present." Philippa Charles, Nigeria v P&ID—*the Challenges for Future Cases*, The L. Soc'y Gazette (Nov. 3, 2023), https://www.lawgazette.co.uk/legal-updates/nigeria-v-pandid-the-challenges-for-future-cases/5117775.article. It is hoped that this publication may provide additional guidance on such matters to future parties and tribunals. *See Commission on Arbitration and ADR*, Int'l Chamber of Com., https://iccwbo.org/dispute-resolution/thought-leadership/commission-on-arbitration-and-adr/ (last visited Apr. 22, 2024).

187. *2023 Nigeria Decision*, *supra* note 4, para. 580.

188. *Id.* para. 582.

189. *Id.* para. 583.

"deeply unhappy"[190] matters that came before Mr Justice Robin Knowles do not arise again. When the integrity of the arbitral process is as severely damaged as it was in the Nigeria case, there are ultimately no winners.

190. *Id.* para. 594.

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