Dealing with Fraud and Corruption in Maritime and Commercial Arbitration

- Cracking down on a "Lucrative Business"

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1. This paper is inspired by 2 events. The "*7th ICC Asia Pacific Conference on International Arbitration"* which nudged me as a panelist into thinking actively about the topic of Corruption in International Arbitration; and the award in a maritime arbitration, which I handed down, involving an alleged hacking of information technology systems. My finding of the involvement of officers and employees of the Claimant in the issuance of a *"Forged Invoice"*, that gave the semblance of an online phishing scam, flowed from red flags that were present in the case. I might add that what I experienced was, in the scheme of maritime fraud or corruption, not large. It nevertheless highlights that every arbitrator can play a role, large or small, in curbing fraud and corruption.

A. A Specific Instance

2. It began as a straight forward international sale of commodities, with the Claimant as seller and the Respondent as buyer. The cargo was duly shipped on board a vessel, and delivery received by the Respondent. Payment of the price was to be made in 2 tranches. The first by a letter of credit, which was duly honored; and the second, as the balance of the price, by telegraphic transfer to an account of a third party to be designated by the Claimant in its Final Invoice.

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3. The Claimant maintained that the Final Invoice required the Respondent to make payment of the second tranche to an account with bank 'A' of its supplier 'X' in country 'B'. The Respondent had instead paid the second tranche into an account with bank 'C', in the name of 'Y', in country 'D' under a *"Forged Invoice". The "Forged Invoice"* was sent under cover of an email resembling the Claimant's email domain, but with a very slight difference; the Wrongful Email. The Claimant maintained that it had not issued either the Wrongful Email or the "*Forged Invoice*". The Respondent was pressed for payment under the Final Invoice by the Claimant in the arbitration.

4. My task was to decide between 2 seemingly innocent parties. Who between them bore the risk of a "hacking" by an unidentified third party? Much can be said about this arbitration and the expedited proceedings under which the claim progressed, but I reduce it to a few key points that led to my finding that the Claimant's employees, officers or owners were complicit in the "hacking" and the issuance of the "Forged Invoice".

5. Neither party engaged IT experts contemporaneous with the incident to identify the cause of the *"hacking"*, or the source of the *"Forged Invoice"*. The default position may have been that the Claimant should receive payment on its Final Invoice since that was the obligation undertaken by the Respondent under the sales contract. The burden of proving that the Claimant was responsible for the *"hacking"* was accepted to rest on the Respondent. What then tipped the balance to prevent double receipt of payment by the Claimant through an arbitration award?

6. As with most cases of fraud or corruption, there was little direct evidence. There were significant gaps in rebuttal evidence, which only the Claimant could fill but failed to do. This, on the balance of probabilities, pointed to the Claimant's involvement in the issuance of the *"Forged Invoice"*. These evidential gaps, which I considered red flags, were several. The non-disclosure of documents by the Claimant, despite orders of the Tribunal. The shifting reasons for the Claimant's non-disclosure; from mis-appreciating its

obligation of disclosure to the non-existence of such documents. When directed that documents include *"data of any kind"* under the IBA Rules on The Taking of Evidence in International Arbitration, patchy and incomplete system logs were produced.

7. Expert reports *albeit* belated were produced but were not conclusive as to the cause of the *"hacking"*. They did however, assist with the balance of probabilities. The Claimant did not present its expert for cross-examination. The Claimant's witnesses of fact revealed little appreciation of their own witness statements. The inconsistencies between their oral testimonies and written statements were alarming. The Claimant's employees conceded a practice of creating invoices for its supplier. In short, adverse inference with regard to the likely content of the undisclosed documents, the lack of credibility of the witnesses, the propensity for the Claimant to issue fabricated invoices for other parties, the payment method chosen by the Claimant that carried an opportunity to create a mishap, *inter alia,* determined the balance of probabilities.

B. The Lucrative Business

8. The prevalent nature of e-mail and online scams, and phishing is undoubted. Fraud in maritime context has made numerous headlines in recent times. The chain of transactions intrinsic to international trade, and the separation between events occurring at the physical phase of the transaction and the paper phase of the deals, make it easy to mask fraud. Circular trade of dubious sale and buy-back, trade in non-existent commodities, the issuance of fake bills of lading and warehouse receipts and more, have emerged. The judicial management and winding-up of a once leading oil trading firm in Singapore, Hin Leong Trading, revealed a largescale fraud resulting in huge financial exposures to banks and counterparties[2]. Separately, insurers who provide international trade cover for unpaid debts have claims submitted that do not meet the pre-requisites for underlying

[2] https://www.reuters.com/world/asia-pacific/hin-leong-trading-founder-trial-accused-cheating-hsbc-2023-04-11/

physical trades, leaving insurers of trade policies at risk of huge unjustified payouts. The landscape of international trade with maritime links is seriously under stress. Creating a crisis of confidence. The words of Lord Hobhouse in *The Star Sea*[3] ring loud:

> *"the fraudulent (insured) must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful I will lose nothing."*

9. The link between fraud and corruption is such that one often overlaps with the other. Corruption enables the fraud. I therefor use corruption to include fraud in this paper. The underlying purpose of their paper is to examine arbitrators' concerns and responsibilities in dealing with fraud and corruption in maritime and commercial arbitration.

C. The Consensus on the Evils of Corruption

10. A good starting point for a conversation on corruption, from a contemporary perspective, is the *UN Convention Against Corruption 2005,* the Corruption Convention, to which 189 countries are parties[4]. That is nearly the whole world. It is common ground that corruption is a scourge in our society. It undermines stability of societies, ethnical values, justice and the rule of law. Any doubt is settled by the recitals to the Corruption Convention.

11. The Corruption Convention provides for states to enact legislation and other measures, to establish it as a criminal offence to promise, offer or give public officials, public international organizations or private sector individuals, directly or indirectly, an undue advantage for himself/herself or another in order to act or refrain from acting in exercising his/her duties or to breach such duties. It also provides for cross-border judicial

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[3] *Manifest Shipping Company Limited v Uni-Polaris Shipping Company Limited and Others* [2001] Lloyd's Rep IR 493, [62].

[4] United Nations Convention Against Corruption; https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf [Page 5&6]

cooperation, freezing and seizure of assets, and the repatriation of assets to the injured country.

12. Notwithstanding that some countries may be slower in enacting or implementing necessary domestic laws, the will of 189 nations is clear. I suggest that a cogent transnational public policy that corruption cannot be condoned, and must firmly and positively be acted upon, is underscored by the Corruption Convention.

13. Arbitrators cannot isolate ourselves from the duties demanded of us as central participants of what is now a mainstream justice system. The New York Convention is facilitative of our efforts. It reminds arbitrators of our duty to render an enforceable award. An arbitrator's eye is always cast on public policy, as a potential ground for the setting aside or refusal of enforcement of an arbitration award.

14. Despite Malaysia having adopted the Corruption Convention in 2008, we saw a grand corruption scheme unfold between 2008 to 2017[5]. The silver lining may be that this provides a case study into the complex international machinery required to combat corruption, particularly the imperatives of cross-border cooperation. The 1MDB corruption necessitated large-scale, high-level cooperation from numerous countries, especially the Department of Justice of United States, before civil and criminal action could be brought in the home state, Malaysia, against the corrupt. As at March 2023, USD6.2 billion of corruptly acquired funds had been recovered and repatriated to Malaysia,[6] underpinning the power of international collaboration. This includes the proceeds of a settlement arising from Malaysia's challenge before the English Courts of

[5] https://www.emerald.com/insight/content/doi/10.1108/PAP-11-2019-0032/full/pdf?title=1mdb-corruption-scandal-in-malaysia-a-study-of-failings-in-control-and-accountability

[6] https://www.thestar.com.my/news/nation/2023/03/07/around-70-of-stolen-1mdb-asset-funds-recovered-says-azam-baki

the Consent Arbitration Award entered into between 1MDB and IPIC, discussed at the end of part F below.

15. Yet Malaysia is no outlier. Corruption spares no country. Despite universal consensus to combat corruption, the 2022 Corruption Perceptions Index, *CPI,* suggests no real improvement in the global average in the last decade. The CPI attributes a score of 0-100 to each country, 100 representing a highly clean country whilst 0 represents a highly corrupt country. 67% of the world scores below 50 while the global average sits at 43.[7] *"With an estimated USD 1 trillion paid in bribes each year (as at December 2020), alongside some countries losing as much as 17% of their GDP (gross domestic product) to practices such as those[8],"* it is clear that the dynamics of doing business has evolved. With public and private funds being diverted to such a significant degree, it is inevitable that this additional cost of doing business will permeate the international arbitral system.

16. So, the question to ask is, *Are arbitrators ready and willing to play their part in ensuring justice and the rule of law are maintained in this toxic new realm of business?*

D. The Connectors – between Corruption and Arbitration

17. There are several threads that connect arbitration and corruption. Corruption can arise as a direct issue in an arbitration, particularly where the dispute relates to an agreement to procure a contract by corrupt means. I call this a Contract to Corrupt. Corruption can arise indirectly, where the dispute involves a Contract Procured by Corruption. The arbitration may also be used by the parties as a means to cover the tracks of corrupt dealings, the Corruption Cover, resulting in a consent award. The arbitration process itself may be corrupted, involving one or more tribunal members that participate in the corruption. The central role of the arbitrator in any of these fact patterns is obvious.

[7] https://www.transparency.org/en

[8] https://www.repository.cam.ac.uk/bitstream/handle/1810/343879/JOIA_39_0603.pdf

18. More fundamentally, arbitrators have genuine concerns that they are hamstrung by arbitration principles. I lightly examine some of these concerns from a practical standpoint, without intending an exhaustive dissertation. My unabashed intention is to encourage arbitrator vigilance.

E. Arbitrators' Concerns

(i) Arbitrability

19. The preliminary concern may be whether a dispute involving corruption and fraud is arbitrable. In commercial and maritime arbitration, the jurisdiction of the tribunal stems from the arbitration agreement. The doctrine of separability allows a tribunal to maintain jurisdiction notwithstanding that the underlying contract is tainted by corruption, or fraud, unless the arbitration agreement provides to the contrary;[9] or the entire document including the arbitration agreement is a forgery, directly impeaching the arbitration agreement. Given the wide acceptance of the principle of *kompetenz-kompetenz*, it is for the tribunal to determine its jurisdiction, including the existence or validity of an arbitration agreement. By large, subject to the applicable law providing otherwise, the arbitration may proceed on the basis of a *prima facie* existence of an arbitration agreement. The jurisdiction to proceed with an inquiry and finding on the issue of corruption, where relevant to the case, is relatively clear.

[9] *Fiona Trust &Holding Corporation and others v. Privalov and others* [2008] 1 Lloyd's Rep 254; *Naza Motors v. Albon* [2007] All ER (D) 501 (Mar); *National Iranian Oil Company v. Crescent Petroleum Company International & another* [2016] EWHC 510 (Comm).

(ii) *Ultra Petita*

20. The main concern would be whether the tribunal would be acting *ultra petita*, going beyond the scope of the parties' mandate and submission to the tribunal.

21. If corruption is raised by a party, the answer to any query of *ultra petita* may be obvious. It is necessary for the tribunal to make findings on the issue raised within the scope of arbitration. The issue of corruption is relevant to the outcome of the dispute, with consequences that follow depending on whether it results in a void or voidable agreement. The former ordinarily follows in a Contract to Corrupt. The later may be open for consideration where it is a case of a Contract Procured by Corruption.[10] In this instance, arbitrators need only to be robust in their inquiry; firm in their conviction that it is the right thing to do.

22. If corruption is not directly raised by the parties but *prima facie* evidence exists to raise alarm, the choice may fall squarely upon the tribunal whether or not to pursue the matter. The current wisdom recommends itself to the tribunal making findings. If nothing else, this affords greater prospects of enforceability of the award, and limits the level of investigation by the supervising or enforcement Court. I discuss this further under part F below.

23. Linked to this choice is the discussion on whether a tribunal should embark *sua sponte* on an inquiry into the evidence of corruption. This effectively depends on whether

[10] *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344:

> *"[185] It follows that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribers are not unenforceable."*

arbitrators see ourselves as guardians of the rule of law, or should allow ourselves to be *"unwitting accessories to heinous acts more audacious than theft"*.[11]

24. The Supreme Court in ***Jivraj v. Hashwani*** [2011] UKSC 40, [41] asserts the quasi-judicial function of an arbitrator thus:

> *"The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interest of the parties and not act in, or so as to further, the particular interest of either party. As the International Chamber of Commerce puts it, he must determine how to resolve their competing interests. He is no sense in a position of subordination to the parties; rather the contrary. He is in effect a 'quasi-judicial adjudicator."*

25. There is an obvious duty impressed upon an arbitrator to rise above partisan interests. We exhibit this duty in a number of ways. An arbitrator is not limited by party autonomy in managing the procedures and processes adopted in ensuring a fair and expeditious arbitration, often against the pleasure of one or both parties. We determine the merits of a dispute without regard to, and beyond the interest of, a nominating party. This duty extends to rendering an enforceable award, which in and of itself encompasses a duty to consider public policy that the supervising and enforcing courts are often moved to examine. Given that 189 countries are parties to the Corruption Convention, the dictates of the Corruption Convention cannot be side stepped. The Corruption Convention is verily transnational public policy.

26. Equal treatment when inquiring into red flags of corruption may be more readily managed, by affording the opportunity for due presentation and representation by both

[11] "Corruption in Arbitration [24] – Law and Reality" by Michael Hwang SC and Kevin Lim. https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media013261720320840corruption_in_arbitration_paper_draft_248.pdf

parties.[12] Issues presented in a dispute are not always symmetrical. One party may have to face a greater degree of prejudice than another, depending on the nature of the complaint. The inquiry does not *per se* give rise to unequal treatment.

27. Whilst to investigate *prima facie* evidence of corruption may be argued as rendering the award beyond the scope of the parties' submission and liable to be set aside, the non-investigation renders the award vulnerable to being set aside on grounds of public policy. The duty to render an enforceable award, it would seem, justifies the investigation. Public policy, in its vast dimensions, clearly encompasses corruption. In *Deutsche Schachtbau- und Tiegbohrgesellsacft mbh v. Ras Al Khaimah National Oil Company*, *Sir John Donaldson MR emphasized that:*

> *"...public policy can never be exhaustively defined, but they should be approached with extreme caution…* ***It has to be shown that there is some element of 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."* [13]
>
> *(emphasis added)*

In a similar vein, Judge Joseph Smith of the United States Court of Appeal Second Circuit in *Parsons & Whittemore v Societe Generale de L' Industrie du Papier*, held that

> "***enforcement of a foreign arbitral award may be denied on public policy grounds only where enforcement would violate the forum state's most basic notions of morality and justice***."[14]
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> *(emphasis added)*

[12] *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315

[13] Cited *in Alexander Brothers Limited v. Alstom Transport SA & another* [2020] EWHC 814 (Comm) [38]

[14] https://casetext.com/case/parsons-wh-ov-v-societe-g-de-l-du-p

Corruption indeed violates the most basic notion of morality and justice of society, and is that which is injurious to public good.

28. Seen this way, the apparent tension between acting *ultra petita* or in alignment with international or transnational public policy, becomes clearer to navigate. It is always within the scope of any submission to ensure the enforceability of an award by due investigation into indicia of corruption relevant to a case. The tribunal's ultimate findings will dependent on proof.

(iii) *Standard of Proof*

29. As claims before a tribunal are civil in nature, the standard of proof should be consistent with civil standards, subject to the applicable law stipulating to the contrary. It is usually the standard of the preponderance of probabilities or balance of probabilities. It is suggested that the gravity of the allegation however, demands clear and convincing evidence to satisfy the balance of probabilities.[15]

30. In the absence of direct evidence of corruption, circumstantial evidence or *"indicia of corruption*" or *"red flags"* when taken together may pave the way for a finding; one way or another. Tool kits have been drawn to assist arbitrators[16]. These red flags include unusual payment patterns or financial arrangements; unusually high commissions; lack of transparency in expenses and accounting records; and lack of qualifications or resources on the part of a joint venture partner or representative to perform the services offered. Once sufficient red flags have been raised, a tribunal may ask the other party to demonstrate the legitimacy of the actions or transactions giving rise to the red flags. Such

[15] *Westinghouse and Burns and Roe (USA) v National Power Company and the Republic of the Phillippines* ICC Case No 6401 (1991*)*; *Dadras International and Per-Am Construction Corporation v. The Islamic Republic of Iran and Tehran Redevelopment Company*, IUSCT Case Nos. 213 And 215

[16] https://baselgovernance.org/sites/default/files/2019-05/a_toolkit_for_arbitrators_29_05_2019_single_pages.pdf

was the approach taken in *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/03, Award (October 4, 2013), given the inherent difficulty in proving claims of corruption, due to the tendency for concealment. Once suspicion is raised, a convincing explanation is required.

31. Requests or orders for the production of documents by the tribunal, or issued by a foreign Court in providing support to an international arbitration[17], subpoena of witnesses by Courts at the seat, and cross-examination of witnesses, may cumulatively be adequate to arrive at a positive or negative finding on corruption. The causal link between the indicia of corruption and the claim is clearly necessary[18]. Adverse inference remains an effective tool where there is a failure to produce documents without good reason, despite access to such documents. The adverse inference must however, be proportionate and reasonable to the facts they logically relate to.

F. Transnational Public Policy and Post Award Consideration

32. It would appear that the greatest sway lies in knowing that our inquiry is highly regarded by national Courts.

33. The inquiry into public policy for an arbitrator naturally begins with Article (v)(2)(b) of the New York Convention, which stipulates that the recognition and enforcement of an award may be refused in a country if it is contrary to public policy of that country.

34. Whilst the phrase "of that country" in Article (v)(2)(b) indicates that public policy is to be guided by the legal, economic, social and political standards of the country of

[17] Section 11 (1) (d) *Malaysian Arbitration Act*, 2005; Article 17 J of the UNCITRAL Model Law, as revised in 2006

[18] *RBRG Trading (UK)LTD v Sinacore Co Ltd* [2018] EWCA Civ 838

enforcement, transnational public policy dictates that it would include conduct involving corruption.[19]

35. There is no standard approach taken by Courts in the annulment or enforcement of awards. The range may be broadly divided into the minimalist intervention, versus the maximalist interference. The enforcement of the *Alstom* award in England (under a minimalist approach), contrasted with the refusal to enforce the award in France, has been used to illustrate this point[20]; although the award appears now to be also enforceable in France following the decisions by the French Supreme Court and the Versailles Court of Appeal[21]. The English High Court, in enforcing the *Alstom* award, maintained that it is the approach of the tribunal which is key. Its stands to reason that due regard be had by Courts to the analysis of evidence and findings by the tribunal. Hence, the prospect of enforcement of an award is clearly greater, when due inquiry and findings are made by the arbitrator on matters of corruption.

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[19] See *Ras Al Khaimah National Oil Company; Parsons & Whittemore, referred to in paragraph 27 above.*
Also, China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another [2018] SGHC 101, [217] where *the Singapore High Court reiterated that to cross the threshold for a public policy violation, it must '**shock the conscience'**, or be '**clearly injurious to the public good**' or '**wholly offensive to the ordinary reasonable and fully informed member of the public'**, or violate '**the forum's most basic notion of morality and justic**e'*

[20] *Alexander Brothers Limited (Hong Kong SAR) v. Alstom Transport SA Alstom Network UK Limited* [2020] EWHC 1584 (Comm);
https://arbitrationblog.kluwerarbitration.com/2021/12/18/new-developments-in-france-on-the-alstom-saga-the-french-supreme-court-overrules-the-paris-court-of-appeals-decision-to-deny-enforcement-of-the-arbitral-award-on-the-grounds-of-corruption/#:~:text=of%20arbitral%20award-,New%20Developments%20in%20France%20on%20the%20Alstom%20Saga%3A%20The%20French,on%20the%20Grounds%20of%20Corruption&text=It's%20all%20still%20to%20play%20for.

[21] https://navacelle.law/arbitration-between-alstom-abl-the-versailles-court-of-appeal-confirms-the-exequatur-on-14-march-2023/

36. It was for a considerable period of time, following the decision in *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd [2000] QB 288,* considered that finality of arbitral awards was in competition with illegality challenges, and the former would be prioritized. The pronouncement *albeit* in interlocutory determinations, including by Sir Ross Cranston in *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm) as is set out below may however, persuade arbitrators to take more seriously our obligation of inquiry.

> *"272. …. it should not be forgotten that as well as these principles section 1 of the 1996 Act refers as to the fair resolution of disputes as a general principle, and to party autonomy as being subject only to necessary public interest safeguards.* ***While judicial views differed as to the appropriate level in Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd [2000] QB 288, all agreed that commercial corruption attracted strong judicial disapproval****: at 315, 317; see also [1999] QB 740, 773." I also note* ***that Cockerill J recently opined that there is no rule of law which automatically prioritizes the finality of arbitral awards over the public policy of refusing to endorse illegal conduct: Alexander Brothers Limited (Hong Kong SAR) v. Alstom Transport SA Alstom Network UK Limited [2020] EWHC 1584 (Comm), [148].***
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> *273. ..****Not only is the integrity of the arbitration system threatened, but that of the court as well, since to enforce an award in such circumstances would implicate it in the fraudulent scheme****."*
>
> *(emphasis added)*

Finality works well when, and if, arbitrators have first considered the position on corruption in the course of the arbitration proceedings.

37. The interlocutory decisions in the matter between *Minister of Finance (Incorporated), 1Malaysia Development Berhad (1MDB) v. International Petroleum Investment Company Aabar Investments PJS* (IPIC), first by the English Court of Appeal [2019] EWHC Civ 2080,

and later the High Court [2021] EWHC 2949, are heartening. The decisions involved the third kind of corrupt fact pattern, a Corruption Cover through a Consent Award entered in 2017 in a London seated arbitration in respect of the 1MDB fraud. With a change in the Government in Malaysia in 2018, an application was made to the High Court in England to extend time to set aside the Consent Award.

38. The application by the Minister of Finance Inc of Malaysia to extend time to challenge the award then gave rise to a separate set of arbitration proceedings commenced by IPIC for breach of the Deed of Settlement that led to the Consent Award. In an application by the Minister of Finance Inc for an injunction to restrain the second arbitration, and a cross application by IPIC to stay court proceedings for the extension of time, the Court of Appeal said this, in reversing the stay order and granting the injunction:

> *"[45] It is worth exploring a little further the public interest which is engaged when an award is challenged**. It is in the public interest that a valid arbitration award should be recognised and enforced and, in this jurisdiction, such an award may be enforced by making use of the coercive powers of the state to enforce a court judgment.** Internationally, an award which is valid in accordance with the law of the seat can be enforced pursuant to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'NY Convention'), with only limited grounds on which recognition or enforcement may be refused by the enforcing court. **Conversely, it is against the public interest for the powers of the state to be utilised to enforce an award in a case where the arbitrators had no jurisdiction or which is the result of a 'serious irregularity'.**"*
>
> *[73] … Those claims infringe and threaten the claimants' undoubted legal right to pursue the court applications under ss 67 and 68, and are vexatious and oppressive. We refer in this regard to the principles explained above as to the **public interest in allowing parties that have agreed to an English seat of arbitration to pursue the limited supervisory remedies** permitted under the 1996 Act. **It is not legitimate for the defendants to seek to enforce the clauses of the settlement deeds that attempt to suppress the court's review of the***

consent award, to which the parties specifically agreed in the binding term sheet.

[74] As matters stand, therefore, the ***terms of the settlement deeds represent a clear attempt to fetter the claimants' exercise of their statutory right to challenge the consent award*** *in the first arbitration under ss 67 and 68.* ***The pursuit of the second arbitrations seeks in terrorem to impose a large financial penalty on the claimants for having sought to exercise their agreed legal rights.***

39. In granting an extension of time of 17 months, under a provision of the English *Arbitration Act,* 1996 that prescribes 28 days to challenge an award, the English High Court held:

"105. ***By s.68(2)(g) it is a serious irregularity if, with the result that substantial injustice has been or will be caused to the party seeking to challenge an award of arbitration, the award has been obtained by fraud or in a way that is contrary to public policy.*** *The argument here is that* ***a collusive settlement by which, in effect, one party connives to conceal or further the concealment of the other party's fraud and dishonesty, to keep it hidden from its victims (here, it is said, the Malaysian state and/or the Malaysian people whose interests Mr Najib is said to have subjugated to his own), is obtained by fraud or in a manner that is contrary to public policy, and therefore so also is a consent award giving effect to it.***

187. ***I reject the submission that an extension granted in this case would undermine the statutory scheme and do damage to London's position as a leading venue for international arbitration…****. The statute does not include any strict upper bound upon the extensions that may be granted.* ***A decision in this case that an extension of nearly 17 months is merited should be seen for what it is, an exceptional decision to meet the justice of an exceptional case.***

40. The above 2 decisions in the 1MDB matter paved the way to an amicable settlement between the parties, that saw the recovery of USD 1.8 billion by Malaysia from IPIC.

G. Conclusion

41. Arbitrators exercise a quasi-judicial function. It is incumbent upon us to uphold the rule of law. Corruption undermines the rule of law and stability of society. Policing corruption is a component of transnational public policy. Inquiry by arbitrators into *prima facie* indicia of corruption, that are relevant to the dispute, will enhance the enforceability of an award. It will strengthen the integrity and process of arbitration.

42. Courts are astute to the grave injustice caused to parties, societies and nations by fraud and corruption. Courts are alert to the possibility of their powers being used and abused by an underlying fraud. Arbitrators too, need to be astute and alert.

Biography

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