

Nigeria v Process & Industrial Developments Limited: has the High Court narrowed the scope for corruption in arbitration?

Arnas Urbutis

Associate at Wordley Partnership

This article will outline the High Court's decision in Federal Republic of Nigeria v Process & Industrial Developments Ltd [2023] EWHC 2638 (Comm), which scrutinized the impact of alleged corruption on arbitration awards. The case centered on a \$6.6 billion award to P&ID, which Nigeria contested, citing bribery and misuse of privileged documents. The court found P&ID's actions fraudulent and did not uphold the award. The judgment raises concerns about corruption in arbitration but does not mandate changes to the process, highlighting the difficulty of addressing fraud in a private, confidential system.

INTRODUCTION

In *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) the High Court addressed a number of factors which may ultimately have a long-standing impact on arbitration awards in circumstances where corruption is alleged in respect of either the award itself or the underlying contract. The judgment is lengthy, some 140 pages, and addresses the actions of the parties to both the contract and the arbitral tribunal in some detail. For most practical purposes, these details will have little relevance to subsequent decisions, but the overriding approach may have a significant impact, despite the facts of this judgment being exception. This article will commence by broadly outlining the factual nexus of the judgment, although this will not be considered in any particular detail. Once this has been set out, the perceived issues in relation to the arbitral process will be considered. Thirdly, the High Court's approach to dealing with such issues will be addressed and finally, a conclusion will seek to consider whether this judgment does, in fact, address the issues in circumstances in relation to corruption in arbitration.

I. THE FACTUAL BACKGROUND

The contractual formation of the agreement between the parties here was historical in 2010, the Nigerian government providing Process and Industrial Developments Ltd ('P&ID') with a contract to process gas supplies into a form which was commercial usable within Nigeria; despite the fact that P&ID or any of its numerous subsidiaries had no history of gas processing. In 2012, PI&D commenced arbitration proceedings against Nigeria on the basis that Nigeria was in breach of contract in respect of failing to provide the infrastructure agreed under the contract and in respect of not supplying gas for processing. These proceedings ultimately resulted in an award of \$6.6 billion dollars plus interest being made to PI&D. Nigeria refused to satisfy the award asserting that both the original contract and the award had been obtained through bribery partly on the basis that Nigeria's lawyers had been bribed to not defend the case effectively. Further allegations were made in respect of privileged documents held and used by PI&D but not disclosed.

When addressing these issues, Robin Knowles J CBE considered the two elements, that of the

underlying contract and the arbitration award separately. The approach taken will, as mentioned, be considered below, however, it is to be noted at this stage that the award was not upheld by the court.

II. THE PROBLEMS WITH CORRUPTION IN ARBITRATION

The fundamental issue in *Nigeria v PIED* was one of whether a corrupt contract and ultimately a corrupt arbitral award made under that contract could be enforced. On the face of it, it should not be difficult to assert that enforcement must not occur. However, it is the fact that corruption requires distinct consideration in respect of arbitration which is paramount in these circumstances. This is partly because, where court proceedings are public, arbitration is not and therefore, can be considered far less accountable. Indeed, it has been suggested that in countries where transparency is often avoided by the state and where corruption is higher, arbitration is viewed as a more appropriate means of resolving disputes.¹ In fact, this approach could be considered to be encouraged on the basis that arbitrators often refuse, because they do not have jurisdiction to do so, to consider the scope of corruption in the underlying contract or investigate evidence effectively in respect of the tribunal hearing.² What this approach ultimately results in is a gloss of respectability for the corrupt contract. In other words, the fact that the arbitral tribunal is not corrupt allows the corruption in respect of the substantive contract or the obtaining of the award to be hidden.

Whilst it is necessarily the case that a judgment of the England and Wales High Court will not automatically address this issue in all circumstances, it may do so where England is

elected as the seat of the arbitration and, it is submitted, may also reflect on other jurisdictions. This, of course, is only possible if the judgment in *Nigeria v PIED* can be seen to be sufficiently robust to allow arbitration hearings to look into these underlying factors.

III. THE HIGH COURT'S DECISION

3.1. THE ARBITRATION CLAUSE

The initial question for the High Court was the validity of the arbitration clause within the contract on the basis that the contract itself was subject to corruption in some form. It appears that the court accepted that corruption was present in the formation of the underlying contract and whilst recognising that contracting in Nigeria was often impossible without some degree of bribery, this was not sufficient justification in allowing a contract formed on the basis of bribery to be valid.³ However, the validity of the substantive contract was not at issue in this judgment and therefore, the only relevance of this related to the validity of the arbitration clause within that contract. It was held, on long-standing authority, that a contractual clause allowing for arbitration was separable for the contract as a whole and therefore, the issue of the clause's validity was only subject to whether it was entered into as a result of bribery.⁴ However, this is not a subjective consideration,⁵ and therefore, the impact of a bribe is not relevant. In any event, the court did not take the view that it was required to decide on the validity of the arbitration clause itself, recognising the autonomy of the parties to an extent and, it seems reasonable to suggest that the issues that were raised within the context of the arbitration were sufficient to place this consideration secondary.⁶

¹ Bentham, J., Schuman, J., Bridge, D. (2023). Arbitration and corruption: Nigeria v process & Industrial Development. Access via internet: <https://www.simmons-simmons.com/en/publications/clp2vgs4n02woudeow9hdnebt/arbitration-and-corruption-nigeria-v-process-industrial-development> [accessed 8th June 2024].

² *Ibid.*

³ *Attorney General for Hong Kong v Reid* [1994] AC 324.

⁴ *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638, [161].

⁵ *Shipway v Broadwood* [1899] 1 QB 369.

⁶ *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638, [160].

3.2. THE ARBITRAL AWARD

The substantive challenge to the tribunal's award was made under the limited grounds set out within section 68 of the Arbitration Act 1996. Section 68(1) provides that an award may be set aside if it is the result of a serious irregularity affecting the tribunal, with section 68(2)(g) providing that such a serious irregularity may arise in circumstances where the “*award was obtained by fraud or the way in which it was procured being contrary to public policy*”. The threshold for challenging an award on these grounds is high.¹ Unconscionable behaviour must be proved to a standard of proof higher than ordinarily required in civil cases.² In addition to proving fraud itself, section 68(2)(g) also requires the fraud to be such that the award was procured contrary to public policy.³

It was made clear in the judgment that whether this threshold was crossed would always turn on the facts, something which, as mentioned, necessarily limits the future scope of the judgment. Despite this limited scope of section 68(2)(g), the High Court found “*without reluctance*” that the actions of PI&D constituted a blatant abuse of the arbitral system.⁴ This was, on the facts, for three reasons. Firstly, PI&D had unlawfully obtained privileged documents belonging to Nigeria and, in using these documents had been able to establish Nigeria's strategy for the arbitration giving it a significant advantage in the arbitral hearing. Secondly, PI&D allowed evidence to be relied upon which it knew to be false, with some of this evidence aimed at undermining the substantive contract. Thirdly, PI&D had bribed a Nigerian official throughout the progress of the arbitration in essence to buy her silence and allow PI&D's version of the events to face no real practical challenge. The court found that if the tribunal had been aware of all or indeed, any of these factors,

its approach to the award given may have been significantly different.⁵

IV. THE VALUE OF THE JUDGMENT

In the judgment it was suggested that parties responsible for regulating the arbitration process may wish to address the nature of the process in circumstances where there was state involvement in the underlying contract or where extremely large sums of money were at stake. It was even mooted, although not found in these circumstances, that contracts could potentially be entered into on the basis that arbitration would occur and that the award would be significant. In effect, the purpose of the contract was to give rise to an arbitral award. Unfortunately, it was not possible for the court to specifically address any of the issues set out above which might arise in arbitration. All that was possible was to suggest to relevant parties that steps towards change should be made. This necessarily means that the judgment does nothing more than reiterate issues that were already known and suggest that these issues should be addressed. The difficulty with this approach is that it is the nature of the arbitration process which allowed for the issues that arose in this judgment, but it is also the nature of the arbitration process which makes it an important tool in commercial dispute resolution. Whilst it is certainly the case that proper disclosure rules should be followed, they will necessarily not be effective in circumstances of fraud because the withholding of documents is deliberate. Likewise, as appeared to be the case here, the slightly more informal approach of arbitration and the fact that it is a neutral method of dispute resolution, means that imbalances between the legal might of the parties is not automatically obvious. Finally, the question of transparency is far from easily addressed. It seems clear in these circumstances

⁷ *Lesotho Highlands Developments Authority v Impreglio* [2006] 1 AC 221.

⁸ *Chantiers de l'Atlantique SA v Gaztransport & Technigas SAS* [2011] EWHC 3383.

⁹ *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 Lloyd's Rep 707.

¹⁰ *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638, [516].

¹¹ *Ibid*, [316].

that it may have been more difficult for PI&D to act in the manner that it did were its actions to be publicly accountable. However, one of the more attractive features of arbitration over legal proceedings is confidentiality. If this is removed, the value of arbitration is significantly reduced.

CONCLUSION

Whilst the judgment in *Nigeria v PI&D* is necessarily significant in regards to the scope of the award that was refused and the actions of PI&D that were taken in attempting to obtain that

award, it does not seem possible to suggest that the judgment itself has far reaching ramifications for the arbitration process. The judgment is fact based, and these were extreme facts and therefore, even though issues were highlighted, the application of the law was not altered and nor is there any obligation for the arbitration process to change. The question of whether the court's suggestions or advice will be followed cannot yet be answered, but it is difficult to see how a relatively entrenched process, successful because of the factors which cause these issues can easily improve.