US $11 BILLION AWARD COURT NEUTRALIZED

English commercial court neutralizes US$11 billion award obtained by fraud against the state of Nigeria

Written by **ANDREW TETLEY, SIMON GREER & LIAM HART**

ReedSmith
Driving progress
through partnership

Key takeaways

- Section 68 of the Arbitration Act 1996 remains an important guardian of integrity in the arbitral process of London-seated arbitrations.
- If there is evidence of fraud, bribery, or corruption affecting a London-seated arbitral process or any consequent award, then it may be possible to challenge the award if evidence of this can be found post-award.
- Bribery by its nature involves a deliberately concealed payment or benefit, which can be difficult to prove. An English Court is likely to be forgiving of a challenging party on matters of delay in bringing a challenge based on bribery and corruption and on the absence of such a challenge in the arbitral process itself. Even long after the award has been handed down, when usual time limits for challenge have expired, and where earlier timely challenges on other grounds may have failed, a challenge based on fraud, bribery, and corruption may succeed, as the commented case exemplifies.
- A claimant against a state may be disadvantaged in the long run if

the state demonstrably does not dedicate the necessary legal and other resources in defense of its position in an arbitral process.

- Going to final judgment or an award against states where corruption is endemic, as the state itself in the commented case admitted, may be a perilous path even for an honest claimant.

Introduction

In the introduction to its judgment of October 23, 2023, the English High Court held up the case as a warning to the arbitral community: "This is a highly unusual case, although one that draws attention to matters of wider importance. Quite apart from the consequences for the parties, the matter touches the reputation of arbitration as a dispute resolution process."

The Case

In this long-running saga, Nigeria challenged separate arbitral awards obtained against it by Process & Industrial Developments Limited (P&ID) on jurisdiction, liability, and quantum under section 68 of the Arbitration Act 1996 (the Act) on grounds of bribery, corruption, and perjury.

An earlier section 68 challenge to the liability award had been refused by the English Court.

The issues raised in the second challenge were not issues raised in the arbitration itself or in the first section 68 challenge. It was only after subsequent criminal proceedings in Nigeria and multiple disclosure applications made around the world by the Nigerian state that the evidence underpinning the state's second challenge emerged.

Allegations of wrongdoing in the second challenge proceedings were focused not only on the contract in question but also on the arbitral process itself and the early stages of the Court challenge.

In bringing the second challenge, Nigeria decided to tender no witnesses of its own for cross-examination.

Before the English Court, it was "common ground that bribery was extensive in Nigeria, and that some business could not in practice be transacted without it." But the Court was clear that such points "do not justify bribery." The Court found that P&ID, its guiding minds, and the Nigerian state in-house lawyer involved were dishonest and that their motivation was corrupt.

The evidence revealed that a senior Nigerian state in-house lawyer had received monies from the beneficiary of the award, P&ID, at the time of the contract between the parties, unbeknownst to her employer, the Nigerian state. By so doing, she "put herself in a position where her self-interest and her duty to Nigeria to give disinterested advice conflicted." The Court was satisfied that bribery was established. While that would have arguably been enough for Nigeria to avoid the contract, a matter for the arbitral tribunal, it was not enough to challenge a subsequent award under section 68.

However, other elements of corruption were alleged, ranging from multiple other unexplained payments during the arbitral process to the choice of leading counsel by P&ID in the arbitration. In addition, privileged Nigerian state internal

legal documents, including legal advice, were examined by the Court and found to have been wrongfully obtained and wrongfully used by P&ID during the arbitration.

The Court relied on section 68(2)(g) of the Act, whereby there is a serious irregularity if it can be shown that the relevant award was obtained by fraud or if the award or the way it was procured was contrary to public policy, in circumstances where that has caused or will cause substantial injustice to the state of Nigeria.

In the end, the Court found the necessary elements to grant the section 68 challenge:

i. P&ID relied on evidence before the tribunal that was material but which it knew to be false. Specifically, P&ID failed to

mention the bribes made to the Nigerian state in-house lawyer when its main witness gave evidence explaining how the contested contract came about.

ii. The bribery of the Nigerian state in-house lawyer continued during the arbitral process "to buy her silence about the earlier bribery." Payments totaling circa US$5,000 were made.
iii. P&ID improperly retained Nigerian state internal legal documents – a flow of over 40 documents during the period of the arbitration.

The Court considered that these constituted a serious irregularity in terms of section 68 because they caused substantial injustice to the Nigerian state. The Court had no hesitation in finding that (i) and (ii) alone would suffice for this finding. But it also found that (iii) was also enough on its own. The state of Nigeria was "comprehensively deprived of its right to legal professional privilege throughout the arbitral process" and "effectively denied an important part of the process of arbitration." The Court observed that had the arbitral tribunal known of this conduct, its approach "would have been very different."

The Nigerian state was also able to surmount the not insubstantial obstacle of section 73 of the Act. Section 73 required the Nigerian state to show that at the time it took part or continued to take part in the arbitral proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objections now made before the English Court in the section 68 challenge. Although the Nigerian state offered no witnesses for cross-examination, the Court found that the Nigerian state did not know and could not with reasonable diligence have discovered the operative fraud and elements relied upon by the Court in finding that section 68 applied.

The Court held over the form of order for further submissions as to how it should exercise its powers under section 68(3) of the Act, following its decision.

Comment

At the end of the judgment, returning to his introductory remarks, Knowles J made a number of concluding comments as to the

significance of this decision for the arbitration community: "I hope the facts and circumstances of this case may provoke debate and reflection among the arbitration community, and also among state users of arbitration, and among other courts with responsibility to supervise or oversee arbitration… The risk is that arbitration as a process becomes less reliable, less able to find difficult but important new legal ground, and more vulnerable to fraud."

He emphasized the importance of parties properly instructing their lawyers and ensuring proper participation in arbitration, querying, "But what is an arbitral tribunal to do?… Could and should the Tribunal have been more direct and interventionist when it was so clear throughout the Arbitration that Nigeria's lawyers were not getting instructions, or when at the quantum hearing Nigeria's then Leading Counsel, was failing to put necessary points to experts to test their opinion and Nigeria's own experts (for whatever reason) had not done the work required? Should the Tribunal have taken the initiative to encourage exploration of new bounds of contract law and the law of damages that may today be required where major long-term contracts are involved?"

These are questions directed to the arbitral process, not the fraud that was found and relied upon by the Court on the section 68 application. They are also not peculiar to arbitration and can equally arise in litigation.

The Court also noted the absence of public or press scrutiny, arising from the privacy of the arbitration process. Knowles J commented, "Is greater visibility in arbitrations involving a state or state-owned entities part of the answer?" This is a well-trodden area in investment arbitrations where strong opinions are held by the various stakeholders. The arbitration in this case was a commercial arbitration. The Court suggested that public scrutiny from an open process might have allowed the chance for the public and press to call out what was not right.

In the end, and subject to the possibility of an appeal to follow, the fruits of the bribery and corruption in this case will not be enjoyed by P&ID. The system has held up, undoubtedly at great cost and time. But it has held up, with the importance of section 68 of the Act being available to maintain the rule of law noted.

Despite the Court's apparent concerns, the arbitral community, and its wider users, should be more reassured than dismayed by this judgment.

Contractual Adjudication

The new resolution process developed by NZDRC and NZIAC with cost and time efficency in mind

If you're interest in hearing more about Contractual Adjudication, please email *registrar@nzdrc.co.nz* or *registrar@nziac.com*

NEW ZEALAND DISPUTE RESOLUTION CENTRE
Te Pokapū Whakatau Tautohe o Aotearoa

NEW ZEALAND INTERNATIONAL ARBITRATION CENTRE
Te Pokapū Whakataunga Taiao o Aotearoa

About the authors

Andrew Tetley is a Partner in Reed Smith LLP's Paris office with broad experience in commercial litigation, international arbitration and project work.

Andrew is a French avocat and English solicitor advocate. He is currently based in Paris, but he has previously practiced in New Zealand and in the UK. Andrew's 25-year long career in arbitration includes ICC, LCIA, LMAA, GAFTA, RSA, CAMP, UNCITRAL, ad hoc and ancillary court proceedings, with emphasis on transport and trading. Alongside his principal work in arbitration, Andrew appears in French commercial, civil and administrative courts, including at appellate level, as well as in the English courts.

Simon Greer is a commercial disputes and international arbitration Partner in Reed Smith LLP's London office, with substantial experience in disputes relating to banking and financial services; investment and hedge funds; construction and engineering; life sciences; aviation, aerospace and defence; telecommunications, media and technology; commodities and real estate.

He has significant experience acting in LCIA, ICC, SIAC, UNCITRAL, Swiss Rules, Stockholm Chamber of Commerce, AAA and LMAA arbitrations and acting in proceedings in the UK Supreme Court, English Court of Appeal and English High Court (particularly the Commercial Court, Queen's Bench Division, Chancery Division, Technology and Construction Court, Companies Court and SCCO).

Liam Hart is Counsel in the London office of Reed Smith LLP. He is an expert in disputes across the construction and engineering sector and has experience in a wide range of industries, including nuclear, offshore and onshore wind, oil and gas, mining, shipbuilding, healthcare, aviation and aerospace. Many of his cases involve complex technical or factual evidence and/ or delay and quantum analyses. He has extensive experience of standard form construction contracts, including FIDIC, NEC, JCT, IChemE and others.

Liam has handled arbitrations both on an ad hoc basis and under the rules of most major international arbitration institutions in jurisdictions across Europe, Asia, North and South America, the Middle East and Africa.