Fraud as a ground for resisting enforcement of arbitration awards and adjudicators decisions

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A global problem with fraud and corruption

Corruption Perceptions Index (CPI) – 66% of countries corrupt

The CPI uses a scale from **0 to 100**

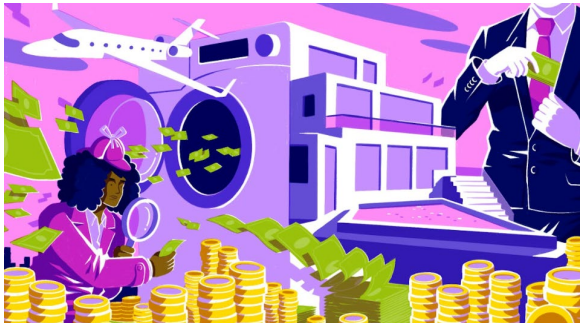
100 is **very clean** and 0 is **highly corrupt** score.

CPI 2023 reports that **over two-thirds of countries score below 50 out of 100**, which strongly indicates that they have serious corruption problems. The global average is stuck at only 43, while the vast majority of countries have made no progress or declined in the last decade. What is more, 23 countries fell to their lowest scores to date this year.

More Interpol Red Notices issued than at any other time.

A global problem with fraud and corruption… and weakening of the rule of law say TI

"Weakening justice systems globally enable corruption by reducing accountability for public officials [look at Trump in waiting!]. *Both authoritarian and democratic leaders contribute to this trend, fostering impunity for corrupt acts like bribery and abuse of power. Corruption infiltrates courts and justice institutions, hindering access to justice for vulnerable groups while benefiting the wealthy and powerful. Even top-ranking countries on the Corruption Perceptions Index (CPI) are implicated in cross-border corruption, yet often fail to prosecute perpetrators and enablers, perpetuating a cycle of impunity…"*



TI - top-scoring countries problem

"Large-scale corruption schemes may often originate from a country lower down the CPI ranking, but they almost always have a transnational element. Many cases have involved companies from top-scoring countries that resort to corruption when doing business abroad. Others have implicated professionals who sell secrecy or otherwise enable foreign corrupt officials…"

In some countries, the CPI has also recorded worsening corruption levels. This includes **Australia** (75) and **Canada** (76), who dropped 10 and 8 points since 2012, respectively. When compared to their scores on the 2015 CPI, **Austria** (71), **Luxembourg** (78), **Sweden** (82) and the **United Kingdom** (71) have also declined significantly!

The issues in FRN v P&ID show the clear nexus with this problem.

Arbitration and fraud

Corruption and fraud a malaise of international business?

'Spotlight on Corruption' – which is a UK Charity that shines a light on the UK's role in corruption here and overseas in its 6 February 2024 submission to the Arbitration Bill [HL] *Special Bill Committee* said: -

In the course of our work, we have grown increasingly concerned about the vulnerability of confidential arbitration proceedings to corruption and fraud – particularly in the context of high-value disputes involving states.

Notwithstanding the significant public interest in the underlying dispute, which concerned public procurement in the corruption-rife energy sector in Nigeria, the arbitration was held entirely in secret. The corrupt payments made by P&ID, a small offshore company with no meaningful track record in the gas industry, remained hidden from public scrutiny until the High Court gave Nigeria permission in 2020 to challenge the awards.

Discuss!

Corruption and fraud a malaise of international business?...

As one senior international arbitrator has observed:

"*Corruption is today one of the greatest challenges facing international commerce and has serious detrimental effects on markets, efficiency, and public welfare. While corruption is certainly not a novel issue for arbitration (over half a century ago, see International Chamber of Commerce (ICC) Case No 1110…), arbitrators in both commercial and investment treaty arbitration proceedings are today adjudicating corruption issues with increasing frequency*."

Emmanuel Gaillard, "*The emergence of transnational responses to corruption in international arbitration*", Arbitration International, 2019, vol. 35, 1–19.

The law – s.68 AA 1996

Arbitral awards - challenged or set aside for fraud and corruption under the Arbitration Act 1996.

Under Section 68 the award can be challenged if a party can prove that there has been a ***serious irregularity*** affecting the

(i) tribunal,

(ii) the proceedings, or

(iii) the award (the high hurdle)

Serious irregularity includes **fraud or corruption**, among other things.

Specifically, **Section 68(2)(g)** allows a party to challenge an award on the grounds that "*the award has been obtained by fraud*." Similarly, Section 68(2)(h) permits a challenge on the basis that "*the making of the award was induced or affected by fraud or undue means*."

If a party can demonstrate that fraud or corruption (civil burden but higher than BoP hurdle) has occurred during the arbitration process or has influenced the outcome of the award, it may have the award set aside by the court.

Ultimate importance of maintaining integrity and transparency in arbitration proceedings in the UK versus the ultimate finality of 'private' arbitration.

Arbitration Act 1996

Presumption of enforceability

Sinocore International Co Ltd v RBRG Trading (UK) Ltd [2018] EWCA CIV 838, there is a presumption of enforceability of arbitral awards under the Arbitration Act 1996. **Challenges to enforcement based on fraud must demonstrate that enforcement would be contrary to public policy - section 103(3) of the AA 1996.** The court emphasised the importance of finality in arbitration decisions and stated that re-opening facts is only permissible in exceptional circumstances.

Parties may challenge domestic awards on grounds of

- **lack of jurisdiction** (s.67),
- **serious irregularity** (s.68) or
- **error of law** (s.69).

Any challenge must be brought within 28 days. s.70(3).

However, there is a discretion to extend time under s.80(5).

But a very high hurdle.

EOT to make application to the Court? The *Kalmneft* factors

Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128 per Colman J:

(1) the length of the delay;

(2) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances:

(3) whether the respondent to the application or the arbitrator caused or contributed to the delay:

(4) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(5) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have.

(6) the strength of the application;

(7) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

Q: Are factors (i)-(iii) the 'primary' factors? *Nagusina Naviera* (2003] 2 CLC 1 LJ Mance at [39] (yes!);

Ali Allawi v Pakistan (2019) EWHC 420 (Comm) at 1471 and most recently Sir Ross Cranston in *FRN v P&ID* (2020) at (160) (no!)

Kalmneft EOTs in fraud cases

Russell says (24th edn at [8-225]):
"*Cases regarding alleged fraud under s. 68(2)(g) AA are arguably treated as* ***special cases*** *for the purposes of granting an extension*".

Two examples:

Chantiers de l'Atlantique [2011] EWHC 3383 (Comm): Losing party received tip-off of perjury some weeks post-award. Flaux J held it was "responsible" to take time to investigate and granted an extension of around one month.

Elektrim SA v Vivendi Universal SA [2007] 1 Lloyd's Rep 693: Losing party discovered a document through US disclosure that had been withheld from the arbitration. Aikens J granted an extension of time: Elektrim had acted "sensibly and reasonably".

Takhār v Gracefield Developments Ltd [2019] UKSC 13: A new slant?

It concerned application to set aside a judgment (**not an award**) on fraud grounds.

The key passage is of Lord Kerr at (54):
*"We are **not required to be 'perpetually on guard'** so that we are looking to discover the fraud of another party ... in my view, it ought now to be recognised that where it can be shown that a judgment has been obtained by fraud, and where no allegation of fraud had been raised at the trial which led to that judgment, **a requirement of reasonable diligence should not be imposed on the party seeking to set aside the judgment**"* ([51]).

Two exceptions:

(1) fraud already raised and rejected at the original hearing; or

(2) "deliberate decision" not to allege fraud earlier ([55]).

Q: BUT does Takhar apply to arbitration? Cockerill J said it was "by no means clear" in *ZCCM Investments Holdings PLC v. Kansanshi Holdings* [2019] EWHC 1285 at [219].

The latest word: *P&ID v Nigeria*

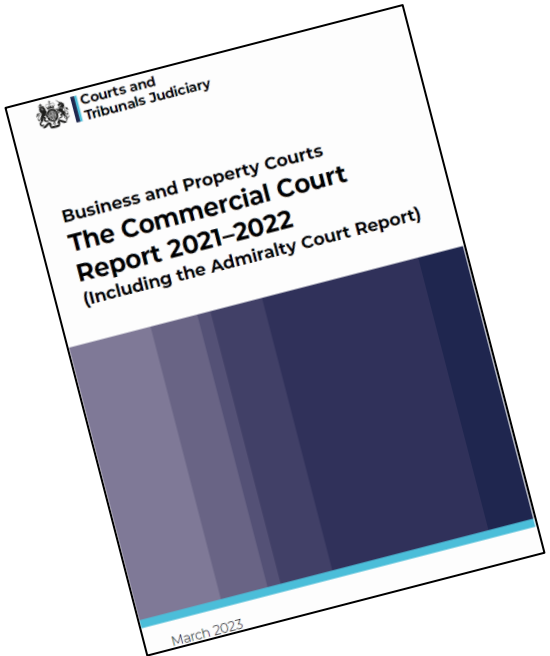
- Application to set-aside US$10 billion award, one of the world's largest lawsuits. Nigeria requested "unprecedented" 3-year extension of time.
- Key paras - Sir Ross Cranston (see (167)-[176]. [261]-[276] **[2020] EWHC 2379** (Comm).
- First, *Kalmneft* EOT grounds remain the starting point for fraud challenges: [262].
- Secondly, merits are important. Nigeria had a "strong prima facie case".
- Thirdly, the Court will examine whether there was a 'trigger': *I accept that there was nothing which Nigeria ought to have been aware of to act as a trigger causing a reasonable person, exercising reasonable diligence, to have discovered the alleged fraud"* ([264]).
- Fourthly, had it been necessary, Sir Ross Cranston would have decided that *Takhar* **does** apply to arbitration, so no reasonableness requirement applies at all ([183]).

Section 68 AA 96 challenges – high bar

Few types of court application with such a high failure rate. ***The Commercial Court Report for 2021-2022*** (latest) recorded that 26 No. s68 applications had been brought the previous year, and **only 4%** – 1 application – succeeded. Nine of the 26 applications – just under 35% – were dismissed on paper.

Over the five years 2015 – 2019 there was a slight increase in both the number of successful challenges, and success rate of s.68 challenges.

A serious irregularity under section 68(2) of the AA 1996, … has caused or will cause "substantial injustice" to the claimant



The hurdle in arbitration – s68(2)(g)

The decision in *Celtic Bioenergy Ltd v. Knowles Ltd* [2017] EWHC 472 (TCC) is a good reminder in the TCC (Jefford J) of the court's ability to set aside an arbitrator's award having found that it had been obtained by the respondent's fraud.

There the award was obtained by fraud in that matters that were completely inconsistent with key issues in Knowles' case were deliberately withheld from the arbitrator.

Of the requirement that an applicant establish that it has suffered substantial injustice Jefford J found, "*It seems to me that where the key issue is one that would potentially be affected by the material not put before the arbitrator it must follow that CBL have suffered a substantial injustice – namely the wrong result.*"

This decision - a reminder to arbitrators of the importance of endorsing principles of fairness by ensuring **that witnesses are given a proper opportunity to address possible weaknesses in their evidence**, particularly in circumstances where such evidence is not accepted by the Tribunal.

Robin Knowles J CBE*: FRN v P&ID* (2023)

*"*516. *I reach these views of the matter without reluctance. **P&ID has the Awards only after and by practising the most severe abuses of the arbitral process**. As a result, Nigeria had a "right to object" under section 68(2)(g) of the Arbitration Act 1996…If this was a fight it was not a fair one, and could not lead to a just result…"*

The court found that the arbitration was compromised by false evidence and conflicted lawyers. The continued concealment of the truth by dishonest witnesses and the improper conduct by lawyers acting for P&ID meant the arbitration was "*a shell that got nowhere near the truth*".

Mr Justice Knowles described Nigeria's challenge as "*a stand-out example of a case where 'justice calls out for' correction*" (para 517).

Federal Republic of Nigeria v P&ID

*582. "Regardless of my decision, **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 facts and circumstances of this case, which are remarkable but very real, provide an opportunity to consider whether the arbitration process, which is of outstanding importance and value in the world, needs further attention where the value involved is so large and where a state is involved."*

The Hon Mr Justice Robin Knowles CBE

On the grounds of s.68 serious irregularity.

Discuss!!!

Federal Republic of Nigeria v P&ID…

The Hon Mr Justice Robin Knowles CBE

583. *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**. The present case shows that having (as here) a tribunal of the greatest experience and expertise is not enough. Without reflection, then a case such as the present could happen again, and not reach the court.*

Discuss!!!

Key strategies for parties to minimise s68 challenges

Some key strategies for parties Knowles J suggested *obiter* to minimise s68 challenges to arbitral awards via proactive conduct can mitigate procedural failings. Strategies include:

1. **Thorough Cross-Examination**: Parties should cross-examine witnesses on core credibility issues to prevent subsequent challenges based on untested evidence.
2. **Clear Pleadings**: Clearly outlining issues in pleadings and their interrelation helps avoid confusion for the tribunal, reducing the risk of overlooking crucial determinations.
3. **Fair Opportunity for Argument**: Providing fair opportunities for all parties to advance arguments and respond to opposing points prevents surprises and potential basis for challenges due to procedural unfairness.
4. **Ensuring All Live Issues are Determined**: Continuously revisiting and updating the list of issues throughout the case ensures no vital matters are overlooked or dismissed prematurely, minimizing the chances of challenges post-award.

Reputational issue for arbitration?

As a private dispute resolution mechanism, arbitration is a system where the arbitration community's perception of arbitrators and their exercise of discretion can significantly affect their prospects of reappointment. This can act as a strong deterrent for tribunals to pursue suspicions of corruption and order disclosure of confidential materials.

Recognising this difficulty, **is there is a need for a clear legislative steer for how arbitrators should handle allegations or suspicions of corruption?**

This would remove the burden of discretion where the public interest in transparency outweighs the disputing parties' preference for confidentiality which *Nigeria v P&ID* highlights.

Federal Republic of Nigeria v P&ID

Mr. Justice Knowles concluded with four key reflections:

1. **Imbalance in drafting major commercial contracts with a State** underscores the importance of professional standards and ethics, highlighting the value of pro bono support by leading law firms for resource-challenged states.
2. **Disclosure of documents played a crucial role in uncovering the truth**, emphasising the significance of disclosure orders in ensuring transparency.
3. In arbitration cases involving a State, **inadequate participation and representation by legal representatives, experts, and officials can hinder the process**, raising questions about the tribunal's role in ensuring proper engagement and exploring new legal boundaries.
4. **The confidentiality of arbitration may hinder public scrutiny**, prompting consideration of whether greater visibility or scrutiny is necessary in cases involving significant public funds.

Federal Republic of Nigeria v P&ID…

Despite finding in Nigeria's favour, Knowles J did not address in the judgment how the awards should be dealt with, deciding that he would hear arguments from the parties on this point at a later date.

However, at a hearing on **8 December 2023**, Knowles J decided to set aside the awards rather than remit them to the tribunal for reconsideration.

Knowles J concluded*: "The grant of leave to appeal has consequences, just as its refusal does. The grant of leave to appeal would not be just in all the circumstances."*

On the question of setting aside the awards or remitting them to the tribunal for reconsideration, he said: "*There is, in my judgment, **no real prospect of justice being done by the tribunal upon reconsideration.** That is not, in this case, because of the behaviour of the tribunal. It is because of the behaviour of P&ID*…"!!!!

Federal Republic of Nigeria v P&ID

- *FRN v P&ID* illustrates that even with an arbitral panel of 'big cheeses' court intervention may still be necessary in intricate, high-value cases.
- Redefined ethical standards and transparency.
- …Far-reaching implications in the realm of international arbitration…causing much soul searching in the arbitration community.
- …the worry is little can be done to address the concerns raised in this judgment without upending the system of international arbitration, and near-automatic global enforcement under the 1958 New York Convention for the Recognition and Enforcement of Arbitral Awards.

"The awards were obtained by fraud and the awards were, and the way in which they were procured was, contrary to public policy"

Is The Red-Flag Standard enough to prove corruption in International Arbitration?

	How to Prove Corruption? Standard of Proof THAT'S PRETTY STANDARD
Standard	Application
Preponderance of Evidence or Balance of Probabilities	• Typically applies as the default rule in investor-state arbitration. • It requires an evaluation of all the evidence produced by both parties on a particular issue and this evaluation would ultimately result in the tribunal determining which party's evidence was more likely than not to be true. • Similar to civil lawyers "inner conviction test."
Heightened Standard of Proof	• Typically for matters that are of a quasi-criminal nature and or allegations of wrongdoings (such as bribery, corruption, fraud, impropriety and other such allegations) or when treaty language calls for a heightened standard (e.g., "manifest" standard under ICSID). • It is higher than a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt.
"Connect the Dots."	Lack of Direct Evidence and Tribunals may use techniques like "Red Flags"

Red-Flags - discussion

While red flags are not direct proof of corruption, they serve as indicators that demand further investigation by arbitrators.

Red flags, like unusually large discounts and involvement of parties linked to foreign officials, should be viewed collectively rather than individually.

The *Sorelec v. Libya* case illustrates the application of the red flags test, which requires proof of serious, specific, and consistent acts of corruption.

However, **not all red flags carry the same weight**, with transaction-specific ones being more significant.

Legal strategies addressing corruption allegations should prioritise these factors. Recent decisions indicate a shift away from the 'clear and convincing evidence' standard towards the traditional 'balance of probabilities' standard in determining corruption claims in international arbitration, as seen in cases like *Metal-Tech, Niko Resources*, and *Vale*.

FENWICK ELLIOTT

Fraud as a ground for resisting enforcement in Adjudication

Fraud as a ground for resisting enforcement in Adjudication

Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to the claims; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.

The mere suggestion or an outright allegation of fraud which is not proven will not normally be enough to unseat the adjudicator or prevent subsequent enforcement of the decision.

Fairly limited cases addressing the impact of fraud allegations on adjudication decisions, revealing a cautious approach by courts in enforcing adjudicators' decisions. However, the Court of Appeal's ruling in *Speymill Contracts Ltd v Eric Baskind* (2010) clarified the law. Jackson LJ summarised the law on fraud in the context of adjudication enforcements and approved the propositions outlined in SG *South Limited v King's Head Cirencester LLP*:

In *SG South Ltd v Kingshead Cirencester LLP* [2009] EWHC 2645 (TCC), the defendant employer alleged fraud during adjudication but failed to substantiate it. In subsequent enforcement proceedings, Akenhead J outlined three key principles regarding fraud allegations in adjudication enforcement:

(a) Fraud can be raised as a defence in adjudications if it's a genuine defence to the claims at hand. Parties can challenge the credibility of witnesses due to fraudulent behaviour.

(b) To raise fraud to seek to avoid enforcement or to support a stay of execution requires clear and unequivocal evidence to be presented.

(c) A distinction must be made between fraudulent behaviour that could have been raised **during** adjudication and behaviour that emerged **afterward**. If addressed during adjudication, the decision is enforceable; if not, it's generally not permissible to raise it later.

Fraud as a ground for resisting enforcement in Adjudication

In *Eurocom Ltd v Siemens PLC* [2014] EWHC 3710 (TCC), “strong prima facie” case of fraudulent misrepresentation.

Eurocom's claims consultants Knowles Ltd listed twelve adjudicators as having a conflict of interest in a nomination form. After Eurocom won the adjudication, Siemens challenged the process, alleging fraudulent manipulation by Eurocom's consultants. Ramsey J found that the consultants provided a false statement on the nomination form, leading to the exclusion of certain adjudicators without valid conflicts. This fraudulent misrepresentation invalidated the appointment process, rendering the adjudicator's jurisdiction null.

Ramsey J also held that there was an implied term of the contract that parties should not *subvert the nomination system through fraudulent misrepresentation*. The decision raised wider concerns about the relationship between claims consultants and adjudicators, leading to suspicions of bias in subsequent cases.

These cases highlight significant issues in the adjudication nomination process, going to the very validity as a dispute resolution method. Similar challenges may arise in other adjudications where suspicions of claims consultant or party rep misconduct exists, potentially leading to disclosure orders and scrutiny of completed adjudications. This situation contrasts sharply with Sir Michael Latham's vision of teamwork and partnership in construction disputes!

Fraud in adjudication

In adjudication, who the adjudicator is can be extremely important. They not only make decisions about the dispute at hand but also handle matters of jurisdiction and ensure the fairness of the process. Over time, some experienced users of adjudication may develop preferences for certain adjudicators or may prefer to avoid others and some have honed these skills!

If a party wishes to allege fraud or fraudulent behaviour in adjudication, **there must be "clear and unambiguous evidence" to support it**. Fraud must be proved on the balance of probabilities "***to a convincing degree***" (Gosvenor below).

*Gosvenor London Ltd v Aygun Aluminium UK Ltd [*2018] EWHC 227 (TCC) a decision of Fraser J involved allegations of fraud including stolen site information, falsified records and fraudulent claims for payment. During enforcement proceedings the court was asked whether the respondent could raise allegations of fraud which were known about but were not put forward in the adjudication.

A case on this point is *Assesmont Ltd v Brookvex IMS Ltd* (2018) QBD (TCC) judgment given on 29 August 2018 by Jefford J who following *SG South* held that allegations of fraud based on fraudulent time sheets could have been raised in the adjudication and therefore could not be used to prevent enforcement of the award.

Fraud in arbitration and adjudication …closing points

In the realm of arbitration and adjudication within the UK legal framework, the spectre of fraud looms as a grave concern, demanding vigilant oversight.

Arbitrators and adjudicators are entrusted with the sacrosanct duty of upholding the sanctity of the process, a mandate that necessitates stringent scrutiny in cases involving allegations or evidence of fraudulent conduct.

Fraud, manifesting in deceitful acts and the dissemination of false information or the propagation of misleading representations, constitutes a flagrant affront to the integrity of the proceedings, and thus merits severe repercussions.

These may encompass the nullification/setting aside of awards or judgments, thereby safeguarding the foundational principles of justice and equity. In instances where suspicions of fraud arise, the judiciary retains the prerogative to intercede, ensuring that the adjudicative and arbitral fora remain bastions of probity and fairness.

Thank you.

Questions?

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