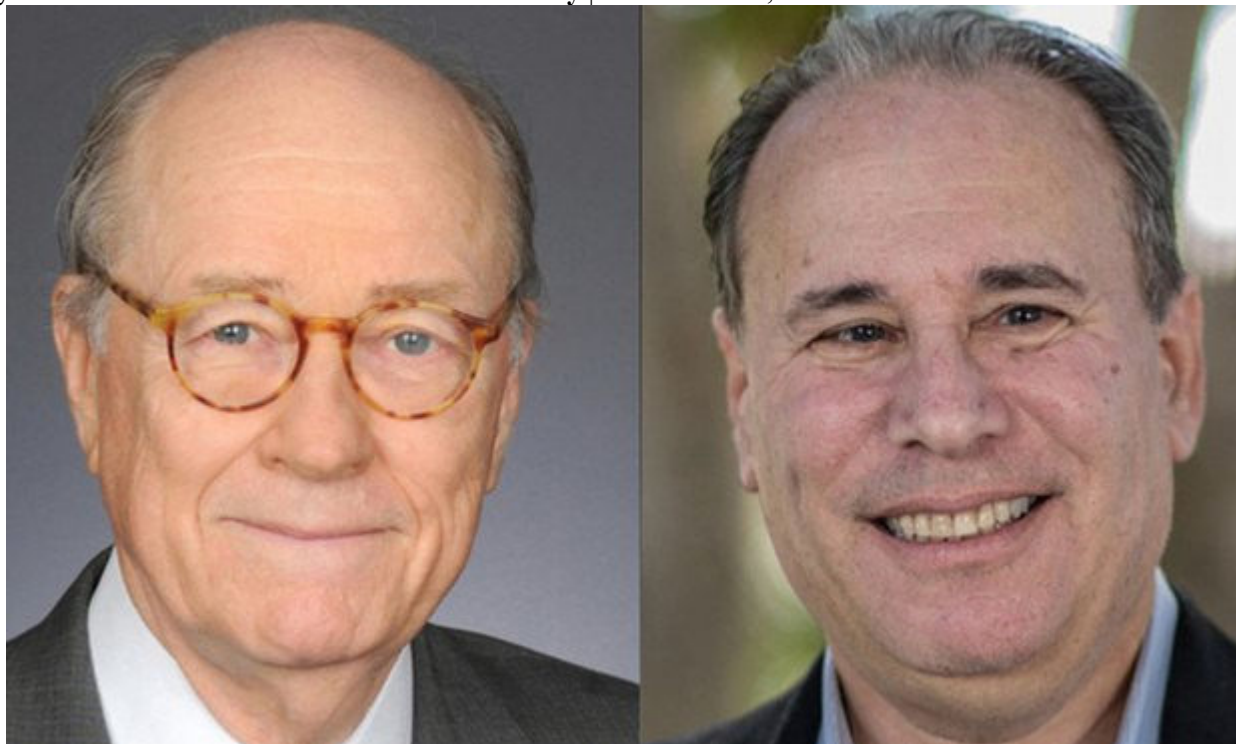


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Should International Arbitrators Be Watch Dogs or Hound Dogs?

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By **Lawrence W. Newman and David Zaslowsky** | December 12, 2023 at 10:00 AM



International arbitrations often involve large amounts of money concerning, on occasion, indications of illegality, including criminal activity, such as the bribing of public officials and the transfer of criminally derived money or other assets. What arbitrators can and should do when they have some awareness of such illegal activity has recently become the subject of commentaries and analyses, notably in a decision by an English court of first instance that examined and set aside a massive arbitration award against Nigeria.

In [*Federal Republic of Nigeria v. Process & Industrial Developments*](#) (P&ID), decided on Oct. 23, 2023 by Justice Robin Knowles of the Business and Property Court of the High Court of Justice in London, two arbitration awards (on the merits and on quantum) totaling \$11 billion were denied enforcement as violative of Section 68 of the Arbitration Act 1996. The court denied enforcement of the awards because they were “obtained by fraud . . . and [because] the way they were procured was contrary to public policy.”

The court’s judgment described how P&ID, a British Virgin Islands shell company with no prior experience, obtained a 20-year contract with unusually loose terms for the processing of so-called “wet gas.” The “wet gas” was to be supplied by Nigeria as a byproduct of its extraction of oil, and the processing of it by the contractor into lean gas was to be used by Nigeria in power generation in the Niger Delta—with the remaining liquid to be available for sale by P&ID. Three years passed in which neither party took any steps to carry out its obligations under the contract.

A later investigation developed that P&ID was corruptly given access to Nigeria's "internal legal documents." The tribunal was chaired by Lord Hoffman, a former Law Lord, and also included Sir Anthony Evans KC and a former Attorney General of Nigeria, Chief Bayo Ojo. It found that Nigeria had repudiated the contract and awarded, in a subsequent proceeding, damages of \$6.6 billion, plus 7% interest.

When P&ID applied to an English court for recognition of this award, Nigeria employed investigators and new counsel (that had not participated in the arbitration) who uncovered new evidence that revealed that P&ID had bribed a lawyer from Nigeria's legal team that had been involved in the contract negotiations.

The court found that these facts as further developed constituted "serious irregularity" under Section 68 the Arbitration Act 1996, commenting that "what happened in this case is very serious indeed, and it is important that section 68 has been available to maintain the rule of law."

The court went on to criticize the way arbitration had been conducted, saying, "In the arbitration, the Tribunal did what it did with what it had . . . But the fact is that the arbitration was a shell that got nowhere near the truth." It went on to observe, "But I end the case acutely conscious of how readily the outcome could have been different . . ." had certain evidence not have become available through investigation when the award was challenged.

Although the court described the arbitral tribunal as comprising persons of the "greatest experience and expertise," it is "not enough . . . a case such as the present could happen again, and not reach the court." It indicated that the tribunal could have done more when it said:

But what is an arbitral tribunal to do? The Tribunal in the present case allowed time where it felt it could and applied pressure where it felt it should. Perhaps some encouragement to be better engaged can be seen as well. Yet there was not a fair fight and the Tribunal took a very traditional approach. But was the Tribunal stuck with what the parties did or did not appear to bring forward? Could and should the Tribunal have been more direct and interventionist. . . . ?

Thus, the court impliedly criticized the more passive "traditional approach" taken by the arbitrators and suggested, particularly for financially important cases, a more "interventionist" approach. Accordingly, where there are indications of corruption in the underlying transaction or in the arbitration process itself, the more susceptible arbitral tribunals are likely to depart from the "traditional approach."

It happens that, prior to the *Nigeria* decision, an extensive effort was being made by a large number of international arbitration lawyers to formulate and advocate the use of guidelines for a more assertive role to be played by arbitrators in cases potentially involving corruption and other illegality.

In April 2019, the Basil Institute on Governance—the publisher of the annual Basil AML (anti-money laundering) Index—issued a "Toolkit for Arbitrators" titled "Corruption and Money Laundering in International Arbitration." The toolkit announced, in its introduction, that it "aims to help arbitrators who suspect, or are confronted with, alleged corruption or money laundering in relation to the undying dispute . . ."

Although the toolkit does not command or advise arbitrators to undertake their own investigations when they suspect corruption or money laundering, it does contain (p. 12) considerable encouragement for them to engage in "sua sponte investigation of the alleged suspected corruption . . . whether in the context of commercial or investor-state arbitration." Arbitrators should consider doing so, the toolkit says, "even if the allegations or suspicions arise only at the final stages of the proceedings."

The toolkit focuses particularly on corruption in the form of bribery, especially with respect to investor-state contracts, where questions arise as to the circumstances under which contracts were awarded by states to the contractors in the arbitrated disputes. The toolkit provides a lengthy list of "red flags" that are intended to "help

arbitrators identify potential corruption.” Although many of the red flags focus on the various ways in which intermediaries may be corruptly used to obtain contractors, some of the red flags concern money laundering, in particular the attitude of the investor company toward compliance and whether there is a company code of conduct regarding anti-money laundering obligations (p. 8).

The toolkit deals more directly with money laundering in a separate chapter that posits two scenarios in which money laundering could be related to the underlying arbitral dispute: (1) sham arbitrations, where both parties are aware of how the funds involved are of illicit origin and (2) when the parties may have a dispute as to funds that are the proceeds of crime (p. 19).

Anti-money laundering laws have been enacted by many countries in the wake of increasing enforcement under the US Foreign Corrupt Practices Act, as have international agreements, such as the 2003 UN Convention against Corruption (UNCAC), Article 23.1. Money laundering under these provisions is based on predicate violations of criminal law commonly fraud in the US, mail and wire fraud, 18 USC sections 1341 and 1343.

Although the vast majority of the more than 100 lawyers named in the toolkit as having participated in drafting its provisions and/or participating in the workshops leading up to the publication of the toolkit were from civil law countries in Europe, the toolkit is a useful checklist of factual issues that every arbitrator involved in international arbitration should be aware of. And, while there were also some participants from common law countries including the United States, Canada and the United Kingdom, more importantly, there is nothing parochial about the provisions of the toolkit, which are directed to troubling factual situations that may emerge in disputed matters anywhere in the world.

There remains the question as to the extent to which arbitrators have a duty—as described in the toolkit, as opposed to the opportunity—to investigate when becoming aware of one or more of the red-flag circumstances. Any such duty runs up against the reality that the powers of arbitrators to follow up on suspicious circumstances are limited, essentially, to information that they may obtain through requests to the parties to the dispute before them.

Nevertheless, as the toolkit points out, when arbitrators ask questions of a party that it fails to answer adequately, such as details on the source of certain funds or concerning a suspicious transaction, they may, in appropriate circumstances, draw an inference that the funds were infected by violations of criminal law. The drafters of the toolkit made clear that they intended that arbitrators not shy away from confronting suspicious circumstances but take them seriously and pursue them. As one of the lawyers who played a major role in the drafting of the Basil Toolkit, Nadia Darwazeh of the office of Clyde & Company in Paris, recently said in a speech in Basil, arbitrators should trust their “inner convictions” and not fear tackling corruption (as reported in *Global Arbitration Review*, 12 May 2023).

It can be fairly understood that arbitrators in international arbitration proceedings are expected to carry out their responsibilities with diligence and to issue enforceable awards. How far these responsibilities of due care and professionalism are carried out by members of international arbitral tribunals through “sua sponte” investigations of suspected corruption or money laundering in particular cases remains to be seen. But attention has been called.

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