EFFECT OF FRAUD AND BRIBERY IN THE ENFORCEMENT OF ARBITRAL AWARD: THE CASE OF P & ID

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Abstract

This research examined the effect of fraud and bribery in the enforcement of arbitral awards. The research in particular, took a cursory on the effect of fraud and bribery in the arbitration case of P & ID. The doctrinal method of research was adopted. The research discovered that the facts and circumstances of the P & ID case may provoke debate and reflection on the effect of fraud, bribery and corruption in arbitration proceedings among the arbitration community, state users of arbitration, and other courts with responsibility to supervise or oversee arbitration. It was recommended that there is need to give further attention in the enforcement of arbitral awards where allegations of bribery, corruption and fraud are raised especially, where the monetary value involved in the arbitration is so large and involves state and state actors. The research concluded that there should be transparency in contract-based investor–state arbitration to avoid government officials from corruptly enriching themselves from public funds.

Introduction

There is a small difference between the concepts of recognition and enforcement of an award. An arbitral award is recognised as binding on the parties when it is made but does not become enforceable until it has been declared enforceable by the judgment of a court.[1] Therefore, execution cannot be levied against a party on the basis of an arbitral award until the court recognises the arbitral award's enforceability.

In Nigeria, the application for enforcement must be brought before the Federal or State High Court at the state where the arbitration award was made, depending on the subject matter of the dispute submitted to arbitration.[2] Similarly, a foreign arbitral award is regarded as valid but cannot be enforced in Nigeria until it has been made enforceable by a court in Nigeria. *Section 51* of the Arbitration and Conciliation Act[3] expressly provides that an arbitral award will be recognised as binding and enforced by the court irrespective of the country in which it is made.

Once an application is made to the court to enforce or set aside an award, the records of the arbitration become part of the court's record and that arbitration loses its confidential status and can be disclosed in third-party court proceedings.[4] Generally, under *section 51* of the Arbitration and Conciliation Act, an arbitral award will be recognised as binding in Nigeria irrespective of the country it was made if the award meets the requirements in *section 26* of the Act. *Section 52* of the Arbitration and Conciliation Act provides grounds when the enforcement of a foreign arbitral award will be refused. These include:

1. Incapacity of a party.
2. Invalidity of the arbitration agreement.
3. Lack of proper notice or opportunity to present case.
4. The award contains matters beyond the submission to arbitration.
5. The award contains matters beyond the scope of arbitration or incapable of settlement by arbitration under Nigerian law.

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1 See *section 31* of the Arbitration and Conciliation Act.

2 Mark Mordi *et all,'* Enforcement pf Arbitral Award in Nigeria: Overview', <https://uk.practicallaw.thomsonreuters.com/w-034-5855?transitionType=Default&contextData=(sc.Default)&firstPage=true> Accessed 30/10/2023.

3 Cap A18, LFN, 2004.

4 However, see *Article 32, Arbitration Rules, Arbitration and Conciliation Act on duty of confidentiality.*

6. The arbitration procedure or tribunal was not in line with the parties' agreement.
7. The award has not yet become binding or has been set aside or suspended.
8. The award was not made in compliance with the applicable law.
9. The award is against Nigerian public policy.

The arbitral tribunal's award in *P& ID case* triggered further litigation in several jurisdictions.[5] However, it was not until November 2019 that Nigeria first raised allegations of corruption in an attempt to convince English courts to set aside the award in *P& ID case* . As the arbitral tribunal had interpreted the contract as designating London as the seat of the arbitration, English courts had jurisdiction to hear challenges to the award by way of an application to set it aside. Corruption is one of a handful of grounds on which an English court has the power to set aside an arbitral award. On October 23, Justice Robin Knowles CBE, of the High Court of Justice, commercial court of Business and Property Courts of England & Wales, the King's Bench Division while ruling on an Arbitration Claim between the Federal Republic of Nigeria and Process & Industrial Developments,[6] halted the enforcement of the $11bn arbitration award in favour of P&ID against Nigeria in a case delineated CL-2019-000752.[7]

Nigeria challenged the enforcement of the award in the case of *P & ID* case on allegations of bribery, corruption and perjury. The allegations by Nigeria include allegations of bribery and corruption by P&ID before, at and after the time the parties entered into the GSPA.[8] It alleges that some of its own lawyers at the time of the arbitration, including two Leading Counsel, were corrupted by P&ID. An award that is against public policy also include cases of fraud and corruption. Justice Knowles held that the process through which P&ID secured a 2010 contract to build a gas processing plant in Calabar, Cross River State, was fraudulent. The court held as follows:

> "in the circumstances and for the reasons I have sought to describe and explain. Nigeria succeeds in its challenge under section 68. I have not accepted all of Nigeria's allegations. But the Awards were obtained by fraud and the awards were and the way in which they were procured was contrary to public policy…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 research, therefore, will examine fraud and bribery vis-a-vis the enforcement of arbitral award.

Nature of Arbitral Awards

Nigerian legislation does not contain a definition of the term "arbitral award"[9] as such, arbitral awards include:

i. **Final awards.** These are awards that resolve all the issues submitted to arbitration definitively enough so that the rights and obligations of the parties do not need further adjudication as to the issues submitted.

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5 Investment Treaty News, 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria'<https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha/ > accessed 6/12/2023.

6 Herein refered to as P&ID.

7 See Yejinde Gbenga –Ogudare, "Legal Lessons from Nigeria vs P& ID Case' <https://tribuneonlineng.com/legal-lessons-from-nigeria-vs-pid-case/ > Accessed 6/12/2023

8 The Document (Agreement) between Nigeria and P & ID bore the title "Gas Supply and Processing Agreement for Accelerated Gas Development" ("the GSPA").

9 Mark Mordi *et all,'* Enforcement pf Arbitral Award in Nigeria: Overview', <https://uk.practicallaw.thomsonreuters.com/w-034-5855?transitionType=Default&contextData=(sc.Default)&firstPage=true> Accsesed 30/10/2023.

ii. **Interim awards.** These are provisional awards pending the further resolution of other issues submitted to arbitration.
iii. **Domestic awards.** These are awards made during domestic legal proceedings.
iv. **Foreign awards.** These are awards made in an international arbitration.

Under *section 26* of the Arbitration and Conciliation Act, for an arbitral award to be valid it must:
1. Be in writing.
2. Be signed by the arbitrator (s). Where there is more than one arbitrator, it is sufficient for the majority of the members to sign the award if the reason for the absence of any signature is stated.
3. State the date it was made.
4. State the place of the arbitration (the place where the award was made).
5. State the reasons on which the award is based, except in cases where parties have agreed that no reasons are to be given.

Nigeria is a party to:
1. The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). This has been incorporated into the second Schedule of the Arbitration and Conciliation Act.[10] This is then subject to the:
    - reciprocal reservation. Under *section 54(1)* of the Arbitration and Conciliation Act, if the recognition and enforcement of any award arising out of an international commercial arbitration is sought, the New York Convention applies to any award made in Nigeria or in any contracting state. However, the contracting state must have reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention.
    - commercial reservation. The New York Convention applies only to disputes arising from contractual legal relationships.
2. 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Nigeria ratified the ICSID Convention on 23rd August 1965 and enacted the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act CAP I 20, Laws of the Federation of Nigeria, 2004 (ICSID Act). This relates only to investment disputes.
3. UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law).
3. Economic Community of West African States Energy Protocol.
4. Bilateral investment treaties, including with:
    - Finland (2005);
    - Spain (2002);
    - Serbia (2002);
    - Sweden (2002);
    - China (2001);
    - Switzerland (2000);
    - Italy (2000);
    - South Africa (2000);
    - Germany (2000);
    - Romania (1998);
    - South Korea (1998);
    - Taiwan (1994);

[10] *Ibid.*

- Netherlands (1992);
- The UK (1990);
- France (1990).

The main applicable domestic framework for enforcement of arbitral awards Nigeria include:

- Arbitration and Conciliation Act. This is a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation in Nigeria. It is largely compliant with the UNCITRAL Model Arbitration Law, with some modifications. However, arbitration does not fall under exclusive federal competence in Nigeria so certain states, such as Lagos State, have their own Arbitration and Conciliation Acts[11].
- High Court (Civil Procedure) Rules.
- Federal High Court Civil Procedure Rules 2019.
- Sheriff and Civil Process Act.

Brief Facts of P& ID Award

As a solution to issues in its domestic gas supply market, Nigeria sought to collaborate with Process & Industrial Developments Limited ("P&ID") on a power generation project. The project turned sour, resulting in substantial arbitration proceedings. In 2017, the arbitral tribunal (the "Tribunal") awarded P&ID the sum of US$6.6 billion, an amount which, with interest, had grown to over US$11 billion in 2023.[12] In September 2020, the English High Court handed down a key decision in the case *P&ID v Nigeria*. The court was considering Nigeria's attempt to overturn a USD 10 billion award rendered in an arbitration under a contract between a foreign investor and Nigeria. Although Nigeria did not raise allegations of corruption during the arbitration, it now alleges that the investor obtained the underlying contract by bribing Nigerian officials and that the investor subsequently bribed Nigeria's legal counsel to ensure that the country would not contest the arbitration vigorously. The court found there was a "strong prima facie case" that the contract was procured by bribes and that the investor's main witness in the arbitration gave perjured evidence.[13] It further found there was a possibility that Nigeria's legal counsel in the case had been corrupted. [14]

Meanwhile on 5 December 2019 Nigeria issued its application for an order from the English Commercial Court to set aside the Awards (and the Award on Jurisdiction) under *sections 67* and *68* of the Arbitration Act 1996 on the grounds that they were procured by fraud and/or other conduct that is contrary to public policy, and that the Tribunal lacked jurisdiction. The main basis of the challenge was on allegations of bribery, corruption and perjury, which extended not only to P&ID but also to its own lawyers at the time of the arbitration. P&ID dismissed Nigeria's allegations as 'false and dishonest'.

On 23 October 2023, the High Court of Justice of England and Wales (the "High Court") handed down its judgment. The basis of Nigeria's challenge was section 68(2)(g) of the Arbitration Act 1996 –that the award was obtained by fraud or the award or the way in which it was procured is contrary to public policy. Nigeria advanced numerous arguments in this regard, not all of which

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11 *Ibid*

12 Charles Russell Speechlys, 'Nigeria's challenge to US$11 billion award succeeds in the High Court of Justice of England and Wales' <https://www.lexology.com/library/detail.aspx?g=6c9a1bcb-ea8a-440b-a485-9cce5d09e4c7> Accessed on 30/10/2023

13 Investment Treaty News, 'Corruption and confidentiality in contract-based ISDS: The case of *P&ID v Nigeria*, *op.cit.*

14 *Ibid.*

were accepted, but the High Court held that three irregularities constituted 'the most severe abuses of the arbitral process on P&ID's part as follows:

- P&ID's provision and reliance on evidence it knew to be false.
- P&ID's continued bribery or corrupt payments to suppress from Nigeria and the Tribunal the fact of bribery in and around the time the GSPA came about.
- P&ID's improper retention of Nigeria's internal legal documents received during the arbitration, some of which were clearly privileged, that allowed it to track Nigeria's internal consideration of merits, strategy and settlement and to monitor whether Nigeria had become aware of the fact that it and the Tribunal were being deceived.

Nigeria also alleges at the Court hearing that some of the sum of money withdrew and spent by P & ID before the Investors Road Show was used to make cash payments to Nigerian officials present at the Roadshow to influence them. This allegation was not properly explained by P&ID despite the opportunity to explain properly, the concern for secrecy and the timing of the withdrawal. The court accepted that some of this money was used in the way alleged. As a result of the above, Nigeria succeeded in its *section 68* challenge. It was also part of the contention as contained in Statement of Case in the litigation that followed before the Court (and which is dated 18 September 2020), by Nigeria that the arbitration clause in the GSPA departed from the model arbitration clause that Nigerian government departments had been directed to use in their contract. On this issue, the court observed as follows:

> They are as consistent with haste behind the GSPA and failed bureaucracy as with the corruption that Nigeria alleges, and there is much that leaves me unclear on how often these requirements were in practice complied with in Nigeria at the time…I do however in this judgment state where I find the presence of dishonesty or corrupt motives, even though in a claim for bribery dishonesty or corrupt motives are irrebuttably presumed (Novoship at [106] citing Re A Debtor [1927] 2 Ch 367 at 376 per Scrutton LJ – "the court ought to presume fraud in such circumstances")

Nature of Bribery

As for the definitions of bribery or the practice of bribery these sources are very important. First, the definition formulated by Leggatt J (as he then was) in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries*, [15] the court sated as follows:

> A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal.

Also, Slade J I laid down the following ingredients of bribery in *Industries and General Mortgage Co Ltd v Lewis*[16]:

> For the purposes of the civil law a bribe means the payment of a secret commission, which only means
> (i) that the person making the payment makes it to the agent of the other person with whom he is dealing;
> (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and
> (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent.

[15] [1990] 1 Lloyd's Rep 167 at 171
[16] [1949] 2 All ER 573 at 575

The essential character of a bribe is, thus, that it is a secret payment or inducement that gives rise to a realistic prospect of a conflict between the agent's personal interest and that of his principal. The bribe may have been offered by the payer or sought by the agent. A bribe encompasses not just a payment of money but the conferring of any advantage or benefit, and may be an actual benefit or merely the promise of a benefit held out by the payer or an expectation of one. The recipient of the bribe (or the person at whose order the bribe is paid) must be someone with a role in the decision-making process in relation to the transaction.[17]

In the *P& ID Case*, the court found evidence of payments paid to Nigerian officials under various headings in order to influence the award of the contract to P & ID. The court therefore, noted as follows:

> The timing of the payments is highly material, just before and just after the entry into the GSPA. The fact that, within the ICIL Group, they came from accounts of Marshpearl and Hobson Industries and not P&ID is neither here nor there; ICIL Group was not run rigorously between companies. In authorising the payments Mr Cahill was, I find, acting for P&ID to incentivise and reward Ms Taiga in connection with the entry of the GSPA. They were deliberately kept secret from Nigeria. I am quite satisfied that Nigeria is correct in its allegation that these m payments in December 2009 and March 2010 were bribes paid on behalf of P&ID to Mrs Grace Taiga's benefit in connectionwith the entry into the GSPA. I reject as untrue the evidence of Mrs Grace Taiga and Mr Cahill, in particular, to the contrary…The payments I have described were not disclosed to Nigeria, her employer, by Mrs Grace Taiga, or by P&ID and ICIL Group, and this was deliberate.

Conditions for Setting Aside an Award

All kinds of arbitral decisions can be set aside.[18] Neither 'award' nor 'procedural order' is specifically defined in Nigerian law.[19] Conceptually, any decision made by a tribunal against a party is technically an award to the opposing party, but only orders that regulate the future conduct of the proceedings are truly procedural. It follows that a pronouncement by the tribunal may be considered both an award and a procedural order.[20]

Interim and partial awards can be set aside, but steps to set them aside can be taken only after the final award has been issued[21]

An award is final and is not subject to appeal. Under *Sections 29* and *30* of the AC Act, an award can be set aside if:

1. there is misconduct by the arbitrators;
2. in the award, the arbitrators exceeded their jurisdiction;
3. the award was improperly procured or obtained by fraud; or
4. there is an error of law on the face of the award.

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17 *Novoship (UK) Ltd v Mikhaylyuk* at [2012] EWHC 3586 (Comm) at [104]-[111] (Christopher Clarke J, as he then was)

18 AC Act, *Sections 29 to 30*

19 Gbolahan Elias, 'Challenginging and Enforcing Arbitration Award : Nigeria" <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/nigeria > Accessed on 30/10/2023.

20 *Ibid*

21 *Bill Construction Co Ltd v. Imani & Sons Ltd* (2006) 19 NWLR (Pt 1013) 1)

Although an appeal may attack the merits and point out errors in the content of the award, a setting-aside application is essentially a complaint only about the process followed in making the award or to the effect that the content of the award is not just erroneous but actually perverse.[22]

However, Under *Section 29* of the AC Act, a party who is aggrieved by an award may:

- request the court to set aside the award, provided this is done within three months of either the date of the award or the date of the request for correction and interpretation of an award; or
- request for an additional award to be disposed of by the arbitral tribunal.

The full terms of *section 68* of the Arbitration Act 1996[23] as used *the P& ID Case*'s is as follows:

> Challenging the award: serious irregularity. (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3). (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant— … (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.

It is recognised that a high threshold is applicable *to section 68*.[24] In *Chantiers de l'Atlantique SA v Gaztransport & Technigas SAS*[25] Flaux J (as he then was) said: "Fraud (that is dishonest, reprehensible or unconscionable conduct) must be distinctly pleaded and proved, to the heightened burden of proof as discussed in *Hornal v Neuberger Products Ltd*[26] and *Re H (Minors)*.[27]

As to public policy, in *Cuflet Chartering v. Carousel Shipping Co* [28] Moore-Bick J (as he then was) said:

> Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution … It has to be shown that there is some 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.

The section above is concerned with serious irregularity "affecting the tribunal, the (arbitral) proceedings or the award". *Subsection (2)* lists nine "kinds" of irregularity. In the case of *P & ID* under consideration, focus is on *subsection 2 (g)* that is concerned with "the award" and "the way in which it was procured". For the irregularity kind in *subsection 2 (g)*, it relates to the kind of award that must be "obtained by fraud"; it is the award or the way in which the award is procured that must be "contrary to public policy". The focus is not on the claim on which the award is based or the cause of action on which the claim is based. The section is founded on the following principles:

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22 *Ibid.*
23 *Section 68* of the English Arbitration Act 1996
24 *Lesotho Highlands Development Authority v Impregilo* [2006] 1 AC 221 at 235H per Lord Steyn.
25 [2011] EWHC 3383
26 [1954] 1 QB 247
27 [1996] AC 563.
28 [2001] 1 Lloyd's 707

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
(c) in matters governed by this Part the court should not intervene except as provided by [Part I of the Arbitration Act 1996].

The grounds for refusal of recognition of a foreign arbitral award under **t**he Arbitration and Mediation Act, 2023(AMA) are a verbatim reproduction of *Article V* of the New York Convention 1958. One of such grounds *"is where recognition or enforcement of the award would be contrary to the public policy of the enforcing country"*.[23] Likewise, where the seat of the arbitration is in Nigeria, one of the grounds upon which an award may be set aside is where the Court finds that the *"award is against the public policy of Nigeria".*[29]

The critical questions which then ought to be explored are whether agreements procured by corruption are contrary to public policy? If yes, will an arbitration pursued to enforce such agreement also be caught by the public policy defence during the enforcement stage? Also, will a party be deemed to have waived the right to oppose enforcement or challenge the award based on public policy if the corruption allegations were not raised during the arbitral proceedings?[30]

To answer these posers, it will be useful to, as a preliminary point, understand what is meant by public policy. Indeed, international arbitration instruments like the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) (the **"**Model Law**"),** do not define the term despite recognizing that it can be a ground upon which enforcement of arbitral award may be refused.[31]

However, in *Total Nigeria Plc. v Ajayi*,[32] the Nigerian Court of Appeal stated that "the principle of public policy is to protect public interest by which the courts would not sanction what is injurious to public welfare or against the public good." The phrase public policy, therefore, means the policy of law of not approving an act which is against the public interest in the sense that it is injurious to public welfare or public good. Similarly, in Macaulay v. FZB of Austria,[33] the Nigerian Court of Appeal held that public policy can be construed as the principles under which freedom of contract and private dealings is restricted by law for the good of the community.

The English Court has held that public policy defence covers cases in which "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."[34]

French international public policy is defined by French case law, as "*all the rules and values that the French legal system cannot ignore, even in international matters.*" Indeed, earlier on, the French courts set a very high bar to set aside an award based on public policy. Specifically, the

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29 Banwo Ighodalo, 'Corruption and Enforcement of Arbitral Awards' <https://www.lexology.com/library/detail.aspx?g=56d0c2b7-a111-4d9c-a519-7858c0956243 > Accessed 3/22/2023
30 *Ibid.*
31 *Ibid*
32 (2003) JELR 44932 (CA)
33 (2003) 18 NWLR (Pt. 853), 282.
34 Banwo Ighodalo, 'Corruption and Enforcement of Arbitral Awards', *op.cit*

violation had to be "manifest" (or "flagrant", "effective" and "concrete").[35] Furthermore, judicial review was limited only to flagrant violations that could be identified simply by reading the award, with little inquiry by the reviewing court beyond the Tribunal's own assessment.[36] Against the foregoing definitions, the following have been held to be a breach of public policy, (i) violation of national sovereignty (ii) duress (iii) penalty (disproportionately high penalty) or damages (extremely high interest rate), (iv) violations of rules on consumer protection, (v) foreign exchange regulation or bans on exports (vi) violations of core constitutional values such as the separation of powers and sovereignty of Parliament and (vii) bribery and corruption etc.[37]

On the same vein, "the award" and "the way in which it was procured" was the cardinal point in the *PID Case* in addressing the issue of public policy requirements.

Conclusion

The objection for setting aside an award on the grounds of the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy", is of fundamental character to the arbitration process. This is because it goes to the integrity of that process. An award obtained by fraud or contrary to public policy (or procured in a way that was contrary to public policy) and which has caused or will cause substantial injustice is not what the parties agreed to when they agreed on arbitration. To support it in the name of supporting arbitration as a process achieves the opposite.

The *Nigeria v P &ID Case* highlights wider policy concerns about the way that investor–state arbitration intersects with corruption. Given the significant public interests at stake in investor–state arbitration, including the possibility that arbitration may facilitate the corrupt transfer of public funds to private actors, they should not be conducted in private. Ultimately, there should be transparency in contract-based investor–state arbitration to avoid government officials from corruptly enriching themselves from public funds.

Thus, awards which have their foundations in fraud and corruption are obviously against public policy and are generally unenforceable. The Courts are encouraged to continue in their jurisprudence of refusing enforcement of awards or annulling awards where the underlying contract is tainted with fraud and bribery.

35 *Ibid.*
36 *Ibid*
37 *Ibid.*