Written Evidence from Spotlight on Corruption

Spotlight on Corruption's submission to the Arbitration Bill [HL] Special Bill Committee

6 February 2024

Introduction

Spotlight on Corruption is an anti-corruption charity that shines a light on the UK's role in corruption at home and abroad.[1] We strive to ensure the UK has transparent, accountable institutions that prevent corruption and allow democracy to flourish. To achieve this we highlight corruption and the harm it causes, and campaign to ensure the UK implements and enforces its anti-corruption and sanctions laws effectively and has strong systems in place to prevent corruption. We also act as policy entrepreneurs, researching and advocating robust and innovative policy recommendations to improve these anti-corruption systems.

We run a unique court monitoring programme to track major corruption cases that are heard in the courts of England and Wales. 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. As one leading 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, in International Chamber of Commerce (ICC) Case No 1110, Judge Lagergren was called on to decide a dispute concerning bribery and fraudulent inducement of government officials), arbitrators in both commercial and investment treaty arbitration proceedings are today adjudicating corruption issues with increasing frequency*."[2]

[1] Charity number (England and Wales) 1185872. Website: https://www.spotlightcorruption.org/.

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

Summary

While the Law Commission ultimately decided that the balance between confidentiality and transparency is best left to the courts to address, we believe the Arbitration Bill should introduce statutory safeguards to protect arbitration from being abused to conceal corruption or fraud.

The confidentiality of arbitration in high-value disputes involving states poses serious risks to the credibility of arbitration and the public interest in scrutinising disputes that may be tainted by corruption. These risks are particularly acute where parties are complicit in corruption and may abuse the confidentiality of arbitration to conceal wrongdoing from both the tribunal and the public.

To ensure that confidential arbitration is not abused to hide corruption from public scrutiny, or as the unwitting vehicle for corruption, we recommend an amendment is put to the Arbitration Bill to:

(a) Clarify the powers and duties of arbitrators in dealing with allegations or suspicions of corruption in arbitrations seated in England and Wales including requirements to report, where appropriate, such allegations or suspicions to law enforcement;

(b) Require arbitrators to refer disputes arising in arbitrations seated in England and Wales and involving allegations or suspicions of corruption to the High Court for directions as to whether the public interest in transparency outweighs the parties' preference for confidentiality in the proceedings.

Regulating confidentiality in arbitration proceedings

1. In its current form, the Arbitration Act 1996 ("1996 Act") does not contain any explicit provision on the confidentiality of arbitrations seated in England. The drafters of the 1996 Act regarded privacy and confidentiality to be "*better left to the common law to evolve*" given various exceptions to confidentiality and acknowledged that "*none doubt at English law the existence of the general principles of confidentiality and privacy*".[3]

[3] *John Forster Emmott v. Michael Wilson & Partners Limited* [2008] EWCA Civ 184 referring to The Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, 1996 (reprinted in Mustill and Boyd, *Commercial Arbitration*, 2nd edition, 2001 Companion, Appendix 1), paras 10, 12.

2. The Law Commission's recent consultation revisited this question of whether the 1996 Act should include include provisions dealing with confidentiality.[4] The Commission noted that "*arbitral rules often provide various bespoke approaches to confidentiality*"[5] and the diverse types of arbitration mean that "*different default rules can apply in different arbitral contexts*".[6]

3. The Law Commission observed that "*in some types of arbitration, such as investor-state arbitrations, the default already favours transparency*" while elsewhere there is a "*trend towards transparency*".[7] It also noted "*further debate*" about the extent to which hearings in relation to certain types of disputes, such as public procurement contracts, should be open to public scrutiny.[8]

4. In view of the various and evolving rules on confidentiality, the Law Commission concluded that a statutory rule on confidentiality would not be "*sufficiently comprehensive, nuanced or future-proof*".[9] While there is "*ongoing debate*" and "*the law is still developing*", the Law Commission considered that the courts are best placed to develop the law on confidentiality.[10]

5. We recognise that there is no "*one size fits all*" approach that can be distilled into a singular statutory rule on confidentiality. However, this should not preclude the introduction of sensible safeguards in the Arbitration Bill to protect against the abuse of confidentiality to conceal corruption and fraud. The statutory safeguards we propose would not cut across the role of the courts in developing the law on confidentiality, but simply clarify what arbitrators are empowered and required to do when faced with allegations or suspicions of corruption in confidential arbitration proceedings.

6. Neither would our proposals be in conflict with commonly used arbitral rules for arbitrations seated in England and Wales. For example:

   (a) Neither the United Nations Commission on International Trade Law (UNCITRAL) Rules[11] nor the International Chamber of

[4] Consultation Question 12.1.
[5] Law Commission report para 2.21.
[6] Law Commission report para 2.22.
[7] Law Commission report para 2.22.
[8] Law Commission report para 2.22.
[9] Law Commission report para 2.25.
[10] Law Commission report paras 2.22 and 2.25.

Commerce (ICC) Rules[12] provide for an express presumption of confidentiality. Rather it is open to the parties and the tribunal to determine the applicable transparency regime for any arbitration.

(b) The London Court of International Arbitration (LCIA) Rules include a general presumption of confidentiality for the parties and the arbitrators "*save as required by any applicable law*".[13] The statutory safeguards that we are proposing would accordingly operate as a carve-out to any confidentiality regime as expressly provided for under the LCIA Rules.

The public interest in arbitration proceedings relating to corruption

7. Section 1(b) of the 1996 Act provides that "*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*". Exceptions to confidentiality may therefore be justified in the public interest.[14] For example, emerging case law has recognised that the public interest in ensuring and maintaining standards of fairness for arbitrators and parties can outweigh the benefit to the parties of maintaining confidentiality.[15]

8. While the "*public interest*" is not defined in the 1996 Act, it should in our view take into account the raft of anti-corruption and transparency legislation that has been passed over the last two decades.[16] The harmful effects of corruption and the violation of *bonos mores* in national, international and transnational public policy has long gained universal recognition. Corruption affects the wider public rather than just the disputing parties.

9. With the proliferation of global corruption, allegations of corruption are increasingly a feature of international commercial arbitration and investor-state disputes. For example, an investor-state dispute where the investment has been made pursuant to a contract with the host State may require the tribunal to make findings about whether the

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[11] UNCITRAL Arbitration Rules 2013, adopted on 16 December 2013.

[12] ICC Arbitration Rules 2021, adopted on 1 January 2021.

[13] LCIA Arbitration Rules 2020, Article 30.2.

[14] *Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054.

[15] *Symbion Power LLC v Venco Imtiaz Construction Company* [2017] EWHC 348; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm); *P v Q* [2017] EWHC 148 (Comm).

[16] This includes the Proceeds of Crime Act 2002, the Bribery Act 2010, the Constitutional Reform and Governance Act 2010, the Crime and Courts Act 2013, the Criminal Justice and Courts Act 2015, the Economic Crime (Transparency and Enforcement) Act 2022, and the Economic Crime and Corporate Transparency Act 2023.

contract was corruptly procured and, if so, to determine the implications on the tribunal's jurisdiction, alternatively the admissibility of the claims. These disputes often arise in the context of sectors most exposed to corruption, such as natural resources, infrastructure and defence.

10. The amounts of money at stake in these kinds of disputes can be eye-watering, with profound implications for the people of the states involved who may have to pick up the bill for an adverse arbitral award. Yet the public interest in these disputes goes beyond their financial implications, as there is a more fundamental interest in ensuring public scrutiny of allegations or suspicions of corruption, particularly those involving an abuse of entrusted power by public officials.

The powers and duties of arbitrators confronted with alleged or suspected corruption

11. Despite heightened public interest in these kinds of investor-state disputes, there is presently no consensus and a lack of guidance about how arbitrators should deal with allegations or suspicions of corruption that arise during arbitration.[17] The many different sets of arbitral rules add to the complexity of achieving a uniform approach to this issue. The result is that there is huge disparity in how allegations or suspicions of corruption are treated in arbitration.

12. Because arbitration is a consent-based form of dispute resolution, a tribunal's jurisdiction is limited to resolving the specific issues that the parties have agreed to refer to arbitration. As noted earlier, this may include allegations of corruption that have a direct bearing on the dispute, such as deciding whether a contract is valid and enforceable. It is not uncommon for one of the parties to raise corruption as a defence, such as a company alleging extortion or corruption in public procurement. In these cases, the allegation of corruption is explicitly raised by the parties and squarely placed before the tribunal as an issue for resolution.

13. There is some disagreement, however, as to whether a tribunal can investigate a suspicion of corruption of its own motion (i.e. without invitation from the parties). While the traditional concept of

[17] A rare and very useful guide has been developed by the Basel Institute on Governance and the Arbitration and Crime Competence Centre, "Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators" (April 2019).

arbitration limits the tribunal's powers to investigating allegations that the parties have themselves raised, there is growing support for the view that the tribunal is empowered to investigate a suspicion of corruption as long as it is relevant to the resolution of the dispute.[18]

14. Even if arbitrators have the *power* to investigate suspicions of corruption arising in the course of arbitration, it is still far from clear that they have a positive *duty* to pursue suspicions of corruption in the absence of the parties' invitation to do so.[19] It is also unclear whether the ethical codes of various arbitral institutions and bar associations have any bearing on how arbitrators should handle suspected or alleged corruption.[20]

A cautionary tale: *Federal Republic of Nigeria v Process & Industrial Developments Limited*

15. The debate about confidential arbitrations involving allegations or suspicions of corruption has been reignited by the case of *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm). In a landmark judgment handed down in October 2023, Mr Justice Robin Knowles set aside the arbitral awards worth $11 billion on the basis that they had been procured through fraud.[21] The High Court ruled that Process & Industrial Developments Limited (P&ID) had paid bribes when procuring a lucrative gas contract in Nigeria and then "*practised the most severe abuses of the arbitral process*" to secure arbitral awards in the company's favour from a London tribunal.[22]

16. 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. A lengthy public trial in early 2023 lifted the lid on an audacious abuse of the arbitration system by

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[18] Jonathan Bonnitcha and Alisha Mathew "Corruption in investor-state arbitration" (Transparency International Anti-Corruption Helpdesk Answer, 28 September 2020) at 7-8.
[19] Jonathan Bonnitcha and Alisha Mathew "Corruption in investor-state arbitration" (Transparency International Anti-Corruption Helpdesk Answer, 28 September 2020) at 8.
[20] Jonathan Bonnitcha and Alisha Mathew "Corruption in investor-state arbitration" (Transparency International Anti-Corruption Helpdesk Answer, 28 September 2020) at 9.
[21] https://www.spotlightcorruption.org/nigeria-wins-challenge-to-11-billion-arbitral-awards-procured-through-fraud/
[22] Para 516.

individuals who stood to receive huge sums of money under the arbitral awards.

17. Far from being a "*fair fight*",[23] 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*".[24] Mr Justice Knowles described Nigeria's challenge as "*a stand-out example of a case where 'justice calls out for' correction*".[25]

18. While recognising this is a "*highly unusual case*", Mr Justice Knowles reflected that it "*draws attention to matters of wider importance*" and "*touches on the reputation of arbitration as a dispute resolution process*".[26] In a lengthy commentary at the end of his judgment, Mr Justice Knowles hoped the case would "*provoke debate and reflection*" as 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 in so large and where a state is involved*".[27]

19. In grappling with this question himself, Mr Justice Knowles addressed particular challenges around the role of the tribunal in major arbitrations of this kind and queried whether a more interventionist approach may be needed where there are concerns about the participation and representation of state parties.[28] He also expressed particular concerns about the confidentiality of arbitration in this context:

    > "*unless accompanied by public visibility or greater scrutiny by arbitrators, how suitable is the process in a case such as this where what is at stake is public money amounting to a material percentage of a state's GDP or budget? Is greater visibility in arbitrations involving a state or state owned entities part of the answer?*"[29]

The need for statutory safeguards to protect against abuses of confidentiality

[23] Para 588.
[24] Para 580.
[25] Para 517.
[26] Para 14.
[27] Para 582.
[28] Para 588.
[29] Para 591.

20. As the case of *Federal Republic of Nigeria v Process & Industrial Developments Limited* demonstrates, the confidentiality of arbitration in high-value disputes seated in England and Wales poses serious risks to the credibility of arbitration and the public interest in scrutinising disputes that may be tainted by corruption. In some cases, it may not be in either of the parties' interests for corruption to be uncovered. On the contrary, the parties may refer their dispute to arbitration to avoid the public scrutiny of open court proceedings. There is accordingly a risk that the confidentiality of arbitration may be abused to conceal corruption – not just from the tribunal, but from the public. Even if a party does subsequently raise allegations of corruption before the courts of England and Wales, there is jurisprudence to preclude the court from investigating those allegations in circumstances where they were not raised before the arbitral tribunal in the arbitration.[30]

21. This challenge is explained by Jonathan Bonnitcha and Alisha Mathews as follows in their report for Transparency International on "Corruption in investor-state arbitration":

    "*The confidentiality of arbitral proceedings intersects with and compounds the underlying problems of corruption, as public awareness and scrutiny is one mechanism by which pressure can be brought to bear on government officials (who may have private incentives that diverge from the public interest) to explain how a dispute with an investor arose.*"[31]

22. The abuse of confidentiality to conceal corruption not only harms the public interest in exposing corruption, but also jeopardises the credibility of the arbitration system. While arbitrators are not judges, they do perform a public function because arbitral awards are generally enforceable in the same way as court orders.

23. Given the significant public interest in ensuring arbitral awards are not tainted by corruption, we believe there is a need for statutory safeguards to ensure that confidentiality is not abused to cover up corruption. While the Arbitration Bill cannot mitigate the risk across the board, it can ensure greater consistency and clarity about how allegations and suspicions of corruption should be dealt with in arbitrations seated in London.

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[30] *Province of Balochistan v Tethyan Copper Company Pty Ltd* [2021] EWHC 1884 (Comm).

[31] Jonathan Bonnitcha and Alisha Mathew "Corruption in investor-state arbitration" (Transparency International Anti-Corruption Helpdesk Answer, 28 September 2020) at 9

24. 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 propsects of reappointment. This can act as a strong deterrent for tribunals to pursue suspicions of corruption and order disclosure of confidential materials.

25. Recognising this difficulty, we think 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.

6 February 2024