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Article

Corruption in international commercial arbitration—Domino effect in the energy industry, developing countries, and impact of English public policy

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ABSTRACT

Corruption has relentlessly posed a major challenge to investors especially in developing countries. However, less attention has been focused on such developing countries from the standpoint of individuals who are indirectly affected by corrupt practices. The relationship between international commercial arbitration, the role of domestic courts and the enforcement of obligations has come under more scrutiny with large awards. Successful parties bring many award enforcement proceedings in England because of the invaluable assistance which English courts provide. Sometimes, there are allegations of corruption with respect to these awards that parties seek to enforce. In this context, English court decisions have significant implications for many parties around the world. However, the traditional narrow interpretation of public policy has come under increasing strain. This article examines how English courts have navigated the matrix of fraud, corruption and public policy-overlapping areas which parties exploit in international commercial arbitration. There is a major argument in favour of striking a balance between various institutional, governmental and people's interests in dealing with difficult cases.

1. INTRODUCTION

Corruption is an important aspect of international commercial arbitration because it reflects the reality of international commercial transactions.[1] Parties are sometimes involved in illegal dealings during commercial transactions. They may be desperate to maximize profits, secure contracts or perhaps perpetrate illegality. This article focuses on the energy industry because it is the mainstay of many developing economies. In this context, non-renewable energy traditionally has been of overarching importance.[2] However, renewable energy has also become increasingly significant.[3] In both aspects of the energy industry, the involvement of

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1 On the increasing prominence of corruption as an issue in international arbitration, see Lucinda A Low, 'Dealing with Allegations of Corruption in International Arbitration' (2019) 113 AJIL 341. For the view that corruption in international business assumed a more serious dimension from 1992, see Salma Bahoo, Ilan Alon and Andrea Paltrinieri, 'Corruption in International Business: A Review and Research Agenda' (2019) 29(4) Intl Bus Rev 1.

2 Especially as they become scarcer. See Bernhard Maier, 'How Has International Law Dealt with the Tension between Sovereignty over Natural Resources and Investor Interests in the Energy Sector? Is There a Balance?' (2010) 4 IELR 95.

3 Kaunain Rahman, 'Overview of Anti-Corruption in the Renewable Energy Sector' (2020) U4 Helpdesk Answer 5.

governments and corruption are common features that often characterize international commercial transactions which sometimes result in disputes.[4] In developing countries such as Nigeria, the relationship between the oil and gas industry and citizens' welfare is critical.[5] Vast award sums can work hardship on the citizenry, both within the oil industry[6] and outside.[7]

London remains a hub of international commerce and English courts wield vast influence on the outcomes of international arbitration proceedings. In determining such outcomes, parties may seek to have awards set aside[8] or frustrate their enforcement abroad.[9] There is no special public policy dedicated to the oil and gas industry or the energy industry in general. English public policy is applicable to different cases as interpreted by the English courts.[10] In this regard, parties sometimes seek to exploit the narrow interpretation of public policy considering its overlaps with bribery or corruption and fraud. Thus, this article examines the extent to which courts should use public policy to strike a balance between the interests of companies, institutions, governments and citizens. Nigeria is chosen as an example of a developing country in the energy industry and some comparative analysis is then undertaken considering other developing countries that have faced challenges of corruption and fraud in arbitration processes. Relevant cases illustrate the corruption in the procurement of arbitration and how State interests are influenced by notions of public interest or public policy.

This article argues that in cases where contracts are procured or executed through corrupt means, the English courts have enough scope to ensure that English policy meets the expectations of parties involved in international commercial arbitration. This involves focusing on the characterization of corruption where the arbitration took place considering English law on corruption. Such an approach requires a progressive application of public policy especially when parties seek to challenge the enforcement of awards. This accommodating, but progressive, approach can be ensured without any radical change in jurisprudence. The first task is to contextualize public policy.

2. PUBLIC POLICY IN INTERNATIONAL ARBITRATION

Public policy is a vague term—its application is imprecise and interpretation can be difficult.[11] Most cases provide guidance on how public policy should be applied without explaining the meaning. It is an 'unruly horse'.[12] A breach of public policy is an affront on the public conscience.[13] For example, courts traditionally did not support the use of public policy as an instrument to facilitate illegality.[14] The difficulty in interpretating public policy extends to international commercial matters including arbitration. In *Maximov v Open Joint*

4 ibid 8.

5 *Shell Nig Exploration and Production v Federal Inland Revenue Service* [2012] CA/A/208/2012. This case concerned domestic arbitration, but it shows the relationship between the Nigerian public interest and the NNPC. On the effect of corruption on poor tax-paying citizens in Kenya, another developing African country, see *World Duty Free Company Limited v Republic of Kenya* (ICSID Case No ARB/00/7 para 181).

6 See the *P & ID* case in respect of which the award and interests of $10 billion formed almost one-third of Nigeria's 2020 national budget <https://www.reuters.com/article/nigeria-budget/nigerias-president-submits-revised-2020-budget-to-parliament-idUSL8N2DA6Q9> accessed 15 June 2021.

7 See the *Tethyan Copper* case in which $5.8 billion 'would wipe out nearly half of Pakistan's foreign exchange reserves as the country contends with the pandemic-driven economic crisis' <https://www.reuters.com/article/pakistan-mining-tethyan-idUSKBN27S2N7> accessed 15 June 2021.

8 Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 10.81.

9 For example England.

10 This article provides several illustrations through relevant case law.

11 At the turn of the 20th century, the literature on English public policy was described as 'rather scanty'. See Percy H Winfield, 'Public Policy in the English Common Law' (1928) 42(1) HLR 76.

12 *Richardson v Mellish* (1824) 2 Bingham 229, 252. Cf *Hewison v Meridian Shipping Services PTE Ltd* [2002] EWCA Civ 1821, para 35 where the court also made the observation.

13 *Hewison* ibid paras 22, 35, 60.

14 *Euro-Diam Ltd v Bathurst* [1990] 1 (QB) 1.

Stock Company,[15] the claimant could not persuade the English High Court on what 'universal principle of public policy' the arbitrators had breached.[16] There is no universality of public policy,[17] but the expression of public policy in this manner indicates that courts should exercise restraint in its application. In reality, 'universal principles of morality'[18] is not easily accessible and, practically, 'the rule of international public policy could be said to be (quite) universal'.[19] The New York Convention would have not been so successful if Contracting States were denied any possible recourse to public policy and this defence was not questioned during the 1958 Conference.[20]

In any case, it is more appropriate to refer to international public policy rather than transnational public policy. This is because the focus is on how English courts apply public policy to international commercial arbitration, although transnational public policy is an appropriate trajectory if the wider arbitration community is considered.[21] Neither international nor transnational public policy should permit any unduly restrictive legal interpretation that impliedly permits large scale corruption.[22]

This is argued because there is a tendency to use public policy to frustrate the enforcement of awards, even though there is a high hurdle to set aside awards for fraud and breach of public policy.[23] Corruption is an important element in interpreting public policy.[24] In *Alexander Brothers Limited (Hong Kong SAR) v Alstom Transport SA Alstom Network UK Ltd*,[25] the defendant sought to set aside an order enforcing the Swiss ICC award on the basis that it violated public policy as payments made by the claimants to the defendants were allegedly used to bribe Chinese officials.[26] The English High Court refused to set aside the enforcement even though an application to enforce the award had been refused in France on the grounds of bribery.[27] A related issue is what the English courts would have done if the award had been set aside in Switzerland where the award was made. There are different trends. For example, the English courts seem to have had more consistency than the US courts in this regard. Although the US courts enforced awards set

15 *Maximov v Open Joint Stock Company*, 'Novolipetsky Metallurgichesky Kombinat' [2017] EWHC (Comm) 1911.

16 ibid para 20.

17 Considering art V (2) of the Convention, English public policy is a matter for local determination. See *Yukos Capital Sarl v OJSC Rosfnet Oil Co (No 2)* [2014] QB 458.

18 *Lemenda Trading Co Ltd v African Middle East Petroleum Ltd* [1986] QB 448, 459; *RBRG Trading (UK) Limited v Sinocore International Co Ltd* [2018] EWHC Civ 838, para 25 are examples.

19 *Alexander Brothers Limited (Hong Kong SAR) v Alstom Transport SA Alstom Network UK Ltd* [2020] EWHC 1584 (Comm) 71 para 157.

20 Wolff argued that 'the tension between its sensible use as a safety-valve and its abuse is unlikely to ever be fully resolved'. Reinma Wolff 'Art III(I)-(2), v(2)(b)' in Reinmar Wolff, *New York Convention: Article-by-Article Commentary* (2nd edn, Verlag CH Beck Ohg 2019) paras 490–91.

21 On the distinction between international and transnational public policy—the latter being broader and more international arbitration community oriented, see Jean-Michel Marcoux, 'Transnational Public Policy as an International Practice in Investment Arbitration' (2019) 10 JIDS 496, 497.

22 In *Niko Resources (Bangladesh) Ltd v People's Republic of Bangladesh* (ICSID Case No ARB/10/18 and ARB/10/18 para 431), the Tribunal referred to 'international or transnational policy' in categorizing bribery. See the 2013 Decision on Jurisdiction <https://www.italaw.com/sites/default/files/case-documents/italaw6322_0.pdf> accessed 15 June 2021; in the 2019 Decision on the Corruption Claim, only 'international public policy' was used <https://www.italaw.com/sites/default/files/case-documents/italaw10696.pdf> accessed 15 June 2021.

23 Under s 68 of the Arbitration Act. See *Stockman Interhold SA V Arricano Real Estate Plc (formerly Arricano Trading Ltd)* [2017] EWHC 2909 (Comm).

24 Although bribery is a form of corruption, both terms are used interchangeably in this dissertation. Also, there are sometimes overlaps between such areas and fraud. In *Honeywell International Middle East Limited v Meydan Group LLC* [2014] EWHC 1344 (TCC) para 1, the claimant (with whom the court aligned eventually), sought a distinction between the enforcement of contracts to commit 'fraud *or* bribery' and contracts which are procured by bribery. See para 178 of *Honeywell*. On condemning 'fraud or bribery' in the context of transitional public policy, see Marcoux (n 21) 496, 512.

25 *Alexander* (n 19).

26 ibid para 4.

27 ibid para 4.

aside in Egypt[28] and Mexico,[29] the US Second Circuit did not enforce an award that had been set aside in Nigeria.[30] In considering to what extent courts where the arbitration took place should have any control over proceedings conducted in their jurisdiction vis-à-vis curbing corruption, the real task is striking 'the correct balance between regulation and laissez-faire'.[31] The need to strike a balance between various competing interests occurs at different stages of the arbitration process, including the enforcement stage, as this article will demonstrate in discussions concerning corruption and public policy.

3. CORRUPTION VIS-À-VIS PUBLIC POLICY IN INTERNATIONAL ARBITRATION

Corruption not only permeates international commercial dealings but also has implications for public policy and the welfare of citizens. For example, the balance to be struck between legal and illegal contracts on the one hand and 'illegal bribery and legal 'commissions' on the other can be challenging.[32] The process starts from the appointment of the arbitrators and conduct of proceedings—it is fair to assume that arbitrators will not abuse their powers.[33] In practice, however, it is not always a question of abuse of power but also the competence and willingness to use powers in a proactive manner. For example, the assumption that arbitrators in developing countries will adequately and appropriately deal with issues that concern corruption is disputed. There is no guarantee, it has been argued, that such arbitrators will consider the 'public interest or policy dimension of a matter'.[34] The fact that courts consider the arbitrator's interpretation of laws with public policy implications does not necessarily mean that judges are biased although it may indicate such courts' approaches to arbitration.[35] In *Maximov*, the claimant sought enforcement of an award of the International Commercial Arbitration Court pursuant to the New York Convention and at common law even though it had been set aside by the Russian court.[36] The English High Court dismissed the claimant's application to enforce the award partly because there was no evidence of corruption or actual bias by the Russian court.[37]

A distinction between domestic and international public policy (a narrow interpretation is apt in the latter case) is necessary if a pro-arbitration improvement over the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 is to be ensured.[38] Otherwise, the pro-arbitration position of the New York Convention and Model Law would be undermined.[39] There is no substantive difference between Article V(2) of the New York Convention and Article 1(e) of the Geneva Convention except the latter also specifically mentions the subject matter being capable of settlement by arbitration in Article 1(b). However, the Geneva Convention stated as a requirement for recognition or enforcement of the award that it is 'not contrary to the public policy or the principles of the law of the country in which it is sought to be relied upon' (just as it required arbitrability of the subject matter). It does make a significant difference though that under the New York Convention, public policy is a ground for setting aside rather than a requirement for

28 See the judgment of the US Federal Court for the District of Columbia in *Chromalloy Aeroservices Inc v Arab Republic of Egypt* 939 F. Supp 907 (DDC 1996).

29 See the judgment of the US District Court for the Southern District of New York and the US Court of Appeals for the Southern District of New York in *COMMISA v Pemex* (2d Cir 2016).

30 *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd* 191 F.3d 194 (2nd Cir 1999).

31 Blackaby and Partasides (n 8) para 11.92.

32 Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 258, 272.

33 ibid 316.

34 In the context of arbitrability vis-à-vis public policy, Mante argued that the requisite training and sense of duty may be lacking—having contrasted the position with Europe and America in general. See Joseph Mante, 'Arbitrability and Public Policy: An African Perspective' (2017) 33 Arb Intl 275, 292.

35 *Maximov* (n 15).

36 ibid para 1.

37 ibid paras 12 and 71.

38 There is however no substantive difference between art V (2) of the New York Convention and art 1(e) of the 1927 Convention.

39 ibid.

enforcement. This reordering helped to clearly focus a pro-enforcement attitude to international arbitration.[40] Such attitude required a careful navigation between domestic and international arbitration. In other words, public policy should be a safety valve rather than an underlying consideration in the recognition or enforcement of awards. Thus, public policy should be interpreted and applied in a narrow manner in international arbitration. Otherwise, the speed and efficiency of arbitration would be undermined.

The need for such narrow interpretation of public policy is widely accepted.[41] However, there is no universally accepted definition of what this should be, and guidance is sought from relevant case law and literature. In conceding the lack of universality with respect to international public policy, a consensus had emerged for decades that 'bribery, corruption and money laundering violate principles of international public policy'.[42] International public policy cannot be completely extricated from national public policy as the basis of the latter is essentially national.[43] This space can be difficult to navigate. While in some other jurisdictions may be possible for an award that arises from gaming to be valid (perhaps only set aside in some states based on public policy),[44] the contract itself may be void and not arbitrable in Nigeria.[45] International commercial arbitration has relentlessly gained ground in arbitrability. This is because the arbitration agreement will be invalid if the subject matter is not arbitrable and the international business community at the outset would be deprived of the opportunity to resolve disputes via arbitration.[46] Thus while public policy and arbitrability offer safety-valve functionalities, public policy has a pre-eminent attachment to the sovereignty of countries as expressed in the will of the people. For example, the lay person may not understand or even care whether certain issues such as insolvency or tax may be inarbitrable. However, enforcing contracts obtained fraudulently does not require any expertise for the same people to be shocked. The question of fraud, including at the stage of procuring contracts, has assumed increasing importance in the matrix of elements that implicate public policy when parties seek to enforce awards.

4. CORRUPTION IN PROCUREMENT OF CONTRACTS

Perpetrating illegal acts during the procurement or execution of contracts does not ipso facto mean that such contracts are illegal. If the contract is illegal, there is much less space for debate. An example is where the contract is to launder money.[47] English case law offers a distinction between contracts that are illegal and contracts procured through illegality.[48] In the case of the former,[49] there will be no enforcement while in the

40 Blackaby and Partasides noted that the Convention provides for a 'simpler and more effective method of obtaining the recognition and enforcement of foreign awards'. See (n 8) para 11.40. On perspectives on the 1927 Convention, see *Alexander* (n 19) para 64.

41 See generally Wasiq Abass Dar, 'Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards: A South-Asian Perspective' (2015) 2(4) EJCL 316.

42 Kenneth D Beale and Paolo Epsosito, 'Emergent International Attitudes Towards Bribery, Corruption and Money Laundering' (2009) 75(3) Intl J Arbit Med Disp Mgmt 360, 368.

43 Albert Jan van den Berg, The New York Arbitration Convention of 1958—Towards A Uniform Judicial Interpretation (Kluwer Law and Taxation 1981) 361.

44 Blackaby and Partasides (n 8) 598. On how criminal offences are not globally recognised and when an award resulting from 'illegal gambling' may be denied enforcement in the context of Austria, cf Wolff (n 20) 577.

45 The Nigerian Supreme Court held that agreements that concern 'gaming or wagering' are void. *Kano State Urban Development Board v Fanz Construction Co Ltd* (1990) NWLR (Pt 142) 1. See also in the context of void contracts *Onyiuke III v Okeke* SC. 430/74 [1976] 10. The Nigerian Criminal Code defines the activities that would amount to 'unlawful gaming'. See s 236(2) of the Criminal Code.

46 Wolff (n 20) 492.

47 On the limits of the traditional presumption of severability, see Dragor Hiber and Vladimir Pavić, 'Arbitration and Crime' (2008) 25(4) J Intl Arb 461, 476.

48 Examples of illegal contracts can be found in *Kaufman v Gerson* [1904] 1 KB 591; *Lemenda* (n 18) 448; *Soleimany v Soleimany* [1998] QB 785; *Nayar v Denton Wilde Sapte* [2010] Lloyd's Law Report 139. The defence of illegality failed in *Holman v Johnson* as the claimant knew the purpose was to smuggle. See *Holman v Johnson* (1775) 1 Cowp 341, 343.

49 In *Lemenda* (n 18), eg, the contract itself was to pay a bribe.

case of the latter (eg bribery) there is no requirement that English public policy should prevent enforcement.[50] A failed attempt to bribe would also not taint the contract.[51]

Such distinctions are not always easy, and secrecy makes it difficult to determine when corruption takes place. Even those who indulge in it would hardly ever admit and need to be confronted with the evidence.[52] Therefore, corrupt acts may be discovered later and the instinct to query why it has only just come up may be weakened. Although 'the public policy of discouraging international commercial corruption' is established, it is not enough to constitute inarbitrability.[53] The doctrine of separability is often effectively used to ensure that the option of arbitration remains available. Public policy, being more directly anchored to national law, has traditionally guarded its territory more jealously.

There is a tendency for English public policy to remain the last line of defence where contracts were procured or executed through corruption. In *Iranian Oil Company*, the Claimant contended that the gas supply purchase contract was procured through illegal means. The English High Court rejected this argument because the arbitral tribunal had considered the allegations in detail over a 30-day period and the tribunal decided that the contract was not illegally procured.[54] While this case reinforced the position that English public policy does not prevent enforcement of contracts illegally procured, the claimant could not improve on the case made before the tribunal. In fact, the claimant could not produce certain evidence that the tribunal required in the claimant's attempt to prove illegal procurement.[55] There is scope for a different outcome where fresh evidence is provided. This is a difficult area to navigate because the court cannot completely abdicate questions of public policy or even complex questions of criminal law to arbitral tribunals. Many arbitrators have no training in such complex matters of criminal law adjudication. On the other hand, the courts should be wary of considering such questions at the enforcement stage as there is a risk of abuse and delay.[56]

In *Honeywell International Middle East Limited v Meydan Group LLC*, the claimant sought to enforce a Dubai arbitration award.[57] The English High Court decided that although bribery was 'clearly contrary to English public policy, contracts which were procured by bribes were not unenforceable'.[58] The innocent party was given an opportunity, at his election, to avoid the contract if counter restitution could be made.[59] Otherwise, such a contract procured by bribes would be valid.[60] In this case, enforcement of the award could not be refused.[61]

Lord Atkin had cautioned that public policy should be applied very sparingly and only in clear cases where the harm to the public is 'substantial' and 'incontestable'.[62] While it may first appear that this affords a very wide latitude for the courts, such application should be based on rules. Lord Atkin advised that determining when to apply public policy should not be subjected to the 'idiosyncratic inferences of a few judicial minds'.[63] A practical extension of that judicial pronouncement is that priority should be given to national legislation.[64] Giving priority to national legislation in this regard affords the opportunity to promote legal certainty and predictability. Whilst public policy can be rather challenging to map definitively due to its fluid nature, it is

50 *National Iranian Oil Company v Crescent Petroleum Company International Limited* [2016] EWHC 510 para 49(2).
51 ibid para 49(3). But this should be contrasted with the UK Bribery Act.
52 William Fox, 'Adjudicating Bribery and Corruption Issues in International Commercial Arbitration' (2009) 27(3) JERL 487, 488.
53 See David Quinke, 'Art. V(2)(a), VII)' in Wolff (n 20) para 465.
54 *National Iranian Oil Company* (n 50) paras 3 and 36.
55 ibid para 36.
56 *Alexander* (n 19) para 140.
57 [2014] EWHC 1344 (TCC) para 1.
58 ibid para 185.
59 ibid para 184.
60 *Wilson v Hurstanger* [2007] 1WLR 2351.
61 [2014] EWHC 1344 (n 57) para 185.
62 *Fender v St John-Mildmay* [1938] AC 1, 12.
63 ibid.
64 *Egerton v Browlow* [1853] 4HLC 1, 123.

usually clear what legislative provisions state in relevant statutory law and this would serve as an important guide for parties. It is in the national interest to promote legal certainty.

5. ENGLISH NATIONAL INTERESTS

There is no need to introduce undue discretion and subjectivity where there are clear rules-based approaches to public policy questions.[65] Novel issues warrant new approaches which may only be properly served through pushing the boundaries of legal positions.[66] However, English public policy can also respond to corruption in international commercial arbitration without any radical departure from practice. Such an approach would not be radical because English public policy is reflected through the UK ratifying relevant conventions on corruption.[67] The implications of such conventions are clear.[68] The UK also enacted a ground-breaking Bribery Act[69] that has some extraterritorial application and seeks to regulate the conduct of British nationals abroad.[70]

It may be argued that there is a risk of undermining international commercial transactions in some parts of the world if a particularly high threshold—as may exist in the UK for example—is used as a yardstick for measuring non-corrupt conduct. As such, a spectrum rather than a binary approach to what should be governed by public policy is needed. The question should be what may be categorized as corruption in the procurement of contracts. This question of categorizing an act as corrupt or not is critical. The UK Bribery Act itself does not stipulate a mechanical or black and white approach in this regard. The law and practice suggest an awareness of the peculiarities and societal context which certain conduct is carried out abroad.[71] The focus should then not be on permitting recovery if the conduct is classified as corrupt. This would lead to potentially inconsistent results, thus undermining legal certainty and predictability.

In *Patel v Mirza*, where the appellant sought to recover money paid for insider information, the UK Supreme Court observed that 'bribes of all kinds are odious and corrupting, but it does not follow that it is in the public interest to prevent their repayment.'[72] When contracts are procured through bribes or other corrupt means, the claims that result therefrom are often not about the repayment of such bribes. After all, the bribes are only a very small fraction when compared with the value of the main contracts in question. The arbitral claims are usually to obtain redress where the main energy (eg oil) contracts are breached. In *Patel v Mirza* itself, the Supreme Court decided that the claimant should not be disbarred from enforcing his claim merely because the money he sought to recover was paid for an unlawful purpose.[73] In this context, the illegality doctrine focuses on what would be contrary to the public interest in enforcing a claim if doing so would harm the integrity of the legal system.[74] This reasoning is supported by a range-of-factors approach (eg considering whether a denial of the claim would be 'a proportionate response to the illegality') has been criticized as undermining legal certainty.[75] There should be legal certainty especially concerning illegality of contracts which should be more easily resolved, considering the long line of decided cases that have provided insights on the issue. Nevertheless, the range of factors approach should be of less concern where the facts

65 Stavros Brekoulakis, 'The Evolution of Public Policy and Judicial Function in English Law' (2019) 10 JIDS 472, 489.

66 ibid 483; On 'expansion or modification' where necessary, see *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661.

67 United Nations Convention on Corruption (2003); the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (1997).

68 Anna D'Souza, 'The OECD Ant-Bribery Convention: Changing the Currents of Trade' (2012) 97 J Dev Econ 73, 75.

69 The UK Bribery Act (2010).

70 s 12(5) of the UK Bribery Act.

71 <https://www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/news-parliament-2017/bribery-act-2010-report-publication/> accessed 15 June 2021.

72 *Patel v Mirza* [2016] UKSC 42 para 118.

73 ibid para 121.

74 ibid para 120.

75 See the dissenting opinion concerning the reasons for the decision. For example reasons for Lord Sumption's rejection of the range-of-factors approach in paras 259–61 in *Patel v Mirza* (n 72); see the critique of Brekoulakis (n 65) 490–91.

are undisputed or fall within a small compass.[76] The need for flexibility is more justified in characterizing the conduct carried out in procurement or execution of contracts.

English public policy can be more accommodating with respect to international commercial arbitration concerning other jurisdictions and several oil producing countries such as Nigeria by focusing on whether the conduct in question itself is corrupt. Just as it is generally clear what the consequences should be if parties have participated in an illegal transaction,[77] it should also be clear what the consequences should be if there is corrupt contractual conduct in terms of violating English law. The UK Bribery Act is modern and focuses on curbing corruption. If more predictability (which is necessary for London as a hub for international commercial arbitration) is desired, it is necessary to strive for an accommodating approach by seeking to understand and apply English law vis-à-vis international commercial arbitration. If the Bribery Act was applied in *Patel v Mirza*, the fact that the illegal contract was not executed (the basis on which the Court of Appeal had decided that the money paid could be recovered)[78] would be irrelevant at least in principle.[79] There is scope to argue that in international commercial arbitration cases, the focus should be on whether corruption had occurred in a contextual application of the Bribery Act.

Such focus was further considered in *Westacre*.[80] In this case, the claimant claimed that the arrangement (contract governed by Swiss law) was procured by fraud through bribery or by illicit personal influence. The defendant appealed based on public policy (and the agreement contrary to Kuwaiti law) to the Swiss Federal Tribunal was dismissed. The English High Court decided that there was no defence to enforcement and the Court of Appeal dismissed the appeal.[81] Both courts reached different results with respect to the balancing exercise as the former attached lesser opprobrium to 'commercial corruption' than drug-trafficking. The High Court should have attached higher opprobrium to commercial corruption. The Court of Appeal declared that it was important for the English court not to ignore large-scale corruption.[82] Also, the extent to which the issues of bribery were expressed and handled would be a significant consideration. English public policy arguably reflects proportion and impact—these can be used to ensure that public policy factors in the impact of corruption in other parts of the world especially developing countries where oil revenue is critical to the sustenance of millions of impoverished people. The Nigerian experience provides analytical and comparative insights in this regard.

6. THE NIGERIAN EXPERIENCE

In *IPCO v NNPC*,[83] the award made against NNPC was worth at least £152 million, and the NNPC sought to invoke its relationship with the Nigerian government and thus by extension circumvent the award. Gross J handled the issue of public policy summarily. NNPC argued that the tribunal's errors (amounting to misconduct) had resulted in an award 'so exaggerated in size that its enforcement, against a state company would be contrary to public policy'.[84] Gross J rejected this argument as it would mean a mere error of fact could result in setting aside an award. The court further observed that English public policy was not engaged and that even if it was, English public policy would favour the enforcement of arbitration awards. Thus, 'to assent to this NNPC argument would be to confer on NNPC an immunity from enforcement which it does not enjoy under the State Immunity Act of 1976.'[85] However, there was the more overarching issue of public policy

76 *Gujra v Roath* [2018] EWHC 854 (QB) para 35.

77 See van den Berg (n 43). For the argument that *Patel v Mirza* encourages highly subjective evaluations, see Brekoulakis (n 65) 495.

78 The reliance principle in *Tinsley v Milligan* [1994] 1 AC 340 on which the Court of Appeal relied was set aside in *Patel v Mirza* (n 72).

79 Under s 1 of the UK Bribery Act, an offer of bribe is an offence.

80 *Westacre Investments Inc v Jugoimport SDPR Holding Co Ltd* [2000] QB 288.

81 ibid 288. Waller LJ dissented.

82 ibid 315.

83 [2005] EWHC 726 (Comm).

84 ibid para 51 [Gross J].

85 ibid para 24.

which Gross J observed that English public policy was not engaged and even if it was it would favour the enforcement of awards. Nevertheless, the issue of fraud remained significant even at the Supreme Court to such an extent that although it set aside the Court of Appeal's judgment (the requirement to provide further security of $100 million), the Supreme Court remitted the matter to the Commercial Court to determine 'NNPC's fraud and non-fraud challenges'.[86] The discussions on fraud and forgery before Field J were so extensive that the court decided that the NNPC had 'established a good prima facie case that is fit to go to trial in Nigeria with the benefit of full discovery and the cross-examination of the various witnesses'.[87] Indeed, NNPC's lawyers observed that the Nigerian government (through the NNPC) had been defrauded of more than $200 million[88] and that diligent prosecution was 'in the national interest'.[89]

The scale of the corruption and its implications should matter. The English High Court in *Alexander Brothers* adopted a practical approach when it considered the scale and nature of corruption in question.[90] In its 'subject matter scale', bribery of public officials would be serious. However, such bribery would be merely incidental as it was 'not planned, not contracted for, not suspected'.[91] This would be less serious on the subject matter scale. The principle behind this approach is sound. Furthermore, this complements the principle that English courts will not enforce an agreement which has an object to commit illegal acts abroad.[92] It is rather rare to find such contracts even brought to arbitration or other dispute resolution processes. The elements of planning or suspecting bribery of public officials are more difficult to justify especially in jurisdictions where corruption is endemic. [93]

In the *P& ID* case,[94] Nigeria challenged the enforcement on the basis that the award was fraudulently procured or the way it was procured contravened public policy.[95] The English High Court decided that Nigeria had established 'a strong prima facie case that the GSPA was procured by bribes paid to insiders as part of a larger scheme to defraud Nigeria.'[96] In granting a relief from sanctions and extension of time to prove its case, the English High Court contrasted the case with one where a party merely seeks to escape its obligations by alleging fraud concerning the procurement of the underlying contract or with respect to the conduct of the arbitration.[97] The UK Arbitration Act does not contain the terms 'bribery' or 'corruption'. However, the case was clearly underpinned by corruption both in Nigeria's claim and the analysis of the court.[98] This characterization itself reflects the fact that English public policy can and should be reserved for cases where its application would prevent an injustice especially in terms of scale and effect on innocent citizens. A party cannot be prejudiced if the other party covered up the corrupt conduct and it is a different matter if relevant facts were known or reasonably capable of being known.[99]

86 ibid para 47 of [2017] UKSC 16.
87 [2014] EWHC 576 (Comm) para 111. That court had refused to enforce IPCO's award.
88 [2014] EWHC 576 (Comm) paras 46–47.
89 ibid para 48.
90 *Alexander* (n 19).
91 ibid 159.
92 'In a foreign and friendly state'. See *Soleimany* (n 48).
93 In analysing international and transnational public policy, the Tribunal in *World Duty Free Company* (n 5) para 173 observed that English common law traditionally ranked 'corruption by bribery of officers of state. . .next to high treason'.
94 *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 para 226 (Comm)—ruling of Cranston J.
95 ss 67 and 68(2)(g) of the Arbitration Act of 1996.
96 *Federal Republic* (n 94).
97 Cf the judgment of Butcher J in *Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm) para 31. See para 270 of Cranston J.
98 paras 117–151 of the Cranston ruling reflects a constant thread of procurement through corrupt means.
99 In *Alexander* (n 19), the allegations of bribery could and should have been raised before the arbitral tribunal.

In its published report, the Select Committee on the Bribery Act 2010 observed that the Act was working well and 'an example to other countries, especially developing countries'.[100] Due diligence is one of the six principles which commercial organizations should consider in setting up procedures to prevent bribery.[101] In taking a proportionate and risk-based approach,[102] it is significant that companies should consider the environment and industry in which they intend to do business. Consistent with the subject matter scale above, a company will not be deprived of a defence merely because a person associated with it bribed someone else in order to obtain business for the company. The focus is more on what robust procedure the company in question had in place to prevent bribery. This balance can be difficult to strike which is why one of the Committee's recommendations to the UK Government was that even small UK embassies should have at least one person who is 'an expert in local customs and cultures'.[103] The terrain may be tricky to navigate in certain cases such as expressing gratitude or 'small facilitation payments',[104] but not in the procurement or execution of contracts through large-scale corruption. The point here is that large-scale corruption in the Nigerian oil and gas industry has since gone beyond speculation. Thus, it would seem rather unrealistic to suggest that such large-scale corruption would be unknown to foreigners especially those who must conduct due diligence. *Nigeria v Royal Dutch Shell plc*,[105] a case that concerns corruption, has been described as one of the five biggest scandals of the oil and gas industry.[106] The English High Court declined jurisdiction to hear Nigeria's claims against companies in the Shell and Eni groups,[107] considering Article 29 of the Brussels Regulation (1 *bis*).[108] However, a major issue was that rights in the prospective licence for block 245 were procured through 'international bribery' of Nigerian ministers and agents.[109] Whether or not the defendants knowingly participated as alleged by the Nigerian government,[110] the case is instructive on at least two levels. First, the case demonstrates the large-scale corruption in the oil and gas industry especially where multinational companies are involved in major contracts. Secondly, such depths of corruption have been in the public domain.[111] In an OECD report based on survey conducted by the OECD covering 20 parties to the Anti-Bribery Convention,[112] it was found that the media played a major role of intermediary with respect to the information flow between the demand side and supply side jurisdictions.[113] The same study report

100 <https://www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/news-parliament-2017/bribery-act-2010-report-publication/> accessed 15 June 2021

101 para 179 of *The Bribery Act 2010: post-legislative scrutiny* (Report of Session 2017-19) HL Paper 303. <https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf> accessed 15 June 2021.

102 ibid.

103 <https://www.parliament.uk/business/committees/committees-a-z/lords-select/bribery-act-2010/news-parliament-2017/bribery-act-2010-report-publication/> accessed 15 June 2021.

104 The Commentaries on the Anti-Bribery Corruption stated that such payments, where applicable, do not constitute payments made to obtain or retain business or other improper advantage within the meaning of Article 1, para 1 (bribery of public officials), but it nonetheless recommended that this should be discouraged and MS are required to 'combat the phenomenon'. See p 12, para 9 and p 19, para VI(i) of the Commentaries <http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf> accessed 15 June 2021.

105 [2020] EWHC 1315 (Comm).

106 The Italian proceedings were well advanced. See ibid para 77 of the judgment.

107 This concerned a $1.092bn claim, most of which was allegedly used to pay bribes at the highest levels of government including a former president, attorney general and minister for petroleum resources. See paras 12(1) and 13 of the judgment.

108 Proceedings concerning the same cause of action and parties brought in courts of different Member States—any court other than that first seised should stay proceedings.

109 [2020] EWHC (n 105) paras 16 and 55.

110 ibid paras 2 and 13.

111 Even in this case, the EFCC started investigations into allegations of bribery and corruption arising out of the OPL 245 transaction in 2012. [2020] EWHC (ibid) para 87.

112 The UK and the USA ratified this Convention about two decades ago, but South Africa was the only African country that ratified it as at 2018.

113 <https://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf> accessed 15 June 2021, p 15.

also stated that sanctioning public officials for (demand-side) bribery posed the same enforcement challenges as sanctioning supply-side bribery.[114]

After the US FCPA 15 became law in 1977, some American businesses felt short-changed because many of their foreign counterparts could still pay bribes to foreign officials. As such, the US lobbied for other countries to adopt a similar position, and this eventually contributed to the OECD Convention of combatting Bribery of Foreign Public Officials.[115] Even if the USA were unable to persuade other countries, this would not by itself have changed the law or public policy in the USA. However, it did demonstrate how public policy should remain relevant by not only being interpreted narrowly to promote international commercial arbitration, but also responding to developments and needs of other countries who are members of the international arbitration community. This underscores the need for an intergrated approach to public policy which is discussed in the next session.

7. AN INTEGRATIVE APPROACH TO PUBLIC POLICY

At a regional level, an approach that factors in developments in other jurisdictions can be illustrated through the approach of the UK before its exit from the European Union (EU). It was argued in the context of enforcing arbitral awards, considering relevant case law,[116] that English public policy should be interpreted as including EU public policy.[117] *Eco Swiss* is insightful because the Dutch company (the other parties were non-EU) argued that the award should be set aside because the licencing agreement was a nullity under EU law. The argument was successful.[118] In contrast, a similar argument failed in *Alexander Brothers* where the defendants (including a UK company) sought to set aside an order to enforce the award. The English High Court did not doubt the validity of EU case law.[119] However, the Court was not convinced that there was any 'mandatory rule of EU Law or EU public policy'[120] The defendant's reliance on EU public policy to set aside the award because its payments were used to bribe Chinese officials was somewhat ironical. This is because, in 2019, Alstom was ordered to pay £16.4 million in fines and costs concerning a contract in Tunisia.[121] Following a US Department of Justice investigation in 2010, US$772 million was also levied as fine concerning corruption by consultants which entities with the defendant group had employed.[122] These fines did not concern activities in China but they were indicative of the tendency for foreign companies to apply double standards in matters of corruption and public policy. A progressive application of English public policy, as influenced by international realities, would require such practical considerations.

An internationalist standpoint can be supported by *Stati v Republic of Kazakstan*,[123] another oil and gas case where the English Court of Appeal decided that an award enforcement application could not be a fraud on the English court where the award was enforceable in other jurisdictions. However, neither 'bribery' nor 'corruption' appeared—suggesting that the English court can use public policy to navigate between all these terms to avoid the perpetration on commercial corruption especially on a large scale. This does not mean that the public policy mechanism should be unduly stretched or overused especially as there is a tendency to abuse it. But the English position in *Stati* is instructive because English courts and foreign courts have sometimes taken divergent positions on the enforcement of the same awards. An example is *Kabab-Ji SAL*

114 ibid p 7.
115 Kenneth D Beale and Paolo Epsosito (n 42)360, 369.
116 Case C–126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055.
117 Dicey, Morris and Collins, *Conflict of Laws* (15 edn, Sweet and Maxwell 2012) para 16–152.
118 Case C–126/97 (n 116).
119 That is, Case C–168/05 *EcoSwiss and Claro v Cenro Móvil Millenium* SA [2000] ECR I-10421.
120 *Alexander* (n 19) para 184.
121 ibid para 12.
122 ibid para 13.
123 [2018] EWCA Civ 1896 para 65.

(Lebanon) v Kout Food Group (Kuwait),[124] where the award was enforceable in France[125] but not in England after appellate court decisions.[126] Both decisions were only months apart.[127] Thus, the possibility and willingness of the English courts being willing to factor in an internationalist standpoint in matters that directly or indirectly have public policy implications demonstrate how there can be greater collaborative efforts through the courts.

There should be a more collaborative approach through a balancing of interests between parties to arbitration at the international level. While the adversarial approach to allegations of corruption would continue, it is important that such a process is channelled towards a productive end in the overall interest of arbitration.

8. BALANCING OF INTERESTS

It may at first seem odd that there should be any balancing of interests at the enforcement stage of awards especially as arbitration is driven by party autonomy and consent. However, the efficiency that these two concepts necessitate justifies the need for balancing interests with a view to secure the integrity of the arbitration process.[128] Thus, UK Supreme Court observed that the New York Convention 'reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge'.[129] In *Process and Industrial Developments v The Federal Republic of Nigeria*,[130] the English High Court considered that if there was any need for a balancing exercise, the public policy strongly favouring the enforcement of arbitral awards outweighed 'any public policy in favour of refusing to enforce an award of excessive compensation'.[131] Nigeria's description of the award as punitive or penal was held to be irrelevant.[132] This may have been so on the facts but one of the reasons people choose the English courts is to avoid punitive damages in the US courts.[133]

In *RBRG Trading (UK) Limited v Sinocore International Co Ltd*,[134] the appellants argued that if the judge had applied the correct illegality test he would have approached the balancing exercise differently and thus refuse to enforce the award.[135] In this case, there was an appeal against the enforceability of a Convention award and there were issues of illegality concerning the underlying claim.[136] Thus, a major argument was that it was contrary to public policy in light of section 103(3) of the Arbitration Act 1996.[137] The appeal was dismissed.

In the context of English conflict of laws, it has been persuasively argued that there should be a balancing exercise between the enforcement of an arbitration award and the policy of ensuring that the enforcement

124 [2020] EWHC Civ 6. This case largely concerned the governing law of the arbitration agreement.

125 CA Paris, 23 June 2020, n°17/22943. <https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2020/07/17-22943.pdf> accessed 15 June 2021.

126 ibid para 86. The UK Supreme Court upheld the decision of the Court of Appeal in *Kout Food Group*. See [2021] UKSC 48.

127 Another such example of divergent positions is *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46. The UKSC refused to enforce an award that emanated from a Paris-seated award. This concerned validity of award and the UKSC determined that the contract did not bind the Pakistani government. In *Alexander*, the defendants argued that enforcement of the award had already been refused in France. The English High Court however took a different position. See *Alexander* (n 19) para 4.

128 For the balance of convenience in preventing a party from using certain assets to fund arbitration vis-à-vis fraudulent acts, see *Koza Limited v Koza Altin Islemeleri AS* [2020] EWHC 654 Ch. On how the strength of the public interest can be attenuated by peculiar facts in the context of the LCIA Rules, see *Maharaj v Petroleum Co of Trinidad and Tobago* [2019] UKPC 21.

129 *Nigeria v NNPC* [2017] UKSC 16 para 41.

130 *Process and Industrial Developments Limited v The Federal Republic of Nigeria* [2019] EWHC 2241, Butcher J.

131 ibid para 102.

132 ibid.

133 See the London Commercial Courts Report 2020, p 1.

134 (n 18).

135 That is (by applying the facts laid down in *Patel v Mirza*). See *Sinocore* (n 18) para 21(1).

136 ibid para 1.

137 ibid para 3.

power of the English court is not abused.[138] The balancing exercise should extend to public policy and its connection with members of the public. Nearly two centuries have passed since it was observed that public policy 'is never argued at all, but when other points fail'.[139] The degree of complexity in bribery and corruption, especially considering the effect on impoverished citizens, has now prompted more legitimate claims to public policy arguments. The implications of corrupt practices have gone beyond mere technicalities and contractual losses to severely affecting quality of life for millions of people. As a reflection of the public good, public policy can be determined with some degree of objectivity even though questions are considered on a case-by-case basis. In cases of enforcing foreign awards, one way of striving for some objectivity is to consider whether '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'.[140] This observation was made even before the UK Bribery Act was enacted and before the UK Arbitration Act. The Bribery Act is an important mechanism for determining the 'ordinary reasonable and fully informed member of the public'. Thus, there should be a deliberate effort to align State policy with what such individuals consider to be wholly offensive. In this context, there is an increasing sense of public awareness concerning issues that previously were not considered objectionable. An emergent but valid case is now being made for public policy to underpin energy, environmental and climate change, international development, finance and taxation.[141] The world has gradually moved into an era in energy litigation and arbitration where human beings are and should remain visible. In business transactions around the world, up to $1trillion is paid in bribes with a large part of this sum in developing countries.[142] Even the poor pay 'the highest percentage of their income in bribes'.[143]

The UK invests a lot of resources in combating corruption in developing countries. For example, £45.1million was budgeted for the Global Anti-Corruption Programme from 2017 to 2022. The work focused on eight countries including Kenya, Nigeria, Pakistan and South Africa. Such programmes are ultimately funded by taxpayers. Therefore, it would seem potentially contradictory to adopt any judicial approach that directly or indirectly minimizes the effect of corruption. Restricting the scope and application of public policy has been an important default approach in the enforcement of awards. This approach remains particularly critical if enforcing obligations is to be promoted. However, a practical question is what would be wholly objectionable to the informed and reasonable member of the public—a point that should influence how courts exercise discretion in engaging with public policy. Parties who seek to challenge the enforcement of awards may find that the prospects of success are arguably better if issues such as fraud are specifically identified. For example, where the contract in question had the effect of defrauding the aggrieved party. But such a question has different implications depending on the party and size of the transaction. These should be underpinned by the scale of offensive conduct in question. Defrauding an individual or company often does not have the same effect as defrauding States especially where poverty is a major concern. Procuring contracts by fraud or contracting to defraud cannot be divorced from corrupt practices. Such distinction is unlikely to have any practical meaning for the reasonable and informed member of the public who funds governmental efforts to curb corruption in developing countries.

For the avoidance of any doubt, the argument is not that the enforcement of obligations should be disregarded merely because such obligations have particularly huge effects on a country's resources. There is merit in avoiding any undue immunity when parties seek to frustrate the enforcement of awards because developing countries can also be at the beneficiary end.[144] The argument is, however, that considering investments

138 Dicey, Morris and Collins (n 117) paras 16–150.

139 *Richardson* (n 12) 229, 252.

140 *Deutsche Schachtbau v Shell International Petroleum Co Ltd* [1990] 1 AC 295, 316.

141 Raphael J Heffron and Ryan Bausch, '*Process & Industrial Developments Limited v The Federal Republic of Nigeria*' (Legal Case Note) (2020) Global Energy Law and Sustainability 102.

142 <https://www.gtreview.com/magazine/volume-14issue-2/from-the-editor/> accessed 15 June 2021.

143 <https://www.worldbank.org/en/topic/governance/brief/anti-corruption> accessed 15 June 2021

144 [2005] EWHC (n 85).

in legal and financial resources, several practical considerations should be in place in unique cases where the economic destiny of a people may be affected by the conduct of governments or their agents. First, the threshold for what is objectionable should be set at a level higher than usual. Secondly, this threshold does not necessarily make it more burdensome for the party seeking enforcement. Usually, it would be difficult for such government entities or their agents to establish innocence if corruption is endemic. Thirdly, English public policy factors in English law which includes regimes such as the UK Bribery Act vis-à-vis other international legal commitments on corruption. Fourthly, the UK Bribery Act itself (through relevant guidance) factors in the socio-cultural contexts in which corrupt practices take place in other jurisdictions especially in developing countries. For example, the issue of facilitation payments which is pervasive in many cases within and outside the energy industry. Investors need not suffer unduly, or obligations undermined merely because of endemic corruption. A mechanical approach in this regard would also imply that the governments of such countries would be unable to enter into contracts that could be of benefit to millions of their citizens. Fifthly, a critical question is therefore one of scale concerning the corrupt or offensive conduct in question. These points underscore the argument that English courts need to consider a wider matrix of factors in considering issues that have overlaps with public policy.

The scope for a wider matrix can be illustrated through *Province of Balochistan v Tethyan Copper Company Pty Limited*,[145] the claimant challenged the jurisdiction of the ICC Tribunal concerning a partial award in a London-seated arbitration.[146] One of the issues before the English High Court concerned corruption. That is, whether the corruption allegation made by the Province sought impermissibly to challenge the ICC tribunal's decision concerning the merits of the claim before that tribunal.[147] The Province did not raise this as a jurisdictional objection before the ICC tribunal but raised it as part of its defence on the merits.[148] Contrary to its previous position, the Province argued that the contract containing the arbitration agreement was void and that Pakistani public policy covered bribery and corruption. In this regard, Pakistani law 'expressly provides that vitiating grounds extend to any conduct that is "fraudulent" or "unlawful"'.[149] To prevent Pakistan from avoiding its obligations, the English High Court had to first interpret the decision of the Pakistani Supreme Court in a restrictive manner. According to the High Court, 'a proper analysis of the Judgment of the Supreme Court of Pakistan shows that the reason for its decision that the CHEJVA [Chagai Hills Exploration Joint Venture Agreement] was void and was not corruption.'[150] However, this was not straightforward as both parties had contrasting interpretations of the Pakistani court decision which had extensive references to anti-corruption laws including the UN Convention on Corruption. Thus, the courts have found it inevitable to be more innovative in engaging with the thought processes of other jurisdictions concerning corruption in the arbitration process.[151]

Finally, there is arguably a wider public policy in ensuring that London that remains attractive to parties as a leading hub for international commercial arbitration as more non-UK litigants than UK litigants have continued to use the London courts. The 2020 Portland Commercial Courts Report states that after five years of growth, there was a dip in activity before the Covid-19 lockdown as London courts have come under increasing competition from 'China, Singapore and post-Brexit Europe'.[152] Africa witnessed a reduction in

145 [2021] EWHC 1884 (Comm).

146 Although a non-enforcement case, this is important because issues of jurisdiction sometimes come up during enforcement proceedings.

147 [2021] EWHC (n 145) para 349.

148 ibid para 351.

149 s 23 of the Pakistan Contract Act. see [2005] EWHC (n 85) para 366 of the judgment.

150 [2021] EWHC (n 145) para 370.

151 In a similar case concerning jurisdiction, the claimant also alleged that the defendant was involved in bribery and corruption. Although this was not an issue for determination, the evidence did not support the allegation. The defendant succeeded—an amicable settlement was not possible and there was therefore no failure to comply with the clause 6.9(c) of the MLA. See *The Republic of Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm) para 37.

152 The 2020 Report reviewed the 198 cases which the London Commercial Courts heard between April 2019 and March 2020 <https://portland-communications.com/publications/commercial-courts-report-2020/> accessed 16 June 2021.

numbers.[153] An active collaboration with arbitrators is required to ensure that the balancing processes during arbitration are productive, effective and practical. An approach that does not gloss over serious allegations of corruption could make the work of the courts approached to enforce awards much easier.[154]

9. CONCLUSION

Arbitration is unique partly because it is driven by party autonomy. However, there remains the possibility of judicial intervention even after a final award has been made and, in this regard, corruption is a critical factor especially in the energy industry which is a key economic part of many developing countries. It should be possible to ensure that public policy responds in an integrated manner to developments around jurisdictions, but especially considering the public policy of other jurisdictions where enforcement may be carried out. This is especially so if public policy is international or transnational. An integrated approach also requires a more collaborative attitude that places certain responsibilities on people who do business in other jurisdictions especially in cases that concern corruption. While obligations should be enforced, it is also important that arbitration retains its relevance by striking a balance between efficiency and protecting itself from judicial interference. In striking this balance, it is critical to remember that public policy (as the term suggests) is people based.

The sensibilities of the public in jurisdictions where enforcement may take place should be considered. There is no conflict between this and the requirement that the public policy of the jurisdiction where enforcement is sought should be considered. However, such public policy should be interpreted and applied in a way that factors in and strikes a balance between efficiency (or service provision) and the interests of citizens. Courts should consider the realities in certain jurisdictions including endemic levels of corruption and their impact on governmental interests or citizens. These approaches will help to prevent situations where enforcement proceedings are unduly protracted or even unpredictable as parties try to exploit the overlaps between corruption, fraud, illegality and public policy.

153 The London Commercial (n 133).

154 Lahlou and Matousekova argued that 'an award that has not punished corruption adequately could be challenged'. See Yasmine Lahlou and Marina Matousekova, 'The Role of the Arbitrator in Combatting Corruption' [2012] 6IBLJ 621, 626.