

Investigating Allegations Of Corruption In International Arbitration: Practical Considerations

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Corruption has been a hot topic in investor-state arbitration in recent years. This is particularly the case in situations where Claimant investors are alleged to have procured their original investment through bribery, which, if proven, may lead to tribunals denying their claims, especially under ICSID.

Many commentators have focused on legal aspects such as the burden of proof (a party's right and duty to support its claims through the introduction of evidence) and the standard of proof, a concept more familiar to common law practitioners. In April 2019, the Basel Institute on Governance published a toolkit for arbitrators summarising the thinking and current practice on corruption in international arbitration. A dedicated ICC Task Force aims to explore existing approaches to allegations or signs of corruption in disputes, and articulate guidance for arbitral tribunals on how to deal with such occurrences.

This article focuses on a practical question: how can one go about proving (or disproving) that the initial investment was obtained through corrupt means?

Potential Claimants and their legal teams may wish to carry out their due diligence

before launching a claim to assess to what extent the original investment complied with applicable laws and the Claimant's anti-bribery policies and processes. Arbitrators may also consider investigating allegations of corruption *sua ponte*. In that case, we assume that the Claimant would agree to providing access to their staff and their books and records to enable a forensic accountant to carry out their work.

Whilst corruption can take several forms, this article focuses on bribery, which can be defined as giving or receiving a financial or other advantage in connection with the improper performance of their duties by someone in a position of authority (often a public official). We outline below the approach that forensic accountants typically adopt to shed light on the circumstances surrounding an investment. After formulating a working hypothesis, investigators typically carry out interviews with key individuals of the Claimant's corporation or key individuals involved in the transaction, search available financial data, contracts, books and records and review email correspondence. The aim is to identify potentially relevant transactions and gather evidence of their intended or actual beneficiary and documented purpose. We provide more detail on each of these steps below.

Formulating a hypothesis. The first step of a bribery investigation is to formulate one or several working hypothesis(es): if bribery occurred in this particular case, how would it have manifested itself?

Bribery can involve direct payments of cash, such as gifts or commissions paid to intermediaries in a tender process. These are the type of schemes envisaged by the Basel Institute. However, bribery can also manifest itself more indirectly. For example, a company can provide goods or services for free or provide expensive and/or repeated entertaining and hospitality to people in a position of authority to qualify or be selected for a bid. In those cases, the Claimant may have paid its regular suppliers (e.g. hotels, restaurants) which (absent large one-off amounts or a "tip") may not raise suspicion.

In the context of due diligence, it is important to discuss with the potential Claimant and their lawyers what possible bribery scenarios could have taken place, which will constitute the starting point of the investigation. It is also important to understand the applicable framework (laws, internal anti-bribery policies and

procedures) and the potential Claimant's usual business practices. This will help assess to what extent any transactions identified depart from acceptable standards.

Interviewing key individuals. Human intelligence is key to increasing the chances of identifying relevant transactions and key evidence.

In our experience, there is no replacement to being 'on the ground' and speaking directly to the company's staff, including junior people who may have a better/different/alternative view of past events and may help refine the working hypothesis.

Staff insight is often key to understanding how transactions were recorded. For example, payments to consultants, agents and intermediaries may have been made through a small subsidiary that is not material at group level and recharged as a management charge. Without a "tip" pointing in that direction, such a payment may be easily missed, in particular if the subsidiary's books are held outside the group's core finance systems. Similarly, the company's staff may have recollection of specific hospitality events or deliveries of goods and services around the relevant time.

The quality of human intelligence that can be obtained in that way will depend heavily on the company's culture, its policies and processes for speaking up, the geography(ies) and the networks of people involved. There is immense value here in bringing in local expertise - people well versed in the local language and local culture - to increase the chances of building a relationship of trust on the ground.

Analysing financial data and documentation

Where bribery involves direct cash payments, the well-known mantra is: 'Follow the money'. Forensic accountants typically aim to:

- identify outgoing payments made by the party suspected of having obtained a contract or business advantage from bribery, and
- assuming a payment of cash, follow the funds through to its ultimate beneficiary(ies).

Identifying any outgoing payments made by the investor is typically based on bank statements and/or cash books, supported by other accounting records such as invoices, goods receipt notes or proof of acceptance of service delivery. If a list of all outgoing payments made in a certain period can be extracted from a finance system (e.g. a cash book), advanced data analytics techniques can be used to try and identify outliers and relevant transactions based on patterns, amounts, beneficiaries or keywords in narrative descriptions. However, books and records can be incomplete or patchy, for example due to the size of certain subsidiaries (which may warrant a less sophisticated finance system) or the standard of record-keeping prevalent in a certain geography. In that case, identifying outgoing payments can become a more manual exercise, and one where the assistance of the potential Claimant's staff will be all the more valuable.

Following the funds through to its ultimate beneficiary(ies) can be an arduous task. Bribery schemes often involve intermediaries, offshore entities and circular payments, which make them inherently difficult to trace, track and evidence. The main sources of information here are often what can be found in the public domain. It may be useful to involve corporate intelligence and asset tracing professionals who will search publicly available information, such as databases, company registers, internet and social media sites. Often, though, the trail of evidence will go cold very quickly without cooperation from the Claimant, present or former employees and key third parties such as banks. The involvement of offshore entities in a bribery scheme often proves insurmountable as financial data and the identity of directors and ultimate beneficiaries may not be easily obtainable (if at all).

Evidencing the purpose of transactions: Once relevant transactions have been identified, the next step is to gather evidence on the recorded purpose of such payments and how they compare to what was commercially expected, what happens in the normal course of business and the potential Claimant's policies and usual business practices.

The extent of documentation available will be key. Emails and documents saved on the company servers will typically be gathered and searched using document review platforms. In certain jurisdictions and for older investments, it may be necessary to search through paper files on site. In many cases, though, the best

available evidence of the purpose of transactions will be the recollections of key individuals.

Reporting on findings

In a due diligence context, findings are typically reported to the potential Claimant in an advisory report (which may be privileged depending on the jurisdiction). Should an arbitration be initiated, findings can be introduced either by way of a witness statement or via an expert report. In the latter case experts may be asked for example to provide an opinion on the extent to which any identified transactions appear to be within the entity's business purpose, policies and usual business practices.

Defining the scope of an investigator's work is key. Conclusions are necessarily constrained by the intelligence and available data. Often it will be difficult to conclusively say that bribery did or did not take place. Conclusions may well be limited to flagging a series of transactions, clues and reported events, leaving their interpretation to the tribunal.

Conclusion

In summary, proving bribery is a challenging task: many years may have passed, key staff may have left or be unwilling to assist, financial and other data may be patchy and proactive steps may have been taken to conceal evidence of transactions. Disproving corruption is even more challenging as a lack of evidence does not necessarily mean that the transactions did not occur. The outcome of an investigation depends heavily on the availability of adequate, sufficient and complete data and the cooperation of key individuals.

The views expressed in this article are the authors' and do not necessarily represent EY's position.