Kluwer Arbitration Blog

Bribery and an Arbitrator's Task

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Tuesday, October 11th, 2011 · WilmerHale

Adjudicating contract disputes where it is alleged that the contract has been tainted by bribery, either in its procurement or in its performance, presents difficult issues for arbitrators, as well as for counsel. While the arbitrability of disputes involving allegations of bribery is generally no longer in doubt, a tribunal will still confront a number of issues when adjudicating such claims.

This is particularly true where the allegations of bribery are themselves in dispute, as well as where the parties have not raised any such allegation, but the facts and circumstances suggest that bribery has tainted the contract underlying the dispute. It is now well-settled that any such contract should be void as contrary to public policy and governing national laws. The enactment of the UK's 2010 Bribery Act, and the first prosecution under that Act of a court clerk for having accepted a £500 bribe,[1] provide a suitable occasion to review the questions of bribery and international arbitration.

Arbitrability of Bribery Claims

Traditionally, arbitration was not perceived as an appropriate venue for adjudicating claims of bribery or corruption. The resistance to recognizing the arbitrability of bribery claims was based on a limited view of the tribunal's jurisdiction, and included concerns about the tribunal's restricted power to compel the production of evidence — particularly as compared with that of regulatory authorities that have traditionally investigated and prosecuted crimes of bribery — and the tribunal's lack of authority to impose criminal penalties.

Where the issue of bribery was raised previously in arbitrations, the response by tribunals often was to find a lack of jurisdiction over the dispute. The most well-known example is Judge Lagergren's ICC Award in 1963, where, acting as a sole arbitrator, he held that he did not have jurisdiction over a contract dispute because the purpose of the contract was to secure commission payments that would then be used to bribe Argentinean officials. He famously declared that having allied themselves with corruption, the parties had forfeited "any right to ask for assistance from the machinery of justice."

The concept of the arbitrability of disputes involving bribery claims began to gain acceptance first with a decision of the Swiss Federal Tribunal in 1994 in *National Power Corp v Westinghouse* affirming an arbitral tribunal's exercise of jurisdiction over a matter involving allegations of bribery. The contemporary approach towards the arbitrability of disputes involving allegations of bribery is reflected in *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd*, a dispute that

arose in the late 1990s. There, despite an allegation that the agreement at issue had been procured by bribery, the tribunal asserted jurisdiction over the dispute, investigated and rejected the bribery allegations, and issued an award on the merits.

The *Westacre* award was challenged in the United Kingdom, where the allegations of bribery and corruption were raised again. The English court held that the award was enforceable, based on considerations including the severability of the arbitration clause, the principle of *competence competence*, and the public policy of encouraging the enforcement of international arbitral awards, all of which weighed in favour of upholding the award.[2]

The arbitrability of disputes involving allegations of bribery is well recognized today. Such disputes no longer appear to confront arbitrators with questions of jurisdiction. Rather, arbitrators must now address the complex questions of proof where the allegations are in dispute, and determine how to approach situations where no allegation has been raised, but the facts and circumstances suggest the underlying contract may have been contaminated by bribery, and should therefore be void.

Examples of Bribery Allegations in Arbitration

Bribery allegations may arise in a number of ways in international arbitration. Some of the most well-known examples, such as the two set forth below, occurred where respondents sought the dismissal of claims seeking the performance of contractual obligations (or damages for failure to perform). By claiming the underlying contracts had been contaminated by bribery, the respondents were seeking to have the contracts declared void, which would result in the dismissal of any claims based on those contracts. Addressing the somewhat unseemly appearance of finding in favour of a respondent that had participated in bribery and then avoided its obligations due to that bribery, one tribunal noted that "claims founded on illegality have to be dismissed for the benefit of the public *and not for the advantage of the defendant*."

Set forth below are two well-known examples of bribery allegations raised by respondents in arbitration:

• In the dispute that led to Judge Lagergren's Award in 1963 in ICC Case No. 1110, the claimant had sought to enforce its contractual entitlement to 10% commission payments for all Argentinean energy contracts awarded to the respondent. The claimant's "major asset" was the remarkable degree of influence he had with the political appointees that awarded the contracts. Here, the tribunal found that the purpose of the agreement was to facilitate bribery to the claimant and to his entourage. This led Judge Lagergren to deny jurisdiction, finding the parties had forfeited their right to justice.

• In *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006, the claimant alleged, among other things, that the Kenyan government had expropriated its two duty free complexes the Nairobi and Mombassa International Airports. In response, Kenya alleged that its underlying agreement with claimant was unenforceable because it had been obtained with a "personal donation" of $2 million to the then President, a fact that the claimant had described in detail in its original submission. The tribunal retained jurisdiction and found the facts surrounding the allegation of bribery were not in dispute. Based on its conclusion that bribery was against transnational public policy, the tribunal found the contract was void and dismissed the claimant's claim.

Issues Raised by Allegations of Bribery in an Arbitration

When an issue of bribery is raised in a proceeding, the tribunal must decide how to address those claims. That decision can be a relatively easy or an exceedingly difficult one to make. Where the facts surrounding the alleged bribery are not in dispute, such as in *World Duty Free Company* where the best evidence of the bribery came from the claimant's own witness statement, the decision is relatively straightforward. In *World Duty Free Company*, the tribunal found that bribery had occurred, and concluded that as a result, the contract was void and the claimant's claims must be dismissed.

Where, however, the opposing side vigorously disputes the allegations of bribery, or particularly where neither party has raised an allegation of bribery but the facts and circumstances of the case suggest the contract is likely to have been tainted by bribery, the decision becomes much more difficult.

Arbitrators must consider a number of factors when deciding how to proceed, including their duty to adjudicate the claims before them and use their best endeavours to ensure that their awards are enforceable, as well as the limitation of their jurisdiction to the issues in dispute. To investigate claims of bribery, particularly where none have been raised by the parties, may invite challenges to the arbitrator's jurisdiction and the validity of the award on the basis of *ultra vires* and/or *ultra petita*.

Conversely, to disregard the possibility of bribery in a dispute may also undermine the enforceability of the award. Enforcing a claim based on a contract that is void due to bribery would violate public policy, and result in any award likely being set aside. The general consensus is that this is a murky area for any arbitrator, and one that may arguably be affected by the passage of the Bribery Act and its expansive jurisdiction provisions.

Of course there is also the question of how to investigate the allegations of bribery without the extensive police powers of a court or regulatory authority. Bribery may differ from traditional contract claims because it is often concealed and more difficult to detect. That being said, there is little reason why a tribunal would not be able to unearth the truth relating to bribery allegations any less ably than it does with other allegations that parties vigorously contest.

Moreover, it is well-settled that arbitrators have significant discovery tools available to them; they are able to order the disclosure of documents under many international arbitration institutions' rules, which also provide tribunals with the authority to issue subpoenas for witnesses or documents. In addition, arbitral tribunals may also be assisted in compelling the testimony of witnesses or production of documents pursuant to the national laws of certain arbitral seats.

What Arbitrators Should Know about the Bribery Act

Bribery and corruption have been recognized as common law offenses in England since the early 1900s, but it was not until last year that the United Kingdom comprehensively addressed the issue of bribery overseas by English or multi-national companies.

In so far as arbitrators and lawyers are concerned, they must take heed of the fact that the Bribery Act significantly expands the UK's anti-bribery laws in two ways: it does not differentiate between private and public entities, and it has an international ambit which is not restricted to UK nationals.

Arbitrators should be aware of the Bribery Act even where the governing law is not English law, the place of performance is outside the UK and the parties are not incorporated or formed in the UK, because the Bribery Act may still be relevant by virtue of its broad jurisdictional application.

The Act defines a 'bribe' as offering financial or other advantage to induce the person to perform improperly a relevant function or activity (or to reward the person for having done so)."[3] The Guidance issued on the Act confirms that "facilitation payments" – payments made to induce officials to perform functions they are otherwise obligated to perform – are included in the definition of Bribery under the Act (contrary to the U.S. Foreign Corrupt Practices Act 1977, which permits small facilitation payments).

The standard of proof imposed by the Bribery Act for criminal sanctions requires the prosecution to prove an offence beyond a reasonable doubt. The Bribery Act does not change the standard of proof in civil cases, applicable in arbitration, which is proof on the balance of probabilities. Some arbitrations have held that rumour and innuendo will not fulfil the requirement, and even that a higher standard of proof may be required for bribery allegations. The latter is based on the seriousness of the allegation, its inherent improbability and the potential for subsequent criminal sanctions.[4]

Set out below is a brief overview of the relevant sections of the Bribery Act:

Section 1 targets those who offer or give bribes to another where they intend to bring about improper performance of a "relevant function or activity." This is a very broad term and includes any function of a public nature and activity connected with a business, or which is performed in the course of a person's employment, whether corporate or unincorporated.[5] It is irrelevant whether the function or activity has any connection with the UK or is performed in a country outside the UK.

Section 5 sets the test for deciding whether conduct has been improper.

Section 6 creates the specific offence of bribery of a foreign public official with the intention of influencing the official in the performance of his official functions and obtaining business and/or an advantage in the conduct of business by doing so.

Section 7 provides that a corporation or partnership (whether or not incorporated in the UK) that carries on a business or part thereof in the UK, commits an offence under sections 1 or 6 if a person associated with it bribes another intending to obtain or retain business for the commercial organization or an advantage in the conduct of its business. The most significant aspect of this provision is that the country in which the person is based is irrelevant for the purposes of the Bribery Act, thus widening the scope of the Bribery Act beyond the UK. Section 7 also provides a defence for commercial organizations where it can prove it had adequate procedures in place designed to prevent persons associated with it from undertaking the conduct.

Section 12 provides that the Bribery Act applies to sections 1 and 6 offences committed within the UK and outside the UK where the offending person has a "close connection with the UK".

[1] Court Clerk Face Bribery Charge, Press Association, dated 31 August 2011
[2] *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [1998] 3 WLR 770
[3] S1(2)(a) Bribery Act
[4] R *(on the application of N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA

Civ 1605
[5] S3(2) Bribery Act, function or activity to which bribe relates includes: (a) all functions of a public nature; (b) all activities connected with a business (which includes a trade or profession); (c) any activity performed in the course of a person's employment; (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).

By Gary Born, Kirsten O'Connell & Nathalie Allen

This entry was posted on Tuesday, October 11th, 2011 at 5:54 pm and is filed under English Law, Jurisdiction, kompetenz-kompetenz
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.