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Proving Corruption in Arbitration: Lessons to be Learned from Metal-Tech v. Republic of Uzbekistan

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Factual background

On 4 October 2013 the Tribunal constituted under Metal-Tech Ltd.'s claim against Republic of Uzbekistan (G. Kauffman-Kohler, C. von Wobeser, J. Townsend) issued the award on jurisdiction in the ICSID case ARB/10/03. The peculiar factual background of the case has been previously discussed here.

The approach taken by the Tribunal in this case deserves closer attention as this is one of the few where allegations of corruption managed to have decisive influence on the outcome of the case, unlike most of the cases where bribery considerations are usually ruled out as inconclusive and unproven, although discussed in the award.

Establishing corruption

A number of tribunals have notoriously observed that corruption is difficult to prove. Allegations of corruption traditionally lead to a controversy as to which party has to bear the burden of proof. According to one view, the party seeking to establish that the tribunal has jurisdiction over the substance of the dispute should also refute any suspicion of corruption (which was raised in the case by Uzbekistan). The other view is that the party alleging corruption should prove its existence (which was pleaded by Metal-Tech).

The Tribunal did not discuss these arguments. It considered that some of the facts in the case did not have reasonable explanation and therefore explanation should have been provided before the Tribunal assuming jurisdiction over the matter.

Therefore, the award ruled, the issue of proving corruption did not turn on the burden of proof incumbent on the parties. The Tribunal adopted an active stance on the matter and issued a number of procedural orders requesting information from the claimant regarding suspicious circumstances in order to establish whether there could be any logical explanation for them. Without explaining this in the award, the Tribunal acted upon its own motion (*in sua sponte/proprio motu*) in engaging into establishing all circumstances regarding existence or non-existence of corruption in the case.

The approach taken by the Tribunal in *Metal-Tech v Uzbekistan* is a distinct one. Unlike other tribunals, it did not remain passive arbiter of the contentions of the parties, evaluating ultimately the level of comprehensiveness and persuasion of their arguments and evidence. To the contrary –

the Tribunal sought to clarify the factual scenario as much as possible as to make a well-informed decision regarding the existence of grounds for jurisdiction (or, as in this case, their absence).

Given the notorious difficulty in dealing with corruption issues in arbitration, this approach can be a useful guidance for future cases.

Inferring corruption from circumstantial evidence

It has been ruled in *Jan Oostergetel v. Slovak Republic* that establishing corruption, if possible at all, is to be based predominantly on circumstantial evidence. Proving depends on the balance of probabilities (*Rompetrol v. Romania*), and therefore on the amount of persuasive evidence provided by the parties (*Libananco v. Turkey*). The tribunal would have to deal with a sufficient number of inferences (based on circumstantial evidence) that corruption offenses have been committed as the precise facts of the offenses cannot be directly and conclusively established. However, it is by no means certain what should be the level of persuasion or the amount of inferences that would lead a tribunal to the final conclusion that corruption is present in the case at hand.

In *Metal-Tech v. Uzbekistan* the Tribunal found the absence of reasonable explanation for the consultancy contracts concluded by Metal-Tech regarding the claimant's investment in Uzbekistan. The consultants hired under the contracts did not have any qualification related to the nature of Metal-Tech's business in Uzbekistan and therefore it was difficult to assume that they had the capacity to advise in the molybdenum industry. The payments made for consultancy services, which exceeded USD 4 million, were tremendously high compared to the standard of living in Uzbekistan. The payments were rendered to a Swiss company where the shareholding was concealed behind offshore companies. There was no explanation provided by the claimant on how exactly the consultants provided support to Metal-Tech's investment. Moreover, the individuals hired as consultants were closely related to governmental officials. One of them worked at the office of the President of Uzbekistan, another one was brother of the Prime Minister of Uzbekistan.

Metal-Tech failed to provide sufficient clear and logical reasons why this consultancy arrangement was signed. The claimant contended that the consultants were, inter alia, lobbyists. However, the Tribunal considered that if lobbying services were provided, this could have been supported by documents evidencing these services, which were absent in the claimant's case.

The ruling of the Tribunal was not based on any direct proof of facts. There was no evidence showing how, when, and where Metal-Tech bribed any officials in Uzbekistan. However, the circumstances as established in the particular case were sufficient to raise a presumption that bribery had been actually committed. Given that the claimant failed to present reasonable and well-grounded explanation of these circumstances, the Tribunal could only rule out the claim as based on corruption and refuse jurisdiction to hear it.

It is important to note that corruption allegations are often brought up in investment arbitration cases by claimants arguing that the respondent State failed to meet investment protection standards by demanding unlawful payments to facilitate investor's business. Such contentions, although probably spawned by real facts, would not gather sufficient evidentiary support and would be dismissed.

• Usually, as the claimant bears the burden of proving the merits of the claim, the inability to prove the existence of relevant facts undermines the claim and it would be dismissed.

• However, in some cases – such as *Metal-Tech v. Uzbekistan* and *World Duty Free v. Kenya* – the claimant has to provide sufficient explanation regarding suspicious circumstances. The absence of such explanation strengthens the position of the respondent.

The existence of corruption may work for the benefit of both parties, but this depends much on which one carries the burden of proving the merits of the claim in the particular case. While in the first type of cases the claimant has to prove the facts of corruption, which makes the task a very difficult one, in the other type, the absence of cogent explanation is sufficient to result into dismissal of the claim, which is beneficial for the stance of the respondent. In result, allegation of corruption turns to work in the detriment of the claimants arguing corruption as breach of investment protection, but positive for respondent States which may become successful in refuting the claim solely on basis of inferences without direct proof.

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