Kluwer Arbitration Blog

Do Arbitrators have an ex officio duty/right to self-investigate corruption?

Raul Pereira de Souza Fleury (FERRERE Abogados) · Wednesday, November 25th, 2015

It has been some time since Judge Gunnar Lagergren – 52 years precisely – arbitrated a case (ICC No. 1110) whose underlying contract involved an agreement to pay bribes, and where he proffered a landmark award holding that "a case such as this, involving such gross violation of good morals and international public policy, can have no countenance in any court . . . nor in any arbitral tribunal."

Since then, a number of arbitral tribunals have been confronted with allegations of corruption, deciding either that such conduct was not present, and therefore applying the contract, or that corruption was proven and so refusing to apply it [ICC Case No. 6401 – *Westinghouse v. National Power Corporation and the Republic of Philippines*; ICC Case No. 7664 – *Frontier AG v. Thomson CSF*; ICC Case 3913; ICC Case No. 3916, among others]. Tribunals in investor-state arbitrations have also been charged with the duty of deciding upon corruption allegations. Cases such as *World Duty Free v. Kenya* [ARB/00/7] and *Metal-Tech v. Uzbekistan* [ARB/10/3] produced lengthy and thorough analysis on the investors' corrupt conducts, which were raised by the States as a defense, and are today milestones in the matter.

It is important to note, however, that there are two scenarios in which corruption can become an issue in an arbitral procedure. First and more obvious, if the parties raise the issue. Second, if the arbitrators become suspicious of certain circumstances in the underlying relationship that brought the parties to the arbitration. In this last situation, tribunals will normally become concerned after identifying one or more so-called *red flags*, which serve the purpose of alerting prosecutors, judges, arbitrators, and the society in general, about situations that could be labelled as "suspicious" [see *Metal-Tech Award* §293].

In the context of the second scenario – the purpose of this piece – one might ask whether arbitrators can *ex officio* initiate an investigation regarding possible corrupt conduct by one or both of the parties when analyzing the underlying contract. Like it or not, there is the possibility of arbitrators coming across these *red flags* and no explicit rule exists with regard to the approach arbitrators must take in these situations. Some clarification on this matter – if any – might be found in case law and scholarly opinion.

One possible tension that could arise is between the tribunal's mandate to decide the matters agreed by the parties and the fundamental principle of international arbitration of *ultra petita*. Does the tribunal have the jurisdiction to self-initiate a corruption investigation and analysis? The

opinion of some scholars is that it does, because sometimes the issue of corruption can be a question of illegality linked directly to the validity of the arbitration clause itself, that is, to the question of whether the tribunal has jurisdiction to decide the case. In this context, an *ex officio* investigation by the tribunal on issues of corruption or other illegalities might not be *ultra petita*, because after such investigations the tribunal will come to "a legal conclusion as to the validity of the main contract, the claims under that contract and/or the arbitration agreement" [A. J. van den Berg, *International Commercial Arbitration: Important Contemporary Questions*, 2003, 239].

In his 1963 award, Judge Lagergren, strongly suspecting that the parties had been guilty of misconduct in the formation and purpose of their contract, felt that he had a duty to self-police allegations of corruption because there were public policy concerns that put the validity of the arbitration agreement at stake. Likewise, practitioner and scholar Richard Kreindler explains [2008, 28] that a self-initiated investigation into illegality, such as corruption, can be relevant to the affirmation or denial of arbitrability and/or jurisdiction. Therefore, the right of arbitrators to ascertain arbitrability and jurisdiction on their own might not be *ultra petita*.

However, Kreindler makes an important caveat; if the illegality is irrelevant for issues of arbitrability, jurisdiction, and enforceability under the law of the seat, then arbitrators "have no right or duty" to investigate such illegality when this investigation is in fact within the province of the public authorities of the state where the arbitration or the corrupt conduct happened.

Now, should an arbitrator or a tribunal decide to conduct a self-initiated investigation, they "must be mindful [not only] of the public policy control but also of the due process control, such that the parties must be made aware of, and be given a reasonable opportunity to comment in particularized fashion, on the suspicion or evidence of illegality" [Kreindler, 2008, 27]. That is, if the tribunal suspects corruption and decides to go further and make a decision on that matter, it must let the parties know of its concern and give them equal opportunities to make their cases. The tribunal must be very careful not to aid the party that might benefit from confirmation that corruption had occurred, especially when that party only became aware of the allegation of corruption thanks to the tribunal's cue [van den Berg, 218].

The other side of the coin

Arbitrators do not always feel comfortable digging into corruption investigations. Some believe that arbitrators might refuse to address issues of corruption because they are concerned that they lack sufficient powers to deal with them, either because they lack effective powers to compel parties to hand over possible incriminating documents, or because the contractual nature of their mandate relates only to commercial disputes between the parties, without the possibility of going beyond that.

In some cases, arbitrators decided not to look into corruption allegations because more important issues have already been proved and therefore, looking at the corruption allegations would not affect the outcome of the decision. In other cases, the tribunal found that there was not sufficient evidence provided by the party to substantiate the allegation of corruption.

This was the case in arbitrations such as *TSA Spectrum v. Argentina* [ARB/05/5] and *Lucchetti v. Peru* [ARB/03/4]. In TSA the tribunal noted that "investigations about criminal offences in connection with the Concession granted to TSA have been initiated in Argentina [and have not been terminated]" and so it decided not to go further with the analysis of the allegations because

the materials they had available were not sufficient to establish corruption [§§174, 175]. In Lucchetti the tribunal did not address at all the allegations by Peru that the judgments granting Luccheti its construction permits and operation were obtained through undue influence. Instead, the tribunal concentrated on analyzing the *ratione temporis* issue and declined jurisdiction on that ground [§61].

No prohibition against ex officio duty/right to self-investigate corruption

Those who advocate an *ex officio* duty or right of the arbitrators to self-investigate corruption and other illegalities believe that there is no explicit prohibition against arbitrators engaging in self-initiated investigations of potential illegalities from corruption on the basis of the tribunal's own reasoned suspicions. Taking for example the 2012 ICC Arbitration Rules, Kreindler believes that Article 41 (General Rule) actually empowers arbitrators to make a self-initiated investigation into corruption and other illegalities, by stating that "the Court and the Arbitral Tribunal . . . shall make every effort to make sure that the Award is enforceable at law." In other words, arbitrators must make an inquiry into suspected corruption in order to avoid an arbitral proceeding and/or an arbitral award that could violate international and transnational public policy and thus, be unenforceable at law [in van den Berg, 2003, 227].

Moreover, if the potential corruption is relevant for issues of arbitrability, jurisdiction, and overall enforceability of the award under the law of the seat, there is no reason to argue that it would be *ultra petita* to inquire more deeply into a *prima facie* suspicion – or even mere suspicion – of corruption, and that it might lead to the rendering of an award on the merits that could be seen as accepting and endorsing an illegal enterprise, by "asserting jurisdiction where none may be asserted, or contributing to a violation of local or transnational public policy or all of the above" [van den Berg, 217, 218].

Although it was presented for the first time 52 years ago, corruption is on the agenda of international arbitration. Other issues besides the one presented here are also present, such as the standard of review of the evidence related to corruption (i.e. balance of probabilities, clear and convincing evidence, or beyond reasonable doubt), or the question whether arbitrators should report to domestic authorities corruption allegations made within the arbitral process; and so, reforms might be needed in these and other areas, in order to make international arbitration a useful mechanism to combat cross-border corruption and preserve its main feature of giving international trade and investment security and certainty.

This entry was posted on Wednesday, November 25th, 2015 at 12:00 pm and is filed under Corruption You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.