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How Far Do Tribunals Have a Duty to Investigate Corruption? The Kenyan High Court Has Its Word

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For AfricArb

It is twelve years since an ICSID tribunal dismissed World Duty Free's claim against the Republic of Kenya for breach of a lease agreement signed in 1989. As is well known, the claimant obtained the contract with a $2 million bribe to former President Moi, and the tribunal held, *inter alia*, that it could not uphold a claim based on a contract obtained through corruption, deeming it contrary to international public policy (*World Duty Free Company Limited v Republic of Kenya* (ICSID Case No. ARB/00/7), para. 188).

Despite this 2006 award, World Duty Free commenced arbitration again in 2008 (against the Kenya Airports Authority ("**KAA**")) for alleged breaches of contracts entered into pursuant to the same 1989 lease agreement. This time, World Duty Free's prospects looked good: an *ad hoc* tribunal awarded it around $50 million in damages in December 2012. But the Kenyan High Court has now put an end to its short-lived success. Following an application from the KAA, it set aside the award on 5 October 2018, finding it "*inimical to public policy*" on the basis that damages had been awarded in relation to contracts founded in the 1989 agreement – which in turn had been obtained through corruption (*Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex* (High Court of Kenya, Nairobi, misc. application no. 67 of 2013)).

Interestingly, the bribe to former President Moi was not raised by either party in the arbitration. The High Court's judgment, therefore, provides a useful reminder that addressing corruption often requires arbitrators to undertake a delicate balancing act, with significant consequences if the right balance is not struck. While a tribunal must not exceed the contractual limits of its power by considering matters falling outside the terms of reference, it must also ensure that its award is enforceable and therefore consistent with relevant public policy demands.

A Tribunal's Duty to Investigate Corruption at Its Own Motion

There is no universally accepted approach to addressing corruption when it surfaces in international arbitration. While there does seem to be a general and gradual shift toward taking a more active stance than previously, arbitrators continue to grapple with issues such as finding suitable methods of applying international conventions on corruption and the possibility of establishing the existence of corruption with the concept of red flags.

However, as allegations of corruption were not raised by the KAA in its defence in the present case, Justice Torgbor (acting as sole arbitrator) considered the matter outside his jurisdiction:

> "*There is therefore no basis… in pleading, evidence or agreement for this Arbitral Tribunal to take cognizance of an 'ICSID judgement' or an unlisted ICSID issue. Subject to the cautionary caveat occasioned by the Respondent's withdrawal from the arbitral proceedings an Arbitral Tribunal does not normally roam around to find and determine issues the parties have not for themselves raised for determination*".

As Torgbor noted, a tribunal must take great care to restrict itself to considering the issues put before it. A failure to decide a case as pleaded may lead to annulment or problems with enforcement. In this case, the sole arbitrator's reluctance to consider the bribe at his own motion is perhaps understandable given the conspicuousness of its absence from the parties' submissions.

Nonetheless, the High Court, when considering the KAA's application to set aside the award, judged that Justice Torgbor had erred in his decision and noted that:

> "*Whilst arguing that the ICSID Award was not placed as formal evidence before the Torgbor Tribunal, Counsel for Kenya Duty Free nevertheless concedes that it was to be found in at least three bundles of Documents placed before the Tribunal. The language used by the Arbitral Tribunal does not suggest that it did not see and read the Award or at any rate was unaware of it*".

It went on to observe that once an allegation of corruption is brought to the attention of a tribunal, even if not pleaded, "*the Tribunal ought to pause and interrogate* [it]". This direction is interesting for its breadth and clarity. It suggests that when confronted with corruption, tribunals should have the confidence to undertake at least a cursory exploration of the relevant allegations (whether raised by the parties or not).

Such logic may find traction elsewhere given the current debate on corruption in international arbitration. Indeed, the High Court's decision fits within a wider trend of national courts indicating that arbitrators should adopt a more active stance in this regard. In a recent case before the Singapore High Court, for example, Kannan Ramesh J reiterated that, "*in appropriate cases, an arbitral tribunal would be required to investigate allegations of corruption*", provided the allegations affect the issues under consideration in the arbitration (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101, paras. 224 and 226). This followed a similar ruling by the Paris Court of Appeal, which suggested early last year that Tribunals seated in France have a duty to "*meticulously examine*" evidence of corruption when it arises (Cour d'appel de Paris, arrêt du 21 février 2017, *Belokon c. Kirghizistan* (15/01650)).

Meanwhile, investment tribunals have also shown a greater willingness to adopt a proactive stance since the landmark 2006 decision in *Word Duty Free v Kenya*. In the 2016 case of *Spentex v Uzbekistan,* for example, the tribunal went as far as using the cost allocation as a means of addressing corruption. It strongly urged Uzbekistan to make a donation to the UNDP anti-corruption initiative, failing which it would have been subject to an adverse costs order.

Importance of Rendering an Enforceable Award

This gradual shift toward a more active stance on corruption requires arbitrators to pay particular attention to need to render an enforceable award, which may be jeopardised if they stray outside the contractual limits of their power by deciding on unpleaded issues. Indeed, section 35(2)(a)(iv) of the Kenyan Arbitration Act provides that an award may be set aside in Kenya if it "*deals with a dispute contemplated by or not falling within the terms of reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration*".

Yet arbitrators must also be alive to the risk of their awards falling foul of public policy requirements. This was underlined by the Kenyan High Court in its judgment, which noted that, "*however much* [Arbitral Tribunals'] *awards should enjoy autonomy, they should not be tolerated as long as they are inimical to public policy*" (para. 38). This principle is of course also reflected in the New York Convention.

The present case illustrates that it can be difficult for tribunals to strike the right balance between these at times competing demands. However, as the ICSID tribunal in the first round of the *World Duty Free* saga observed, corruption is almost universally considered to be contrary to public policy:

> "*in light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy*".

With this in mind, the precedence afforded by the Kenyan High Court to the need for arbitrators to consider the issue of corruption is understandable.

Conclusion

It remains uncommon for a court to condemn a tribunal's failure to investigate corruption at its own volition; however, the tribunal, in this case, was in the unusual position of possessing damming evidence of corruption in the well-publicised ICSID award. The wider impact of this decision may, therefore, be limited due to the factual circumstances.

Nonetheless, the High Court's decision highlights the on-going tension between arbitrators' nervousness at exceeding the contractual limits of their power, the arbitrator's duty to investigate corruption at its own motion, and the need to render an enforceable award consistent with public policy. While in this case, the arbitrator was likely fully aware of Word Duty Free's corruption, and therefore may have been overly cautious in the eyes of the Kenyan High Court, it illustrates the difficulties faced by arbitrators dealing with unpleaded allegations of corruption in the absence of explicit guidance.

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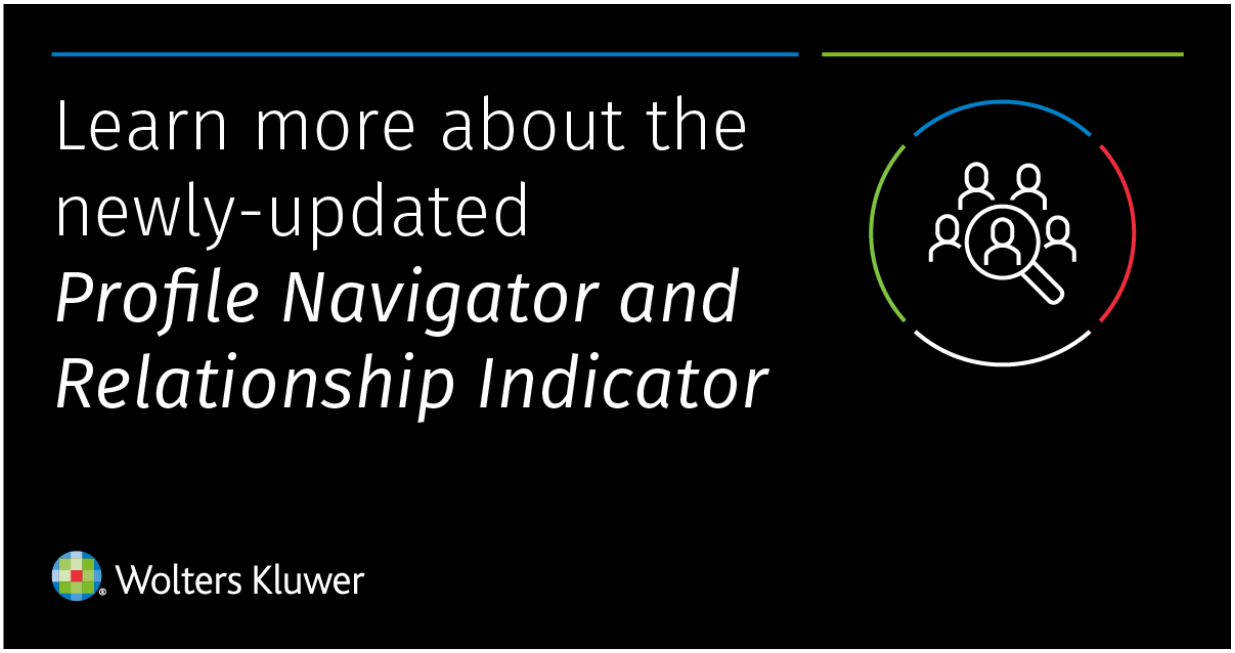

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