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Can You Enforce an Agreement Involving Bribery? From World Duty Free v. Kenya to Vantage Deep Water Co. v. Petrobras Am., Inc.

Diogo Pereira (De Almeida Pereira PLLC) · Sunday, July 7th, 2019

Discussions of corruption carry strong moral sentiments. After all, the abuse of public office for private gain erodes people's trust in government and institutions, makes public policies less effective and fair, and siphons taxpayers' money away from schools, roads, and hospitals. More generally, broad-based corruption weakens the foundations of a healthy economy, degrades social norms, and undermines civic virtues. Unsurprisingly, it is easy to provoke outrage with a nuanced or concise discussion of this issue.

Illegality and Corruption in Commercial and Investment Arbitration: A One-Sided Proposition?

In the context of international commercial arbitration, illegality and corruption can serve as a basis to deny jurisdiction or admissibility of a dispute, can be dispositive of claims on the merits, and can serve as a basis to deny enforcement. Arbitral practice is well developed on issues relating to illegality of underlying contracts with notable commercial cases like *Fiona Trust & Holding Corp v. Privalov*, which provide rich discussions of foundational arbitral principles such as *kompetenz kompetenz*, and severability, which are necessary for a tribunal to even entertain allegations of illegality and corruption. *See Fiona Trust & Holding Corp v. Privalov*, [2007] UKHL 40. Similarly, cases such as *Soleimany v. Soleimany* provide for the unenforceability of an arbitral award based upon a contract that was illegal in the jurisdiction of enforcement. *See Soleimany v. Soleimany* [1999] Q.B. 785, 798.

In investment arbitration, the number of cases involving allegations of corruption is increasing. One of the most notable examples, which reads like a Hollywood script, is the case of *World Duty Free v. Kenya*. In that case, the claimant's only witness, Mr Nassir Ibrahim Ali of Dubai, testified to the following facts relating to how the concession contract had originally been procured:

> "protocol in Kenya required that I should in addition make a "personal donation" to President Moi. … X advised me that the appropriate donation … was US$2 million. I was further advised by him that the donation should be in cash. … I brought [part of the cash in Kenyan shillings] to my meeting with President Moi in a brown briefcase.

> When we entered the room where the President received us, [I] put the briefcase by the wall and left it there. After the meeting [I] collected the briefcase from where [I] had left it. On the departing journey I looked in the briefcase and saw that the money had been replaced by fresh corn".

This case was disposed of on the merits in favor of Kenya under the skilled representation of Jan Paulsson and Constantine Partasides. The tribunal noted that, due to the bribery, the respondent Kenya:

> "was legally entitled to avoid and did avoid legally … the Agreement … [and] [t]he Respondent, Kenya, *did not lose its right to avoid the said contract by affirmation* or otherwise … under these applicable laws;" (emphasis added)

This award, while widely commended, has not been without criticism and has raised valid concerns. While anti-corruption norms are important, legitimate concerns about fairness arise if tribunals privilege anti-corruption laws over all other normative considerations. After all, the payment of a bribe is not a unilateral act and always implicates at least *two* guilty parties. Notwithstanding its *pari delicto* nature, it is also concerning to notice that it is usually the host states or government entities that allege corruption as a defense against allegations of their own later misconduct.[1)] The availability of a remedy to the host state only where both are involved in the illegitimate conduct can be seen as unfair and can also create a moral hazard. After all, a cynical State could conclude that it should encourage an act of corruption at the inception of an investment to inoculate themselves against future investor claims.

Vantage Deep Water Co. v. Petrobras Am., Inc.

On 17 May 2019, in *Vantage Deep Water Co. v. Petrobras Am., Inc.*, the U.S. District Court for the Southern District of Texas (the "Court") denied Petrobras' effort to vacate an arbitration award obtained by Vantage Deepwater Drilling on the basis that the underlying contract was procured through bribery.

By way of background, petitioners ("Vantage") and respondents ("Petrobras") entered into an eight-year Agreement for the Provision of Drilling Services ("DSA"), for which performance of offshore drilling services commenced on 2 December 2012. On 27 October 2014, Vantage and Petrobras executed the Third Novation and Amendment Agreement to the DSA ("Third Novation") which provided that all disputes were to be resolved before the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association ("AAA"). *See Vantage Deepwater Company et al v. Petrobras Americas Inc. et al*, Civ. Action No. 4:18-CV-02246.

Petrobras' premature termination of the DSA on 31 August 2015 led Vantage to commence the arbitration proceeding. During the arbitration, Petrobras argued "that the DSA was void or unenforceable for allegedly being procured through bribery". Notwithstanding, the majority found Petrobras liable to Vantage for US$615.62 million. On 8 July 2018, Vantage petitioned the Court to confirm the final award under U.S.C. §§ 301-307. Subsequently, Petrobras filed a response opposing confirmation of the final award, arguing that it should be set-aside under two provisions

of Article V of the Inter-American Convention on International Commercial Arbitration of 30 January 1975 (the "Inter-American Convention").

Petrobras argued that Article V(2)(b)[2)] of the Inter-American Convention provides such ground to refuse enforcement because it would violate public policy to require a party to pay for damages resulting from a contract that was invalidly obtained by bribery. However, the Court noted that defenses to enforcement of the Inter-American Convention are construed narrowly and there is an "empathetic federal policy" in favor arbitral dispute resolution. Although Petrobras argued that confirming the award involving a contract procured through bribery would violate the public policy of the United States, that was not the case. The Court stated a public policy defense is only applied where enforcement would violate the forum state's most basic notions of morality and justice. The Court here took the view that public policy did not refer to any international notion but rather should be examined with respect to Texas law. In this case, Petrobras conducted a bribery audit two months before executing the Third Novation. This, the Court explained, is evidence that Petrobras continued with recognizing the agreement with the knowledge of the bribery allegations, and thus, ratified the agreement under Texas law. Therefore, the question before the Court was whether enforcing a contract alleged to have been procured through bribery—and subsequently ratified by the non-bribing party—would violate public policy.

The Court cited further case law and explained that public policy does not favor allowing a party engaged in fraud to attempt to use fraud as a defense to a valid arbitration in favor of its alleged co-conspirator. Thus, enforcement of the final award did not violate public policy where the parties who were alleged to have mutually engaged in some misconduct during the formation of a contract, particularly when that contract was later ratified. As a result, the Court granted Vantage's petition to confirm the arbitral award.

The Competing Roles of International Arbitrators

In its treatment of allegations of bribery and illegality, the District Court's opinion in *Vantage Deep Water Co.* is consistent with the decisions of previous commercial and investment tribunals at both the merits and enforcement stages. Notably the tribunal in *World Duty Free* specifically noted that there was no subsequent affirmation of the contract in question that would have compromised the state party from avoiding the contract. Nevertheless, this case is notable in that it squarely acknowledges that a state actor or state-owned entity should not use their own misconduct as a defense, particularly when they later ratified that conduct.

The intersection of anti-corruption norms and international arbitration raises important theoretical questions about arbitration and exposes inherent tensions. Arbitration arises out of an agreement between parties, but at the same time, arbitrators must consider issues that could impact the wider public. Questions of corruption in particular straddle the line between civil and criminal law and raise questions of public interest that extend beyond the limits of party autonomy. This intersection exposes the reality that arbitration lies at the center of divergent claims of authority and arbitrators must delicately balance competing functions. As repugnant as bribery is, a finding of bribery is not necessarily dispositive of a case. International tribunals must consider various important public and private legal principles in reaching their decisions. Future cases will continue to grapple with the contours of these principles as they are fundamental and of recurring importance.

The views in this post represent the view of the author only and do not represent the view of De Almeida Pereira. This post was prepared with the invaluable support of Wilson Carneiro, Summer Associate at De Almeida Pereira in Washington DC.

References

?1 It is important to note here that government officials who accept bribes do not necessarily do so in their official capacity and as a result their conduct is often not attributable to the State.

?2 Article V(2)(b) allows a signatory country to refuse enforcement of an award if such enforcement would conflict with public policy.

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