Kluwer Arbitration Blog

Paris Arbitration Week Recap: Arbitrating Allegations of Corruption in International Business Transactions – Problems and Solutions

Lucian Ilie (Reed Smith) · Friday, July 31st, 2020

On Monday 6 July 2020, during the first day of the Paris Arbitration Week, Reed Smith held a webinar on '*Arbitrating allegations of corruption in international business transactions – problems and solutions*', a highly controversial topic which has gained much attention in the arbitration community in the last decade. The event focused on a series of discussions and Oxford Union-style debates between distinguished professionals comprised of: **Alexis Mourre** (President, ICC International Court of Arbitration), **Christina Täuber** (In-house legal counsel, CML International), **Karl Hennessee** (SVP Litigation, Investigations & Regulatory Affairs, Airbus), **Mark Pieth** (Professor, University of Basel, President, Basel Institute on Governance), **Sophie Nappert** (Independent arbitrator, 3 Verulam Buildings, Co-chair, ICC Task Force Addressing Issues of Corruption in International Arbitration) and **Yves Derains** (Founding partner, Derains & Gharavi, Chairman of the ICC Institute of World Business Law). The panel also included the following Reed Smith lawyers: **José Astigarraga** (Global Head of International Arbitration, Miami), **Peter Rosher** (Partner, Paris), **Ana Atallah** (Partner, Paris), **Andrew Tetley** (Partner, Paris), **Clément Fouchard** (Partner, Paris) and **Ben Love** (Counsel, New York).

Alexis Mourre, President of the ICC International Court of Arbitration, acknowledged in his keynote speech that there is consensus in the arbitration community that corruption "*is a scourge upon international business transactions, and needs eradicating*".[1] He further acknowledged that the International Chamber of Commerce (ICC) has taken the lead in this fight, and has poised itself at the very forefront of this battle against corruption.[2] While the welcoming note was loaded with legal and policy issues, he concluded with a note of caution: honest arbitrators dealing *bona fide* with corruption matters should be protected.

The webinar was further divided into three parts: (i) a conversation on dealing with corruption-tainted transactions; (ii) two Oxford Union-style debates; and (iii) a discussion on the Toolkit for Arbitrators.

The following highlights from the discussion include a range of views expressed by members of the panel and guests. No comments should be attributed to any particular individual.

A conversation on dealing with corruption-tainted transactions

The first session involved a discussion around the main problems encountered by arbitration practitioners when facing corruption allegations. The panel considered five key issues.

Firstly, the panelists agreed that current arbitral practice is mainly focused on corruption on the part of foreign investors (i.e. 'supply side' corruption). However, 'demand side' corruption (such as the bribery of public officials as a condition of investment) is often overlooked. The panel reflected on practical tools ("minimal standards") that foreign investors could utilise to address 'demand side' corruption, such as: implementing high level third party vetting (to ensure third parties in vulnerable regions are subject to enhanced due diligence), operating under clear compliance rules and business guidelines, offering internal/external training, and outlining steps taken to avoid corruption.

Secondly, although States have seen many changes in their policy and legislation over the last 10 years, the panel could not pinpoint an overarching discernible culture change, noting that corruption and bribery are concepts that evolve easily over time: "*it is not yet clear whether the change in the behavior of public officials is better or worse*". The panel expressed how repeat behaviors and circumstances are being uncovered, particularly in the construction industry, a sector that is exposed to bribery through public tendering procedures.

Thirdly, although there are diverging attitudes towards different modes of doing business or exercising political influence in different countries, the panel agreed that a 'one size fits all' approach based on "minimal standards" is appropriate (the practical tools described above to combat corruption). Where such "minimal standards" cannot be met, business should be avoided.

Fourthly, the panelists agreed that when selecting an arbitrator, they look for a strong personality, high level of competence, a good track record, as well as a degree of 'arbitral courage' (i.e. willingness to take a specific action if required, by not relying on procedural grounds to avoid taking unusual decisions).

Fifthly, having noted that there are often significant differences in approaches adopted by arbitral tribunals, the panel discussed whether a "standardised approach" towards corruption would be desirable. It was agreed that, although the Toolkit for Arbitrators has done a great job to address these issues in a systematic and comprehensive manner, corruption and fraud are constantly evolving, and a "standardised approach" may never be able to keep up with criminality.

Oxford Union-style[3)] debates

In the second part of the webinar, debaters argued for, or against, a motion, and then a "tribunal" voiced their opinions on the subject. The "tribunal", composed of members of the panel, had to decide on two legal issues: (i) in the first debate, the tribunal had to assess whether the standard of proof for corruption allegations should be higher than the balance of probabilities, and (ii) in the second debate, the tribunal questioned whether a party who obtained a contract through corruption is entitled to recover damages. Each debate involved two debaters.[4)]

Motion 1: "This house believes that the standard of proof for corruption allegations should be higher than the balance of probabilities"

The debater in favour of the motion considered several reasons why a higher standard of proof should be required: (i) the gravity of the consequences of a finding of corruption (either the contractual amount is due or it is not, either the arbitral award will remain valid or it will be annulled – i.e. there is no middle ground), (ii) the ability to disseminate evidence (regardless of who is alleging corruption); (iii) the variety of types of corruption and definitions, which require an intentional element (the appropriate standard of proof should be tailored to the most demanding definition of corruption); and (iv) there may be a large margin of error among the members of the arbitral tribunal (composed traditionally of three members).

The debater against the motion advocated that the balance of probabilities is the highest standard available, which properly balances the respective interests of those in dispute. It was further argued that some proponents even advocate for a lower standard of proof, on the grounds that corruption is particularly difficult to prove. Moreover, the balance of probabilities is sufficiently flexible to properly respond to allegations of corruption. Ultimately, to retain any higher standard would be to introduce the criminal "beyond all reasonable doubt" standard, which would be inappropriate in a civil dispute resolution process.

Motion 2: "This house believes that a party who procured a contract by corrupt means should be entitled to recover damages to the extent of the benefit conferred on the State"

The debater in favour of the motion advocated that a party to a contract that was procured by corruption should be entitled to restitution for the following reasons: (i) for fairness because no party should benefit from its participation in a corrupt transaction (i.e. damages in the form of restitution should still be available to prevent unjust enrichment of the respondent invoking a defense of illegality, in particular if it were a participant in the illegal conduct); (ii) precluding restitution would put the tribunal in the improper position of imposing disproportionate penal measures on the claimant, which is likely already subject to fines or other penalties in the domestic legal system (i.e., proportionality in the administration of civil justice); and (iii) as a matter of policy, it better achieves the central goal of fighting corruption (e.g., for States, a 'zero-tolerance' approach to corruption creates the perverse incentive to engage in bribery (or at least to overlook such acts) when concluding investment contracts, in order to shield the State from eventual liability; and for investors, a 'zero-tolerance' approach incentivises them to focus fewer resources on self-policing and reporting, because such self-investigation would be punished rather than rewarded).

The debater against the motion rebutted these arguments for the following reasons: (i) entitling a party who has procured a contract by corruption to recover damages is unfair and has no basis in law; (ii) it would not serve to deter corruption but risks in fact encouraging it; (iii) it would threaten international arbitration's legitimacy and reputation; (iv) it is rarely both parties to the arbitration who have participated in the bribe in the same way; (v) a "zero tolerance" approach deters corruption and can change the corporate culture towards corruption; and (vi) international arbitration cannot be seen as encouraging acts of corruption.

Corruption and money laundering in international arbitration – a Toolkit for Arbitrators

The third and final part of the session concluded with some final remarks on the Toolkit for Arbitrators, and some of the reasoning behind it: one key motivation was that the practice has been incredibly uneven, with every tribunal having a tendency to “reinvent the wheel” when confronted with such corruption issues, which may pose problems at the enforcement stage. This Toolkit aims to help arbitrators who suspect, or are confronted with, alleged corruption or money laundering in relation to the underlying dispute, to find a practical solution in accordance with the applicable laws. Although the Toolkit is a comprehensive and useful tool in practice, it remains however a non-binding instrument.

Conclusion

Arbitrating corruption allegations presents complex and weighty issues. The allegations can be made both by States and investors. The adequacy of the evidence that should be required to prove such allegations, such as the so-called “red flags,” as well as the standard of proof, are key issues in such cases. Even if corruption is proven, tribunals must resolve other issues such as the legal consequences of such corruption, which can depend on at what point in the process the corruption takes place, the causal connection between the corruption and the transaction, and the parties’ conduct after the corruption occurred. To add to the challenge, disputes involving corruption can be high-profile and highly controversial, further complicating the work of tribunals. The law and practice surrounding these disputes is likely to continue to evolve as more debate and thought is focused on the subject.

More coverage from Paris Arbitration Week is available here.

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References

- ?1 By referring to Emmanuel Gaillard's note in "*La corruption saisie par les arbitres du commerce international*", French Rev. Arb, 2017, No. 3, page 805.
- ?2 For example, by adopting in 1977 (as updated in 2011) the ICC Rules on Combating Corruption as a method of self-regulation and encouraging businesses to respect high standards of integrity in business transactions.
- ?3 Discussion was led in the "Oxford Union-style", which means that debaters argue in favour of, or against, a motion.
- ?4 For the purposes of these two debates, the 'tribunal' and all of the debaters were role playing, and thus none of the views expressed during the debates should be attributed to any of the individuals participating in the debates, their respective firms or institutions, or any of their clients.

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