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Arbitral Tribunals Beware: Better Keep an Eye on Potential Corruption Involving Consent Awards

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The dispute involving the State of Libya and French company SORELEC was heard by the Paris Court of Appeal in the context of a much lower tolerance for bribery and corruption in domestic and international affairs than ever before. France has indeed significantly strengthened its anti-corruption framework since adopting the so-called "Sapin II" law in December 2016, introducing mandatory anti-corruption programs for large companies, and creating a deferred prosecution agreement instrument which the French prosecutorial services have employed in a series of landmark cases since then. On 17 November 2020, the Paris Court of Appeal provided yet another example of its strong inclination to scrutinize awards relating to facts where corruption is suspected to have occurred, and provides new insight regarding its approach to such matters.

Background

In 1979, the Education Ministry of the State of Libya and SORELEC entered into a contract for various construction works. In 1985, a dispute arose and after several failed attempts to settle, SORELEC brought the ICC arbitration proceedings against the State of Libya, claiming €109 million in damages plus interest. On 27 and 29 March 2016 – at an advanced stage of the proceedings – the parties reached yet another settlement (**"the Protocol"**) providing that (i) the State of Libya would pay SORELEC €230 million within 45 days from notice and (ii) that the State's failure to pay in the allocated time would result in another award being issued against the State, ordering it to pay €452,042,452.85 in damages (i.e., SORELEC's initial claim in the arbitration together with interest). The Protocol was signed for the State of Libya by Mr. Omran, the Justice Minister of the provisional government of Libya at the time.

SORELEC requested on 22 August 2016 that the arbitral tribunal render an award reflecting such agreement. In a partial award dated 20 December 2017, the tribunal approved the Protocol and thus issued an award ordering the State of Libya to pay €230 million within 45 days from notice. Following the State of Libya's failure to pay, a second award was rendered on 10 April 2018.

The State of Libya brought annulment proceedings against both awards, respectively on 26 January and 10 April 2018, alleging amongst other matters that the awards violated international public policy by enforcing a contract obtained through bribes of a public official, and succeeded in having

the first award set aside by the Paris Court of Appeal. Indeed, the State of Libya alleged that there was "*serious, precise, and concurring evidence*" sufficient to demonstrate that the Protocol was obtained by unlawful means.

The Paris Court's Analysis

When controlling the regularity of the award with respect to international public policy, the Paris Court of Appeal applied what is now seen as its typical approach, using "*red flags*" of corruption, or, in other words, identifying signs of potential corruption in order to uncover a corrupt practice.[1)] Reaffirming the existence of an international consensus on the definition and incrimination of acts of corruption of public officials, namely the practice of offering a public official an undue advantage (referring to the OECD Convention of 1997 and the UN Merida Convention of 2003), the Court conducted an in-depth analysis of all the circumstantial evidence submitted by the State of Libya to assess whether there was sufficient evidence to warrant the conclusion that corruption had occurred.

The political context as an indicator of corruption

The Court meticulously noted that when the Protocol was agreed, Libya was in the midst of a civil war between the two competing factions and that both national and international organizations had reported that corruption was pervasive in Libya at that time. The Protocol had been agreed during "*this chaotic period*", in circumstances that were particularly favourable to corruption.

Evidence of corruption in the Protocol itself

- *The bypassing of normal procedures*

Under Libyan Law, a Minister cannot settle a dispute without prior notification of the State's Litigation Department. The Court noted that this process was not complied with, which gave rise to a suspicion that Mr. Omran, who executed the Protocol on behalf of Libya, directly or indirectly received a bribe – Mr. Omran having himself acknowledged the duty to follow certain procedures. This was therefore considered a "*serious and precise indicator of collusion with SORELEC*", and all the more so bearing in mind Mr. Omran's implication in the Ghenia case where an Award rendered under the UNCITRAL Arbitration Rules and dated 9 December 2016 was retracted by the arbitral tribunal following similar corruption allegations.

- *The absence of evidence documenting the negotiation process immediately before execution of the Protocol*

The Court noted that the parties had failed to settle their dispute for over a decade, and that their positions in the arbitration were strongly antagonistic. Moreover, a commission responsible for conducting the negotiations, which Mr. Omran personally appointed, issued a report a couple of months before the Protocol was signed recommending that the dispute be settled for a principal amount of €59.4 million.

Although the preamble of the Protocol stipulated that negotiations were difficult and lasted over a week, a handful of documents submitted by SORELEC did not amount to satisfactory evidence of a genuine negotiation.

- *The specific terms of the Protocol*

In view of the State of Libya's political situation as well as its public finances at the time, the undertakings from the Protocol were held to be inconsistent with the state of Libya's public finances at the time.

The absence of any concessions from SORELEC and the "*striking difference*" between the terms of the Protocol and the various documents issued by other State commissions prior to the Protocol, indicated an absence of economic or a political incentive to enter into this agreement, especially considering the advanced stage of the arbitral proceedings. The Court of Appeal concluded that Mr. Omran knowingly accepted terms that were obviously detrimental to the interests of Libya and that such acceptance could only be explained by the fact that he had accepted a bribe.

In light of the serious, precise, and concurring evidence that the Protocol had in fact dissimulated a corrupt scheme between SORELEC and Mr. Omran, the partial award rendered on 20 December 2017 was set aside.

In *Alexander Brothers*, the Court of Appeal had previously described the type of circumstantial evidence that could be taken into account to prove corruption. The SORELEC case provides additional guidance in this respect, and also relates to a different type of agreement (a settlement, rather than an intermediary broker arrangement).

What Is Expected of Arbitral Tribunals?

The decision maintains the keystone solution that the corruption of foreign public officials is offensive to international public policy. As a result, the French courts are under a duty to examine, both in fact and in law, the legality of agreements and whether the recognition or enforcement in France of awards violates international public policy in a "*manifest, effective and concrete manner*". The Court of Appeal, however, provides no guidance as to what is expected of arbitral tribunals. In answer to SORELEC's argument that the State of Libya had not alleged the payment of bribes before the arbitral tribunal, the Court held that it was under a duty to determine whether or not the award allowed the enforcement of an illicit act, irrespective of the parties' arguments raised before the arbitral tribunal.

In numerous other cases, bribery (or fraud) had been alleged by one of the parties during the arbitration.[2)] In some instances, criminal proceedings running in parallel to the arbitration made it especially difficult for the arbitral tribunal to ignore the allegations and dismiss them.

In *SORELEC*, the parties had made it difficult in practice for the arbitral tribunal to investigate the matter, given that they applied for consent award. There are, nevertheless, arguments in favor of more intervention on the tribunal's part.

The first relates to the enforceability of the award itself. It is generally considered that arbitral tribunals are to render awards that are enforceable (see, for instance, Article 42 of the ICC Rules), and failing to investigate further in case of concerns about potential corruption could be taken as a breach of that duty.

The role of arbitration in the general justice system should also be borne in mind. Given the very

efficient enforcement of arbitral awards (to illustrate, in France, exequatur is obtained *ex parte* and allows for the immediate seizure of assets), it is difficult to consider that arbitrators should not be mindful of giving effect to agreements obtained through corrupt practices. In *SORELEC*, the tribunal was indeed manipulated by the parties to carry out their corrupt scheme.

Even if arbitral tribunals prove reluctant to investigate such matters of their own motion for a number of reasons,[3)] the *SORELEC* case should undoubtedly encourage arbitral tribunals to exercise extra caution in circumstances that raise, or should raise, concerns such as those in this particular case.[4)]

References

?1 Belokon (CA Paris, 21 February 2017), Rev. Arb. 2017 (3) p. 915, *Alexander Brothers* (CA Paris, 10 April 2018), *Indrago* C. Cass, 1st civil 13 September 2017 no. 16-25.657

?2 Belokon (CA Paris, 21 February 2017), Rev. Arb. 2017 (3) p. 915, *Alexander Brothers* (CA Paris, 10 April 2018), *Indrago* C. Cass, 1st civil 13 September 2017 no. 16-25.657

?3 See S. Bollée Rev Crit DIP 95(1) jan-mar 2006 p.104

?4 For a detailed analysis, see Rapport sur la responsabilité de l'arbitre, Club des juristes 2017

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