Kluwer Arbitration Blog

The 2022 Dutch Arbitration Day: Fraud and Corruption in Arbitration

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After two years of absence due to COVID-19, the Dutch Arbitration Association held its eighth conference on 2 June 2022 in Amsterdam. The main theme of this year's conference was fraud and corruption in arbitration. This blog reflects the main issues of the keynote speech and the panel debates of the conference. We will not discuss two sessions dealing with additional topics, namely a breakfast panel dedicated to the importance of cognitive diversity in arbitral tribunals presented by Nathalie Allen (Addleshaw Goddard) and Leonor Díaz-Córdova (C|T Group) and the panel discussion of Erik Bos (PwC), Erik van Duijvenvoorde (Accuracy) and Alan Rozenberg (Compass Lexecon) about recent trends in damages awards.

Fraud and Corruption in Arbitration: Overview of Main Issues

Michael Polkinghorne (White & Case) delivered a keynote speech on "*Fraud and Corruption in Arbitration*". He started by looking at various definitions of fraud and corruption, and referred to the different tools addressing the problems of fraud and corruption, such as the OECD Convention, Foreign Corrupt Practices Act (FCPA). Mr Polkinghorne stressed that national courts seem to be more willing nowadays to intervene if issues of fraud and corruption are brought before them in the post-arbitration court proceedings. For example, French courts often deal with such issues in the context of public policy.

The question arises who is in a better position to decide on a fraud allegation, is it an arbitral tribunal in the initial arbitral proceedings or a state court in the following state court proceedings? Mr Polkinghorne noted that allegations of corruption should only influence the validity of an award if there is a causal link between such allegations and the outcome of the arbitral proceedings, for example, the damages awarded. He highlighted that an arbitral tribunal should raise concerns of potential fraud or corruption, if any, already during the proceedings and give parties a chance to address these matters to safeguard due process. He also posed a question whether a counsel is obliged to battle bribery or corruption, for example, by proactively reporting potential fraud, and concluded that this issue is not settled yet.

Bribery in International Business Transactions

The keynote was followed by a presentation of Drago Kos (OECD Working Group on Bribery) who provided an overview of the OECD activities to fight fraud and corruption in business transactions. He highlighted that research shows that there is more corruption in certain industries, such as fossil fuels, construction, transportation, and communications. Interestingly, developed and developing countries have approximately the same number of reported corruption cases. Mr Kos suggested that OECD and the arbitration community should engage more with each other on the topic, and that the arbitration community should contribute to battling fraud and corruption.

Corruption of Evidence

The panel moderated by Eniko Horvath (Dechert) discussed "*Fraud and Corruption and Evidence in Arbitration*". The panelists were Mirjam van de Hel-Koedoot (NautaDutilh), Andrew Cannon (Herbert Smith Freehills), Melanie van Leeuwen (Derains & Gharavi) and Prof. Remme Verkerk (Houthoff).

The speakers stated that corruption of evidence comes in different forms, such as forged or corrupted evidence or non-compliance with document production orders. Arbitrators have a duty to render an enforceable award, thus, if an issue of corruption of evidence is raised, they need to react and address it.

The speakers also discussed whether the burden of proof should shift in case of allegations of corrupted evidence. In *Methanex*, the tribunal found that once a party shows *prima facie* that evidence was obtained illegally, the burden of proof should shift to the other party to demonstrate that the evidence is admissible. However, tribunals have used different standards of proof, including a high standard for allegations of forged documents. The speakers noted that the existence of red flags for illegality is not enough. They should be tested with evidence.

The panelists stated that awareness about fraud of evidence is important. They also thought it is essential to develop best practices on how to deal with fraudulent evidence procedurally, as it may interrupt the proceedings. The new edition of the IBA Rules on the Taking of Evidence in International Arbitration 2020 includes the recently adopted Article 9(3) allowing the tribunal to exclude evidence obtained illegally. However, the IBA Task Force did not reach a consensus on the specific circumstances in which such evidence should be excluded and left the matter to the tribunal.

Guerilla Tactics in Arbitration

Dorine ten Brink (Ploum), Albert Marsman (De Brauw Blackstone Westbroek), Franz Schwarz (WilmerHale) and Prof. Niek Peters (Simons & Simons) discussed guerilla tactics in arbitration. The workshop panel concluded that the definition of guerrilla tactics depends on the circumstances of the case. It should, thus, be established on a case-by-case basis whether a certain practice, for example, an extension request, is a guerilla tactic. The speakers discussed various examples and whether they constitute guerilla tactics, such as threatening witnesses, bombarding the tribunal with unsolicited submissions, requesting reconsideration of tribunal's decisions and orders, making repeated disclosure requests and appointing a co-arbitrator who does not have time to act as an arbitrator, insisting on an in-person hearing.

In practice, the mentioned tactics can be used by a party in its attempt to put some pressure on or even hinder the presentation of a case by an opposing party. Usually, an experienced tribunal can spot and prevent any negative effects of such tactics during the proceedings. It is not uncommon for arbitrators to take these tactics into account in costs awards.

Fraud and Corruption in Investment Arbitration

In a workshop, Prof. Eric de Brabandere (Leiden University), James Boykin (Hughes Hubbard & Reed), Iuliana Iancu (Hanotiau & van den Berg) and Alfred Siwy (Zeiler, Floyd & Zadkovich) discussed fraud and corruption in investments.

The panel presented an overview of the approaches to illegality issues in investment arbitration. The "*in accordance with the host state law*" clause can serve as either a basis for a jurisdictional objection or a merits and/or quantum defense. The speakers proposed to use "*legal realism*" so that trivial violations of host state law should not deprive an investment of protection.

The panelists also debated if the burden of proof should shift to the investor if a state presents *prima facie* evidence of corruption. Burden of proof exists to ensure due process and shifting it can be used by a state strategically. The tribunal is required to deal with this issue, so the focus of the dispute may shift and this will inevitably lead to higher arbitration costs. Thus, there may be a significant benefit for a state to raise such allegations. In any event, the speakers agreed that shifting the burden of proof should not be automatic. This is also supported by case law, as arbitral tribunals in numerous arbitrations, including in *Jan Oostergetel* and *Rompetrol*, have adopted a general assumption that *prima facie* evidence submitted by a claimant is generally not sufficient to shift the burden of proof to a respondent.

Furthermore, the speakers discussed that enforcement of investment arbitral awards is often delayed by allegations of fraud and corruption. Providing security under Article VI of the New York Convention may be a good practical option to eliminate corruption concerns. If a party seriously believes in fraud or corruption allegations it raised in the post-award court proceedings, it should be ready to provide security in the amount awarded by the tribunal.

Fraud or Corruption in Arbitration-Related Court Proceedings

Another panel discussion, moderated by Sophia von Dewall (Derains & Gharavi), dealt with the role of state courts in enforcement and setting aside proceedings involving fraud or corruption and provided observations from a few jurisdictions. Wouter Cortenraad (Amsterdam Court of Appeal), Prof. Stefan Kröll (Bucerius Law School), Julie Spinelli (Le16) and Prof. Gerard Meijer (Linklaters) gave insights into Dutch, French and German law. This topic was already touched upon by Mr Polkinghorne during the keynote speech.

In the Netherlands, in case of a fraud involving arbitrators, a court will usually conduct a full review. If the case involved allegations of fraud regarding the substance of the dispute, on the other hand, courts should have more restraints in doing a full review. If fraud is discovered after an award is rendered, Dutch law provides for a revocation procedure.

The French courts consider the facts but they are bound by the findings of arbitrators. In *Belokon*, the French Supreme Court did a *de novo* review of the legal and factual evidence and then applied a red flags test. However, the *de novo* review by courts is not unlimited, and it will usually not go into the merits of the case, but the judges will check if enforcing an award will be against public policy.

A full review is also provided under German law in case of public policy concerns. Lower courts would do a full review of law and a restricted review of facts. In contrast with Dutch law, no revocation procedure exists in German law. In addition, when a party brings allegations of illegality in the arbitration-related court proceedings, German courts need to check if the award was actually affected by such illegality.

Thus, the courts may have different approaches. However, as an overall emerging trend, we observe that state courts now engage more with issues of fraud and corruption in arbitration-related court proceedings. Although courts do have a duty to protect public policy, it is up to the arbitration community to stop and punish the behavior that undermines awards with fraud allegations in courts, where such allegations are clearly frivolous.

The various topics discussed during the conference show that fraud and corruption may appear in different forms and at different stages of an arbitration dispute, such as procurement of a contract containing an arbitration clause, defrauding the arbitrator, admitting the illegally obtained evidence or even after the award is rendered in the post-award court proceedings. The conference discussions covered the main forms thereof. "*You know it when you see it*" may be a suitable starting point, however, a tribunal should test red flags before them with additional available evidence. The arbitration community should think of the best practices on how to tackle fraud and corruption allegations.

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