Kluwer Arbitration Blog

2024 PAW: Going after the Arbitrators – The Criminalization of International Arbitration Proceedings

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While criminal proceedings and corruption in international arbitration have been much discussed in recent years, on the second day of Paris Arbitration Week, in the scenic 18th century Belgian Residence in Paris, Liedekerke organised a conference focusing on criminal liability, criminal threats and corruption allegations brought against arbitrators. The event was moderated by Bruno Hardy (Liedekerke) and the speakers included Elena Gutierrez (Arbitrator), Judge Dominique Hascher (French Court of Cassation – First Civil Chamber) and Gabriele Ruscalla (Liedekerke).

Situations in Which Arbitrators Can Face Criminal Prosecution

The panel began by discussing the various scenarios in which an arbitral tribunal may face criminal actions and/or sanctions. Drawing on her experience in Latin America, Elena Gutierrez distinguished three situations:

1. anti-suit injunctions directed not against the parties, but against the arbitral tribunal members who either (allegedly) lack jurisdiction or competence. In practice, these injunctions are rendered by courts without a clear idea of their competence, but also by state courts that are unrelated to the seat of the arbitration. Regardless of how the injunctions are redarned, failure by the arbitral tribunal to comply with such orders can result in sanctions or criminal proceedings;
2. accusations of bribery or criminal schemes against arbitrators; and
3. criminal acts or threats against the arbitrators, including those which do not necessarily consist of a formal criminal complaint, but where a party makes it clear to the arbitral tribunal (e.g. by written submissions) that a particular interpretation of the law or facts would make it an accomplice to a criminal offence.

Allegations of corruption can be made even in the absence of criminal offences. Gabriele Ruscalla cited the example of an arbitral tribunal that was found guilty of corruption for changing the seat of the arbitration. Specifically, in an attempt to resolve various jurisdictional issues, the tribunal moved the seat of the arbitration from Qatar to Tunisia and opted for an ad hoc arbitration to limit the jurisdiction of the Qatar International Centre for Conciliation and Arbitration (QICCA). However, the Qatari party to the arbitration commenced criminal proceedings that resulted in a three-year prison sentence for the members of the arbitral tribunal, as well as an ongoing civil lawsuit seeking USD 250 million in damages. The case shows how state courts can take initiatives

that are completely unfounded, based on allegations of corruption that have not been proven, and where the change of seat was done for the sole purpose of having a neutral seat (none of the parties had any connection to Tunisia). Ruscalla also noted that while criminal proceedings are generally viewed negatively (and rightly so), there are exceptions to this rule. A famous example is the Chevron case (*Waleed Bin Khalid Abu Al Waleed Al-Qarqani et al v Chevron Corporation et al*), where the Egyptian public prosecutor found the arbitral tribunal guilty of corruption and bribery in an arbitration conducted through a non-existent arbitration centre.

Finally, Judge Hascher considered the criminal actions/accusations of corruption in France, touching on the weaponisation of criminal proceedings to interfere with the arbitration proceedings or the enforcement of awards. The use of criminal law to prosecute arbitrators opens vast new frontiers, completely uncharted for the traditional arbitration practice, where indictments, accusations and prosecutions can be used as a tactic to intimidate arbitrators. The consequences of these allegations should not be overlooked. Corruption of arbitrators can take various forms, ranging from bias and conflicts of interest (e.g. undisclosed relationships between parties, law firms or entities that may be seen as an exchange of "favours" or benefits), to acts of bribery and collusion.

An answer to how to deal with these issues can be found in a number of basic fundamentals developed by arbitration law, such as competence-competence, separability of arbitration agreement, respect of arbitration agreements, or declarations of independence and impartiality in the nomination process. However, Judge Hascher expressed his concern that "these basic fundamentals of arbitration are just part of a mythology whose beliefs stop at the door of criminal justice."

He also noted that there is a total inversion of values; the legal fiction intended to protect the integrity of dispute resolution and arbitrators will backfire on the arbitrators and the parties. For example, where the arbitrator is appointed in a case where corruption is one of the issues for the Tribunal to decide, and the arbitrator rejects every procedural request from a party (e.g. suspension requests), there can come a point where such denials can be considered as "red flags" of corruption if the arbitrator has denied every procedural challenge. Another example is the allocation of fees, which may be considered a proof of bribery among the members of the arbitral tribunal, who share the proceeds of corruption because they have accepted to sit as arbitrators in a dispute involving corruption, where the contract is tainted by corruption and the arbitration agreement is a mechanism to get the money out of the party that has been harmed by corruption.

The Role of the Seat

Regarding the role of the seat in these scenarios, in Gutierrez's view, the seat plays a pivotal role because the consequences of an arbitrator's failure to comply with a state court's order can lead to imprisonment, fines, and suspension from practice. The seat also matters as criminal prosecution of arbitrators can vary greatly from one state to another and from a less arbitration-friendly state to a more arbitration-friendly state. Finally, criminal proceedings may have different consequences for arbitrators who are nationals of the prosecuting state (which may, for example, lead to domestic arrest) and for those who are foreign to that jurisdiction.

Turning to the French perspective, Judge Hascher noted that the jurisdiction of the French criminal

courts does not necessarily coincide with the seat being in France. The French criminal courts will have ample opportunity to prosecute criminal offences if the seat is in Paris (or France in general), but they may also be involved if any element of the crime is committed in France or if the injured party is a French national even if the crime is perpetrated abroad.

Guidance to Arbitrators When Facing Criminal Allegations

Ruscalla noted that there are few, if any, ethical guidelines and codes of conduct for arbitrators. When it comes to corruption, the only applicable rules are general principles such as the independence, impartiality and integrity of arbitrators. There is no reference to corruption in the institutional rules or in the institutional notes on the conduct of arbitrators, with the exception of the regional institutions of the Jamaica International Arbitration Centre and the Kuala Lumpur Regional Centre for Arbitration (renamed as Asian International Arbitration Centre (Malaysia) in 2018). Apart from these exceptions, there is no clear guidance for arbitrators on how to deal with allegations of corruption. The International Chamber of Commerce (ICC) has implemented in its Rules and the arbitrators often include the principle of immunity in the Terms of Reference, and while immunity can be helpful, it is limited to commercial arbitration and civil matters. In criminal matters, immunity is almost always excluded as the seriousness of the underlying criminal allegations precludes protection.

Responding to Corruption Allegations

With respect to the question of who is best placed to investigate corruption issues, whether that be the arbitral tribunals or the courts, Judge Hascher pointed out that arbitrators cannot compel the production of documents, cannot order coercive measures and have no investigative powers. They are left with the so-called red-flag method. If the arbitration takes place in Paris, there is also no obligation for an arbitrator to report to the French judicial authorities or the French public prosecutor, as arbitrators are not public officials. Nor are they obliged to suspend the arbitration, even if there are ongoing criminal proceedings for corruption which could affect the facts of the arbitration. However, the lack of investigative powers should not lead to an arbitral tribunal abstaining from dealing with corruption issues and thus turning a blind eye.

Ruscalla emphasised the important role of the institution, citing letters the ICC has sent in the past in response to criminal investigations or the amicus curiae brief submitted by the ICC before the US courts in relation to the Chevron case mentioned above.

In conclusion, criminal allegations can be a powerful weapon in the hands of the parties, as they can lead to the suspension and delay of arbitral proceedings, resignations of arbitrators, but also criminal and monetary sanctions against the arbitrators. When faced with these issues, arbitrators are left with limited protection and guidance on how to deal with them, and well-established mechanisms in arbitration can often backfire. However, when it comes to criminal and corruption issues, it remains difficult to draw a line between where the allegations are merely a means of obstructing the proceedings and where, given the potential seriousness of the underlying issues, they should be treated with extreme caution.

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This entry was posted on Thursday, March 21st, 2024 at 8:03 am and is filed under Criminal law and arbitration, Paris Arbitration Week
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