Kluwer Arbitration Blog

Delos GAP Symposium 2024: Evidence In Corruption Matters: How Much Is Needed? How Much Is Required?

Johanna Büstgens (Hanefeld) · Saturday, January 4th, 2025

On 4 September 2024, Delos hosted the "Delos GAP Symposium 2024" at the Paris Arbitration Centre by Delos. The topic of this year's symposium was "Corruption & International Arbitration". After opening remarks by Mr Thomas Granier (Anima Dispute Resolution) and Mr Hafez Virjee (Delos; Virjee Arbitration), the symposium was kicked-off with a panel discussion on "Evidence in Corruption Matters: How Much is Needed? How Much is Required?". The panel consisted of Prof Mohamed Abdel Wahab (Zulficar & Partners), Ms Carolyn Lamm (White & Case), Mr Filipe Vaz Pinto (Morais Leitão) as well as Mr Jacob Grierson (Anima Dispute Resolution) and was moderated by Ms Cecilia Carrara (Legance). The panel discussed key issues arising in arbitrations dealing with evidence of corruption.

The Counsel Perspective on Corruption

First, it addressed the counsel perspective on this topic, in particular at the stage of preparing the case.

It was discussed whether counsel have ethical constraints or duties in the context of preparing a case where there is a "flair" of corruption. One panelist stated that, while there should be ethical and professional obligations of counsel, the question is whether counsel actually complied with them. Moreover, one also needed to consider that different jurisdictions have different standards as to how strictly breaches of professional obligations are sanctioned. In any event, regardless of the applicable standard, counsel should bring to the attention of the client that minimal evidence of corruption would need to be presented as, otherwise, the tribunal could hold the client liable for costs. Moreover, making groundless allegations of corruption could damage the counsel's credibility in general. In conclusion, it was stated that the arbitration community had a vested interest in ensuring that there are minimal ethical standards for counsel.

The panel then turned to the issue of criminal proceedings running in parallel to the arbitration proceedings. One panelist suggested to consider – if criminal proceedings had not been initiated yet – whether to initiate them oneself in order to make the allegation of corruption more credible in front of the tribunal. The panel also discussed the general challenges that counsel might face with regard to criminal proceedings, including that these proceedings are often confidential, that they could involve different parties, that they could take longer than the arbitration and that the outcome

of these proceedings is uncertain. The panelists further discussed whether a request for suspension of the arbitration could make sense, but concluded that such requests tend to be dismissed by arbitration tribunals unless the relevance of the criminal investigations for the arbitration is proven.

The panelists then discussed whether the ordinary methods of collecting evidence, such as the interviewing of witnesses and obtaining of documents, were enough, or whether an investigator should be engaged. They concluded that one could rarely rely solely on witnesses and documents in corruption cases and that it was advisable to engage an investigator. This was regarded not only as a question of ethical obligations, but also of good lawyering, considering the seriousness of corruption allegations. Furthermore, with regard to seeking the assistance of state courts in compiling evidence, the proposal was made to first submit document production requests with great specificity in the course of the arbitration and only thereafter, in case the opposing party defaults on production, seek the assistance from the state court.

It was also questioned whether it made any particular difference to represent the party who alleges or the party who resists allegations of corruption. This was answered in the affirmative. When acting on behalf of the party making allegations of corruption, counsel's strategy should be – in case no clear evidence of corruption can be discovered – to seek explanations from the other party for the red flags identified and if the party did not provide sufficient answers, to use this as circumstantial evidence to build one's case on or to even make adverse inferences to reverse the burden of proof. In contrast, when representing the party who needs to resist allegations of corruption, it is advisable to give explanations proactively and to provide full disclosure, being the best way to prove the negative.

As far as the use of artificial intelligence ("AI") to investigate corruption is concerned, one panelist found that while there were already some useful tools, such as document management applications to detect recurring patterns, and corruption was certainly no exception to the use of artifical intelligence, there is still some room for improvement, in particular in terms of reliability, and innovation, for example, with regard to tools for testing witness evidence through AI applications. In contrast, the use of AI by arbitrators, for example, in order to reach some kind of decision on corruption, could potentially lead to a travesty of justice, unless there were safeguards implemented.

Finally, concerning the question of how to deal with issues of burden and standard of proof in the context of corruption claims, one panelist advised to have an open discussion with the tribunal on the applicable burden and standard of proof at the beginning of the proceedings, taking into account the applicable law. At the same time more important than the question of the applicable standard and burden of proof is whether the evidence is persuasive. It would not be advisable for counsel to "hide" behind the burden of proof. Rather, tribunals expect the party resisting the allegation of corruption to engage with the evidence on record. Also, it was noted that, while the standard of proof in corruption cases may not be higher, it nevertheless requires more cogent proof due to the special nature of the situation.

The Arbitrator Perspective on Corruption

Second, the panel addressed the arbitrators' perspective and how they should evaluate evidence of corruption.

Concerning the question of how a tribunal should look at red flags, it was held – taking the case of *Metal-Tech v. Uzbekistan* as an example – that tribunals should take red flags of corruption very seriously, ask for more evidence, such as witnesses and documents, and, if needed, suspend the proceedings. If it is unclear for the tribunal whether one party indeed pleaded corruption, it should request the parties to take a clear position in this regard. At the same time, one panelist stressed that whether red flags of corruption indeed existed depended on the applicable law. It was therefore important to carefully scrutinize the legal experts' testimony.

The panelists were also asked whether it was the role of the tribunal in commercial cases to make positive findings of corruption in its award or to raise suspicions of corruption. One panelist observed that the tribunal had an obligation to address allegations of corruption, making a positive or negative finding, as long as it was pleaded. As a side note, if there are indications that the parties are using the arbitration for purposes of money laundering and request the tribunal to issue an award of consent, it was advised to simply terminate the proceedings.

Finally, the panelists were asked how much the personal background of the arbitrators mattered in making findings of corruption. According to one panelist, the cultural background and sense of justice going along with it may indeed affect the decision-making with regard to allegations of corruption. The suggestion then was made to ask the parties what they expected the tribunal to do, how the allegation of corruption affected the claims, and whether the tribunal should consider provisions that have not been addressed by the parties.

Discovery of Evidence of Corruption After the Rendering of the Award

Third and finally, the panel looked at the consequences of the discovery of evidence of corruption once the award had been rendered and discussed general trends in different jurisdictions.

With regard to the judgement of the English High Court in *Nigeria v. Process and Industrial Developments Limited* and the question of whether the tribunal itself could have done more during the proceedings, the opinion was expressed that it is not the role of the tribunal to come up with new ideas for one of the parties, even where that party is underrepresented (see our previous coverage here). In the specific case, it could also be doubted whether the tribunal would have gotten any answers even if it had asked more questions. Moreover, on a general note, one panelist noted that – despite the High Court's judgement – English courts still would not reopen an award unless there was new evidence.

Furthermore, the panel discussed whether it is more often the case that parties are not happy with the award and only then engage investigators to try to attack the award. The panelists confirmed that parties indeed took advantage of new developments in this regard, for example, by using parallel criminal proceedings to their benefit, also where they are only concluded after the rendering of the award.

Finally, the opinion was stated that the courts' approach to post-award review could affect the choice of seat in cases involving state parties. This opinion was not shared by all panelists. One panelist noted that the French approach to corruption allegations during the setting-aside proceedings would not cause contracting parties not to choose a French seat, arguing that the parties then at least had recourse to a court which would examine a "bad" award.

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This entry was posted on Saturday, January 4th, 2025 at 8:05 am and is filed under Arbitral Award, Arbitral Tribunal, Corruption, Delos, Evidence
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