THE IMPACT OF CORRUPTION ON THE ARBITRAL PROCESS: BRIBES AND THE NEW YORK CONVENTION

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Seminar outline

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(1) Introduction

- Corruption may arise in the context of arbitration proceedings in different ways:
  - As a pleaded issue in the arbitration – raised by either the claimant or by the respondent (as a defence to a claim)
  - Alternatively, as a bar to the recognition and enforcement of any arbitral award
  - Sham arbitration proceedings as a cover for money laundering or other illegitimate transfer of funds
  - In relation to arbitrators' conduct and duties
- Corruption poses problems for practitioners according to the circumstances in which it arises or is alleged

(2) Defining corruption

- Definition of corruption
  - No universal definition
  - Transparency International description: "*the abuse of entrusted power for private gain*"
- UN Convention against Corruption
  - Adopted by General Assembly in October 2003, entered into force in December 2005
  - First legally binding instrument against corruption
  - Presents a comprehensive set of standards, measures and rules that all State parties to the Convention should apply to strengthen their legal and regulatory regimes in the fight against corruption
  - Addresses preventative measures, criminalization and law enforcement, international cooperation, asset recovery, technical assistance and information exchange
  - Does not define corruption, but defines specific acts of corruption (including bribery, embezzlement, money laundering)

(3) Impact of pleading corruption in arbitration proceedings

- Issues of corruption may arise or be pleaded in different phases of the arbitral process:
  - As a preliminary objection to the jurisdiction of the arbitral tribunal
  - As a defence on the merits
  - As a bar to the recognition and enforcement of an award
- What happens when the arbitrator(s) suspect corruption, but it has not been raised or pleaded by the parties?
  - The duties and powers of arbitrators to investigate corruption
  - The danger of arbitrators exceeding their mandates
- Approaches in international commercial arbitration and investment arbitration may differ
  - In commercial arbitration:
    i. Doctrine of separability applicable to arbitration agreement - preserve the jurisdiction of the arbitral tribunal
    ii. Is the contract void or voidable?
  - In investment treaty arbitration, does corruption on the part of the investor:
    i. Deprive it of recourse to ISDS (lack of consent to arbitration/failure to comply with legality requirement under the relevant investment treat)?
    ii. Deprive it of any right to successful finding on the merits or a remedy from the arbitral tribunal?

(3) Impact of pleading corruption in arbitration proceedings

Standard of proof:

- Generally accepted in both commercial arbitration and investment treaty arbitration that the burden of proof is a high standard

- However, not always easy for parties and tribunals to obtain strong evidence of high probative value

- *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6) Award (6 August 2019): "*there need not be "clear and convincing evidence" of every element of every allegation of corruption, but such "clear and convincing evidence" as exists must point clearly to corruption. An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt, although of course proof beyond a reasonable doubt would be conclusive. This approach reflects the general proposition that the graver the charge, the more confidence there must be in the evidence relied on*."

- Contrast with *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL (Final Award, 23 April 2012): "*For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence.*"

(3) Impact of pleading corruption in arbitration proceedings

- Potentially significant consequences of a finding of corruption:
  - Tribunal may decline jurisdiction, depriving the investor of protection under the treaty
  - At the merits stage, the investor may find all claims dismissed/lose its entitlement to a remedy
- Some consider that this goes too far, citing:
  - The potential benefit to the State from the misconduct of its officials
  - The opportunism of the State bringing up the investor's corruption only when there is a dispute over the investment
- Should the effect of a finding of corruption take account of the extent of the corrupt act (proportionality considerations)?
- Should the approach be different depending on when and towards whom corruption occurred (*ie.* in the making of an investment or in performing a contract)?

(3) Impact of pleading corruption in arbitration proceedings: recent cases

Niko Resources (Bangladesh) v BAPEX (ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18) (Decision on Corruption Claim) (25 February 2019)

- These arbitration proceedings arose out of a joint venture agreement and a gas purchase and sale agreement, as well as various related claims
- The Respondents argued that Claimant had procured the contracts by corruption and that, consequently, the Arbitral Tribunals should decline jurisdiction and dismiss all the claims
- Rejecting the Respondents' argument, the Tribunals distinguished Respondents' allegations from corruption allegations in other cases. Here, the Respondents alleged that the corruption did not consist in a single act by which an investor bribed a civil servant in order to gain some unjustified advantage, but instead in payments made through a multitude of transactions to different players in different countries and passing through different accounts of different individuals, although destined for different final beneficiaries
- In its decision, the Tribunals found that the agreements had not been procured by corruption. They held:

  "The Tribunals also examined the numerous acts which the Respondents identified as Governmental acts procured by Niko through corruption. They found that the Respondents' allegations were unsupported by the evidence, often relied on speculation or assumed links that were not shown to exist by the available evidence. When considering this evidence the Tribunals were mindful that corruption is often difficult to establish; they also considered, as they must, that they have a duty of fairness and due process to both sides and they may not accept the serious charge of corruption against a party when this charge is not adequately proven."

(3) Impact of pleading corruption in arbitration proceedings: recent cases

Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) Award (6 August 2019)

- The dispute arose out of a casino investment in Laos, and arbitration proceedings were commenced under the Netherlands/Laos BIT. The Claimant alleged expropriation and various other breaches of the BIT including allegations of unfair and inequitable treatment
- The Respondent's threshold position was that the Claimant's claims should not be entertained on the basis of the claimants' bribery and corruption
- The Arbitral Tribunal dismissed the claims on other grounds
- As to the allegations of corruption, the Tribunal held:

  "proof of corruption at any stage of the investment may be relevant depending on the circumstances. […] Serious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of an investment) is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal. […]

  The Tribunal acknowledges the difficulty of proving corruption as well as the importance of exposing corruption where it exists. In the nature of the offence, the person offering the bribe and the person accepting it will take care to cover their tracks. Nevertheless, given the seriousness of the charge, and the severity of the consequences to the individuals concerned, procedural fairness requires that there be proof rather than conjecture."

- While the Arbitral Tribunal found that some of the transactions were "deeply suspicious", it considered that:

  "there was not clear or convincing evidence (although in at least in the case of one allegation, while "the Tribunal is unable to find "clear and convincing evidence" that a bribe was made or even offered through Mr. Anousith. However, on the lower "probabilities" standard, the Tribunal concludes that it is more likely than not that a bribe was paid to an unidentified Government official or officials in an unsuccessful effort to advance the Claimants' agenda at the Thanaleng Slot Club."

(3) Impact of pleading corruption in arbitration proceedings

- Corruption may be used as a bar to the recognition and enforcement of an arbitral award
- Article V(2)(b) of the New York Convention (NYC), a State may refuse to recognise and enforce an arbitral award if "the recognition or enforcement of the award would be contrary to the public policy of that country" (see also, Article 36(1)(b)(ii) of UNCITRAL's Model Law)
- Although neither the NYC nor the UNCITRAL Model Law define "public policy", illegality and bribery are widely accepted as breaching it
- However, there are of course limits (which differ between national courts) to the refusal to recognise or enforce an arbitral award. For example:
  - English courts take the position that they cannot look behind the decision of the Arbitral Tribunal even if they would have reached a different result on corruption allegations
  - Where allegations of bribery and corruption have not been raised before the Arbitral Tribunal which could and should have been, English courts will not take these allegations into account in the absence of special circumstances

  See: *Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA* [2020] EWHC 1584 (Comm)

(3) Impact of pleading corruption in arbitration proceedings

- Practitioner tips:
  - If pleading corruption, then be aware of the high standard of proof and ensure that sufficient evidence is available
  - Bear in mind that arbitrators have very limited scope to order disclosure of documents or provision of witness testimony
  - Consider strategy – remember that in some jurisdictions, if corruption is not pleaded before the tribunal when it could have been, then courts may take a dim view of any attempt to bar enforcement of an award based on the corruption allegations
  - "Corruption and Money Laundering in Arbitration – A Toolkit for Arbitrators" (April 2019, Competence Centre Arbitration and Crime, Basel Institute on Governance) – identifies red flags to help arbitrators detect potential corruption

(4) Arbitration proceedings as a cover for corruption/money laundering

- Legal proceedings sometimes used as a front for money laundering because money paid through legal professionals and/or in accordance with a judicial decision usually appears legitimate
- Arbitral proceedings are generally confidential and not open to the same outside scrutiny as court proceedings so potentially more open to abuse
- Lawyers are under significant obligations to detect and report suspicions of money laundering and must be aware of the risks and preventative measures at all times
  - For further information, see “A Lawyer’s Guide to Detecting and Preventing Money Laundering” (prepared by IBA, American Bar Association, Council of Bars and Law Societies of Europe)
- Instances of arbitration being used as a cover for corruption/money laundering:
  - Sham arbitration – where the dispute is fabricated and is a front for moving money from one party to another under an award; or
  - If the Arbitral Tribunal recognises as enforceable a contract violating public policy, for example related to criminal/corrupt activity

(4) Arbitration proceedings as a cover for corruption/money laundering

- Case study:
  - Counsel is retained by a foreign company in a contractual claim against another foreign company
  - Fees are being paid by a third party and no satisfactory explanation is given
  - Notice of Arbitration filed against respondent
  - Respondent fails to file a defence/files a limited defence in which it does not seriously contest claims, or admits liability
  - Limited documentation provided in support of (or in defence of) claim/defence
  - No real underlying performance of the contract
  - Arbitration takes place on expedited basis/no need for oral hearings with no objection by parties
  - Arbitrator issues award and respondent pays damages immediately

(4) Arbitration proceedings as a cover for corruption/money laundering

- Red flags:
  - No previous contact with client?
  - Any issues with due diligence/KYC? Be aware where third party is paying the fees
  - Be alert where the arbitration is proceeding too smoothly with no dispute over process, no real attempt to defend claim or damages sought, or challenge to award

(4) Arbitration proceedings as a cover for corruption

- Practitioner tips:
  - Be aware of the vulnerabilities in your practice and red flags for potential money laundering/corruption
  - Ensure preventative measures (such as due diligence, know your client, *etc.*) are in place and are followed for early detection and reporting
  - Continually monitor transactions and identify any suspicious aspects

(5) Corruption issues relating to arbitrators' conduct and duties

- Allegations of corruption by arbitrators are rare
- Arbitrators are required by the rules of most institutions to sign declarations stating that there are no facts or matters that would call into question their impartiality or independence
- ICSID Convention (Article 52) specifically provides that corruption of an arbitrator is grounds for annulment of award
- Very few public cases in which an arbitrator has been found to be corrupt
- One example in which the conduct of an arbitrator was called into question was the PCA case between Croatia and Slovenia
  - Note – there was no allegation of corruption in that case, but the arbitrator's conduct was troubling
  - In particular, the (Slovenia-appointed) arbitrator had leaked details of the Tribunal's likely decision to Slovenia, held "secret" conversations with Slovenia's agent, and had taken submissions from Slovenia with the intention of presenting them to the Tribunal as his own notes
- Where a party suspects or has concerns as to an arbitrator, what steps should be taken?
- What do you do as an arbitrator if you think that your co-arbitrator may be corrupt?

(6) National approaches - Switzerland

- The Swiss legal order considers promises to pay bribes as contrary to morals and consequently void due to the defect they contain. According to well-established opinion, they are also contrary to public policy (ATF 119 II 380, at 4b)
- For the corresponding grievance to be upheld, corruption must be established but the Arbitral Tribunal must have refused to take it into account in the award (4A_538/2012 of 17 January 2013, at 6.1; 4P.208/2004 of 14 December 2004, at 6.1)
- If the Arbitral Tribunal – based on its own assessment of evidence – has established that corruption allegations were not proved, the Swiss Federal Supreme Court does not have the power to review the assessment of such evidence (4A_136/2016 of 3 November 2016, at 4.2.1)
- Furthermore, Swiss-seated arbitral tribunals have generally considered that the seriousness of the accusation of corruption requires a high standard of proof (circumstantial evidence alone being insufficient)

(6) National approaches - England

- Bribery Act 2010 (in force 1 July 2011) – replaced previous bribery and corruption offences both under pre-existing statutes and at common law, and created new specific offences of bribery of a foreign public official (Section 6) and where a commercial organisation fails to prevent bribery (Section 7)
- Arbitration Act 1996 – broad policy in favour of enforcement of arbitration awards, and limited grounds for challenge.
- Corruption will be grounds for non-enforcement on grounds of public policy (see section 103 of the AA 1996)
- But where a tribunal has considered whether there was illegality and found that there was none, there is virtually no scope for the English court to open its own enquiry into such allegations

(7) Concluding observations

- Corruption allegations are an increasing feature of large scale arbitration/litigation involving States/State entities
- The high standard of proof and lack of direct evidence leads to very few allegations being sustained
- Arbitrators are developing alternative methods to effectively achieve the same outcome – disallowing claims where a lack of good faith has been shown or deploying “red flags”/rebuttable inferences to enable findings of fact to be made
- As more transactional information is processed “online” and competition for business becomes more aggressive, the potential for traces of corruption to be revealed is likely to be enhanced