DOSSIERS
ICC Institute of World Business Law

Addressing Issues of Corruption in Commercial and Investment Arbitration

ICC INTERNATIONAL CHAMBER OF COMMERCE
The world business organization

Edited by
Domitille Baizeau,
Richard Kreindler

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Contents

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Contents

Foreword

Yves Derains*

This Dossier XIII of the ICC Institute of World Business Law addresses one of the more difficult issues that international arbitrators have to face: corruption. It was previously discussed in 2002, at the 22nd Annual Meeting of the ICC Institute, along with related matters such as money laundering and fraud[1]. Why to revisit the topic 12 years later? There are several reasons, one of which is that although arbitrators have been confronting corruption for many years, as illustrated by the well-known Judge Lagergren's Award of 1963 in the ICC case n°1110, and have progressively learned to react properly against it, the environment of international arbitration has changed since 2002, for better and for worse.

For better, the legal environment has considerably improved: most national laws are now favourable to arbitration and more than 150 countries are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards. The arbitrability of matters involving public policy is less and less disputed and as a result the arbitrators are expected to deal with it. For worse, the media and the public are now aware of the importance of the arbitration phenomenon, in particular in investment treaties, and, under the misguidance of groups and individuals with a political agenda, are developing towards it some distrust. The vote of the European Parliament on 8 July 2015, relating to the Transatlantic Trade and Investment Partnership recommending that investor-State disputes be dealt with "by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and **where private interests cannot undermine public policy objectives**" is very telling.

The fear that arbitration might be a procedure used to enforce agreements tainted with corruption contributes to this unfair distrust. Even in a jurisdiction such as France where the courts have traditionally shown the greatest trust to arbitrators in the enforcement of public policy, limiting their control to extreme cases where the breach of public policy was "clear, effective and concrete,[2]" the arbitrators' decision on corruption issues has become subject to full review by the courts. According to the Court of Appeal of Paris, "Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings, seized of an application based upon article 1520-5° of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an effective or concrete manner.[3]" So the findings of the arbitrators are provisional.

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In this climate, the fight against corruption is a test for all arbitration practitioners to show that arbitration is a procedure through which public policy rules may be enforced. This Dossier of the Institute provides them with analyses of the legal and factual hurdles to overcome and the tools to win that fight.

The main hurdle is probably the reluctance of the parties to raise the issue in front of arbitrators, especially when both of them have been involved directly or even indirectly in the corruption process. For instance, there are many cases when the arbitrator has to decide whether an intermediary is entitled to a commission for helping a company to conclude a contract with a State. Under its own agency contract, the intermediary is required to study the local market, sell the company, organize meetings with decision makers, etc. The company refuses to pay, alleging that the intermediary did not perform, and that the contract with the State was concluded without its help. Can the arbitrator, instead of assessing the work of the intermediary, ask the parties whether the actual purpose of the agency contract was not to pay bribes to certain civil servants and, if so, what are the legal consequences of this new characterization? The arbitrator has not only the power to do so but he must. Contrary to some hasty views, this is not in breach of due process as the parties are invited to comment and in case the arbitrator eventually dismisses the claim as incompatible with public policy, the decision is not ultra petita, since the request to dismiss the claim was presented by the company. However, what can the arbitrator do if both parties deny that their agency contract was contemplating inter alia the payment of bribes? It depends very much upon the circumstances but in no case the arbitrator should be consciously instrumental in an illegal transaction. If nothing else can be done, the arbitrator must resign.

However, corruption is not easy to prove and the arbitrator, as any judge, may not act on the basis of a general impression only. As recently pointed out by the Paris Court of Appeals, it could not be accepted, without ruining the binding force of contracts, that a State could free itself of contractual obligations by alleging "*a general climate of corruption*" within its administration, without specifying the individuals involved and without the alleged beneficiaries being prosecuted[4].

The reader will find that these issues and many others are addressed in this Dossier in a systematic way, balancing theoretical and practical considerations and clearly distinguishing between commercial and investment arbitration.

The Dossier gathers the papers discussed at the 34th Annual Meeting of the Institute on 24 November 2014. Its preparation reflects the greater involvement of the Institute members in the Institute's activities. The tradition was that two experienced members of the Institute's Council were in charge of devising a programme for the Annual Meeting on the basis of the theme elected by the Council. It was decided this time to ask one of the 200 members of the Institute, Domitille Baizeau to work with an active council member, Richard Kreindler. The dynamic was perfect and the result is impressive.

Yves Derains

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NOTES

1 See Dossier I of the ICC Institute World Business Law, 2003.

2 Paris, 18 November 2004, *SA Thalès Air Défense v GIE Euromissile*, Rev. arb. 2005.751

3 Paris, 4 March 2014, *Sté Gulf Leaders for Management and Services Holding Company v SA Crédit Foncier de France*, Rev. arb. 2014,502.

4 Paris, 14 October 2014, République du Congo v S.A. commissions Import Export (Commisimpex) Rev. arb. 2014, 1030.

Introduction

Definitions and Scope of the Topic

Domitille Baizeau*

The annual meeting of the Institute has always been a major event in the very full calendar of seminars on international arbitration, certainly in my own diary as well as that of Professor Pierre Lalive, the founder of the Institute, who passed away in March this year. I admit that I should have liked to exchange ideas with him in preparing the programme, and I know he would have liked to have shared his thoughts during the discussions. He did not, to use his own expression, like "conferences that break down open doors," and he also used to say that the proliferation of arbitration seminars had triggered an obsessive search for "new" topics, which rarely turned out to be new at all, at the expense of a more in-depth study of recurring issues.

Addressing issues of corruption in international arbitration is not a "new topic"[1] as such, but it is certainly a complex one, and it has never been more relevant. As Richard Kreindler, whose expertise in the field is well known, pointed out during our initial discussions, corruption is not a recent phenomenon, either generally or in arbitration, but questions about its implications for arbitration have become significantly more frequent and more complex in recent years, both in commercial and investment arbitration. This is so even though there seems to be a convergence in law-making at the international level aimed at combating corruption and other unlawful acts.

The subject of the annual meeting was corruption, including extortion, which can probably be treated in a similar way. We did not deal with other unlawful acts, such as fraud or money-laundering, which were already the subject of the Institute's seminar in 2002,[2] and which do not necessarily raise the same issues, in particular since corruption has a bilateral aspect, in other words it involves two parties.

So, what definition might we adopt for "corruption"? The term is so commonly used that we all think we know what it means, but there does not seem to be any universally recognized and accepted definition at the international level. The legal writings and international conventions such as the United Nations Convention Against Corruption of 2004 (UNCAC) or the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, offer various definitions, some of them limited to practices involving public officials, and others including acts in the private sector.

One fairly broad definition is the one to be found in the ICC Rules on Combating Corruption of 2011,[3] Article 1: "prohibited practices," defined as

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the practices of "Enterprises" in their relations with public officials, political parties, party officials or candidates to political office, as well as, in the private sector, the directors, officers or employees of an Enterprise. Bribery, first of all, is defined as "the offering, promising, giving, authorizing or accepting of any undue pecuniary or other advantage to, by or for any of the persons listed above ... in order to obtain or retain a business or other improper advantage ...". Extortion or solicitation is defined as "the demanding of a bribe, whether or not coupled with a threat if the demand is refused," which can thus be the source of the corruption. Article 1 also contains examples: "Bribery often includes (i) kicking back a portion of a contract payment ... or (ii) using intermediaries ... to channel payments ...". That definition, or rather those definitions, are detailed, but still ultimately somewhat vague.

One major difficulty derives from the fact that those same practices are not unlawful or contrary to public policy, under the applicable law or "codes of conduct" or local customs and usage. There are several examples to illustrate this issue — which itself goes a long way to explaining the lack of a uniform approach to these questions in international arbitration. Three examples can be cited.

The first relates to facilitation payments, made to accelerate the carrying out of routine or necessary acts to which the person making the facilitation payment is legally entitled. They are illegal in most countries, but not all (the United States, for instance) if the circumstances (such as duress, emergency, or threat to personal safety) justify them.

A second, and more problematic, example is that of gifts. Depending on the circumstances, their size, frequency and timing, they might be considered as part of a common, lawful practice in the country where they are made, but not necessarily by third parties, including arbitrators. Article 5 of the ICC Rules attempts to provide an exhaustive list of the criteria to be taken into account when determining at what point the offer of a gift becomes an unlawful practice, but applying them is problematic for businesses and will be for arbitrators too.

Last come contracts with intermediaries or with consultants or business partners that provide for assistance (often very vague) in securing public or private contracts. Depending on the applicable law, such contracts may be lawful or unlawful, even in the absence of any offer or acceptance of an undue pecuniary advantage to or by public officials.

We are not on easy ground, therefore. What must an arbitrator do when the agreement or the acts in question seem to be unlawful, not under the law applicable to the substance as chosen by the parties, or the public policy of the seat of arbitration, but under the laws of the country where the agreement or acts were performed, or the law with which the dispute between the parties has a direct connection? Is it of any significance that the parties wished precisely to avoid the application of that law? Does it alter the burden of proof or the standard of proof? What about the law of the country where the award might be enforced? These are all questions that have been answered in very different ways in the legal writings and arbitral awards.

Even where there is no doubt that the acts in question are unlawful, either under the law applicable to the substance or, whatever the applicable law, on grounds of international public policy, in other words the public policy common to all countries, complex issues still arise at every stage of the arbitral proceedings.

The seminar dealt with these issues by addressing both theoretical and practical considerations, and by examining the respective viewpoints of the parties, counsel and arbitrators, as well as aspects that may be specific to commercial arbitration on the one hand, and investment arbitration on the other.

The first panel, Yas Banifatemi, Aloysius Llamzon and Hiroyuki Tezuka, chaired by Antonio Crivellero, a member of the Council of the Institute with great knowledge of the subject, analyzed the impact of corruption on the preliminary questions of arbitrability, competence and admissibility, as well as on procedural aspects.

Then, Andrea Menaker, Vladimir Khvalei and Sébastien Besson, under the chairmanship of Professor Hi-Taek Shin of the National University of Seoul, set out the latest theories and approaches to the burden and standard of proof in allegations of corruption.

The third panel, composed of Thomas Sprange, Nassib Ziadé and Edoardo Marcenaro, examined the rights and duties of arbitrators to investigate or report acts of corruption. Richard Kreindler chaired this panel.

Our final panel, Sophie Nappert, Matthew Gearing Q.C. and Juan Fernández-Armesto, chaired by Carita Wallgren-Lindholm, a member of the ICC International Court of Arbitration, dealt with the consequences and effects of allegations or findings of acts of corruption both on the dispute and the decision on the merits, and on the enforceability of the arbitral award.

Lastly, Richard Kreindler had the daunting task of drawing conclusions about the dysfunctionalities or elements that could be — or at least deserve to be — put right, and about prospects for the future.

Domitille Baizeau

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1 See *e.g. Tackling Corruption in Arbitration*, International Court of Arbitration Bulletin Supplement 2014 Edition; *ICC Experience of Corruption in Arbitration, Arbitral Awards on Corruption, Recent Anti-Corruption Initiatives and Arbitration*, E-Chapters from ICC International Court of Arbitration Bulletin Supplement 24, 2014 Edition.

2 *Arbitration — Money laundering, corruption and fraud*, 25 November 2002, 22nd Annual Meeting of the ICC Institute of World Business Law & Dossier I of the ICC Institute of World Business Law, 2003 Edition.

3 First drafted in 1977 by the ICC Commission on Corporate Responsibility and Anti-corruption (reissued in 2011).

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