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CONTRACTUAL IMPACTS OF CORRUPTION IN INTERNATIONAL COMMERCIAL ARBITRATION

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Since it is self-evident that arbitrators will never prosecute corrupt practices as a criminal court would (and leaving for another opportunity the topic of a possible duty to report), the remedies available to arbitrators are contractual ones. These include declaring contracts void, voidable or unenforceable; awarding damages; determining reduction of prices; ordering disgorgement of profits; mandating restitution or addressing unjust enrichment.

What I find particularly fascinating in this topic is how nuanced the approaches can be. Once we go past the initial view that anything touched by corruption is unworthy of protection by an arbitral tribunal, there are multiple aspects that make an arbitrator's role much more complex (and interesting).

The first step is to distinguish between contracts providing *for* corruption, also known as bribe agreements (e.g. hiding bribes as consultancy fees or as prices in a sham supply agreement), and those procured *through* corruption. Although both categories of contracts are tainted by corruption, the outcome and appropriate remedies differ depending on the law applicable to the dispute (SCHWENZER, Ingeborg; PEREIRA, Cesar, 'International Sales, Arbitration and Corruption', Kluwer Arbitration Blog, 2023. Available at: <https://arbitrationblog.kluwerarbitration.com/2023/03/15/international-sales-arbitration-and-corruption-a-cisg-perspective/>).

In neither category will the arbitration agreement within a contract tainted by corruption be automatically invalid. Competence-competence and separability protect the enforceability of the arbitration agreement. The power to determine the validity of the arbitration clause remains in the hands of the arbitrators, depending on the specific facts of each case. In any case, the arbitrators are the first to have the authority to render a decision regarding their own jurisdiction (PEREIRA, Cesar; SOUZA-MCMURTRIE, Leonardo F. 'Arbitragem e Corrupção: o que os árbitros podem (e devem) fazer?'. Publicações da Escola da AGU, ano 13, n. 5, pp. 273-300, 2022, p. 279).

Bribe agreements (the first category) are generally seen as invalid and unenforceable, and prohibition of bribe agreements amounts to transnational public policy. Since bribe agreements are unenforceable, the practical principle in these cases is that "the money stays where it is". This is in line with the well-known and widely accepted Roman law principle "*in pari turbitudiene melior est causa possidentis*" ("in cases of equal wrongdoing, the position of the party currently possessing the item in question is stronger"). Neither party to a bribe

agreement may seek enforcement or restitution, for instance. In this sense, the arbitral tribunal in World Duty Free Company *v*. Republic of Kenya, ICSID Case Arb/00/7 found that claims based on contracts tainted by corruption could not be upheld, as it would be contrary to transnational public policy. A similar reasoning could be used in commercial cases.

As for the second category, there are three possible outcomes: first, the main contract, obtained through corruption, is declared void; second, the injured party has the option between the invalidity of the agreement or its continuity; and third, the main contract is deemed binding and effective, which limits the injured party's rights to other remedies, such as damages or price reduction (BONELL, Michael Joachim; MEYER, Olaf. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, Michael Joachim; MEYER, Olaf (Ed.). The Impact of Corruption on International Commercial Contracts. Cham: Springer Internatinal Publishing, 2015, p. 20). In a very interesting study on the *disgorgement of profits* related to corrupt contracts, Ewoud Hondius also points out to a trend "toward a solution that places the fate of the contract in the hands of the principal as the direct victim of corruption" (HONDIUS, Ewoud. Corruption in Contract Law and Disgorgement of Damages. In: UNIDROIT (Ed.). Eppur si muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday, vol. 2. Rome: UNIDROIT, 2016, pp. 1045-1046).

Alexis Blois notes that "[t]he central question is to determine whether the corrupt payment is detachable from the contract concluded" ('Contracts and Corruption: Kickbacks and Claims'. International Business Law Journal, no. 4, 2008, p. 472). If a supply contract provides for an overprice to hide funds intended for bribery, it may be possible to determine the amount attributable to the overprice and hold the seller liable for the performance of the contract for a price that is net of the bribery funds. This leads to further questions. How does one accurately calculate the extent of overpricing within a contract, and what methodologies are reliable in isolating the corrupt component from the legitimate aspects of the deal? Additionally, at what threshold of overpricing does the principal amount of the contract become significantly tainted, calling into question the validity of the entire agreement? Furthermore, what criteria do we use – if any – to know whether a contract is fundamentally a farce, designed solely for corrupt purposes, or if it is a legitimate agreement that unfortunately has a corruption scheme attached to it, potentially capable of being detached?

Corruption-related contracts with States generally fall under the category of contracts procured through corruption, such as bid-rigging or collusion between State officials and private contractors or their agents.

Sometimes States can enter into bribe agreements. A government contract may be intentionally overpriced to hide subsequent kickbacks to government officials. This will be an example of a bribe agreement involving a State entity – and possibly also an example of detachable corrupt portions of a valid contract. Except in the situations that corruption contaminates a contract as a whole, a government contract tainted by corruption is not necessarily invalid or

unenforceable, since its ultimate purpose – supply of goods or service, public works – is a valid one. Normally the fate of the contract will be in the hands of the injured party, subject to constraints of unjust enrichment or other similar remedies to protect the contractor's rights to restitution or compensation (SCHWENZER, Ingeborg; PEREIRA, Cesar, 'International Sales, Arbitration and Corruption', Kluwer Arbitration Blog, 2023. Available at: <https://arbitrationblog.kluwerarbitration.com/2023/03/15/international-sales-arbitration-and-corruption-a-cisg-perspective/>). As Blois concludes, "[a]ccording to the most widely accepted solution under English law, reprised by the arbitrators in relying on an opinion of Lord Mustill, if A concludes a contract with B by making a corrupt payment to a third party, employed or representing B, the contract is neither void nor unenforceable, but voidable by B. Contracts contaminated by corrupt acts are therefore not 'void' but 'voidable'. They remain legally valid but the State has the choice to either rescind the contract or indeed to waive that right to rescind" (op. cit. p. 472).

Lastly, we should also be mindful that corruption and related practices, such as collusion, bribery, bid-rigging, kickbacks and the like are not subject to an all-or-nothing solution even under the applicable domestic or international criminal, anticorruption, or antitrust legislations, as well as development banks and agencies rules. There are numerous opportunities for non-prosecution or leniency agreements, self-cleaning or other arrangements by which governments ensure that even parties that have been involved in corrupt practices can be considered as having overcome their misconduct, reorganized their business and corporate structure, and restored their present responsibility to remain as viable government suppliers in current or future contracts (cf. PEREIRA, Cesar. TONIN, Mayara Gasparoto. 'Corruption in Public Procurement in Brazil'. Routledge Handbook of Public Procurement Corruption. Routledge. Forthcoming 2024). This awareness underscores the need for arbitrators to hear the parties and allow them to provide all appropriate clarifications before adopting absolute or categorical conclusions regarding the impact of corruption on the subject matter of arbitral proceedings. The shift away from black-and-white solutions increases the burden on arbitrators to exercise judgment. We must apply not only our legal expertise but also a fine sensibility. This task demands not just knowledge, but wisdom, to balance the strict letter of the law with the subtle nuances of human behavior. Here, more than ever, arbitrators are carefully observed by the watchful eyes of our peers.

The vast literature on this topic is a good indication that there are many other aspects and examples to be considered. Large-scale corruption scandals since the early 2010's such as Operation Car Wash (*Operação Lava-Jato*) involving Brazil's state-controlled Petrobras contributed many of them, with ramifications spreading over several countries. If there can be a bright side to them, it will certainly be the increased sophistication and practical awareness in the approach taken by courts, arbitrators and agencies dealing with corrupt practices.

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