IMPACTS OF CORRUPTION IN INTERNATIONAL COMMERCIAL ARBITRATION

Cesar Pereira C.Arb FCiarb

Partner at Justen, Pereira, Oliveira & Talamini

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). For contractual purposes, such arrangements may amount to a cure of a corrupt contract's original defect, as I discussed with Ingeborg Schwenzer in the article mentioned above. It remains to be seen whether one may extend this reasoning to issues of legality and jurisdiction in ISDS: if there is a leniency agreement or a similar arrangement regarding the corrupt practices, to what extent may the host State rely on corruption to challenge legality or jurisdiction? Or, conversely, will such arrangements amount to a confession of illegality to preclude any investment protection?

This awareness of the complex environment of corruption 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.

A whole different aspect is corruption involving the arbitral tribunal. Fortunately, the issue comes up in practice much less frequently than corruption on the underlying contractual or business relationship.

It is impossible to talk about corrupt arbitrators without remembering the mythological judgement of Paris of Troy, who was bribed with Helen of Sparta to grant Aphrodite the golden apple as the fairest of three goddesses. Have modern arbitrators managed to escape the entanglements that once captured Paris, or are they doomed to cyclically retrace his steps? Has arbitration evolved with the tools to escape this eternal return?

Arbitrator corruption comes in many forms, from subtle biases and conflicts of interest to blatant acts of bribery and collusion. Undisclosed relationships between arbitrators and parties, law firms, or entities may compromise their impartiality and lead to exchanges of favors or other benefits. The most infamous form of arbitrator corruption are bribery and undue influence. Parties and counsel may attempt to sway arbitrators through financial incentives, gifts, or other perks, compromising the arbitrator's ability to render an impartial decision.

Acts of corruption are mentioned expressly in Article 52(1)(c) of the ICSID Convention as a ground for annulment of an award, but this provision has not been used yet. Even though no similar provision exists in the New York Convention, corruption affects one's ability to present its case before an honest and unbiased arbitrator and is recognized as contrary to public policy. An arbitral award tainted by corruption is unenforceable pursuant to Article V(1)(b) (party "otherwise unable to present his case") or Article V(2)(b) (public policy) of the New York Convention. Although the UNCITRAL Model Law is silent on the issue, national legislation such as the FAA in the United States or the Brazilian Arbitration Act expressly provide for vacatur of awards procured by corruption or when there is corruption in one or more arbitrators.

The circumstances of the case are key factors. Whether the corrupt practice has been completed or only attempted may lead to different results as for the validity of the arbitral award, since in the latter case there may not be an effective harm or jeopardy to the parties' substantive and due process rights. Could there be situations in which an award could remain valid despite proof of corruption within the arbitral tribunal? Probably only in extremely exceptional cases, if any.

Combating arbitrator corruption involves both preventive measures and responsive actions. Arbitration institutions and national legal systems must implement robust ethical standards, disclosure requirements, and sanctions for arbitrators engaging in corrupt practices. Transparency and accountability are thus crucial in maintaining the credibility of the arbitration process. Bodies that are designed to oversee professional conduct and take their role seriously, such as the Chartered Institute of Arbitrators - Ciarb, may help in this regard. This is a key difference from the Judgment of Paris, an ad-hoc proceeding in which a deity orchestrated the event, lacking any overseeing authority or ethical standards to govern it.

What about the misuse and weaponization of criminal legislation to interfere in the arbitration proceedings or the enforcement of the arbitral award? How serious can that be as a threat? Frivolous allegations of corruption may be used as dilatory tactics within the arbitration. Arbitrators rely on their reputation, which is an easy thing to stain or even destroy. Accusations of misconduct by arbitrators easily make headlines and newscasts. The misuse of criminal law can manifest as the wrongful prosecution of arbitrators. This situation was evident during an extensive corruption investigation in Peru, which focused on foreign construction companies. In such cases, there's often a fervent pursuit of those involved, resembling a witch-hunt. Within this context, some arbitrators faced accusations of "indirect bribery" simply because their fees exceeded the standard rates established by the Arbitration Center of the Chamber of Commerce of Lima. This scenario is highlighted in the work of Carlos Ríos Pizarro, "Mixing Righteous and Sinners," published on the Kluwer Arbitration Blog in 2019. Indictments, accusations, and prosecution can be simply a tactic to intimidate arbitrators that are brave enough to face the political, economic, or even physical pressure that may come in high-stakes cases. In an environment that rightly abhors corruption and boasts “zero tolerance” with wrongdoings, will the arbitration community and industry organizations have the fortitude to stand by those abusively accused? Not always, or not fast enough to avoid irreparable harm.

The issue of arbitrator corruption was put under the spotlight in a request for revision of an arbitral award in the ICC Case n. 16257/EC/ND/MCP/AZO/SP between Commisimpex (a Congolese company with alleged links to Iran or its proxies) and the Republic of Congo (Award, Commerciale Commisimpex v Republic of the Congo - ICC Arbitration Case No 16257-EC-ND-MCP - Final Award - English and French - 21 January 2013 <https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=31182>, “Award on the Admissibility and the Merits of the Respondent’s Application for Revision” https://jusmundi.com/en/document/decision/en-commission-import-export-s-a-v-republic-of-the-congo-reconstitution-of-the-tribunal-pending-monday-13th-december-2021). The Republic of Congo’s application for revision of a 2013 award in favor of the Commisimpex was based on allegations that the chairperson of the arbitral tribunal had been bribed and had undisclosed ties with Iran through his

law firm's representation in other cases involving Iranian entities. The arbitral tribunal appointed for revising the proceedings found in October 2023 these allegations to be unsupported by evidence and deemed them unreliable as mere "hearsay". As a result of this unfortunate course of events, the wrongly accused chairperson initiated criminal proceedings for defamation after the accusations had been widely disseminated by the press and other channels.

What is more pressing in international practice, arbitrator corruption or the weaponization of criminal prosecution and of the risks of reputational damage? Can one prevail over the other? The international arbitration community must remain vigilant. To maintain and enhance its reputation as a just, unbiased, and dependable method for resolving international disputes, it is essential to confront the problem of arbitrator corruption directly and fully understand its complexities. We must remember the lesson of Paris' corruption, which led to a decade-long devastating war, resulting in the fall of his city and the obliteration of his culture, plunging it into obscurity. There is insight to be gained from myth.

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