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Corruption in International Arbitration

Corruption has been arising as an issue increasingly frequently in international commercial arbitration and investment arbitration cases alike. There are any number of parts corruption can play on the stage of international arbitration. Most frequently, however, it appears in the guise of a respondent alleging corrupt conduct on the part of the claimant.

Allegations of corruption can deal a knock-out blow to a claimant's claim. If it is proven that an investment has been procured by corruption in investment arbitration, this will typically result in the dismissal of an investor's claim – either on the basis that the tribunal lacks jurisdiction or because the claims are inadmissible. Proof of corruption can also be fatal to claims in international commercial arbitration, albeit typically not on the basis of jurisdiction.

Corruption raises a host of complexities within international arbitration, both procedurally and substantively. Through the lens of two recent developments, we explore in this article the approach tribunals have taken to their powers to investigate allegations of corruption and the standard of proof applicable to those allegations in arbitral proceedings.

Niko Resources (Bangladesh) Ltd ("Niko") v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case Nos. ARB/10/11 and ARB/10/12

The impact of Bapex and Petrobangla's new allegations of corruption on the pending claims is not straightforward, not least because they have been raised at a relatively late stage in the proceedings. What is interesting for the purposes of this analysis, however, is the tribunals' approach to investigating those allegations.

In this instance, the tribunals decided on their own initiative to suspend consideration of the primary claims in the arbitration until after the corruption issue has been decided. In doing so, the tribunals noted "the seriousness of corruption offenses" and acknowledged that, as a principle of international public policy, "the prohibition of bribery overrides the general principle of party autonomy".

The tribunals also issued detailed procedural directions relating to the evidence they wished to see from both sides in relation to the corruption allegation, including various documents and an account of the negotiations leading up to the two agreements. In addition, both sides were ordered to identify potential future witnesses, with the tribunals noting that they will decide in due course whom they wish to hear. As the tribunals noted in their procedural order, this approach accords with that of "other ICSID tribunals [that] have taken the initiative of examining alleged acts of corruption without being restricted by the specific allegations of the Respondents" or their burden of proof. The tribunal in Metal Tech Ltd v The Republic of Uzbekistan (ICSID Case No. ARB/10/3), for example, made various ex officio requests for documents, and drew adverse inferences in the absence of their production before refusing jurisdiction on the basis of corruption.

Summary of relevant facts

The primary dispute in the Niko v Bapex and Petrobangla arbitrations relates to Petrobangla's failure to pay for gas that Niko has delivered under a Gas Purchase and Sale Agreement and Niko's potential liability under a Joint Venture Agreement for two blowouts at an onshore gas field in 2005. Both cases are being heard in parallel by the same panel of arbitrators.

In a decision on jurisdiction in August 2013, the ICSID tribunals had already rejected the Respondents' argument that Niko's claims were barred by its admission of corruption before the Canadian authorities[1]. Petrobangla has also been ordered to pay more than US$35 million to Niko for gas deliveries.

However, the Respondents have now submitted allegedly fresh evidence that the underlying agreements were procured by corruption. They argue that this renders the agreements void or voidable, and that the tribunals should vacate their previous orders against Petrobangla and dismiss Niko's claims accordingly.

[1]In Canadian criminal proceedings, Niko had admitted to bribing the Bangladeshi State Minister for Energy and Mineral Resources after the gas blowouts, by supplying the use of a Toyota Land Cruiser and paid trips to North America. Since the admitted bribes took place after the agreements were signed, the tribunals held that those agreements had not been procured through corruption and upheld jurisdiction accordingly.

Getma International and others ("Getma") v the Republic of Guinea ("Guinea"), ICSID Case No. ARB/11/29

Summary of relevant facts

The final award has recently been released in Getma v Guinea, an ICSID case involving alleged violations of Guinea's foreign investment law. The claims related to a port and railway concession contract that Guinea had awarded to Getma International in late 2008 and then terminated in March 2011.

Most relevant for present purposes, Guinea alleged that Getma had procured the contract by corruption and fraud, by bribing members of the selection committee and by misrepresenting essential elements of its tender. Consequently, Guinea said, the tribunal had no jurisdiction or, alternatively, Getma's claims were inadmissible. The tribunal considered Guinea's allegations, but expressed concerns regarding the reliability of Guinea's witnesses' evidence and was ultimately unpersuaded that corruption or fraud had been established on the facts.

The Getma v Guinea award raises a number of interesting issues[2]. In this article, however, we focus on the tribunal's analysis of the standard of proof applicable to Guinea's allegations of corruption.

In this respect, Getma argued that a particularly high standard of proof applies to proving corruption allegations. It referred to authorities in which other tribunals have endorsed standards such as "irrefutable" evidence, "clear and convincing" evidence or a "particularly heavy" standard. However, in this case, the tribunal saw no substantial difference between most of the authorities relied on by Getma, and those Guinea had put forward in support of an ordinary standard of proof. This conclusion may well raise eyebrows and some tribunals would likely disagree. In any event, the tribunal rejected Getma's argument, concluding that the appropriate standard was whether the evidence was "clear and convincing" and gave the tribunal "reasonable certainty" that the concession had been obtained by bribery (whilst accepting that corruption can be proven by circumstantial evidence).

The Getma v Guinea award serves as useful notice that there is at present no clear consensus on the applicable standard of proof for corruption in international arbitration (whether such consensus is necessary or desirable is another matter). Since national laws differ on applicable standard(s) of proof generally, this is not entirely surprising. While it is arguable that allegations of corruption warrant a heightened standard of proof (particularly in light of their seriousness), there is also support for the proposition that the usual (or lower) standard of proof is appropriate (given the civil context, the notorious difficulty of proving corruption and the limited investigative powers of tribunals). In practical terms, the issue arguably may not be critical in many cases, given the difficulty of proving corruption. Indeed, the rare instances in which arbitral tribunals have made findings of corruption have tended to involve unusually clear evidence.

About the authors

Ula Cartwright-Finch and Rebecca James are Managing Associates in Linklaters' Dispute Resolution team based in London.

Ula is a specialist in international arbitration, and has acted for clients in commercial and public international law matters across a range of industry sectors, including energy, finance, hospitality and telecoms. Ula has extensive experience arbitrating in numerous jurisdictions and under many of the major institutional rules (including ICC, LCIA, HKIAC, SIAC, CIETAC, IAA and ICSID) as well as in ad hoc proceedings.

Rebecca specialises in complex dispute resolution (international arbitration and litigation), with experience across a range of sectors including energy and finance. Her experience also includes acting on investigations, and advising on anti-corruption laws, international sanctions and other aspects of international law. Rebecca previously practised at a leading Australian law firm.

[2]Not least because the tribunal concluded that it lacked jurisdiction over Getma's central expropriation claim (and most of the losses claimed), on the basis that they were contractual in nature. In November 2015, the Cour Commune de Justice et d'Arbitrage de l'OHADA (the "CCJA") annulled an award made in Getma International's favour in a parallel arbitration under the arbitral rules of the CCJA (the specified contractual forum).