Do Anti-Corruption Investigations and Anti-Bribery Legislation Influence or Affect International Arbitration?

*Catherine S.M. Duggan*

In this breakout session, chaired by Robert Pé of Gibson Dunn, the panelists were asked to discuss whether “it is possible for violations of domestic anti-corruption legislations to influence the outcomes of international investment arbitrations and should that be the case?” These questions were addressed by Christopher Stephens, General Counsel of the Asian Development Bank, Ellen Gracie Northfleet, an independent arbitrator and former Chief Justice of the Federal Supreme Court of Brazil, Kate Yin, a partner with Fangda in China, and AB Mahmoud, Managing Partner of Dikko & Mahmoud in Nigeria, former Solicitor General and Attorney General for Kano State.

Two themes emerged during the course of the session. First, bribery and corruption pose an enormous challenge to global economic and social development. The panelists agreed that the problem must be taken seriously within international arbitration proceedings, both as part of an effort to combat the scourge of corruption, and because unchecked corruption could undermine confidence in international arbitration itself. Second, it is not only hard to establish whether allegations of corruption are true, particularly given the limitations of arbitration proceedings, but can be difficult even to know whether certain behaviors constitute violations of domestic law. The panelists were in agreement that violations of domestic anti-corruption legislation clearly do influence international arbitrations. They cautioned, however, that what arbitrators should do when faced with allegations of corruption is a much more nuanced, evolving question.

Mr. Stephens set the scene by describing the enormous volume of transactions in areas prone to corruption, as well as the potential damage corruption poses to investment and economic development. Using infrastructure as an example, he noted that every year the ADB alone is involved in thousands of transactions and contracts that “almost invariably” require arbitration of principal disputes. Looking only at the work of the ADB, World Bank, African Development Bank, Inter-American Development Bank, and European Bank for Reconstruction and Development, hundreds of thousands of contracts and billions of dollars of transactions are being made in countries where incentives for corruption are high and governments are unable or unwilling to police it. If the mechanisms for resolving disputes in these transactions do not work, then these failures stand to jeopardize the success of these projects.

Corruption represents a serious challenge to a state’s capacity to manage economic activity through regulatory and legislative processes, as well as to its ability to provide adequate legal frameworks that will consistently, predictably, and ethically enforce contractual obligations. Although treaties and domestic anti-corruption legislation are critical, these efforts are “only the start.” Where corruption obstructs contract enforcement, Mr. Stephens concluded, it may undermine confidence among domestic and private investors, thereby impeding investment—and, ultimately, economic development and poverty alleviation.

---

1 Visiting Scholar, Said Business School, Oxford University
Against this backdrop, Ms. Gracie Northfleet delved more deeply into the implications of corruption for international arbitration. Echoing the trends identified by Mr. Stephens, she noted that it would not be surprising to have corruption become an increasingly important issue for arbitration tribunals. She noted the efforts by governments and international organizations to enforce clear rules of conduct to minimize corruption, including the United States Foreign Corrupt Practices Act of 1997, the OECD Anti-Bribery Convention of 1997, the UN Convention against Corruption of 2005, the United Kingdom’s Bribery Act of 2010, Italy’s anti-corruption law of 2012, and Brazil’s law of 2014.

Ms. Gracie Northfleet drew a distinction between the problem of corruption within arbitration proceedings and the fact that arbitration may offer parties an opportunity to enforce—or “launder”—contracts obtained through illegal conduct. Criminal conduct by arbitrators is the “least likely” type of corruption to occur. Less rare are fraudulent or criminal acts by other actors during arbitration proceedings, including false testimony, forged documents, and unlawful surveillance of the parties or arbitrators. Even more commonly, arbitrations may be associated with contracts obtained through fraud or corruption—particularly since firms are most likely to prefer arbitration to local courts in areas where problems of corruption and judicial weakness are most serious.

These various possibilities for corruption influence arbitrations in different ways. Parties can use allegations that corruption occurred during arbitration proceedings to try to convince national courts to set awards aside on public policy grounds. Suggestions that contracts themselves were obtained through illegal activities may be used to try to convince arbitral tribunals to void a contract. This influence represents a shift: until recently, Ms. Gracie Northfleet notes, tribunals treated allegations of corruption with great caution, since they did not see their jurisdiction as going beyond the commercial dispute at hand.

In fact, the increasing influence of corruption allegations in arbitrations has encouraged parties to make false claims of corruption in an effort to influence these outcomes. This misuse of arbitration is made possible by the confidentiality of the proceedings, as well as by the fact that arbitrators lack subpoena powers that would enable them to compel parties to share evidence of corrupt practices. At present, if a party refuses to hand over documents that might provide this type of evidence, “all a tribunal can do is to draw an adverse inference from the failure.”

A second concern stems from uncertainty regarding the standard of proof that an arbitration tribunal ought to apply when considering an allegation of corruption. What should a tribunal adopt as “clear and convincing proof”—the common law criminal standard of “beyond a reasonable doubt,” the civil law standard of the “balance of probabilities,” or something in between? The difficulty of considering these allegations is compounded when particular behaviors are illegal under some countries laws but not others, as is the case with facilitating payments.

---


Arbitrators, Ms. Gracie Northfleet concluded, “should be careful in drawing the fine line between the need to root out corruption and the competing duty to defend the robustness of the process and the enforceability of the awards.” They should “not shy off from acknowledging corruption when it is evident,” and should seek to “avoid the perception that arbitration might be a safe haven for corruption by laundering corrupt contracts, acts, and practices.” They should, moreover, do this without admitting challenges to arbitral awards based on non-substantiated allegations of corruption.

Ms. Yin’s remarks expanded on the complexities and inconsistencies of domestic corruption laws, using illustrations from China. It is clear, she began, that domestic anti-corruption laws have influenced arbitration decisions. Some states have turned to corruption allegations as a defense in investor-state arbitrations, hoping to have the investment contract declared void. *World Duty Free Co., Ltd. v. Republic of Kenya* is the “classic” example of such an argument. The arbitration tribunal, relying on international public policy, Kenyan, and English law, agreed with Kenya that the contract at the center of the arbitration was void because it had been obtained with a bribe. In other examples, government officials are alleged to have secretly participated in investments through a commission or agency agreement (*Wena Hotels Ltd. v. Arab Republic of Egypt*), or through shares in, or other benefits from, an entity involved in the investment (*Metalclad Corporation v. United Mexican States*). Foreign investors have complained that they were subjected to unlawful expropriation or unfair treatment as a result of their refusal to comply with demands for bribes from government officials (*EDF (Services) Ltd. v. Romania*).

In commercial arbitration cases, Ms. Yin noted, principals will sometimes refuse to pay commissions to agents, claiming that the agent was involved in a corrupt act. Chinese arbitration cases have declared contracts void when they were procured through corrupt conduct. For example, the China International Economic and Trade Arbitration Commission ruled that the two supplemental trademark agreements were invalid as a result of a bribe paid before the agreements were signed (*Wang Laoji v. Jia Duo Bao*).

Yet the normative question, whether these violations influence arbitration awards, is a more nuanced one. Some cases present a “clear scenario” in which violations of these domestic laws can be used as a defense. Less clear-cut examples, on the other hand, might involve a country in which facilitation payments were the norm, even though they were illegal. If a foreign investor made such a payment, then the government might choose not to do anything about it on the grounds that it was consistent with common practice. Here it is less obvious that the state should be allowed to use corruption as a defense in an arbitration.

Nonetheless, Ms. Yin argued, “there are good reasons why violations of domestic anti-corruption legislation should be considered in arbitration.” These include: standards about the way agreements are treated when they are in violation of moral standards or international public policy; the ‘clean hands doctrine’ that is widely recognized in international investment law; and the enormous negative implications of corruption for social and economic development. International arbitrators are often in a better position to deal with corruption than a country’s domestic courts, since arbitration tribunals may be more independent and professional—and better financed—than local prosecutors and judges.

Yet it can be exceedingly difficult to establish what even constitutes corruption. There are sometimes inconsistencies even in the interpretation and enforcement of domestic legislation within the same jurisdiction. In China, for example, anti-bribery laws associated with commercial transactions are “broad and vague.” Ms. Yin noted that “there isn’t a set of commercial bribery laws,” but that relevant laws are “scattered around in different legislations,” with enforcement powers awarded to various government agencies.
To illustrate, Ms. Yin pointed to an example of a recent case in which the global multinational corporation Siemens was investigated by the Chinese government. The company was accused of “commercial bribery” under the Anti-Unfair Competition Law for allegedly providing a thousand hospitals with free medical equipment so that it could sell them the relevant reagents used in the equipment. This practice is, in fact, commonplace: hospitals in China, which do not have the budget to purchase medical equipment, often demand that companies provide equipment free of charge as a condition for purchasing other products from the manufacturer.

Cases in which the government is involved, Ms. Yin argued, are invariably characterized by “shades of grey.” In the Siemens case, for example, the hospitals in question are state-owned enterprises. One can, as a result, reasonably ask whether it is fair for public procurement contracts to be found to be void as a result of the free provision of medical equipment to state hospitals.

Another issue stems from the inconsistent enforcement of anti-corruption legislation, which, in these areas, is not always motivated by a simple interest in enforcing the law. Ms. Yin recalled a case in which a provisional government circulated an internal memorandum encouraging officials to collect fines to meet its revenue needs; the enforcement of these fines, she noted, was “not really fair.” Under some circumstances, companies facing allegations of violations are forced to settle “just to get on with business.” It would, she observed, “be inappropriate for such a settlement to be used as evidence of bribery.”

Ms. Yin concluded by briefly touching upon a number of grey areas that arbitrators ought to keep in mind when dealing with violations of domestic anti-corruption legislation. One example, recalling a problem also described by Ms. Gracie Northfleet, is that some behavior is considered corruption in one country but not in another—including facilitation payments, which are illegal under Chinese law but fall within an explicit exception of the United States Foreign Corrupt Practices Act. Nor is it always clear which behaviors constitute extortion by public officials. Another grey area includes the circumstances under which a company can be considered innocent: is an investor blameless if it does not give a bribe only because negotiations over the bribe failed?

Finally, Ms. Yin observed, inadequately nuanced approaches to considering corruption in international arbitrations may have unintended and undesirable implications. In areas where bribery is rampant and governments have taken no action to enforce their domestic anti-corruption legislation, then allowing states to use corruption as a defense in international arbitrations might actually encourage corruption. States may, under these circumstances, have incentives to tolerate corruption among government officials as a way to shield the state from liabilities arising out of investment disputes.

The final panelist, Mr. Mahmoud, drew on his experiences in Nigeria to provide examples of the complex roles corruption can play in international arbitration. Although the answer to the question of whether violations of domestic anti-corruption legislation influence the outcomes of international arbitration was “an obvious yes,” he cautioned that “such a straightforward answer glosses over” some

---

of the “intricate and complex questions,” including legal and jurisprudential questions, with which arbitrators dealing with issues of corruption “will inevitably have to contend.”

He made note of two recent arbitration cases in which issues of corruption played a central role. The first case, World Duty Free Co., Ltd. v. Republic of Kenya, which Ms. Yin’s discussed, also raised a “troubling” question in the fact that the arbitration tribunal made a finding of bribery against the president of Kenya, who was not a party to the arbitration. The second case, BSG Resources Limited v. Republic of Guinea, currently before the ICSID arbitration panel, was triggered by United States Foreign Corrupt Practices Act investigations, which appear to have established that fraud occurred. The case is, he argued, a “clear indication” that these sorts of investigations will influence arbitrations, especially on behalf of legislation with an extraterritorial reach.

Mr. Mahmoud narrated two of his own experiences. The first involved a petroleum company that had hired containers from a subsidiary of the government-held Nigerian National Petroleum Corporation. The hiring company claimed that the containers, which had been used to transport petroleum products to Europe, had not met European standards, and submitted a claim for fines and tonnage that eventually reached $400,000. There was “no evidence” for the claims made by the petroleum company, leading Mr. Mahmoud to conclude that “this was a fraud.” Troublingly, the case was assigned to a sole arbitrator who approached Mr. Mahmoud privately and suggested that he should advise his client to settle rather than “having to contend with a huge award.”

In light of these concerns, Mr. Mahmoud and his client filed an action in a Nigerian court. They contended that the claim was fraudulent on its face and asked the court to declare that it was therefore not suitable for arbitration, as well as to grant them leave to revoke the authority of the arbitrator and the arbitration agreement. The lower court did exactly that, and its finding was upheld by the Court of Appeal in Nigeria.

Mr. Mahmoud’s second example illustrated the difficulties of demonstrating fraud. He described an agreement between the government and a contractor that inadvertently left out a detailed description of the services to be rendered. The contractor, after a year of work, produced four useless floppy diskettes and issued the government with a bill for $1 billion. The government’s effort to take the matter to court was unsuccessful, and the case went to arbitration. Mr. Mahmoud, having come “to the inevitable conclusion that this was a fraud,” set about demonstrating this fraud to the arbitration tribunal. He and his team were “satisfied and convinced that we had presented evidence beyond a reasonable doubt,” and were confident that the tribunal would dismiss the claim. Instead, the tribunal awarded half a billion dollars to the contractor. The government, after making some effort to have the award set aside, eventually paid it.

Mr. Mahmoud concluded by citing some of the key questions asked at the recent OECD integrative forum. Should anti-corruption clauses in investment and trade agreements be cited to help arbitrators address issues of corruption? Should there be guidelines developed by international arbitration centers to assist arbitrators on how to identify corruption and how to deal with collusion? What are the rights and duties of arbitrators as they investigate corruption? “It is high time,” he argued, “that the community of international arbitrators begins to address the point: how do we devise the tools of dealing with issues of corruption?”

The panelists had time to address two questions from the audience. The first, from Jose Perez, a member of the Supreme Court of the Philippines, asked how corruption could be an arbitrable issue in
places where corruption was a criminal offense outside the jurisdiction of the arbitration tribunal. Mr. Stephens noted that an arbitration panel might find that a breach of contract had occurred if the contract’s clauses prohibiting bribery or collusion had been violated. More importantly, however, one of the fundamental challenges of arbitration is in determining which law even applies, and this difficulty would be particularly acute in the situation described by Justice Perez.

The final question came from Eric Schaeffer of Germany, who asked what he should do, as an arbitrator, if the parties did not raise issues of corruption but he had “a feeling that corruption might have something to do with their dispute.” Ms. Gracie Northfleet responded, noting that while arbitrators once avoided questions of corruption under those circumstances, there appeared to be a trend toward confronting issues of corruption even if the parties did not raise them. “I would say,” she concluded, “that arbitrators should not turn a blind eye,” particularly since the result of the finding would have consequences for the resulting award.

The panel ended as Mr. Pé thanked the panelists.