Too hot to handle?

Khawar Qureshi QC reports on how fraud & corruption are dealt with in the arbitral process

IN BRIEF

- How effective is international arbitration when dealing with issues of fraud?
- Is the English court approach to questions of bribery and corruption as reflected in the Court of Appeal decision from 1998 still tenable in the light of recent developments such as the Bribery Act 2010?

Many commentators have observed that fraud and corruption issues are becoming more evident in the context of international arbitration. Reasons for this could include the increased use of the arbitral process to deal with complex commercial matters, as well as the frequency with which states or state entities are parties to such contracts.

Nevertheless, the fact that the arbitral process is consent based and generally confidential in nature, coupled with the position that domestic courts in the states which are often called upon to enforce arbitral awards can only exceptionally review the artibral process, may mean that fraud and corruption issues cannot effectively be considered by the arbitral process.

Dealing with fraud by arbitration

Jurisdiction

This will depend on the arbitration clause. The English law position, as is the case in most jurisdictions, is clear: arbitrators can deal with fraud/bribery allegations, see *Fiona Trust v Privalov* [2007] All ER (D) 233 (Oct) and *Bilta (UK) Ltd v Muhammad Nazir* [2010] All ER (D) 146 (May).

Procedure

Many commentators observe that the limitations of disclosure requirements, powers to compel attendance of witnesses, and lack of meaningful sanctions inevitably limit the scope for arbitration to address issues which of their nature are difficult to prove.

Practice

The examples below illustrate how practice has developed, with reference to English cases pursuant to the Arbitration Act 1996 (AA 1996):

- *Thyssen Canada v Mariana* [2005] All ER (D) 346 (Feb): plead and argue the fraud case at the arbitral hearing. If you wait until you lose, and then try to resist enforcement of the arbitral award on the basis of fraud, you will be held to have waived your rights (s 73 AA 1996) or even engaging in an abuse of process.
- *Michael Wilson v Emmot* [2008] 2 All ER (Comm) 193: beware of making multiple fraud claims in different jurisdictions which are inconsistent.

What does it mean (when challenging an arbitral award) that an arbitration award was obtained by fraud or was procured by fraud?

- *Elektrim v Vivendi* [2007] 2 All ER (Comm) 365 (Aikens J): allegation of withholding a key document was rejected. There was no deliberate concealment of the document by a party to the arbitration or a third party with the knowledge of the party to the arbitration, and in any event, the document would not have made a material difference to the outcome.
- *L Brown v Crosby Homes* [2008] All ER (D) 315 (Apr) (Akenhead J): challenge to an award on the basis that a document disclosed in one set of arbitral proceedings should also have been disclosed in another was rejected on the ground that disclosure was never sought or ordered and the challenge was brought 66 days after the 28-day time limit for challenging the award (which can be extended for cause) expired.
- *Double K v Nestle* [2009] All ER (D) 214 (Dec) (Blair J): while a witness's evidence was false, the testimony had not been deliberately procured by the party to the arbitration and no evidence that it was aware of the falsehood.

Where it was strongly arguable that an arbitration award was obtained on the basis of a forged signature in the underlying contract and, further, that the evidence had only come to light after the arbitral award was delivered, the English court will grant a stay of enforcement of the award (per s 103(3) AA 1996) pending determination of the forgery issue by the court, see *HJ Heinz Co Ltd. V EFL Inc* [2010] EWHC 1203 (Comm). For a rare example of a court finding that an arbitration award was obtained by fraud see *Arab National Bank v* ***El Sharif Saoud*** [2004] All ER (D) 350 (Oct) (Morison J).

Impact on international arbitration

This is a controversial and emotive issue, bribery is an "essential element of business" according to some. In 1963, in an ICC arbitration case (No 1110), Judge Lagergren declined jurisdiction to decide the merits of a case concerning alleged bribery of Argentine officials on behalf of a UK company (with respect, rejecting jurisdiction was mistaken and the proper course would have been to decline remedies).

In 2002, the ICC Institute of World Business Law guidance for arbitrators faced with an allegation of bribery/corruption focused upon the need to investigate the evidence, recognise the public policy significance and significance of the allegation under the applicable law, explicitly refer to legal and factual conclusions in the Arbitral Award while recognising the limitations of the arbitral process and the tactical use of such allegations to divert attention or try to adduce extraneous material.

In its report in 2000, the International Law Association considered the question of public policy as a bar to enforcement of International Arbitral Awards and concluded as follows: "Following the 1997 OECD Convention…which reflects the mounting International concern about the prevalence of corrupt trading practices, it is arguable that there is an international

consensus that corruption and bribery are contrary to International Public Policy."

There are few publicly available examples of bribery being alleged and proven in the context of international arbitrations, see *World Duty Free v Kenya* (ICSID Case No ARB/00/7) (4/10/06).

English court decisions

The case of *Westacre v Jugoimport* [1999] All ER (D) 486 reflects the present position (until and unless re-considered). The Court of Appeal decision of 21 pages contains the carefully reasoned 19-page dissenting opinion of Lord Justice Waller. His lordship was of the view that the balance was strongly in favour of refusing to enforce arbitration awards tainted by bribery and corruption. However, at first instance, Coleman J (approved by the majority in the Court of Appeal) said as follows (p 773): "Although commercial corruption is deserving of strong Judicial and Governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug trafficking …the public policy in sustaining an international arbitration award outweighs the public policy in discouraging corruption."

Subsequent cases

- *Omnium v Hillmarton* [1999] 2 All ER (Comm) 146 (Walker J): failed challenge to enforcement of an arbitral award. Geneva seat/Swiss Law. The defendant had not established that the agreement which formed the basis of the claim (a consultant in Algeria) was unlawful in the place of performance and that infected the award. It was not unlawful under Swiss law either, even if English public policy might have taken a different view.
- *Cameroon Airlines v Transnet* (29/7/2004) (Langley J), South African law. *Quantum meruit* claimed and awarded as a result of bribes having been paid to secure the underlying contract/rendering contract unenforceable.
- *R v V* (3/7/2008) (Steel J), Consultancy Agreement (Libya), ICC Arbitration, London/English Law. Agreement not illegal under Libyan law and not violating English public policy.

Anti-money laundering issues

- London/UK seat (s 328, Proceeds of Crime Act 2002). Individuals / businesses must not enter/become concerned in an arrangement which know/suspect facilitates acquisition, retention, use or control of criminal property.
- Reporting obligations (s 330, Proceeds of Crime Act 2002). With regard to application to legal profession/legal proceedings, see the case of *Bowman v Fels* [2005] All ER (D) 115 (Mar).

Concluding observations

Claims of fraud, bribery/corruption are capable of being dealt with in the arbitral process, and if properly substantiated, may also prevent an arbitral award from being enforceable before the English courts. However, the arbitral tribunal needs to be experienced as well as robust to deal with such matters, and also alert to the tactical use of such allegations. As for bribery/corruption and its impact on claims which are the subject of arbitration it would appear that the majority view in the *Westacre* decision is due for a re-visit, not least because international public policy and English law are now much more emphatic in denouncing bribery/corruption, wherever it takes place. NLJ

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