# ARBITRATION & CRIME CONFERENCE

# PANEL DISCUSSION ON THE CONSEQUENCES OF PROVEN CRIME IN ARBITRATION

# PRESENTATION BY CRAIG ORR QC

## 1. JURISDICTION, ADMISSIBILITY AND UNCLEAN HANDS: POSSIBLE INVESTOR/CLAIMANT RESPONSES

**Introduction**

1. An investor or other claimant who is proved to have engaged in corruption is liable to have his claim dismissed by an arbitral tribunal on a preliminary basis, whether on the grounds of jurisdiction, admissibility or unclean hands. The question arises as to whether, and if so, how, the investor/claimant might avoid dismissal of its claim in such circumstances.

2. The context in which this question arises is a growing awareness on the part of tribunals, host states, investors and other parties of the bluntness of the outcome consequent upon an approach which requires automatic dismissal of a claim as soon as corruption is proved.

3. Such bluntness of outcome gives rise to differing views. From one perspective, zero tolerance of corruption is necessary in order to uphold international public policy and maintain the integrity of the arbitral process. Zero tolerance may also be considered to be the most effective way of promoting the fight against corruption.

4. On the other hand, such an approach might encourage corruption as host states would stand to benefit from acceptance of bribes by their officials as that would provide the state with an automatic defence to claims in respect of investments or contracts procured by such bribery. Corruption allegations often surface when contracts or projects have been completed or are near completion. In such cases, dismissing the claim altogether at a preliminary stage serves not only to punish the claimant but also to confer a windfall on the respondent state, even though its officials were complicit in the corruption which induced the contract or project.

5. The potentially disproportionate nature of such outcomes has led commentators to suggest that a more nuanced approach is appropriate. In particular, some commentators have suggested that resort should be made to arguments of estoppel and waiver, or acquiescence, and that tribunals might make invocation of a bribery defence conditional upon the host state taking genuine steps

to prosecute the officials involved in the bribery. However, none of these approaches is without difficulty.

**World Duty Free v Republic of Kenya**

6. The problem is starkly illustrated by the facts of ***World Duty Free v Republic of Kenya***.[1] This was an ICSID arbitration, conducted under UNCITRAL rules. The Claimant alleged that the Republic of Kenya had expropriated its investment and interest in duty free complexes at Nairobi and Mombassa airports in Kenya. Those complexes had been established and operated by the Claimant pursuant to a contract concluded by the Claimant with the Republic in 1989. As part of that contract, the Claimant agreed to renovate and upgrade the passenger facilities at both Nairobi and Mombassa airports. The Claimant spent US$27m doing so. In 1998, disputes arose between the Claimant and the Republic, resulting in what the Claimant alleged was a state-orchestrated takeover of its business.

7. Prior to concluding the contract with the Republic in 1989, the Claimant's manager and principal shareholder (a Mr Ali) made what he described in evidence to the tribunal as a 'donation' of US$2m to President Moi, who was then President of Kenya. The Claimant treated this payment as part of the consideration for the contract. Mr Ali said that he believed that the donation was lawful, being made in accordance with what he understood to be an accepted practice in Kenya of making community gifts, known as 'Harambee'.

8. At the Republic's request, the tribunal determined on a preliminary basis whether this payment was a bribe and if so, whether it required the dismissal of the Claimant's claim *in limine*. The tribunal concluded that the payment was a bribe and that the claim fell to be dismissed on a preliminary basis, on public policy grounds. The Claimant was therefore left empty-handed. Kenya, however, was left with its renovated and updated passenger terminals, as well as the duty free complexes; and President Moi was left with his payment of US$2m.

9. In its award, the tribunal expressly acknowledged the perceived unfairness of this outcome. However, it said that the result was unavoidable because "*the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world*". It nevertheless admitted that it was "*a highly disturbing feature*" in the case that the corrupt recipient of the Claimant's bribe was not merely an officer of the state but the state's most senior officer - the President; and that although he had left office and was not immune from suit under the Kenyan Constitution, the state had done nothing to prosecute him for corruption or to recover the bribe from him.

---

[1] ICSID Case No. ARB/98/4, Award 8 December 2000.

10. All the tribunal could do to reflect its concern about the unfairness of the outcome was to deny the Republic recovery of its costs. The tribunal therefore made no order for the costs of the arbitration, each side being made to bear its own costs.

11. Similar costs orders have been made in other cases: e.g. in ***Metal-Tech v Uzbekistan***[2] and ***Spentex v Uzbekistan***[3]. However, the costs of an arbitration, even if significant, are likely to be dwarfed by the amounts at stake in the arbitration.

12. Is there any way round this problem?

**Estoppel**

13. Estoppel will only assist if the host state could be shown to have unequivocally represented that bribe payments were lawful. If such a representation could be shown to have been made by the state, it could then be argued that the state was precluded from resiling from that representation.

14. However, the prospects of a state being found to have made such a representation are remote, especially given the near-universal consensus that corruption is unlawful, as reflected in the many international conventions against bribery and corruption.

**Waiver/Acquiescence**

15. Waiver or acquiescence might arise where a state could be shown to have <u>known</u> about the bribery or corruption of its officials. If, despite such knowledge, the state acquiesced in its officials soliciting or accepting bribes, it could be argued that the state had waived its right to rely upon the corruption of its officials as a defence to claims by investors or contractors.

16. This may in some cases be a more promising line of enquiry than estoppel. Where states are governed by kleptocratic regimes, it may be possible to assimilate evidence showing actual knowledge on the part of the state of solicitation or acceptance of bribes by its officials. However two difficulties should be noted.

17. First, it would be necessary to show not only knowledge, in a general sense, of solicitation or acceptance of bribes by the state's officials, but knowledge of solicitation or acceptance of bribes in relation to the particular investment or transaction in issue in the arbitration.

18. Second, the knowledge of the corrupt official himself, or herself, will ordinarily not be attributable to the state and will therefore not count as the knowledge of the state. This was the

---

[2] ICSID Case No. ARB/10/3, Award 4 October 2013

[3] ICSID Case No. ARB/13/26, Award 27 December 2016

conclusion reached by the tribunal in ***World Duty Free***, who said that the bribe in that case was a covert payment made to the President, in a personal capacity, and was therefore not legally to be imputed to the Republic of Kenya itself.

19. It is arguably inherent in the nature of a bribe that it comprises a payment made to a public official in his or her private capacity. Transparency International defines corruption as "*the abuse of entrusted power for private gain*". If the payment was in fact made for a public purpose, it would not count as a bribe and any corruption defence would not be triggered.

20. Under the International Law Commission draft Articles on the Responsibility of States for Intentionally Wrongful Acts (the "***ILC Articles***"), the conduct of a state official is only attributable to the state if the official acts in his capacity as a state official, and not in a private capacity (Article 7). If receipt of bribes is a private act, the official's knowledge and conduct will therefore not be attributable to the state, as a matter of international law.

21. Nevertheless, there is an argument to the contrary. It might be overly narrow to focus only on the 'private' nature of the official's receipt and retention of the bribe monies. After all, the bribe was not paid or received in a vacuum, but as part of a governmental (i.e. public) process whereby an investment or other contract was negotiated and agreed by or through the official, acting as an organ or representative of the state. Arguably, therefore, the official's corrupt conduct should be attributed to the state, even though the official abused his power by soliciting or accepting a bribe in the course of negotiating and approving the investment or contract. Under Article 7 of the ILC Articles, the conduct of a state organ or representative is attributed to the state "*even if [the organ or representative] exceeds its authority or contravenes instructions*".[4]

22. However, the argument that solicitation or acceptance of a bribe is properly to be characterised as a private (rather than public) act is a powerful one, as the award in ***World Duty Free*** shows. The ILC concludes in its commentary to the ILC Articles that *"[t]he question of the responsibility of the State whose official had been bribed … could hardly arise*".[5] The ILC explains that Article 7 of the ILC Articles:

> "*indicates that [conduct attributable to the state] comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and*

---

[4] Compare the analysis of Dr Bernardo Cremades, 'Corruption in Investment Arbitration', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum Robert Briner*, ICC Publications, 2005, at 203 and 216. See further Llamzo, *Corruption in Internal Investment Arbitration* (2014), chapter 10.

[5] ILC commentary, reproduced in the *Yearbook of the International Law Commission*, 2001, at p.46 footnote 150.

*not the private actions or omissions of individuals who happen to be organs of the State. In short, the question is whether they were acting with apparent authority*."

23. If considered as a question of apparent authority, it is difficult to see how a state official could be said to have apparent authority to solicit or accept bribes. Given the near universal condemnation of such conduct, no official could realistically be said to have apparent authority to solicit or accept bribes. This, at least, is the conclusion reached by English domestic law (as to which, see below).

24. Whilst arguments of waiver and acquiescence should therefore be considered, they may nevertheless be difficult to establish in practice.

**Other Options**

25. These difficulties have led some commentators to suggest more novel approaches, such as making invocation of a corruption defence conditional upon the host state taking genuine steps to prosecute the state officials involved in the corruption. However, it is unclear what legal principle might be said to underpin this approach: on what legal basis can a tribunal deprive a respondent state of an otherwise valid defence to a claim because the state's prosecuting authorities have not taken action against a particular official or officials? Moreover, some states may genuinely not have sufficient resources or expertise to pursue effective prosecution of state officials involved in complex bribery schemes, especially bearing in mind that any criminal conviction for bribery requires proof beyond reasonable doubt.

26. It may be possible for a tribunal that is dealing with a corruption defence <u>on the merits</u> to make an award of restitution which ameliorates the impact for a claimant of having his claim dismissed on corruption grounds, but it is difficult to see how a tribunal can achieve an equivalent outcome when addressing disposal of the case at a preliminary stage, on grounds of jurisdiction or admissibility.

27. Questions that therefore need further consideration by the arbitration community are whether the blunt nature of outcomes in cases such as ***World Duty Free*** are acceptable and if not, whether (and if so, how) other possible solutions to this problem might be developed.

## 2. ENGLISH LAW ON VOIDABILITY OF CONTRACTS FOR BRIBERY

**Contracts providing for corruption**

28. Under English law, a contract providing for corruption is illegal and therefore unenforceable by either party (e.g. a contract with an intermediary who is paid, expressly or implicitly, to bribe or otherwise influence foreign public officials). Sometimes courts describe such contracts as being 'void', but the better analysis is that they are unenforceable rather than void *ab initio*.[6] However, this distinction is unlikely to matter in practice in relation to such contracts.

**Contracts procured by corruption**

29. Contracts procured by corruption have traditionally been regarded in English law as voidable, rather than void. Thus it is well established that where Party A (or an agent acting for and on behalf of Part A) procures a contract with Party B by bribing an agent, employee or officer of Party B, the contract is voidable at the option of Party B.[7]

30. The rationale for the rule is that the principal/employer (Party B) is entitled to the disinterested advice of its agent/employee/officer; where the principal/employer is deprived of such disinterested advice by surreptitious dealings between the agent/employee/officer and another contracting party, the principal/employee should be afforded an opportunity to reconsider whether the contract is truly in its best interests.

31. Where Party B elects not to affirm the contract, it is entitled to claim rescission of the contract, so as to bring it to an end. Rescission is a discretionary remedy, which the court will ordinarily grant on terms that the rescinding party restores the value of monetary and other benefits received under the contract. So far as practicable, the parties should (upon the contract being rescinded) be restored to the positions they would have occupied if the contract had not been made.

32. More recently, commentators and practitioners have focussed on the argument that a contract induced by bribery is void, as opposed to voidable. If void, there never was a contract in the first place. It will therefore not be necessary (adopting the example above) for Party B to seek an order for rescission of the contract from the court. Party B will be entitled, upon proving that the contract was induced by corruption, to avoid the contract altogether.

33. The argument that the contract is void depends upon application of agency principles. There are

---

[6] Chitty on Contracts, Vol 1, [16-001]; Treitel on Contracts, [11-111].

[7] McGrath, Commercial Fraud in Civil Practice, [10.36] to [10.40].

three relevant principles:

(1) An agent has no authority to enter into a transaction known to be induced by bribery.

(2) A contract entered into by an agent in excess of his authority is not binding upon his principal unless the other contracting party can rely upon the agent's apparent authority.[8]

(3) Where the other contracting party knows of the bribery (because it was responsible for the bribery), it cannot rely upon the agent's apparent authority. As explained by Chitty on Contracts: *"where the third party has notice from the nature of the transaction that he is or may be dealing with an agent who is exceeding his authority, the principal is not bound, and the fact that the agent's acts are manifestly for his own benefit may amount to such notice."*[9] If therefore the other contracting party deals with the agent otherwise than in good faith, knowing that the agent is acting in his own interests rather than the interests of his principal, it cannot rely upon any apparent authority to hold the principal to the contract.

34. This argument may be perceived to be more advantageous for contracting parties who are concerned about the prospect of a court either refusing, in its discretion, to grant rescission of the contract or alternatively deciding to impose terms upon the grant of rescission.

35. Whether a contract procured by bribery is properly analysed to be void or voidable, it is clear that English law adopts a strict approach to bribery. In particular:

(1) A bribe is widely defined in English law as comprising any secret commission paid or promised to an agent without the knowledge of his principal.[10]

(2) A payment may comprise a bribe even if not paid directly to the agent: *"Bribes may be paid to third parties close to the agent, such as family members or discretionary trusts, or simply to those whom the agent wishes to benefit. The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty."*[11]

---

[8] Bowstead & Reynolds on Agency, Article 73; and see, in the context of contracts induced by bribes, Bowstead & Reynolds at [8-218] and McGrath, Commercial Fraud in Civil Practice at [10.31]-[10.35].

[9] Chitty on Contracts, Vol 1, [31-061].

[10] *Anangle Atlas Cia v Naviera SA v Ishikawajima-Harima Heavy Industries Ltd* [1990] 1 Lloyd's Rep. 167, at p.171 and *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep. 486 at [16], citing *Industries and General Mortgage Co. Ltd. v. Lewis* [1949] 2 All E.R. 573 per Slade J at p.575.

[11] *Novoship (UK) Limited v Mikhaylyuk* [2012] EWHC 3586 at [107], Christopher Clarke J.

(3) There are a series of irrebuttable presumptions that apply in claims against the payer of a bribe, as follows:

(a) There is no need to show that the payer of the bribe acted with a corrupt motive.

(b) There is a presumption that the agent's mind was affected by the bribe.

(c) There is a presumption that the principal suffered loss at least up to the amount of the bribe.

(d) Linked to this, the principal does not need to show that the transaction entered into was not in his best interests. Thus there is no inquiry into the merits of the particular transaction, and it is unnecessary (indeed, irrelevant) to ask whether or not 'but for' the bribe, the principal would have entered into the contract in any event. This is consistent with the policy of the law being *"to operate as a deterrent against the giving of bribes"*.[12]

(4) It is equally unnecessary to prove that the bribe was given specifically in connection with a particular contract, *"since a bribe may also be given to an agent to influence his mind in favour of the payer generally (eg in connection with the granting of future contracts)"*.[13]

## 3. ENGLISH LAW ON CHALLENGES TO ENFORCEMENT OF AWARDS

**Revision/setting aside of an English award**

36. Under Section 68(1) of the Arbitration Act 1996 (the "***Arbitration Act***"), a party may apply to the English court for the revision or setting aside of an arbitral award made in England "*on the ground of serious irregularity affecting the tribunal, the proceedings or the award*". Section 68(2) defines the term 'serious irregularity' as meaning an irregularity "*which the court considers has caused or will cause substantial injustice to the applicant*" and which is (so far as potentially relevant for this seminar) of one or more of the following kinds:

---

[12] *Daraydan Holdings v Solland International* [2005] Ch 119 at [53], Lawrence Collins J.

[13] *Daraydan Holdings*, at [53](e). See also: *Novoship* at [108]-[110]: *"It is sufficient if the agent is tainted by the bribery at the time of the transaction between the payer of the bribe and payee's principal. If that is so, the agent's conflict of interest means that the principal has been deprived by the other party to the transaction of the disinterested advice of his agent and is entitled to a further opportunity to consider whether it is in his interests to affirm it. It follows that subsequent transactions may be tainted by payments linked to an earlier transaction between the parties, or by a payment not linked to any particular transaction."*

(a) Failure by the tribunal to act fairly and impartially, and to give each party a reasonable opportunity of putting its case;

(b) The tribunal exceeding its powers;

(c) Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) Failure by the tribunal to deal with all the issues that were put to it;

(e) …

(f) …

(g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) …

(i) …

37. If such serious irregularity is shown, the court may remit the award to the tribunal for reconsideration, set the award aside or declare the award to be of no effect (Section 68(3)).

38. The English courts have stressed the high threshold that must be established for any challenge under Section 68 to succeed. There is a strong pro-enforcement bias, which is rarely displaced. Most pertinently, there is no reported decision where a challenge on public policy grounds under Section 68(2)(g) has succeeded.

**Challenges to enforcement of New York Convention awards**

39. Under Section 103 of the Arbitration Act, enforcement of a New York Convention award may only be refused by the English court if the person against whom the award is invoked proves that one of the grounds for non-enforcement under Article V of the Convention is made out (including that enforcement of the award would be contrary to public policy).

40. The case law on Section 103 again demonstrates a strong pro-enforcement bias on the part of the English courts. Enforcement is only likely to be refused by the court on public policy grounds where it is apparent from the face of the award that it gives effect to a contract or enterprise which is unlawful in the place of performance or otherwise contrary to English public policy (such as a contract for the payment of bribes).[14] Where it is apparent from the award that the

[14] *Soleimany v Soleimany* [199] QB 785; *Sinocore International v RBRG Trading* [2017] 1 Lloyd's Rep 375

arbitral tribunal considered but rejected an allegation of corruption or other illegality, the award will generally be enforced.[15]

**Westacre Investments v Jugoimport-SPDR Ltd**

41. The English court's approach is illustrated by *Westacre Investments v Jugoimport-SPDR Holding*,[16] where a majority of the Court of Appeal upheld enforcement of an ICC award. The case concerned an award made before the Arbitration Act came into force, but nevertheless illustrates how the English court is likely to approach challenges to enforcement of awards under the Arbitration Act.

42. The award in *Westacre Investments v Jugoimport-SPDR Holding* was made in arbitration proceedings brought by Westacre for payment of sums alleged to be due from Jugoimport under a consultancy contract, pursuant to which Westacre had been appointed by Jugoimport as consultants for the procurement of contracts for the sale of military equipment to Kuwait. At the arbitration, Jugoimport argued (among other things) that the consultancy contract was contrary to public policy because its object was to procure sales of military equipment to Kuwait by bribery and corruption. This allegation was dismissed by the tribunal, who found in Westacre's favour. When Westacre sought to enforce the award in England, Jugoimport argued that enforcement would be contrary to public policy. It sought to adduce new evidence, not presented to the tribunal, showing that the consultancy contract was for the purposes of procuring the corruption of Kuwaiti government officials. This evidence (which included evidence that Westacre was beneficially owned by the Secretary-General of the Kuwait Council of Ministers, which was responsible for approving the purchase of military equipment by Kuwait) had been available to, but had not been deployed by, Jugoimport at the arbitration.

43. A majority of the Court of Appeal (Mantell LJ and Sir David Hirst) held that the allegation of bribery and corruption had been made, entertained and rejected in the arbitration and could therefore not be re-opened, at least in the absence of fresh evidence which had not been reasonably available to Jugoimport at the time of the arbitration. That was not the case in respect of the new evidence which Jugoimport had sought to introduce on its challenge to enforcement of the award.

44. However, Waller LJ (in the minority) would have allowed Jugoimport's challenge to enforcement to proceed, by requiring the court to assess whether the new evidence was credible and justified re-opening the award and if so, whether the award should then be set aside. Waller LJ

---

[15] *Westacre Investments v Jugoimport-SPDR Holding* [2001] 1 QB 288

[16] [2001] 1 QB 288

emphasised that in the context of enforcement, the state's own interest was engaged in ensuring that its executive power was not abused by being used to give effect to a corrupt agreement. There were therefore circumstances in which:[17]

> "*despite the prima facie position of an award preventing a party reopening matters either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators, the English court will allow a re-opening. The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused*."

45. Waller LJ acknowledged that the court should be alert to a party changing tack by running arguments at the enforcement stage which it could have run in the arbitration but chose not to because the party "*did not want to accept what they now put forward as their case, that they or employees of theirs were involved [in corruption] and intended the agreement to constitute the vehicle by which a bribe was to be paid*". However, the inescapable fact was that "*the arbitrators simply did not have an opportunity of considering the case as now made, and whatever their suspicions, … did not feel it in their place to make enquiries*". In Waller LJ's view, the court was therefore both entitled and required, in accordance with public policy, to re-asses the evidence of corruption:

> "*it is always unattractive for one party to be able to take the point, but the English court is concerned with the integrity of its own system, and concerned that its executive power is not abused. If the agreement represented a contract to pay a bribe, Westacre should not be entitled to enforce the agreement before an English court and should not be entitled to enforce an award based on it*."

46. The division of opinion between the majority and minority in Westacre *Investments v Jugoimport-SPDR Holding* case reflects the difficulty inherent in seeking to balance the public policy in favour of the finality of awards against the public policy of ensuring that the enforcing state's executive power is not abused.

---

[17] [2000] 1 QB288 at 314.

**CRAIG ORR Q.C.**

One Essex Court,
Temple,
London,
EC4Y 9AR

11.1.2018