Anti-Corruption in International Arbitration: A Toolkit for Arbitrators

JULY 1, 2019

Last month, the Competence Centre Arbitration and Crime, together with the Basel Institute on Governance, released a toolkit for arbitrators aimed at helping them to identify and deal with allegations of corruption and money laundering in international arbitration.[1] Acknowledging that international public policy increasingly demands attention to these important issues in arbitration, the toolkit sets out a step-by-step guide to help arbitrators recognise corruption, investigate it, and consider the possible consequences for the arbitration going forward.

However, while the toolkit provides a basic framework, the detail of how each step should be applied is, at times, somewhat vague. It is evident throughout, particularly with regards to the choice of law and the burden and standard of proof, that there is scope for confusion and inconsistency, and that the consequences of a finding of corruption will largely be left to the arbitrator's discretion. It is therefore possible that more than one divergent body of jurisprudence may develop which may contribute to misunderstandings and, ultimately, a lack of clarity in how corruption allegations in arbitrations should be handled.

Which law applies?

The first section of the toolkit deals with how to identify potential allegations of corruption in an arbitration, outlining a non-exhaustive list of "*red flags*" which arbitrators should look out for. The indicators, such as disproportionate remuneration and a lack of proper documentation, are familiar hallmarks of corruption cases and provide a strong foundation on which an arbitrator can build.

However, problems arise when moving on to the next stage of the guide: identifying and applying the relevant national (and international) concepts and laws. Although the toolkit provides some helpful definitions of bribery and corruption from international treaties such as the 2003 UN Convention against Corruption and the 1997 OECD Anti-Bribery Convention, confusion arises when attempting to distil exactly which national criminal law is applicable to the particular allegations.

On one hand, a contract's governing law clause should provide a helpful starting point; on the other, the principles of territoriality (that a state exercises jurisdiction if bribery has been committed in its territory) and nationality (that a state exercises jurisdiction if a national of that state was involved in

bribery anywhere in the world) could provide second, or even third, options as to what is the applicable criminal law.

Such a conflict of laws could realistically lead to a situation in which conduct may be deemed illegal under one option but legal under another. Which is the arbitrator to apply? There is no correct answer, and the toolkit provides little guidance. This creates a very real danger that corruption may go unchecked, either intentionally or unintentionally, based on the choice of law applied.

The standard and burden of proof

A similar pitfall arises in the context of both the standard and burden of proof.

The guide suggests three possible standards of proof: firstly, the "*balance of probabilities*", which is known and accepted to be the default standard in UK civil litigation, and would be applied if criminal allegations were made during such proceedings; secondly, the "*clear and convincing evidence*" standard, which is a higher threshold than the balance of probabilities; and finally, the principle of "*intime conviction*" – an arbitrator's inner conviction that there is enough evidence to substantiate the corruption allegations. Not only do these variations again risk inconsistency of outcomes, but, given the potential for a more stringent standard to be applied than in civil litigation, could make establishing corruption in arbitration more difficult than would be in other forums of dispute resolution.

The toolkit approaches the burden of proof as a primarily fact-finding exercise, suggesting that both parties may be asked for further evidence to substantiate factual assertions. However, it goes further than this, stating that "*arbitrators may ask the party that denies the corruption allegations to produce supporting evidence to prove the facts*." This, effectively, is a reverse burden of proof: a party is being asked to prove that no corruption occurred i.e. to prove a negative. This is something which in many situations will be nigh on impossible, and is one of the primary reasons why, in the case of most UK criminal offences, the burden is on the party alleging criminal conduct to prove its case to the requisite standard. If an arbitrator chooses to impose a reverse burden of proof, this, again, could lead to unfairness and inconsistencies, both between arbitrations and as against the wider civil and criminal justice system.

What are the consequences?

The big question hanging over most arbitrations, and the one with which most parties will be most concerned, is: what happens if allegations of corruption are proven? This will of course vary, both depending on when the corrupt activity occurred and how severe it was. At the most extreme end, the toolkit suggests that it is possible that a claim could be rendered completely inadmissible if it is based on an investment procured by corruption. When compared to an analogous situation in civil proceedings, this seems draconian. While a substantiated allegation of corruption in litigation could result in a party being deemed to have come to the process with "*unclean hands*" and thus barred from equitable remedies, this would ordinarily not jeopardise the entirety of the claim; default remedies such as damages would usually remain available. Alternatively, in cases where corruption has occurred during the performance of a contract, an arbitrator could take a more holistic view, balancing the practical effects of corruption against the untainted remainder of the

claim.

The key here will be proportionality. The real effects of corrupt conduct may pale into insignificance when compared to the value of a multi-billion-dollar contract or investment, and corruption allegations should not be used as a get-out-of-jail free card for parties seeking to evade their contractual obligations. At the same time, however, it must be acknowledged that often corruption is endemic, and efforts must be made to ensure that parties cannot profit from it. A fine balance must be struck, made all the more difficult by the fact that criminal allegations are being made in the context of a commercial dispute.

A balancing act

The new toolkit provides a solid framework to assist arbitrators in identifying and handling allegations of corruption which may arise in international arbitration. Due to the fact that these disputes are, by there very nature, international, there will be inevitable conflicts of laws and inconsistencies in how those laws are applied. It may be that the dynamic nature of such disputes means that hard and fast rules will never be appropriate, but, nonetheless, care must be taken to ensure that, in the absence of accepted and agreed norms relating to issues such as the standard and burden of proof, the wide discretion available cannot be manipulated for the gain of either party. However, the guide is a sensible and much-needed first step in the right direction, helping to raise awareness of these important issues and providing arbitrators with the tools to handle them.

---

[1] Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators