

Hot Topics In International Arbitration

Deafening Silences in International Arbitration:
Sua Sponte Corruption Inquiries In Commercial
Arbitration

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INTRODUCTION

- Corruption: a recurring “hot topic”
- The deafening silence around corruption
- Why is this an issue for arbitrators
 - Corruption causes serious harm
 - Duty to render enforceable award / public policy nature of corruption
 - Risk of complicity

SELECTED QUESTIONS

- What are the civil law consequences of corruption on the contract at issue and the claims at hand?
- Can the Tribunal raise the issue of corruption where the party that can plead corruption does not do so?
 - What constitutes corruption
 - Impact of corruption on the dispute
 - What indicia / “red flags” suffice for *sua sponte* enquiry
- Some challenges

What is corruption?

- Law applicable to the contract
- Law of the place of enforcement
- International standards:
 - Transnational prohibition of direct bribery of public officials
 - Grey area: “influence peddling” / “trading in influence” / *“trafic d’influence”*

Impact of corruption: (1) contract **for** corruption

- Generally void *ab initio* as against public policy
- Cannot be enforced by a court or arbitral tribunal
- Justification for raising corruption *sua sponte*

Impact of corruption : (2) Contract **obtained through** corruption

- May not be void *ab initio* as a matter of public policy, but voidable
- No justification for raising corruption *sua sponte*?
- What if void *ab initio* at place of enforcement?
- Commercial arbitration vs Investment arbitration
- *World Duty Free v. Kenya*

Red flags - Contracts for corruption

- Performance in country known for corruption
- Intermediary suggested by public official with discretionary authority
- Close personal /business relationship of intermediary with public official or relative
- Intermediary's non-transparent corporate structure
- Intermediary lacks technical qualifications to perform alleged services
- Intermediary's fee disproportionate to services to be rendered

Selected challenges

- Both parties denying corruption
- No criminal complaint by party able to rely on corruption defence
- Arbitral tribunal perceived as exceeding its mandate
- Due process requirements
- Lack of police powers

THANK YOU

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