

moment in which it has been duly rendered and the required formalities have been fulfilled in order to consider it as an arbitral award.<sup>7</sup>

### The Spanish court followed the French trend to enforce awards regardless of their annulment at the place of arbitration

The decision of the Spanish court follows the trend generally adopted by the French courts when faced with the question of enforcing an award set aside by the courts of the seat of arbitration. Indeed, the French Cour de Cassation has allowed the enforcement of foreign awards annulled by the courts at the seat of the arbitration, as for example in the *Hilmarton* case<sup>3</sup> in 1997 and, more recently, in the *Putrabali* case in 2007.<sup>4</sup>

By contrast, courts in other jurisdictions, like the United States Court of Appeal, District of Columbia Circuit, in the *TermoRio* case<sup>5</sup> have refused to enforce awards set aside by the competent courts of the country where they had been rendered. In doing so, they have generally relied on the wording of Article V(I) (e) of the New York Convention and preferred to avoid contradictory decisions.

### The need to modify the New York Convention to address the issue of the enforcement of annulled awards

The existence of these two approaches and the conflicting results reached by different national courts have been the object of a wide

debate, especially in the context of the 50th Anniversary of the New York Convention during 2008. Leading practitioners have highlighted the need to revise the New York Convention in order to modernise and adapt it to the problems encountered since its drafting in 1958,<sup>6</sup> including the issue of the enforcement of annulled awards. However, these proposed changes are far from being agreed upon and uncertainty remains regarding what a particular court will do when faced with the question of enforcing an award that is subject to annulment proceedings. For now, Spain seems to favour the enforcement of foreign arbitral awards even if said awards were challenged.

#### Notes

- 1 Decisions from the Spanish lowest courts are generally not published and, therefore, not publicly available.
- 2 Cour d'Appel Paris, 10 May 1971. *Compagnie de Saint Gobain-Pont à Moresson v The Fertilizer Corporation of India Ltd*, 1 YBCA 184 (1976).
- 3 Cour de Cassation France, 23 March 1994. *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)*. XX YBCA 663 (1995).
- 4 Cour de Cassation France, 29 June 2007. *PT Putrabali Adyamulia v Sté Rena Holding*.
- 5 United States Court of Appeal, District of Columbia Circuit, 25 May 2007. *TermoRio SA E SP v Electranta S P* 487 F 3d 928 (D C Cir 2007).
- 6 See, among others, Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*. Years of the New York Convention: ICCA International Arbitration Conference, publication date 2009. Available at: [www.arbitration-icca.org/media/0/12133703697430/explanatory\\_note\\_ajb\\_rev06.pdf](http://www.arbitration-icca.org/media/0/12133703697430/explanatory_note_ajb_rev06.pdf).

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## Switzerland

### Where there's smoke, there's fire? Proving illegality in international arbitration

In international commercial arbitration, allegations of illegality most often arise in the context of agency or consultancy agreements. The dispute usually arises when the principal refuses to pay the commission, objecting that the agreement was illegal and invalid. In investment arbitration, allegations of illegality are likely to be made by the states against the foreign investors in respect of the establishment or development of the investment,<sup>1</sup> although in a recent case,

the allegation of corruption was made by the foreign investor, arguing that the breach by the state of the investment treaty was caused by the investor's refusal to comply with demands for bribes by government officials.<sup>2</sup>

Allegations of illegal conduct in international arbitration trigger two key questions: what is the law applicable to the issue of whether a certain act is illegal and what is the standard of proof? This article examines each of these two issues in turn.

## What is the applicable law?

### *The rule: substantive law of the contract*

Arbitral tribunals confronted with allegations of illegality normally apply the substantive law of the contract chosen by the parties to determine whether a certain act is illegal, except to the extent that applying it would contravene international public policy.

### *Can a foreign mandatory rule apply?*

It is occasionally argued before arbitral tribunals that a foreign mandatory law should be applied that renders the contract illegal and void. In England, for instance, the fact that a contract is void in the country where it is to be performed would be relevant if English law governs the contract.<sup>3</sup> Other countries, including Switzerland, will not apply a foreign law unless the principle forms part of international public policy. Several arbitral tribunals have therefore refused to apply statutes providing for a sweeping prohibition of agents.<sup>4</sup> Similarly, in an arbitration where Swiss law was applicable, the respondent alleged that the claimed commission payments were contrary to the US Foreign Corrupt Practices Act (FCPA) as a mandatory foreign law, but the arbitrator ruled that the FCPA was not applicable as it could not prevail in the given circumstances over the choice of Swiss law.<sup>5</sup>

In one arbitration where the tribunal did apply a foreign law to declare the contract void, the award was subsequently set aside.<sup>6</sup> The sole arbitrator considered that the claimant's mission under the agreement was contrary to Algerian law, which prohibits the use of intermediaries, whereas Swiss law governed the contract. He declared the contract void on the ground that it contravened an Algerian mandatory rule. The award was set aside by the Cour de justice of Geneva as, unlike corruption, the use of intermediaries did not offend Swiss law. This decision was upheld by the Swiss Supreme Court.<sup>7</sup> The problem of the award has been identified as being that the arbitrator did not reach his conclusion on the basis of a transnational public policy rule (such as prohibition of corruption of foreign officials) but a local standard.

Foreign laws therefore have limited application for determining the legality of a contract. Tribunals have stated, however, that a mandatory foreign law may be applicable if it forms part of transnational public policy.<sup>8</sup>

### *Transnational public policy*

Examples of international or transnational public policy include prohibitions against agreements to perform criminal acts.<sup>9</sup> There is also broad support for an international public policy against bribery of public officials, recognised in arbitral case law, national case law and commentary.<sup>10</sup> As the tribunal stated in the *Westacre* case, there is an international public order, which makes bribery contracts invalid and contrary to bonos mores.<sup>11</sup> Alleged illegal conduct may therefore also be assessed against such principles of transnational or international public policy.

### *Public policy of the place of enforcement*

It has also been argued before arbitral tribunals that a contract should be declared illegal and invalid because an award enforcing it would be contrary to the public policy of the country in which the award would be enforced.<sup>12</sup> Indeed, there are cases where the alleged underlying illegality of a contract was a bar to the enforcement of the arbitration award on the basis that enforcement would be contrary to public policy at the place of enforcement.<sup>13</sup>

### *Choice of law analysis matters where national laws vary on illegality*

Given the impact of the international anti-corruption instruments in place,<sup>14</sup> most substantive laws now clearly make corruption illegal. In practice, therefore, there is a convergence of national laws on corruption issues and an emergence of an international public policy standard against corruption. These trends mean that in clear cases, a tribunal should be able to make a finding of corruption regardless of the applicable law.

It is in less clear-cut cases, where national laws may vary on what constitutes illegal conduct, where the selection of applicable law will be crucial. In these cases, tribunals are likely to apply the substantive law of the contract unless its application would itself be contrary to international public policy. Tribunals may also expressly refer to principles of international public policy to assess the alleged illegal conduct. To the extent that a foreign mandatory rule forms part of international public policy, it may also be applied. In certain jurisdictions, for example England, parties could argue that

the alleged conduct is illegal by reference to the law of the place of performance.

### What is the standard of proof?

It is well-established in international arbitration that a high standard of proof is required when it comes to allegations of illegality. It is equally clear that a 'mere suspicion by a member of the arbitral tribunal is entirely insufficient',<sup>15</sup> as are 'allusions not supported by evidence and based on suppositions'.<sup>16</sup> However, there has been no universal evidentiary standard that has been applied by arbitral tribunals in addressing allegations of illegality. The treatment of allegations of corruption by arbitral tribunals is particularly illustrative and is therefore the focus of the review that follows below.

#### *Certainty*

In the *Hilmarton* case, the arbitrator concluded that the evidence (witness statements and the amount of the commission) was not sufficient to establish 'with certainty' the existence of illegality.<sup>17</sup> A similarly high standard was followed in the *Westinghouse* case: the arbitral tribunal held that, with respect to the allegation of corruption, a higher standard of 'clear and convincing evidence' would apply.<sup>18</sup> Even though evidence existed that Westinghouse intended to bribe President Marcos by paying the local agent, the arbitral tribunal stated that the respondents failed to satisfy their burden of proof, since they neither provided evidence of payments to President Marcos nor proved the existence of an agreement between President Marcos and Westinghouse.<sup>19</sup>

Investment arbitration tribunals have applied a similarly high standard. In *African Holdings v Congo*,<sup>20</sup> the arbitral tribunal noted that the allegation of corruption was 'very grave', requiring 'irrefutable evidence' and a 'particularly high standard of proof', such as the investigation or criminal prosecution of the corrupt act in countries where they are deemed as a criminal offence. In the absence of such evidence, the allegations were dismissed.

The standard of proof required will be particularly high in the unusual event that the allegations of corruption form the basis of the investment claim brought by the investor against the host state. This was demonstrated recently in the case of *EDF v Romania*,<sup>21</sup> which

revolved around allegations of corruption made by the foreign investor. EDF asserted that in 2001, when it refused to comply with demands for bribes from senior Romanian Government officials, Romania started to expropriate unlawfully its investment and treated its investment unfairly, inequitably, arbitrarily and unreasonably. The tribunal stated that 'clear and convincing evidence' should have been produced by the claimant showing not only that a bribe had been requested from a government official, but also that such request had been made not in the personal interest of the person soliciting the bribe, but on behalf of the government authorities in Romania, so as to make the State liable in that respect. The tribunal rejected EDF's allegations of corruption on the basis that EDF had not satisfied this high burden of proof.

#### *High degree of probability*

In another case, a slightly lower standard than certainty was applied. Several agency agreements were disputed, but no 'conclusive evidence' of bribery was found to have been provided.<sup>22</sup> Nonetheless, a 'high degree of probability of bribery' in respect of one of the agreements was sufficient for the tribunal to declare the contract void under the applicable Swiss law. The tribunal's acceptance of a lower standard in this case is probably attributable to the fact that the party accused of corruption refused to disclose bank records of payments to third parties, in relation to the 33.33 per cent commission fee. This was considered to be decisive circumstantial evidence for irregularity of the payments.<sup>23</sup>

#### *Circumstantial evidence*

Several arbitral tribunals have considered circumstantial evidence when addressing allegations of corruption.<sup>24</sup> For example, findings of corruption have been made on the basis of corruption being endemic in the relevant region;<sup>25</sup> the refusal of an agent to disclose details of its corporate structure and its interventions;<sup>26</sup> the speed with which the contract was awarded;<sup>27</sup> short duration of consultancy agreement;<sup>28</sup> commission based on percentage of the amount of the contracts awarded to the principal;<sup>29</sup> and an excessively high commission.<sup>30</sup>

However, in all of the cases where a finding of corruption was made on the basis of

circumstantial evidence, the tribunal relied upon a number of factors rather than any single indication. It is the convergence of these indicators that resulted in the arbitral tribunals making a finding of corruption. A tribunal has stated that, in order for circumstantial evidence to prove a fact, 'such circumstantial evidence must lead to a very high probability'.<sup>31</sup> In most cases where circumstantial evidence is proffered, this alone is not deemed to be sufficient.<sup>32</sup>

### Timeliness of evidence

Parties alleging illegal conduct, must ensure not only that they have the necessary evidence to support their allegations, but also that the evidence is presented in a timely manner. In a recent case that came before the Swiss Supreme Court,<sup>33</sup> a party applied to the Swiss Federal Supreme Court for review of a partial arbitral award, on the basis that the agreement had an illicit nature, involving bribery, and produced new evidence in this regard. The court denied the request, on the basis that the evidence was not new and could have been (but was not) produced in the arbitration and therefore the prerequisites for a review were not met.

### Sufficiency of proof is key

It is the requirement of sufficient evidentiary proof that will often be a key hurdle in proving illegality in international arbitration. Although no universal evidentiary standard has been applied by arbitral tribunals, the standard of proof is consistently very high in relation to allegations of illegality. Arbitral tribunals regularly require certainty or clear and convincing evidence, both in international commercial arbitration and in investment arbitration. In the less common cases where tribunals have made findings of illegality on the basis of the slightly lower standard of high probability or on the basis of circumstantial evidence, this can often be attributed partly to the accused party's behaviour, such as refusal to disclose evidence in relation to its alleged misconduct. The high standard of proof therefore continues to be the norm in international arbitration.

An arbitrator must establish the facts of the case as they flow from the parties' pleadings and the evidence offered. With limited means at the arbitrators' disposal to gather evidence, the burden of satisfying this high standard of proof remains squarely on the

shoulders of the party alleging illegality. The burden will be particularly heavy where a party's allegations form the basis of the claim, as demonstrated by the recent case of *EDF v Romania*.<sup>34</sup> The combination of these factors means that proving illegality continues to be a significant challenge in international arbitration.

### Notes

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- 1 *World Duty Free Company Limited v Republic of Kenya* (ICSID case no ARB/00/7); *SGS Société Générale de Surveillance S A v Islamic Republic of Pakistan* (ICSID case no ARB/01/13); *Wena Hotels Limited v Arab Republic of Egypt* (ICSID case no ARB/98/4); *Metalclad Corporation v United Mexican States* (ICSID case no ARB(AF)/97/1); *Lucchetti S A and Lucchetti Peru S A v Republic of Peru* (ICSID case no ARB/03/4).
- 2 *EDF (Services) Limited v Romania* (ICSID case no Arb/05/13), Award 8 October 2009. Award and Dissenting Opinion available at: <http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf>.
- 3 *Lemena Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] Q B 448 (Q B) (English court will not enforce contract for influence peddling if it is contrary to foreign law at place of performance). See also *Soleimany v Soleimany* [1998] 3 W L R 811 CA, discussed further below.
- 4 Geneva Chamber of Industry and Commerce (CCIG), Award of 23 February 1988, [1988] ASA Bull 136; Ad hoc award (1989), [1991] ASA Bull 239; *Westacre v Jugoimport*, ICC case no 7047 (1994), [1996] YB Com Arb XXI 79.
- 5 ICC case no 9333 (1998), [2001] ASA Bull 757-780 at p 773. See also ICC case no 8459 (1997), *Cahiers de l'arbitrage*, Gaz Pal, 14 décembre 2006 no 348, p 16, where Algerian law governed the contract and it was held that the principles of French law put forward do not form part of public international policy and are not therefore applicable.
- 6 *Hilmarton*, ICC case no 5622 (1988), *Collection of ICC Arbitral Awards* (1991-1995) 220; [1993] ASA Bull 247; [1994] YB Com Arb XIX 105.
- 7 Swiss Supreme Court, *Omnium de Traitement et de Valorisation (OTV) v Hilmarton Ltd*, case no 4P.263/1989, [1993] ASA Bull 253.
- 8 ICC case no 6320 (1992), [1995] J D I 986.
- 9 *Soleimany v Soleimany*, *op cit* at footnote 3.
- 10 Swiss Supreme Court, *Jugoimport-SDPR Holding Company Ltd & Beogradska Banka v Westcare Investments Inc* (*Westacre case*), case no 4P.115/1994, [1995] ASA Bull 711; *Westacre v Jugoimport*, ICC case no 7047 (1994), *op cit* at footnote 4; *World Duty Free Company Limited v Republic of Kenya* (ICSID case no ARB/00/7); Paris Cour d'appel, *European Gas Turbines SA v Westman Int'l Ltd*, [1995] YB Comm Arb 198 at 201 ('the arbitral award violates French public policy

- and international public policy as its enforcement in France would give effect to an illicit contract the aim and object of which being traffic in influence or the payment of bribes.’); ICC case no 3916 (1983), [1984] J D I 930; *Oscanyan v Arms Co*, 103 US 261, 277 (US S Ct 1880) (‘A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country not from any considerations of the interests of that government or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people.’); Oberlandesgericht Hamm, Judgment of 27 September 2005, [2006] ASA Bull 153 at 157. See Homayoon Arfazadeh, *Considérations pragmatiques sur la compétence respective de l’arbitre et du juge en matière de corruption*, [2001] ASA Bull 672; Bernard Hanotiau, ‘Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings’, in *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No 11 (2003) 261; Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (2004). See also Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 17 December 1997 (‘OECD Convention’), available at: [www.oecd.org](http://www.oecd.org).
- 11 *Westacre v Jugoinport*, ICC case no 7047 (1994), *op cit* at footnote 4.
  - 12 Unpublished, referred to in Magnus Eriksson, ‘Arbitration and Contracts Involving Corrupt Practices: The Arbitrator’s Dilemma’, [1993] *Am Rev Int’l Arb*, 409.
  - 13 *Soleimany v Soleimany*, *op cit* at footnote 3: The English tribunal acknowledged that the parties had been involved in an ‘illicit’ enterprise but considered the illegality to be of no relevance since, under the applicable substantive law of the contract, any illegality would have no effect on the rights of the parties. However, the English court refused enforcement of the award on the basis that enforcement of an illegal contract would be contrary to English public policy.
  - 14 See, eg, The Inter-American Convention against Corruption, adopted by the Organization of American States (1996), the OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union (1997), the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe (1999), the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe (1999), the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union (2003) and the United Nations Convention against Corruption (2003).
  - 15 *Westacre v Jugoinport*, ICC case no 7407 (1994), *op cit* at footnote 4; *Westinghouse International Projects Company v National Power Corporation*, ICC case no 6401 (1991), [1992] *Mealey’s International Arbitration Report*, Vol 7, Issue no 1, Section B, at pp 17-18.
  - 16 ‘*Plateau des Pyramides*’ case, *SPP v Egypt* (ICSID case no ARB/84/3), [1994] YB Com Arb XIX 51.
  - 17 *Hilmarton* case, ICC case no 5622 (1988 and 1992), *op cit* at footnote 6.
  - 18 *Westinghouse* case, ICC case no 6401 (1991), *op cit* at footnote 15; See also Ad hoc award of 4 May 1999 in *Himpurna California Energy v PT Persero*, [2000] YB Com Arb, XXV 13, at 44: ‘A finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof.’
  - 19 This award was confirmed by the Swiss Supreme Court on 2 September 1993, case no 4P.27/1992 (BGE 119 II 380), [1994] ASA Bull 244.
  - 20 ICSID case no ARB/05/21, Award, 29 July 2008.
  - 21 *EDF (Services) Limited v Romania* (ICSID case no Arb/05/13), Award 8 October 2009, *op cit* at footnote 2.
  - 22 ICC case no 6497 (1994), [1999] YB Com Arb XXIV 71.
  - 23 *Ibid.*
  - 24 For an in-depth analysis of circumstantial evidence in corruption cases, see Matthias Scherer, ‘Circumstantial Evidence in Corruption cases before International Arbitral Tribunals’, [2002] *Int’l Arb L Rev*, Vol 5, pp 29-40.
  - 25 ICC case no 3916 (1981), *op cit* at footnote 10.
  - 26 *Ibid.*
  - 27 *Ibid.*
  - 28 ICC case no 8891 (1998), [2000] J D I 1076.
  - 29 *Ibid.*
  - 30 *Ibid.*
  - 31 ICC case no 4145, Second Interim Award of 1984, [1987] YB Com Arb XII 97.
  - 32 ICC Award of 21 March 1992, [1994] Rev arb 359; ICC case no 6497 (1994), *op cit* at footnote 22, where the circumstantial evidence was an alleged disproportion between consultant’s costs and his fee and lack of transparency of consultant’s group; ICC case no 9333 (1998), *op cit* at footnote 5; *African Holdings v Congo*, *op cit* at footnote 20.
  - 33 Swiss Supreme Court, *X v Y*, case no 4A\_69/2009, unpublished.
  - 34 *Op cit* at footnote 2.