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NOUVELLES DE L'ARBITRAGE A L'ETRANGER

1. Ratifications of the Additional Protocol to the Criminal Law Convention of the European Council on Corruption

For years, arbitration has been considered as benefiting from a sort of 'special status' within the judicial system; it was supposed to be the preferred arena for '*tournois chevaleresques*' between parties acting in good faith. Nobody knew whether this image was actually disconnected from reality or whether the worldwide fight against corruption had also to apply - or to be seen to apply – to the field of arbitration so as to fill in a void.

The fact is that, on May 15, 2003, the Council of Europe adopted the Additional Protocol to the Criminal Law Convention on Corruption (CETS N° 191), which mainly deals with the corruption of arbitrators.

By July 1st, 2006, 16 States had ratified or acceded to the Protocol and 14 States had signed the Protocol without having yet ratified it. It is however expected that most States Parties to the Council of Europe will ratify the Protocol.

The Criminal Law Convention on Corruption (thereafter 'the Convention') as well as its Additional Protocol (thereafter 'the Protocol') entered into force in Switzerland on July 1, 2006¹. In practice, it will not change much for Switzerland as the provisions on corruption have already applied to arbitrators since 1999; *i.e.* since the revision of Title 19 (Corruption) of the Swiss Criminal Code. Nevertheless, the entry into force of the Convention and the Protocol is a good opportunity to examine briefly the conditions of application of the corruption provisions to arbitrators².

According to the Protocol, each Party must adopt legislative and other measures as may be necessary in order to establish as criminal offences under its domestic law the following, when committed intentionally: the promising, offering or giving by any person, directly or indirectly, of any undue advantage to an arbitrator exercising his or her functions under the national

¹ See *Message du Conseil fédéral concernant l'approbation et la mise en œuvre de la Convention pénale du Conseil de l'Europe sur la corruption et du Protocole additionnel à ladite convention* dated November 10, 2004, FF 2004-0640 (thereafter : 'the Message of the Federal Council'). The provisions of the Swiss Criminal Code which apply to corruption are art. 322ter-322octies.

² See the Explanatory Report of the Council of Europe to the Protocol, at <http://conventions.coe.int/Treaty/en/Reports/Html/191.htm>, which is largely referred to.

arbitration law of the Party, for himself or herself or for anyone else, in order for him or for her to act or refrain from acting in the exercise of his or her functions (active bribery of domestic arbitrators). The same requirements apply to an arbitrator if he or she requests or receives, directly or indirectly, any undue advantage for himself or herself or for anyone else, in order for him or for her to act or refrain from acting in the exercise of his or her functions (passive bribery of foreign arbitrators). Lastly, each Party must also adopt such legislative and other measures as may be necessary in order to establish as criminal offences under its domestic law the active and passive bribery when involving an arbitrator exercising his or her functions under the national arbitration law of any other State Party³.

Under the Protocol, an arbitrator is a person who, by virtue of an arbitration agreement, is called upon to render a legally binding decision in a dispute submitted to him or her by the parties to the agreement. Obviously, this definition refers to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, even though the New York Convention does not define an arbitrator *per se*. The briber can be anyone, whatever his or her capacity: a party to the arbitration, another arbitrator, etc.

The definition of an 'undue advantage'⁴ prohibited by the Protocol is somewhat more problematic. The vagueness of the term may indeed create some difficulties for international arbitrators who have to adapt themselves to various national practices. Under Swiss law, the term 'undue advantage' encompasses all liberalities granted freely, whether material or immaterial, to the extent that they are objectively measurable⁵. The Convention and its Protocol, as well as Swiss law, exclude from 'undue advantages' those advantages which are in conformity with the law or with the regulations as well as those which are of little value or are considered as socially acceptable⁶.

Material 'undue advantages' will encompass any payment, in cash or otherwise, the grant of goods or assets, the renunciation of credits or charges in favour of the arbitrator, such as free transportation or accommodation. Very often, such advantage is covered up by fictitious contracts, such as consultancy contracts or by invoices for services which were allegedly but

³ The same applies to jurors but the present article focuses on arbitrators.

⁴ As compared with 'undue pecuniary or other advantage', as provided for by art. 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

⁵ See the Message of the Federal Council, p. 6563.

⁶ Art. 322^{octies} para. 2 Swiss Criminal Code.

not actually provided. The reality of such contracts and services therefore ought to be checked.

Examples of immaterial advantages include company or professional advantages, such as promotions, better career prospects, voting rights, admission on a board of directors, as well as distinctions, titles or sexual advantages⁷. In the end, what is important is to verify whether the offender (or the beneficiary of the advantage, if different from the arbitrator) is placed in a better position than the one he or she enjoyed before the commission of the offence and whether he or she is otherwise entitled to the benefit granted. The promise made to an arbitrator that he or she will in the future receive a mandate (as arbitrator or Counsel) by one of the parties in the arbitration (or its Counsel) in turn for the arbitrator's promise to influence the arbitration panel may well fall within the ambit of such immaterial advantage.

The fact that the undue advantage is granted not to the arbitrator but to a third party, such as a relative, an organisation to which the arbitrator (or juror) belongs or the political party of which he or she is a member, obviously makes no difference. Irrespective of whether the direct recipient or beneficiary of the undue advantage is the arbitrator him or herself or a third party, the transaction, even if performed through intermediaries, may be constitute an offence.

The undue advantage does not have to be actually provided to render the behaviour criminal. Indeed, it is enough that it is promised or offered (active bribery) or required to be promised or offered (passive bribery).

'Promising' may, for example, include situations where the briber commits him or herself to grant an undue advantage at a later stage (in most cases only once the arbitrator (or juror) has performed the act requested by the briber). 'Offering' may consist in situations where the briber shows his or her readiness to grant the undue advantage at any moment. Finally, 'giving' will encompass situations where the briber actually transfers the undue advantage.

Contrary to some other countries (France for example), Switzerland has made a reservation to the Convention in order to exclude from its field of application the trading in influence, *i.e.* the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or

⁷ See M. Pieth, 'Bestechung; art. 322^{ter}', in: Niggli / Wiprächtiger (eds), *Strafgesetzbuch II, art. 111-401 StGB. Basler Kommentar*, Basel 2003, p. 2093 s.

confirms that he or she is able to exert an improper influence over a civil servant. This reservation also applies as far as the Protocol (and therefore arbitrators) is concerned.

With regard to the passive side of the bribery, *i.e.* the arbitrator's side, the material elements of the perpetrator's act include requesting or receiving an undue advantage or accepting the offer or the promise thereof.

'Requesting' may, for example, consist in a unilateral act whereby the arbitrator lets another person know, explicitly or implicitly, that he or she will have to 'pay' to have certain task-related act done or abstained from being done. Whether the request is actually acted upon is immaterial since the request itself comprises the core of the offence. Likewise, whether the arbitrator requested the undue advantage for him or herself or a third party is irrelevant.

'Receiving' may, for example, include the actual taking of the benefit, whether by the arbitrator him or herself or by someone else (a spouse, a colleague, an organisation, a political party, etc.). The latter case supposes at least some kind of acceptance on the part of the arbitrator. Again, intermediaries may be involved and the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the arbitrator, necessarily entails identifying the criminal nature of the arbitrator's conduct, irrespective of the good or bad faith of the intermediary involved.

If there is a unilateral request or a corrupt pact, it is essential that the act or the omission from acting by the arbitrator takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under this Protocol to receive a benefit after the act has been performed by the arbitrator provided that there was no prior offer, request or acceptance of an undue advantage. However, such an advantage could, in certain circumstances, be seen as an indication that corruption has taken place. By way of illustration, it may be that where the President of an arbitration panel receives a large or high profile new mandate from one of the parties to the dispute (or its Counsel), soon after the award has been rendered in favour of that party, the commission of an offence could be suspected.

The word 'receipt' means keeping the advantage or gift at least for some time. The arbitrator who, having not requested it, immediately returns the gift

to the sender or turns it over to the competent authorities, would not be committing an offence. Moreover, this provision is obviously not applicable to benefits that are unrelated to a specific subsequent act in the exercise of the arbitrator's functions.

The offence of active or passive bribery can only be committed intentionally. The intent has to include all substantive elements of the offence. It must relate to a future result. It is however immaterial whether the arbitrator (or juror) actually acted or eventually refrained from acting as intended.

This Protocol also obliges States to criminalise active and passive bribery of foreign arbitrators. Apart from the persons who are bribed, *i.e.* foreign arbitrators, the substance of this offence is identical to the ones defined under articles 2 and 3. According to the explanatory report to the Protocol, the decisive element for qualifying an offence as a case of bribery of a foreign arbitrator is not the nationality of the arbitrator or of the parties involved, but whether the arbitrator exercises his or her functions under the national arbitration law of a State other than the prosecuting State⁸. However, this development should not be seen as an extension of the rules on Swiss jurisdiction as provided for by articles 3-7 of the Criminal code.

Is this the end of a protected world? Probably not, on a practical point of view, as the huge majority of arbitration cases are not corrupted, but most certainly as it is now clear that criminal law is bound to further invite itself in the forum of arbitration in the future.

Marc Henzelin*

⁸ See Explanatory Report ad. art. 4.

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ASA Bulletin

Swiss Arbitration Association Bulletin

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