Hot Topics In International Arbitration

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

Dmitille Baizeau, LALIVE
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

Domitille Baizeau, LALIVE