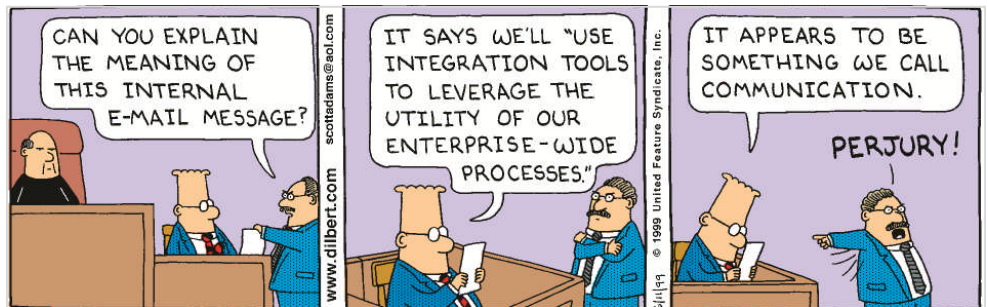


The Arbitrator

INTERNATIONAL DISPUTES NEWSWIRE

June 2011/Issue 6



Bribery and International Arbitration

by Robert Blackett



Lawyers have been rushing to advise the world about the implications of the Bribery Act 2010 (the "*Bribery Act*"). As a result, you will almost certainly have seen articles and bulletins, each summarising the Act and its significant implications for businesses. This article seeks to take a different angle, and to look at bribery issues (including, but not limited to, the effects of the Bribery Act) in the context of international arbitration.

Enforcement of arbitration clauses in contracts alleged to have been induced by bribery

In English law, the effect of a bribe on the contract which is obtained through bribery can be analysed in two ways. First, it can be said that a bribe is analogous to a misrepresentation. Both bribery and misrepresentation are factors which induce a contract, and which give the party which is induced to enter the contract an option to rescind it.¹ This remedy is available

provided that it is still possible to restore the parties to their pre-contractual position. A contract which results from a payment made to an agent is liable to rescission if the principal neither knew of nor consented to the payment. If he knew of it, but did not give his informed consent, the court may award rescission as a discretionary remedy, if it is just and proportionate to do so.² Pending the exercise of that option, the contract remains in force.

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¹ See e.g. Goff & Jones *The Law of Restitution* 7th Ed. (2007) 33-022

² *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch) Per Briggs J at paragraph 203, citing *Wilson v Hurstanger Ltd* [2007] EWCA Civ.299 Per Tuckey LJ at paragraphs 47 to 51, following *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyds Rep PN 309.

There is then the second possibility:

"...there is in such situations also considerable scope for the use of the basic agency reasoning that the agent is simply not authorised to act contrary to his principal's interests: and hence that an act contrary to those interests and known to be so by the agent is outside his actual authority. On this basis the transaction is void at common law unless the third party can rely on the doctrine of apparent authority."³

When the contract which is alleged to have been obtained by bribery contains an arbitration clause, the question arises whether the principal, whose agent was bribed, is required to claim by way of arbitration when he seeks either to rescind or to avoid the contract. A claim to rescind a contract for bribery was, of course, the issue in *Premium Nafta Products Limited and Others v Fili Shipping Company Limited*⁴, better known as the "Fiona Trust" case.

Eight shipowners, which were sister companies owned by Sovcomflot, the Russian state shipping company, entered eight charterparties with eight charterers. Each of the eight contracts provided that "any dispute arising under this charter" was to be decided by the English courts, but gave each party a right to elect that it would instead be determined by arbitration.

It was alleged that each of the eight charters had been procured by bribery of senior officers of Sovcomflot. The shipowners brought actions seeking declarations that the contracts had been rescinded, and the charterers each applied to have the proceedings stayed under s.9 Arbitration Act 1996, on the ground that the proceedings were "in respect of a matter which under the agreement is to be referred to arbitration".

The House of Lords held that the charterers were entitled to a stay of proceedings. Giving the lead judgment, Lord Hoffman first set out section 7 of the Arbitration Act 1996:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

His Lordship continued:

"The ... question is whether, in view of the allegation of bribery, the clause is binding upon the owners. They say that if they are right about the bribery, they were entitled to rescind the whole contract, including the arbitration clause. The arbitrator therefore has no jurisdiction and the dispute should be decided by the court."

The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement."

It was not being alleged that the employees were bribed to agree to arbitration - rather that they were being bribed to agree to unfavourable hire rates rather than more favourable hire rates, on standard form contracts which happened to provide for arbitration. As such, the alleged bribery did not relate specifically to the arbitration agreement, and the bribery issue fell to be decided by the arbitrators. The decision is robust and pragmatic, with its emphasis upon the expectations of commercial people - if a contract contains an arbitration clause then one would expect to have to arbitrate disputes 'about' that contract.

A claim to rescind a contract on the ground that it was obtained by a bribe will be subject to arbitration. The exception; namely where the bribe "related directly" to the agreement to arbitrate, is going to arise rarely, if ever.

A claim that a contract is void for want of authority on the part of the bribed agent is similarly caught by this doctrine of 'separability'. So, provided that the agent generally had the authority (actual or ostensible) to enter contracts containing arbitration clauses like that in the contract, then the arbitration clause will apply to a dispute regarding the question whether the agent lacked authority, actual or ostensible, to enter the particular contract which is the subject of the dispute.

An exception to the 'separability' of arbitration clauses

One point to bear in mind is that the 'doctrine of separability' identified by Lord Hoffmann is a doctrine of English law. The contracts in *Premium Nafta* which the claimants sought to set aside each contained an English choice of law clause. Where the proper law of the contract is some other law, it may be that this doctrine will not apply, and so that an arbitral jurisdiction can be avoided. Some assistance can be found in *Astrazeneca UK Limited v Albemarle International Corporation* [2010] EWHC 1020 (Comm). In that case, a contract provided that it was to be subject to the laws and jurisdiction of South Carolina. AstraZeneca brought proceedings against Albemarle in England, claiming that it had entered this agreement under economic duress, which took place in England, and seeking to have it declared void. Albemarle applied for a stay of this claim in favour of South Carolina.

AstraZeneca sought to argue that South Carolina Law (the putative law of the contract) did not recognise a doctrine of separability, and so that AstraZeneca's claim to avoid the con-

³ *Bowstead & Reynolds on Agency* 19th Ed. (2010) at 8-218

⁴ [2007] UKHL 40

tract for duress should be taken as affecting both the substantive contract and the jurisdiction clause.

Albermarle argued that 'separability' was a matter for the law of the forum (English law) and so the contract and the jurisdiction clause it contained should be treated as distinct.

Hamblen J held that 'separability' was a matter for the putative law of the contract. On the facts it was held that South Carolina did recognise a doctrine of separability, and so the point ultimately fell away.

Separability, bribery and the enforcement of awards

Arbitrators might well hear a claim alleging that a contract was obtained through bribery, but uphold the contract. The question then arises whether the alleged bribery might be relied upon as a ground for resisting the enforcement of the award before the English Courts.

For awards made in the UK or in non-New York Convention states, enforcement in England would be under s.66 Arbitration Act 1996. This provides that the court 'may' give leave to enforce awards unless the arbitral tribunal lacked substantive jurisdiction. An allegation that the underlying contract was obtained by bribery would usually be of no relevance, since the separability doctrine would mean that the tribunal had jurisdiction to decide the issue. One would instead have to try and persuade the judge that the alleged bribery was a ground on which the judge should exercise discretion not to enforce the award.

For a judge to refuse to enforce the award, a party would need to say something more than that the arbitrators had been wrong on the question of whether the contract was obtained by bribery. As set out above, the law will generally recognise the arbitrators as competent to decide the question of whether the contract in which the arbitration agreement appears was obtained by bribery - that is the effect of separability.

When might a judge exercise his discretion, and not enforce the award? We suggest that it will be necessary to point to something which has happened subsequent to the arbitration, and was not considered by the tribunal. One possibility is where bribery was only discovered after the date of the award. Another possibility is where an arbitrator has considered an allegation of bribery, and found that there was no bribery, but new and compelling evidence has emerged subsequently. A third possibility is where an arbitrator has found that there was no bribery, but the alleged wrongdoers have also been subject to a criminal prosecution which has found that there was bribery.

For awards made in New York Convention states other than the UK, enforcement in England would be subject to s.103 Arbitration Act 1996, which provides:

"(1) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves -

...

(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place.

...

(3) Recognition or enforcement of the award may also be refused if ... it would be contrary to public policy to recognise or enforce the award."

This substantially reproduces the grounds on which enforcement may be refused under the New York Convention.

If the law of the country where the arbitration took place did not recognise separability, and treated bribery as voiding both the substantive agreement and the arbitration clause it contained, then a party might resist enforcement of an award which upheld the contract on the grounds that *"the arbitral procedure ... was not in accordance with the law of the country where the arbitration took place"*.

Otherwise a party seeking to resist enforcement in England would be left with an argument that, since the underlying contract was obtained by bribery, an award enforcing it should not be enforced as contrary to public policy. If the issue of bribery was raised in the arbitration and decided upon by the arbitrators then, again, it would seem unlikely that 'public policy' could provide a ground for resisting enforcement of the award. Section 103(3) is to be approached with caution and is not an open ended escape route from awards (see e.g. *DST v Rakoil* [1987] 2 Lloyd's Rep. 246). Again, it would probably be necessary to point to some post-arbitration event (bribery discovered after the award, new evidence or a successful prosecution) in order for enforcement to be refused on public policy grounds in England.

Of course, if an arbitrator was, herself, bribed then that would provide grounds to challenge an award or resist its enforcement. It is also necessary to bear in mind that, when it comes to enforcement in other New York Convention states, their courts will apply their own concept of 'public policy', and the effect may be to treat an allegation of bribery differently than would be the case in England.

Arbitration of claims to recover bribes and claims to damages for deceit

Where it is alleged that a contract which contains an arbitration clause has been induced by bribery, the arbitrator will usually have jurisdiction over the parties to that contract. Usually, the recipient of the bribe and the payer of the bribe will each have been agents or employees, and the contract containing the arbitration clause will be between their respective principals or employers. Those agents and employees will not be subject to the arbitrator's jurisdiction.

As noted above, one remedy which the party whose agent has been bribed might claim in the arbitration is rescission of the contract. There may, however, also be further or alternative remedies which can be claimed against the party who paid the

bribe, or whose agent paid the bribe, if the agent's conduct can be attributed to them.

When an agent receives a bribe in the course of his agency from a person who deals or seeks to deal with his principal, the agent is liable to his principal, *jointly and severally with that person*:

- (a) in restitution for the amount of the bribe, together with interest⁵ from the date of receipt; or
- (b) in the tort of deceit for any loss suffered by the principal as a result of entering into the transaction in respect of which the bribe or secret commission was given or promised.⁶

The bribe itself is regarded as the property of the principal, held on trust by the agent. If the property representing the bribe decreases in value, the fiduciary must pay the difference between that value and the initial amount of the bribe. If the property increases in value, the fiduciary is not entitled to any surplus in excess of the initial value of the bribe.⁷

If the injured party has recovered the amount of the bribe and chooses to rescind the contract, there is no need to give any credit for that amount - he is entitled to treat the payment as a gift to him.⁸ Credit must be given for benefits received under the contract in the usual way.

If, on the other hand, the injured party claims in deceit for the loss suffered as a result of entering the contract, there can be no recovery for the amount of the bribe and no rescission. In cases where it is not possible to restore the *status quo ante* the claim will typically be in deceit. So, for example, where the contract obtained by bribery was a contract to carry out work at an inflated price and the work has been carried out, there can be no rescission and the claim will be a claim in deceit for the additional cost.

Liability of arbitrators who are bribed

A judge owes no duty of care to either party, but only a public duty to administer justice in accordance with his oath.⁹ A judge is a fiduciary of his principal (the government), and so is prohibited from obtaining any advantage for himself by virtue of that position, save with the knowledge and consent of his principal.

The relationship between an arbitrator and the parties is different. The arbitrator is not exactly like the parties' employee or agent, but the arbitrator nonetheless owes each a statutory duty to act impartially,¹⁰ and so not in her own interest or in the

interest of one party over another. English law has shown a willingness to recognise that property which is obtained 'unconscionably' may be held on constructive trust for another, even absent a fiduciary relationship,¹¹ or else to label a relationship as 'fiduciary' which would not usually be understood as being so. See, for example, the recognition by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*¹² that a thief can be characterised as a fiduciary, and so as a constructive trustee of the stolen property.

It seems likely, therefore, that an arbitrator who takes a bribe will hold it on constructive trust for the innocent party or parties. The arbitrator's immunity from suit under s.29 of the Arbitration Act 1996 is of no relevance, since it does not cover things which are done in bad faith.

There is nothing in s.29 to say that an arbitrator is prevented from owing a duty to those whom she might reasonably foresee will be injured by a failure to conduct the arbitration and produce an award with reasonable skill and care. Section 29 simply says that the arbitrator enjoys immunity from suit in respect of such breaches, absent bad faith.

It is obvious that to decide in advance that one will produce an award which will favour one party will injure the other, and this is also an obvious failure by the arbitrator to exercise the skill and care which one would reasonably expect of people who exercise that function. The fact that a bribe has been paid by the winning party would seem to create a presumption of bad faith. Where an award has been obtained by bribery which is discovered only once the award has been enforced, it would seem that the losing party therefore also has a claim against the arbitrator in damages for the amount of the award.

Lest it be thought that this is all academic, I should make clear that it is not unheard of for arbitrators to be accused of having taken very substantial bribes in very substantial cases. The best known example is the so called "Gulf Petro" case. The case concerned a joint venture dating from 1993 between Petrec International Limited, a subsidiary of Texan company Gulf Petro Trading, and the Nigerian National Petroleum Company ("NNPC"). The parties agreed to jointly own and finance a Nigerian company called PNL, which was to reclaim and salvage waste slop oil produced in the course of NNPC's normal operations.

NNPC allegedly failed to contribute its share to the financing of PNL and to provide the necessary access to NNPC's facilities. In 1998 Petrec referred the dispute to the Chamber of Commerce and Industry of Geneva. The tribunal issued a partial award in 2000, finding that NNPC had breached the agreement. In 2001 the panel issued a final award, finding that Petrec 'lacked capacity' to maintain its claims against NNPC.

¹⁰ Under s.33 Arbitration Act, 1996.

¹¹ See the discussion in Virgo, *The Principles of the Law of Restitution* 2nd Ed. (2006) at p608-611.

¹² [1996] AC 669, 716.

⁵ *Nant-y-glo and Blaina Iron Co. V Grave* [1878] 12 Ch. D. 738. Such interest might now stand to be awarded on a compound basis following the decision of the House of Lords in *Sempre Metals GmbH v Inland Revenue Commissioners* [1007] UKHL 34.

⁶ *Mahesan v Malaysia Government Officers' Cooperative Housing Society Ltd* [1979] AC 374.

⁷ *Attorney General of Hong Kong v Reid* [1994] 1 AC 324 (PC) Per Lord Templeman.

⁸ *Logicrose v Southen United FC* [1988] 1 WLR 1256.

⁹ Per Lord Hoffmann in *Hall v Simons* [2000] UKHL 38.

Petrec was unsuccessful in a challenge to the final award before the Swiss courts and in an action seeking to enforce the partial award and claim a determination of damages in Texas. Following this, in 2005, Petrec brought a second claim in Texas alleging that the award had been obtained by bribery, alleging that NNPC had agreed to pay the arbitrators \$25 million in exchange for a favourable award and relying on a letter purporting to be from NNPC's General Counsel to one of the arbitrators, detailing this arrangement. The Texas Court, again, declined jurisdiction and this was upheld on appeal¹³ so, in the event, the issue whether the arbitrators had been bribed was never determined.

Bribery as a crime and its consequences for arbitration

At the time of writing, the Bribery Act is not yet in force. It is due to come into force imminently, on 1 July 2011. The Bribery Act does not have retrospective effect, and so the criminality of acts which took place before 1 July 2011 will fall to be determined under the old law. A number of contracts in respect of which bribery has been alleged are very long term contracts, where the bribery has been discovered or alleged many years after the event. For example, BAE Systems' sale of air defence radar to Tanzania in 2002 was only alleged to have been obtained by bribery in 2007. In 2002 the head of Lesotho's thirty year Katse Dam project was convicted of having taken bribes over a period of ten years in respect of the appointment of contractors to the project.

As such, it is helpful to understand both the pre and post-Act criminal law. A quick internet search will render several 'summaries' and 'updates' regarding the Bribery Act 2010, but little or no information about the present state of the law. We have therefore provided below a summary of the criminal law on bribery as it presently stands and also summarised the effect of the Bribery Act 2010.

Criminal law can be relevant to the arbitration of a dispute about civil rights and obligations in various ways. First, it might be alleged that the contract which is the subject of the arbitration agreement is a contract to do something which is, itself, illegal, either under the law which governs the contract or under the law of the seat. So an arbitrator might, conceivably, be asked to decide a claim under a contract which, itself, appears to provide for the payment of a bribe (perhaps an agreement for the payment of commission to an agent, in circumstances where this commission has not been disclosed to the principal). This is more likely to arise in an international context, since such contracts, though unlawful in most jurisdictions, may not be unlawful everywhere. Particular problems arise when the contract would be lawful under the governing law chosen by the

parties, but illegal according to the law of the seat. A further difficulty arises if the contract's illegality is not raised by the parties, when an arbitrator will need to decide whether to raise this illegality - and declare the contract unenforceable - of her own initiative.

A second problem lies in the English law 'money laundering' offences. These are principally to be found in the Proceeds of Crime Act 2002 ("POCA"). The relevant provisions came into effect on 24 February 2003¹⁴ and are considered in detail below. A question arises whether an arbitrator might incur a criminal liability if asked to decide a dispute regarding a contract, the performance of which would constitute a crime, and where payment under it would constitute the proceeds of a crime. This in turn leads to the question of when an arbitrator ought to report potentially criminal matters disclosed in an arbitration to the relevant authorities.

English law bribery offences before 1 July 2011

English law presently recognises two statutory offences and one common law offence that apply to foreign bribery:

- (a) Under the Public Bodies Corrupt Practices Act 1889, it is a crime to corruptly give, promise or offer any gift, advantage etc. to officials of public bodies.
- (b) The offence in the Prevention of Corruption Act 1906 is based on an agent/principal concept. It is an offence to give any consideration to any *agent* as an inducement for doing any act to show favour or disfavour to any person, in relation to his/her *principal's* affairs or business.
- (c) As to the common law offence, Russell defines this as "*the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity*".¹⁵ Halsbury's states: "*It is an offence at common law for any person to bribe a public officer as an inducement to act contrary to his duty or to show favour or forbear to show disfavour in the discharge of his duty.*"¹⁶

Extension of the territorial and substantive scope of these offences.

Originally, none of these offences expressly referred to bribery of *foreign* public officials. The definition of 'public bodies' in the 1899 Act was originally confined to particular local government entities. The Prevention of Corruption Act 1916 broadened the

¹⁴ Proceeds of Crime Act 2002 (Commencement No. 4, Transitional Provisions and Savings) Order 2003.

¹⁵ *Russell on Crime*, 12th Ed. (1964), p. 381.

¹⁶ Halsbury's Laws of England 4th Ed. 2006 Reissue Criminal Law Evidence and Procedure Vol 11(1) p. 509

¹³ 2008 U.S. App. LEXIS 256 (5th Cir. 2008).

definition of 'public body' in the 1889 Act to include, in addition to the other categories listed, 'local and public authorities of all descriptions'.

The Anti-terrorism, Crime and Security Act 2001, the relevant parts of which came into force on 14 February 2002, extended the three offences. It has two key effects:

- (a) If a national of the United Kingdom or a body incorporated in the United Kingdom does anything in a country or territory outside the United Kingdom and the act, if done in the United Kingdom, would constitute one of these offences, the act constitutes the offence concerned, and proceedings for the offence may be taken in the United Kingdom. It is immaterial if the functions of the person who receives or is offered the reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.
- (b) The definition of 'public bodies' in the 1899 Act is extended to cover equivalent institutions outside the UK.

The first change served to extend the territorial scope of the offence. The second change serves to increase (or, perhaps, to clarify) the substantive scope of the offence.

Does UK criminal bribery law have extra-territorial application for acts committed before 14 February 2002?

The general rule is that the exercise of criminal jurisdiction does not extend to cover acts committed on foreign territory. Jurisdiction over a crime belongs to the country in which it was committed. So, in general, British subjects who commit acts abroad are not amenable to the jurisdiction of the courts in England and Wales in respect of those acts. English courts do not have jurisdiction to try a criminal offence unless the last act or event necessary for its completion occurs within the jurisdiction.¹⁷ This general principle applies to both common law and statutory offences, but Parliamentary supremacy means that it may extend the territorial limit of an offence.

In a report published in 1998, the Law Commission was of the following view:¹⁸

"Parliament may extend the territorial limit for particular offences, and has done so on occasion, but the offences under the Prevention of Corruption Acts have no extended territorial limit."

In December 1998, the UK ratified the OECD Bribery Convention. Article 1(1) provides:

"Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

On 3 March 2003, the OECD published a report regarding the UK's compliance with its obligations under the Convention. The report identified that there was considerable uncertainty regarding the scope of the existing law, in particular whether the definition of 'public body' and 'public office' was sufficient to cover all foreign officials. The report goes on to state:

"The Working Group further noted that under the existing law, the courts did not have jurisdiction to try a bribery offence unless some part of the corrupt transaction took place in the United Kingdom. The Working Group recommended that the U.K. government consider the extension of the scope of the bribery offences beyond its territorial jurisdiction in order to cover acts occurring entirely outside the territory of the United Kingdom."

It would seem that a person who paid a bribe in a foreign country to a foreign official prior to 14 February 2002 would not thereby have committed any offence under English law.

Acts in England and Wales before 14 February 2002 which were connected to foreign bribery

This leaves the following possibilities:

- (a) A bribe paid to a foreign official in England or Wales.
- (b) Incitement in England or Wales to pay a bribe to a foreign official in a foreign country.
- (c) Conspiracy in England or Wales to pay a bribe to a foreign official in a foreign country.

In its response to the OECD working group, the UK government submitted that the existing English law offences did apply to bribes paid to foreign officials in England and Wales.

Bribery of a foreign official in England

The common law offence does not appear in practice ever to have been applied to the bribery of a foreign public official. In any future case, it would therefore fall to be decided by the judge whether the notion of a 'public office' extended to foreign

¹⁷ Criminal Law: Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element (1989) Law Com No 180, para 2.1.

¹⁸ Legislating the Criminal Code: Corruption (1998) Law Com No 248, para 7.7.

officials. Judges are typically slow to extend the scope of common law offences.

As to the 1889 Act, it could perhaps be argued that the words "local and public authorities of all descriptions" extended to foreign public authorities. This was not, however, an argument which the UK relied upon in its submissions to the working group.

The UK argued that the 1906 Act (with its principal-agent liability) would cover a bribe paid to a foreign official in England or Wales. Considerable reliance was placed on a case called *Raud* (1989).

Raud concerned a prosecution for conspiracy to commit an offence under the 1906 Act. The official in that case was an employee at the Irish embassy in London. *Raud* had met him, inside and outside the embassy, to pay him bribes for issuing Irish passports to others. The UK relied on this as an example of a case where payment to a foreign government official in England had been held to satisfy the 1906 Act.

Incitement in England to pay a bribe in a foreign country

Section 59 of the Serious Crime Act 2007 abolishes the common law offence of incitement with effect from 1 October 2008.

Prior to that date, incitement was a crime at common law, consisting of seeking to persuade another to commit a criminal offence. It was probably not an offence to seek to persuade someone to commit an act abroad which would - if committed abroad - would not constitute an offence in England. This was the case, even if the same act would constitute an offence if committed in England. This appears to have been the law, and the Criminal Justice Act 1993, by creating various exceptions to this rule, seems to have assumed that was the case. As such, inciting someone, in England, to pay a bribe outside England was probably not an offence prior to 2002.

Conspiracy to bribe a foreign official

So far as conspiracy is concerned, the relevant law on conspiracy is to be found in s1A of the Criminal Law Act 1977. Section 1A addresses conspiracy to commit acts abroad, and was inserted by the Criminal Justice (Terrorism and Conspiracy Act) 1998.

A party will commit an offence as a matter of English law if:

- (a) there is an agreement to pay a bribe in a foreign territory;
- (b) paying that bribe would be an offence if it were done in England (i.e. under the 1906 Act or, possibly, under the 1889 Act or at common law);
- (c) paying the bribe would constitute a crime according to the law in the foreign territory; and;
- (d) a party to that conspiracy did something in England and Wales prior to the formation of the conspiracy, became a

party to the conspiracy in England and Wales or, themselves or through their agent, did or omitted to do something in England and Wales in furtherance of the conspiracy.

An example of a prosecution in England for conspiracy to pay a bribe in a foreign country (*R v Innospec*) is considered below. Note, however, that the *Innospec* prosecution concerned a course of conduct which spanned the 2002 reforms.

Corporate liability for bribery offences

The three bribery offences are not offences of strict liability. Rather they have *mens rea* elements as follows:

The offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906 require that one acts 'corruptly'. This means "purposely doing an act which the law forbids as tending to corrupt".¹⁹ The *actus* consists of making a payment.

The common law offence would also seem to involve an element of *mens rea*, because the payment must be made for the purpose of influencing behaviour.

There is a degree of uncertainty in English law as to when companies may be treated as having *mens rea*. One line of cases requires that someone who can be 'identified with the company' should have had the necessary *mens rea*. In *Tesco Supermarkets v Natrass* this was held to mean someone at the apex of the company's hierarchy. *Per* Lord Diplock, it meant someone who was actually granted plenary authority in the company's articles of association. *Per* Lord Reid, plenary authority was required but he was prepared to look to substance rather than to form, and did not make a grant of authority in the articles of association a precondition for 'identification'.

Application of this doctrine can be seen in e.g. *Redfern* where Dunlop (Europe) Ltd was charged with knowingly exporting combat equipment to Iraq in breach of sanction. The facts of the matter were known to the European manager, but he was considered insufficiently important as to be identified with the company. In *P&O Ferries (Dover) Ltd* (regarding the Herald of Free Enterprise disaster) the ship's master was held not to be someone who could be identified with the company in a prosecution for gross negligence manslaughter.

A second line of cases takes a different approach. *Tesco Supermarkets v Brent LBC* concerned whether Tesco 'knew or had reasonable cause to believe' that a person to whom it had hired a restricted video was under 18. The divisional court distinguished the previous Tesco decision as concerning liability under a different statute, and upheld the trial judge's ruling that the state of mind of the checkout assistant could be identified with Tesco. This second kind of reasoning has since been ap-

¹⁹ *Cooper v Slade* (1858) 10 ALL ER 1488, per Willes J at p. 1499. Followed in *Smith* [1960] 2 QB 423 per Lord Parker CJ at 429 and *Wellburn* (1979) 69 Cr App R 254 per Lawton LJ at p. 265.

plied by the House of Lords in *Director General of Fair Trading v Pioneer Concrete*, finding that the knowledge of the company's sales force was sufficient to place the company in contempt of court.

The resulting uncertainty was addressed by Lord Hoffmann in *Meridian Global Funds v Management Asia Ltd*. His conclusion was that there was no general theory of attribution of criminal responsibility to companies, and that there are instead specific rules of attribution tailored according to the policy of the statutory or common law offence at issue in the particular case.

It is, unfortunately, unclear what standard would be applied to an offence under the old bribery statutes or at common law.

Prosecution of companies in England for bribery offences under the old law

We are not aware of any cases in which companies have been successfully prosecuted for bribery offences under common law or the 1889 Act, and are only aware of one case where a company has been successfully prosecuted under the 1906 Act. In *R v Innospec Limited*, Innospec pleaded guilty to an offence of conspiracy to make corrupt payments in Indonesia contrary to s1 of the 1906 Act. The company's directors in England arranged payments of around \$8m in bribes to officials in Indonesia. This appears to have begun in 2000 and continued after the reforms in 2002.

The Serious Fraud Office has, however previously prosecuted companies incorporated in England for breach of s.221 Companies Act 1985 (now ss.386 and 387 Companies Act 2006). Section 221 imposed a duty on the company to keep accounting records which were "sufficient to show and explain the companies transactions" and required that the records contain "entries from day to day of all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure takes place".

If the company fails to keep records as required, then every officer of the company in default will have committed an offence. Payments made 'off balance sheet' or which were inaccurately described in any accounts will have been breaches of these sections, giving rise to a strict liability.

Bribery offences under the Bribery Act 2010, from 1 July 2011

The effect of the Bribery Act is to create one of the world's most stringent anti-corruption regimes:

- (a) It extends the crime of bribery to private sector transactions, where previously bribery offences were confined to transactions involving public officials and agents. By way of comparison, the US Foreign and Corrupt Practices Act ("FCPA") does not apply to private sector bribery.
- (b) It creates a new strict liability offence of failing to prevent bribery. An organisation will only have a defence if it can

show it had "adequate procedures" in place to prevent bribery.

- (c) Offences are broadly defined with significant extra-territorial scope.
- (d) For individuals, a maximum prison sentence of ten years and/or an unlimited fine can be imposed; for companies, an unlimited fine can be imposed.

There are four offences under the new regime:

- (a) bribing another person; (s.1)
- (b) being bribed; (s.2)
- (c) bribery of a foreign public official (s.6);
- (d) failure of a commercial organisation to prevent bribery (s.7).

It is the offence under s.7 which is most significant for the everyday conduct of business, but less so for the arbitration practitioner. The primary offences are defined in a complicated way, so as to ensure that a broad range of conduct is caught by the act. The offence in s.1 is defined as follows:

"(1) A person ("P") is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party."

A 'relevant function or activity' includes any function: (i) of a public nature; (ii) connected with a business; or (iii) performed in the course of employment; and: (i) which is expected to be performed in good faith; (ii) impartially or (iii) in respect of which the person performing it is in a position of trust.

Something can be a 'relevant function or activity' even if it has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom.

'Improper performance' is judged according to whether the performance is 'in breach of a relevant expectation'. Essentially, this is what a reasonable person in the UK would expect in rela-

tion to the performance of a function or activity of the type concerned. In judging what is to be expected, where the performance is not subject to the law of any part of the UK, local custom or practice is to be disregarded unless permitted or required by the written law applicable to the country or territory concerned.

Being bribed

The offence in s.2 is defined as follows:

"(1) A person ("R") is guilty of an offence if any of the following cases applies.

(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

(3) Case 4 is where—

- (a) R requests, agrees to receive or accepts a financial or other advantage, and
- (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—

- (a) by R, or
- (b) by another person at R's request or with R's assent or acquiescence.

(6) In cases 3 to 6 it does not matter—

- (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
- (b) whether the advantage is (or is to be) for the benefit of R or another person.

(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper."

Bribing a foreign public official

The offence in s.6 is defined as follows:

"(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—

- (a) business, or
- (b) an advantage in the conduct of business.

(3) P bribes F if, and only if—

- (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
 - (i) to F, or
 - (ii) to another person at F's request or with F's assent or acquiescence, and
- (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift."

Territorial scope of the primary offences

Pursuant to s.12 of the Bribery Act, an offence is committed under ss.1, 2 or 6 if:

- (a) any act or omission which forms part of the offence is committed in any part of the UK; or
- (b) a person's acts or omissions outside the UK would form part of such an offence if they took place within the UK, and that person has a 'close connection' with the UK.

A 'close connection' is defined so as to include citizenship, ordinary residence and incorporation in any part of the UK.

Secondary liability

Aiding or abetting any of the three primary offences identified above would constitute a crime. Section 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977 provides:

"Whosoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any Act passed or to be passed shall be liable to be tried, indicted, and punished as a principal offender."

Conspiracy

It would also be a crime for two or more people to enter any agreement which, if carried out, would result in the commission of any of the primary offences by one of them.

Corporate responsibility for offences under ss. 1, 2 and 6

The difficulties which prosecutors faced in fixing companies with liability for bribery offences committed by their employees

was an important reason for enactment of s.7 of the Bribery Act, creating a corporate strict liability offence, discussed below.

Entirely distinct from that offence, however, there remains the possibility of a body corporate being found guilty under English law of the *primary* offences. That is clear from both s12 (with its reference to incorporation in the UK) and from s.14 of the Bribery Act which provides (emphasis added):

"14 Offences under sections 1, 2 and 6 by bodies corporate etc.

(1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate...

(2) If the offence is proved to have been committed with the consent or connivance of—

- (a) a senior officer of the body corporate ..., or*
- (b) a person purporting to act in such a capacity,*

the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) But subsection (2) does not apply, in the case of an offence which is committed under section 1, 2 or 6 by virtue of section 12(2) to (4), to a senior officer or person purporting to act in such a capacity unless the senior officer or person has a close connection with the United Kingdom (within the meaning given by section 12(4)).

(4) In this section—

"director", in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate,

"senior officer" means—

(a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate, ..."

Section 14 appears to contemplate that a body corporate could commit an offence under ss. 1, 2 or 6 even if the offence was not committed by a 'senior officer or person purporting to act in such a capacity'. It may therefore be that the criminal actions of an employee, who did not have a senior management role but was acting in the course of their employment, would be sufficient to establish a criminal liability on the part of that corporation. Unlike for the offence under s.7, it would be no defence to show that there were adequate procedures in place to prevent bribery.

Failure of a commercial organisation to prevent bribery (s.7)

Section 7 of the Bribery Act is the most significant from the point of view of most businesses, but is of limited significance for the purposes of arbitration. It provides:

"7 Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—

- (a) to obtain or retain business for C, or*
- (b) to obtain or retain an advantage in the conduct of business for C.*

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

- (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or*
- (b) would be guilty of such an offence if section 12(2) (c) and (4) were omitted.*

...

(5) In this section—

...

"relevant commercial organisation" means—

- (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),*
- (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,*
- (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or*
- (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,*

and, for the purposes of this section, a trade or profession is a business.

8 Meaning of associated person

(1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2) The capacity in which A performs services for or on behalf of C does not matter.

(3) Accordingly A may (for example) be C's employee, agent or subsidiary.

(4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the

relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C."

Territorial scope of the offence under s.7

The effect of s.7(3)(b) is that the 'associated person' need have no close connection with the UK. The territorial scope of the s.7 offence is thus wider than that of the primary offences. A company incorporated in England or which carries on business in England will commit an offence if an 'associated person', who has no close connection with the UK, pays a bribe outside the UK.

Bribery giving rise to liability for money laundering offences

The following are 'money laundering' offences under POCA:

"328 Arrangements

(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

"329 Acquisition, use and possession.

(1) A person commits an offence if he—
 (a) acquires criminal property;
 (b) uses criminal property;
 (c) has possession of criminal property."

'Criminal property' is defined as follows:

"340 Interpretation

...

(2) Criminal conduct is conduct which—
 (a) constitutes an offence in any part of the United Kingdom, or
 (b) would constitute an offence in any part of the United Kingdom if it occurred there.

(3) Property is criminal property if—
 (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
 (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.

...

(9) Property is all property wherever situated and includes—

- (a) money;
- (b) all forms of property, real or personal, heritable or moveable;
- (c) things in action and other intangible or incorporeal property."

The definition of 'property' in s.340(9) includes things in action, such as rights under a contract. Bribing another person or bribing a foreign public official would constitute crimes if they took place in the United Kingdom. Therefore a contractual right which was obtained in consequence of bribery would constitute the benefit of criminal conduct.

A bribe would similarly constitute the benefit of criminal conduct (since being bribed would constitute an offence if it took place in the United Kingdom).

Each would therefore constitute "criminal property" if the alleged offender knew or suspected that it represented the benefit of criminal conduct.

Offences under sections 328 and 329 carry a maximum penalty of 14 years imprisonment and an unlimited fine.

Further to these (and other) primary offences, the POCA creates secondary offences which apply only to a "regulated sector". This regulated sector is not defined so as to include arbitral tribunals.

Arbitrating a contract to pay a bribe

Consider an English law contract for the payment of commission to an agent in exchange for the agent having entered a contract on his principal's behalf, in circumstances where the commission is not disclosed to the principal. If the payment is to be made or received in the UK then it will constitute a crime, and so the contract would be void for illegality under English law.

An English-seated arbitrator who nonetheless issued an award enforcing, the contract arguably thereby "becomes concerned in an arrangement which he knows or suspects facilitates ... the acquisition, retention, use or control of criminal property by or on behalf of another person.", and so commits an offence under s.328 of POCA. It could also be argued that the arbitrator had aided or abetted the s.1 and s.2 offences. In the circumstances, an English seated arbitrator should probably decline to enforce the hypothetical contract and, if the illegality were not raised by the parties, to raise it of her own initiative.

A more complicated problem would arise when the contract relates to payment and performance outside the UK. An offence is only committed under ss.1 and 2 where the performance to which the bribe relates is 'improper', and impropriety falls to be judged according to what a reasonable person would expect. Section 5(2) provides that "where the performance is not

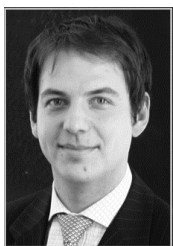
subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned". In this context, the "performance" is performance, by the party receiving the bribe, of the function which it is alleged they are being bribed to perform improperly.

The relevant law for this purpose, then, is not that which governs the contract between the party which pays the commission and the agent. Instead, it is that which governs the relationship between the agent and their principal. So an arbitrator would have to enquire as to the propriety of the agent's conduct under the applicable law, in order to decide whether the conduct in question would constitute a crime according to English law.

Let's see what transpires. ☺

It Takes Time to Turn a Tanker

by Markus Esly



The English courts have a formidable weapon in their arsenal, which allows them to enforce and protect arbitration agreements: the 'anti-suit injunction'. The High Court may grant an injunction to restrain an offending party from pursuing proceedings in a forum other than that prescribed by contract, either through an arbitration agreement or an exclusive jurisdiction clause.

As readers may recall, two years ago the High Court's power to issue anti-suit injunctions was curtailed. In February 2009, the Court of Justice of the European Union ("ECJ") issued its much discussed judgment in the *West Tankers* litigation (*Allianz SpA v West Tankers Inc - Case C-185/07*). This eliminated anti-suit injunctions in all cases where the offending foreign proceedings were brought in the courts of an EU member state - and arguably also where the offending proceedings are brought in Denmark, Iceland, Norway or Switzerland, which are not subject to the relevant EU Regulation (see below), but with whom the United Kingdom has a treaty in substantially the same terms.

The Luxembourg judges held that anti-suit injunctions were incompatible with the 'Brussels Regulation' (Council Regulation 44/2001). The Brussels Regulation governs the basis on which the courts of EU member states may assume jurisdiction, and recognise their respective judgments, in civil and commercial matters. Many arbitration practitioners have lamented the ruling in *West Tankers* as it removed what they saw as a useful, prompt remedy in cases where a party commenced foreign proceedings - perhaps with the aim of disrupting or delaying the

resolution of the dispute. In a recent twist, the story of *West Tankers* has continued in the English courts with a more arbitration-friendly result.

Don't litigate in breach of contract

An arbitration agreement is, at its most basic, a binding promise that disputes arising out of the relevant contract will be referred to an arbitral tribunal, rather than to litigation before the courts. An injunction is simply a way of restraining a party from breaking that promise. In *The Angelic Grace* [1995] 1 Lloyd's Rep 87, Lord Millet put the rationale for granting such injunctions concisely as follows (at page 96):

"There is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them."

An injunction is always a discretionary remedy. Applicants must satisfy the court that it is appropriate to grant an anti-suit injunction. The applicant must show that there is a binding arbitration agreement (subject to the supervision of the English Courts), and that the respondent is at least threatening to breach that agreement by litigating abroad (over the substantive rights, and not just by bringing ancillary proceedings). In practice, however, anti-suit injunctions are often granted where a party deliberately flouts a contractual dispute resolution clause. In that regard, it is not necessary that an arbitration has actually been commenced. The existence of the arbitration clause is sufficient (see *AES Ust-Kamenogorsk Hydropower Plant Llp v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647).

A reminder: the ECJ's decision in *West Tankers*

The *West Tankers* litigation arose out of the collision of the vessel 'Front Comor' with a jetty in the port of Syracuse. Litigation in the Italian courts was commenced by Allianz, the insurers, despite a London arbitration clause. Allianz, exercising their subrogation rights, sought to recover amounts they had paid out to the charterers under the insurance policy from the owners of the vessel. The High Court granted an anti-suit injunction to prevent the insurers from continuing with the claim before the Italian courts, as this breached the arbitration clause.

The House of Lords referred the question whether an anti-suit injunction was compatible with the Brussels Regulation to the ECJ. In February 2009, the ECJ gave its answer: it held that the High Court had overstepped the mark. Under the Brussels Regulation, it was for the Syracuse court to consider its own jurisdiction, and that extended to opining on whether the London arbitration clause was valid. The ECJ noted that underlying the Brussels Regulation regime was a principle of trust: the High Court in London should trust the Italian court to come to the right conclusion, rather than interfering by making orders

²⁰ [ref]

against the litigants.

The fallout from *West Tankers*

Arbitration practitioners have been critical (in our view, rightly) of the ECJ's ruling. It is all very well to say that the foreign court should be trusted to come to the right decision, but there can be no guarantee that an arbitration clause will always be upheld. Even within the EU member states, it is conceivable that a first instance judge might accept jurisdiction despite the contract providing for arbitration. Allowing the foreign proceedings to reach a decision on jurisdiction can be time-consuming if nothing else: there may need to be an appeal.

An objection on a point of principle can also be made. The English High Court should be able to restrain a party from breaching an arbitration clause, if the parties have either agreed to arbitrate in England and Wales or if the English courts have jurisdiction over the offending party on other grounds.

Enforcing a declaratory award: the solution?

While the Italian proceedings and the reference to the ECJ were ongoing, the London arbitrators appointed under the contract had not been sitting idle. At the behest of the owners, by November 2008, the tribunal had issued an award in declaratory form. The award stated that the owners of the vessel were not under any liability to the insurers.

Once the anti-suit injunction had been lifted following the ECJ's ruling, the Italian proceedings also continued. If Allianz were to win in the courts of Syracuse, they would be able to enforce any Italian judgment for damages in England under the Brussels Regulation. One way of forestalling that was for the owners to mount a pre-emptive strike, by obtaining first an 'inconsistent judgment' from an English court. The owners could then pray in aid one of the narrow exceptions in the Regulation, in Article 34(3):

"A judgment will not be recognised:

...

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought."

The owners therefore applied to the High Court to recognise and enforce the 'negative' arbitration award (i.e. that they could be under no liability to Allianz) as an English judgment. If that happened, any Italian judgment holding otherwise could not be enforced in England and Wales because it would then contradict the English judgment confirming the arbitral award.

The insurers objected to this. They argued that an arbitration award could not be enforced if it was only in purely declaratory terms. Such an award would be of pure academic interest, and could not really be 'enforced' in the true sense of the word since

there was nothing due to the enforcing party under such an the award.

Field J rejected that argument (see *West Tankers Inc v Allianz SpA and another* [2011] EWHC 829 (Comm)). The judge noted that Section 66 of the Arbitration Act 1996, which governs enforcement of English arbitral awards, should assist the party wishing to obtain the benefit of an arbitration award, even if that award was purely declaratory:

"... to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it. Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. ... Where, however, as here, the victorious party's objective in obtaining an order under s.66 (1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s.66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award."

So the threat of an Italian judgment contradicting the award made by the London arbitrators provided the very basis for the High Court's jurisdiction to enforce that declaratory award under the Arbitration Act 1996.

Within the EU: A common sense decision

There has not yet been a ruling that a judgment of the courts of an EU member state is inconsistent under the Brussels Regulation with an English decision upholding an arbitration award, but there is nothing in principle that would prevent such a ruling. Field J's decision, to the effect that a negative, declaratory award offers some real benefit to a party facing a threat from foreign proceedings conducted in breach of an arbitration clause, is robust and replete with common sense. It is to be welcomed.

It is hoped that the English courts will have equally little difficulty in finding that a subsequent, substantive Brussels Regulation judgment would be inconsistent with an award that has already been enforced here under Section 66 of the Arbitration Act.

Anti-suit injunctions still available where proceedings are commenced outside of the EU

Anti-suit injunctions of course remain available where the foreign proceedings to be restrained are commenced in the courts of a state that is not a member of the European Union.

This was affirmed by the High Court shortly after the *West Tankers* decision. In *Shashoua & Ors v Sharma* [2009] EWHC 957 (paragraph 39):

"In my judgment therefore there is nothing in the European Court decision in the Front Comor which impacts upon the law as developed in this country in relation to anti suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration..."

Where the arbitration agreement is under threat through proceedings outside of the EU, it is therefore 'business as usual'.



Commercial Arbitration

Awards:

Are they investments, protected under international law?

by Melanie Willems



Recent awards try to shed light on the relationship between 'ordinary' international commercial arbitrations and claims under a bilateral investment treaty ("BIT"). As we will see, opinion between some leading arbitrators is divided as to whether a commercial arbitration award can itself be an investment that is protected under public international law and relevant BITs. We have looked for common threads running through these decisions, considered what kind of contractual rights might be an 'investment', and identified those findings that we think cannot be reconciled.

Investment treaty arbitrations - a quick reminder

Before delving into the issues, a quick reminder of how investment treatment arbitration works. A state party to a BIT must afford certain favourable conditions and protection to investors who are nationals of the counterparty to the BIT, provided these investors fulfil a number of criteria (for instance, as regards their nationality and the nature of their investment). A dispute concerning a protected investment between the host state and the foreign investor may be referred to arbitration. The foreign investor can claim directly against the host state, where the latter has breached international law. Claims are commonly brought where there has been unfair and inequitable treatment of investors, discrimination between foreign in-

vestors and domestic businesses (or those from a third country), or expropriation, or nationalisation, of assets without payment by the state of effective compensation.

The International Centre for the Settlement of Investment Disputes, or "ICSID", established under the Washington Convention 1965, oversees many such investment treaty arbitrations. ICSID provides a procedural framework and arbitration rules, and also offers a panel of qualified arbitrators from which appointments can be made. Arbitral tribunals appointed under BITs wield considerable power. Though they are private individuals, they can (and routinely do) order sovereign states who have breached their international law obligations to pay hundreds of millions in damages to claimants. In practice, many ICSID awards are honoured by respondent states.

What is a 'qualifying investment'?

One of the jurisdictional hurdles to be overcome by all foreign investor claimants is establishing that a 'qualifying investment' has been made in the host state.

Investment treaty awards often grapple with this concept. Most tribunals agree that an investment should be a wide concept. In turn, that means it can prove elusive to pin down. BITs will contain a definition of 'investment'. This usually takes the form of a long list. By way of illustration, the United Kingdom's model BIT declares that an investment comprises "*every kind of asset and in particular, though not exclusively, includes*":

- movable and immovable property and other property right such as mortgages, liens and pledges;
- shares, stocks and debentures of companies or interests in the property of such companies;
- contractual rights ("*claims to money or to any performance under contract having financial value*");
- intellectual property rights and goodwill; and
- business concessions under law or contract.

Over the last decade, a consensus has emerged that, in cases where arbitration under the ICSID Convention is the relevant avenue of redress, it is not enough for the investor to bring the relevant economic activity within the applicable 'BIT list'. More is needed. The ICSID Convention itself (in Article 25(1)) provides for arbitration in disputes arising out of an investment without defining the term. The history of the treaty shows that omitting a definition was quite deliberate. Many ICSID tribunals have held that there is a minimum threshold as to what can properly be an investment under international law. What is commonly accepted as the test here was first expounded by the arbitrators in *Salini Costruttori SpA v Morocco* (2001) (ICSID AR-B/00/4). As considered and commented on in subsequent awards, the test involves searching for the following four hallmarks:

- a (financial) commitment by the would-be investor;
- performance of a project for a certain duration;

- existence of a risk for the investor; and
- a significant contribution to the economic development of the host state.

Tribunals have been careful to reserve to themselves a discretion as to when these criteria have been satisfied. Some have even warned that these criteria should not be "... *elevated into a fixed and inflexible test*", because doing so would create a danger of "... *the arbitrary exclusion of certain types of transaction from the scope of the [ICSID] Convention.*" (see *Biwater Gauff (Tanzania) Ltd v Tanzania* (2008) (ICSID ARB/05/22)).

The tribunal sounding that cautionary note instead preferred to apply a:

"more flexible and pragmatic approach to the meaning of 'investment'... which takes into account the features identified in Salini, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID[meaning either the BIT or an investment contract providing for ICSID arbitration]."

At the same time, some arbitrators have been clear that jurisdiction under the ICSID Convention cannot be expanded through agreement. As the tribunal in *Phoenix Action Ltd v Czech Republic* (2009) (ICSID ARB/06/5) noted (at paragraph 96):

"... if a BIT would provide that ICSID arbitration is available for sales contracts which do not imply any investment, such a provision could not be enforced by an ICSID tribunal."

While it is reasonably clear that a mere sales or supply contract would not be an 'investment', it is not always easy to explain in terms of principle where the line will be drawn. ICSID tribunals continue to wrestle with the relationship between the BIT and the ICSID Convention when it comes to identifying what is an investment. Arbitrators look for a way of applying the usually wide definition of 'investment' in the applicable BIT, to which some importance should be ascribed, with the desire to limit ICSID jurisdiction to matters that have a sufficiently substantial connection with the host state and its economy. Minimum thresholds, in terms of either the value of the alleged investment or the duration of the project in question, have been rejected as overly rigid.

In *GEA Group Aktiengesellschaft v Ukraine* (2011) (ICSID ARB/08/16), the tribunal acknowledged the controversy but neatly side-stepped it by noting that it "*need not be resolved*" on that occasion. Instead, and "*out of an abundance of caution*", the arbitrators in that case considered "*all potentially applicable criteria*" that could be part of the 'investment test', reaching the same conclusion no matter what. In so doing, the tribunal seems to have disagreed with an earlier decision as to what kind of contractual rights might be an investment.

Arbitral awards as 'investments' - Why does it matter?

At the outset, let us recall the difference between a breach of contract and a breach of international law (the obligations on the host state to respect investments in the BIT). Assume that an investor has made a qualifying investment, which involves a contract that contains an ICC arbitration clause. The investor's counterparty under that contract is a state entity. If the state entity breaches the investment contract, the investor will have right to pursue the matter before an ICC tribunal.

The investor will not, however, be able to bring a BIT claim unless the breach of contract also happens to be a violation of the state's obligations under the BIT. The question as to whether the contract has been breached will be decided by applying the governing law of the agreement, which might well be the law of the host state. Whether the state has breached the BIT will be determined under international law. The difference was explained by the tribunal in *Impregilo SpA v Pakistan* (2005) (ICSID ARB/03/3) (paragraph 260):

"... the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ('puissance publique'), and not as contracting party, may breach the obligations assumed under the BIT."

Certain BITs contain what is commonly known as a "fork-in-the-road" provision. These require an investor to make a choice as to which avenue of redress will be pursued: either claiming in the national courts or before an arbitral tribunal under the contract (depending on the dispute resolution provision), or under the BIT. The investor will be held to the election.

If the investor were to proceed under the contract and secure an arbitral award in its favour, that award might then be enforced in the courts of the host state to secure payment. Let us assume that the courts of the host state are disappointing upholders of the rule of law, and simply declare the award to be null and void because it goes against 'national interests'. If the award is an investment that is itself protected under a BIT, then the investor could claim there has been expropriation (the purported setting aside of the award) or, perhaps, unfair and inequitable treatment at the hands of the host state's judiciary.

Actions by the national courts can, of course, amount to a breach of BIT obligations. Such breaches are commonly referred to as 'denial of justice'. The investor must suffer 'an international wrong' at the hands of the national courts: the decision that is being impugned must cause "*shock and surprise*" to an impartial observer so that, on reflection, there are justified concerns as to the judicial propriety of the national courts (see

Mondev International v United States of America (2002) (ICSID ARB 99/2). This is not an easy test to satisfy, since BIT tribunals are not 'courts of appeal' that will review decisions of national courts on the merits. Where the national courts fairly heard the investor, but rejected the investor's arguments without there being evidence of discrimination or disregard of the applicable law, there will be little chance of a denial of justice claim succeeding.

Returning to the status of an arbitral award as an 'investment', if an award were not an investment, then it might be thought that an investor would have no remedy if the national courts wilfully and deliberately set the award aside. An investor who has successfully taken a claim to arbitration, and is then denied by the national courts, might be worse off than an investor who was the victim of an international wrong (within the *Mondev* test) having litigated the matter in the national courts.

With that in mind, we consider three recent awards on the point: one decides that an award cannot be an investment of itself, while two further decisions suggest the opposite.

GEA Group Aktiengesellschaft v Ukraine (2011) - An arbitral award is not an 'investment'

In *GEA v Ukraine*, the tribunal considered a number of contracts as potential investments under both the ICSID Convention and the Germany - Ukraine BIT. The dispute arose out of an arrangement whereby the German claimant company supplied naphtha fuel to a Ukrainian state-owned entity, Oriana. The venture went awry, and fuel started to go missing, seemingly having been misappropriated. An inspector dispatched by GEA was, it seems, unceremoniously shot in the kneecap. Many thousands of tons of fuel remained missing. This first dispute about the unaccounted-for fuel was eventually settled. Both a repayment and a settlement agreement in favour of GEA were entered into (separate contracts to the original investment agreement).

That settlement, however, proved problematic too. Eventually, GEA obtained an ICC arbitration award enforcing the terms of the settlement, through operation of the dispute resolution clauses contained in the relevant contracts. The Ukrainian courts then refused to enforce the ICC award, which led the claimant to commence ICSID arbitration proceedings under the BIT. The Ukraine defended the claim on the basis, *inter alia*, that there had been no qualifying investment.

The tribunal considered the original contract pursuant to which the fuel was supplied. It had little difficulty in concluding that this arrangement was an investment. It rejected the Ukraine's contention that the contract was nothing more than an arrangement for the supply of certain products for a fee (so, in other words, a contract for sale that was too transient to amount to an 'investment'). In doing so, the tribunal relied on the definition in the BIT, under which an investment encom-

passed "*rights to the exercise of an economic activity*" (Article 1(1) (e) of the BIT).

The tribunal, in essence, accepted that GEA assisting with delivery in the Ukraine, resolving customs issues, paying for local freight (within the Ukraine) and supplying materials necessary for the ultimate use of the fuel in the Ukraine were sufficient to constitute an "*economic activity*" within the Ukraine. Coupled with that, the claimant also supplied "*movable property*" (including the fuel), another element of the definition in the BIT (Article 1(1)(a)), as part of the economic activity. The arbitrators noted that there was a "*relationship of 'common interest'*", which satisfied the BIT.

The requirements of the ICSID Convention were also met. The tribunal found that the original contract was an investment, applying the *Salini* criteria (paragraph 152):

"... entailed a contribution in kind, in the form of over one million metric tons of diesel and naphtha, catalysts and other materials, delivered to the Ukraine as part of a broad economic operation, as well as the contribution of the Claimant's know-how on logistics, marketing, and the mobilisation of repairs and other services. This was clearly a complex relationship going far beyond a simple sale of raw materials. The relationship extended over a certain duration (a three year period...). Further, it is unquestionable that the foreign investor ... undertook multiple risks, in the form of market risk, credit risk and political risk, in particular since Oriana was with diesel without advance payment."

The settlement and repayment agreements did not, however, pass muster. The tribunal accepted the Ukraine's objections that the settlement agreement only established an inventory of goods that had not been duly delivered and created a debt payable to the claimants for those goods, while the repayment agreement dealt with how that debt would be paid. The arbitrators held the view that "*as legal acts [these contracts] are not the same as the investment in the Ukraine itself.*" (paragraph 157).

The ICC award, made under the settlement and repayment agreements, was not (itself) an investment either. The award was concerned with rights and obligations arising under those two contracts, which were themselves not investments. Here, the arbitrators went further and stated that even if the ICC award had arisen directly out of the original investment contract, that could make no difference. This was because:

"... the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. ... the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall - itself - within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention."

The definition of 'investment' in many BITs contains a 'catch-

all' proviso that a change in the form of an investment, or rather its constituent parts, should not prejudice the status of the investment. The Germany - Ukraine BIT provided (Article 1) that:

"Any change to the form in which the assets are invested shall not affect their nature of as investment."

Since the award and the investment were conceptually distinct, the arbitrators found that this proviso could not apply. Putting this another way, the tribunal concluded that the investment contract (or the rights under it) did not simply change in form to become, firstly, the settlement contracts, and then, secondly, the ICC award made under the settlement contracts.

The tribunal nonetheless considered whether, if the award had been an investment, the actions of the Ukrainian courts might have violated the BIT. The arbitrators found that the Ukrainian courts had not applied the law in a discriminatory manner. In the tribunal's view, the courts had listened to the arguments and reached a conclusion that the claimants did not agree with. As we will see, the standard for showing unfair and inequitable treatment at the hands of the judiciary of a host state is a high one.

Frontier Petroleum v Czech Republic (2010) - A contrary view

The reasoning of the tribunal in *GEA v Ukraine* as to the relationship between an arbitration award and the underlying investment flatly contradicts the award in *Frontier Petroleum Services Ltd v Czech Republic* (UNCITRAL) (2010).

Frontier concerned an alleged investment in the Czech aviation industry. Frontier, a Canadian investor, entered into a joint venture with a Czech aircraft manufacturer, Moravan. Frontier financed Moravan's acquisition of the assets of LET, an insolvent Czech aviation company, through payments exceeding US\$ 1,000,000 and CDN\$ 2,000,000. Moravan was then obliged to transfer LET's assets to a newly formed joint venture vehicle, LZ, which would issue shares to Frontier and assume Moravan's debt to Frontier. Frontier was to take first-ranking security over the assets.

Frontier alleged a number of breaches by Moravan of the shareholder agreement, and took steps before the Czech courts in civil, criminal and insolvency proceedings. These actions were aimed at preventing dealings by Moravan and LZ with the LET assets, which Frontier asserted were aimed at dissipating these in breach of contract. Frontier also commenced arbitration proceedings (in Stockholm), obtaining a final award in its favour. The final award gave Frontier a first, secured charge over the assets.

Frontier then sought to enforce the award through the Czech courts. The Czech courts refused, allowing the sale of LET's assets to other creditors as part of the ongoing insolvency proceeding. This refusal was said to be within one of the narrow exceptions to enforcement of foreign arbitral awards permitted under

the New York Convention 1958, an international treaty dealing with the enforceability of international arbitral awards: that enforcing the award would be a contravention of public policy (see Article V(2)(b) of the New York Convention). The Czech courts reasoned that the award purported to give Frontier greater rights against the assets of an insolvent company than other creditors would have, without respecting the rules of Czech insolvency law. That kind of preference was held to be a violation of a fundamental principle of Czech law, and hence against public policy.

Left with nowhere else to go, Frontier began an investment treaty arbitration against the Czech Republic under the BIT with Canada. This particular BIT did not provide for ICSID arbitration, so the case proceeded under the UNCITRAL Rules. This meant that the definition of investment under Article 25(1) of the ICSID Convention did not need to be considered.

One of Frontier's claims was that the arbitration award was itself tantamount to an investment, and that the failure by the Czech courts to enforce it amounted to unfair and inequitable treatment. To have jurisdiction to hear that claim, Frontier had to establish that there was an investment. At paragraph 231 [our emphasis], the arbitrators accepted that Frontier's:

"... original investment consisted of the payments made [to enable the acquisition of the assets] which were transformed into an entitlement to a first secured charge in the Final Award. The Tribunal also notes that Article 1(a) of the BIT provides that "[a]ny change in the form of an investment does not affect its character as an investment". Accordingly, by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment."

The tribunal in *Frontier* found that the original investment was 'transformed' into the award. Frontier had undoubtedly made an investment: Frontier had acquired title to movable assets located in the Czech Republic, had acquired shares in a local investment company, and (although this was not expressly considered by the tribunal) had made a contribution to the Czech economy. The arbitrators in *Frontier* applied the treaty wording concerning a "change in the form of an investment" to encompass the award confirming that Frontier had security over the assets, pursuant to the shareholder's agreement.

Ultimately, the arbitrators concluded that the refusal of the Czech courts to enforce the award was not a violation of international law. The principle of fair and equitable treatment (set out in Article III.1 of the applicable BIT) was not breached. The Czech courts had not committed an "abuse of rights contrary to the international principle of good faith" in how they had interpreted the New York Convention, and the concept of public policy (paragraph 525).

The tribunal provided an interesting commentary on precisely what public policy meant here. The arbitrators were clear that the national courts were entitled, to a degree, to form their own view as to what overriding considerations might justify refusing enforcement of a New York Convention award. There was no clearly defined 'international standard' of public policy (paragraph 527):

"... it is not necessary for this Tribunal to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard. States enjoy a certain margin of appreciation in determining what their own conception of international public policy is. This Tribunal determines that it is sufficient to examine whether the conclusion reached by the Czech courts applied a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention. Put another way, was the decision by the Czech courts reasonably tenable and made in good faith?"

The answer to that question was 'Yes': the Czech courts had decided the matter in good faith, since enforcing the award would have given Frontier priority over all the other creditors, defeating their claims. The tribunal noted that other national courts (in France and Germany) had also ascribed importance to respecting the equal rights of creditors when considering the enforcement of an arbitral award.

So while Frontier's award was a protected investment, there had been no breach of international law by the Czech Republic.

Saipem SpA v Bangladesh (2009) (ICSID ARB 05/7) - Side-stepping the issue, but protecting the investor

It has been suggested (both by commentators, and by the claimants in *GEA v Ukraine*), that the tribunal in *Saipem* found that an ICC award was an investment. On closer inspection however, the arbitrators drew a fine distinction between the award itself, and the rights that 'crystallise' under it. The *Saipem* arbitrators, nonetheless, went on to decide that the Bangladeshi courts had violated international law in refusing to honour the award.

Saipem had entered into a contract with Petrobangla, the national oil and gas company, to construct a gas pipeline in Bangladesh. The project was substantial, and had all the hallmarks of an investment. *Saipem*'s EPC contract provided for ICC arbitration, in Bangladesh. *Saipem* referred disputes to arbitration and after protracted proceedings, with many applications to the Bangladeshi courts (who had supervisory jurisdiction over the arbitration), obtained an award for US\$ 6.5 million. The award was made following an order by the High Court of Bangladesh declaring that the ICC tribunal had no jurisdiction or authority. On the basis of that order, the High Court then also refused to enforce the award, since according to the High Court it

was a nullity.

The tribunal found that the actions of the Bangladeshi High Court (an organ of the state) amounted to an expropriation of an investment. The property that had been expropriated was described as being the rights created under the investment contract, which 'crystallised' in the ICC award (paragraph 128):

"Turning first to the identification of the property at stake, the Tribunal considers that the allegedly expropriated property is Saipem's residual contractual rights under the investment as crystallised in the ICC Award ..."

Article 1 of the Italy-Bangladesh BIT contains the usual, widely-worded, definition of 'investment' (see Article 1(c)):

"... credit for sums of money or any right for pledges or services having an economic value connected with investments ..."

The *Saipem* tribunal further considered the status of the award itself in its decision affirming jurisdiction (handed down in 2007). The tribunal in fact noted that the award itself would not be an investment within Article 25(1) of the ICSID Convention (paragraph 113):

"Indeed, the opposite view would mean that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, which the Tribunal is not prepared to accept".

Elsewhere in the decision on jurisdiction, the tribunal left the point open, stating that it was "*contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.*"

Having found that these crystallised contractual rights were a protected investment, the tribunal went on to find that the High Court of Bangladesh had acted contrary to international law and had expropriated these rights.

Interestingly, the arbitrators reached that decision by applying the principles of the New York Convention (which Bangladesh had signed and ratified) directly, even in the absence of Bangladesh having enacted any national legislation to implement the New York Convention as part of the national legal framework. The arbitrators in *Saipem* were critical of the findings of the High Court, which had found the ICC arbitrators guilty of misconduct, by doing nothing more than refusing to accede to certain procedural applications that Petrobangla had made. Acceding to Petrobangla's challenge of the tribunal's jurisdiction, and issuing an anti-arbitration injunction against *Saipem*, on spurious grounds meant that Bangladesh had violated Article II of the New York Convention. Article II created an obligation under international law which required Bangladesh's courts to 'refer a dispute to arbitration' where a valid arbitration agreement was shown to the court, as was the case here. The arbitrators found the conduct of the High Court so objectionable

that they even suggested that similar problems might have arisen if Saipem had commenced a new arbitration, with a fresh ICC tribunal.

Discussion and Conclusion

Investment treaty claims can only be brought in respect of a qualifying investment. Despite numerous decisions considering what economic activities might suffice to engage the arbitral jurisdiction created by the ICSID Convention, there remains uncertainty as to the precise formulation of the test. Tribunals tend to be flexible, and 'will know an investment when they see one'.

One key point to bear in mind is that there must be a territorial connection or link between the investor's economic or financial contribution and the host state. This can take the form of ownership or participation rights in a local company, advancing monies to local partners (as in *Frontier*), or activity 'on the ground' such as managing logistics, transport, custom clearance (to give examples from *GEA v Ukraine*), or marketing or promotional activity in the host state's market.

Once an investment has been created, many BITs provide that a change in the form of the relevant 'asset' should not affect its status as investment. So, for instance, where shares in a local (investment) joint venture are sold and the proceeds are then used to purchase property in the host state, that change in the nature of the investment should not matter.

However, it seems that if claims arising out of an investment contract are confirmed or upheld by an arbitration award obtained by the investor, the resulting award is not, of itself, an investment. Both the tribunal in *GEA v Ukraine* and in *Saipem v Bangladesh* concluded that the award was not an investment. Yet the rights that have 'crystallised' under the award are protected, at least according to the *Saipem* tribunal. That decision shows that ICSID arbitrators will hold a state to its international law obligations to respect arbitral awards.

In *Saipem*, the investor was therefore able to take the benefit of the New York Convention and enforce this directly against Bangladesh, through the requirement of fair and equitable treatment set out in the BIT. That is a powerful remedy, as it amounts to a private individual holding a sovereign state to promises which that state made to other nations under a multi-lateral treaty.

Investment treaty tribunals should not, however, overstep the mark and act as appellate tribunals, reviewing all decisions made under the New York Convention (or national laws implementing it). The facts in *Saipem* may very well have been exceptional, as there seems no good reason why the High Court of Bangladesh should have accused an ICC tribunal of 'misconduct' merely because Petrobangla repeated procedural gambits failed. The decision in *GEA v Ukraine* shows that merely rejecting an investor's claims to enforcement under the New York Convention is not sufficient to amount to an international wrong. More is needed: the judicial conduct in question must be such as to cause 'shock and surprise'. It must also be remembered that by signing the New York Convention, states do not abrogate their right to apply domestic public policy, and may yet refuse enforcement if an award offends against fundamental principles (see *Frontier*).

Finally, we hope that the decision in *GEA v Ukraine*, that an award is not an investment, will not be used as precedent for refusing any redress for an investor who has made a qualifying investment, had its claims upheld by an arbitral tribunal, only then to be the victim of discrimination at the hands of the courts of the host state. If an award is not enforced in circumstances that amount to a true denial of justice under international law principles, ICSID tribunals should hold the state to task. ☉

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