CORRUPTION AND OTHER ILLEGALITY IN THE FORMATION AND PERFORMANCE OF CONTRACTS AND IN THE CONDUCT OF ARBITRATION RELATING THERETO[1]

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Introduction

Asia has no monopoly on corruption. Ubiquitous and pernicious, corruption respects neither international boundaries nor national laws. It is so widespread not only in Asia but also in Europe[2], Africa and South America, probably providing a significant portion of civil servants' family income, that it is simply accepted as a way of life and rarely even mentioned. This "everyday" corruption is seen as just another cost of living, although it is often on this level that cosmetic attempts to clean up are directed. Corruption on the general private business level, where kickbacks are given to procurement personnel and "grease" to regulatory officials - the "cancer of commerce" - is also generally widespread and becomes an element in the transaction's costing that has to be borne by the businessman and/or ultimate consumer.

But it is corruption at a higher level - in public infrastructure projects - that is of more serious concern. The cost of this type of corruption, augmented by multiple profit-margins along the way, has to be borne by the taxpayer. And we must also differentiate between infrastructure projects of a commercial nature, such as construction of a road or airport or development of an oilfield or mine, and those for the provision of basic needs of and services to the populace, such as clean water, electricity and telecommunications. In these latter cases, the cost and other damage of the corruption must be borne doubly by the populace - as recipients of the public services and as taxpayers.

Unfortunately it is unlikely that the governments of the countries in which corruption is rife will be able, or even have much political will, to eradicate it. Possibly not ever. So many of those in power are too involved, or their families are. And it is generally accepted that, at least in Indonesia, most of the middle class has grown out of this

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1 Paper prepared for the 16th Congress of ICCA (International Council for Commercial Arbitration): INTERNATIONAL COMMERCIAL ARBITRATION: IMORTANT CONTEMPORARY QUESTIONS, London 12-15 May, 2002.

2 See, e.g., Theil and Dickey, EUROPE'S DIRTY SECRET, Newsweek (international edition) 24 April, 2002.

corruption - starting their businesses or funding their children's higher education from the fruits of this "black economy" or its trickle-down. No wonder there are few sincere efforts to reform.

Arbitrations in any jurisdiction often run across corruption in its more common, lower, levels. But it is on the higher level, with public infrastructure projects, that it is most imperative that the greatest degree of diligence in scrutiny for corruption must be applied by a tribunal because, although, as mentioned above, it is the populace that will be most affected, the populace have no advocate in the arbitral reference. We, as arbitrators, take on this additional responsibility, sitting as we do *in locus curiae*. One might even question whether public policy should not reserve to the courts of the land disputes affecting the livelihood of its populace, seeing that the populace never agreed to have foreign arbitrators determine their interests: what they will have to pay for electricity, water or telecommunications, and whether the same will be available to them even if they are able so to pay.

In order to fight corruption, we must be able to recognise it. And to do that requires an understanding of how it is manifest in the applicable venue which, in turn, requires more than a little knowledge of the politics and culture of that venue. It would be nothing short of negligence were we to believe we can evaluate Asian conduct by western paradigm.

This paper will discuss some of the ways corruption works, particularly in infrastructure projects, and how we, as arbitrators, might deal with it. Corruption of arbitrators is also discussed. Indonesia is used as an example because that is the jurisdiction in which this writer is based, because the country is notorious for the depth and breadth of its corrupt systems, and also because there have been some high profile Indonesian infrastructure arbitrations recently as a result of the Asian economic crisis, and we may be seeing more in due course.

HOW CORRUPTION IS MANIFEST

Where foreign, or even local, contractors wish to invest in infrastructure projects, they normally seek a concession of some sort from the local and/or central government, such as an exclusive right over a certain geographical area, either for exploration and exploitation or for market. This concession is akin to a monopoly of sorts, or a license to control the area and receive "rents". The officials vested with the authority to grant such concessions also see that authority as their right to rents, or to obtain personal profit from the exercise appropriate to the quantum of the concession being awarded. This, of necessity, increases the cost to the host government or its people, since the investor will seek to recoup from project revenue, or even from project costs, the improper payments it has made.

When such a contract breaks down, which it is likely to do where its terms are stacked against the host country, the result of the collusion of unscrupulous foreign businessmen with officials acting contrary to the mandate of their position, can be devastating losses to their nation and its people. Failure on the part of a tribunal to recognise this can have, and has in fact had, disastrous results.

Corruption in the Awarding of the Project

Indonesian law requires any contract of greater than a virtually nominal value[3], that in any way affects the state treasury, to be bid at open[4] or limited[5] tender, and any contact that is not so tendered is invalid[6]. Tender is essential to ensure that both pricing and quality are competitive. In infrastructure projects tender is all the more necessary so that the populace affected will not be overcharged for, or deprived of, their basic needs.[7]

Probably only three or at most four of the 27 independent power projects awarded in Indonesia since the early 1990's were tendered. The rest were "arranged" through collusion and corrupt means. Interestingly none of those few projects that were tendered have been the subject of arbitrations thus far. Technically all of the contracts upon which the recent arbitrations have been held were thus illegal and invalid.

With or without tender, there is often something of an underground "auction" where the prospective investors not only have to compete for the official terms, but also for the underground payment to be made to the licensing or awarding officials themselves. This kind of corruption may be initiated by the officials, but is more often initiated by the foreign investors who, over the years, have learned that the easiest way to obtain a project is handsomely to reward those with the power to grant it. Often heads of state (such as Soeharto during his reign) or other powerful politicians simply order the granting authorities to award the contracts to companies owned or controlled by their family members or cronies.

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3 Indonesian Rupiah 50,000,000, roughly equivalent to U.S. $ 5,000.00 at current exchange rate.

4 Openly publicised and open to any number of bidders.

5 Requiring tender by at least five selected bidders.

6 See, *inter alia*, Article 33 of the Indonesian Constitution of 1945; the Indonesian Mining Law (Law No. 37 of 1967); the Oil and Gas Law (Law No. 44 of 1960) and Presidential Decree No. 16 of 1994.

7 See, *inter alia*, Asian Wall Street Journal, 9 February, 1994; Waldman & Solomon, US DEALS IN INDONESIA DRAW FLAK, Asian Wall Street Journal, 24 December, 1998; Dan Murphy, TROUBLE ON THE GRID, *Far Eastern Economic Review*, October 21, 1999; and Petrominer magazine, August 21, 1998, THE FATE OF 26 IPP PROJECTS, in which it is noted: "*In accomplishing the contracts, practices of collusion, corruption and nepotism were rampant, resulting in the high price of private electricity.*"

Foreign Government Intervention

Where substantial infrastructure projects are involved we may even find the government of the investor playing a role in the "corruption" by exerting political or economic pressure upon the host country government to award the contract to its nationals rather than to others. Some European countries, as well as Japan and South Korea, have long been noted for lobbying host governments to move business to their nationals, whether or not the host country even needs these projects. Recently the United States has joined in this kind of lobbying. "*Corruption can lead not only to individual agreements that are not the best deals that could have been negotiated, from the public point of view, but also to more capacity than needed, since each contract can carry some side payments. The former head of PLN has, for example, stated publicly that he was "told" to sign power agreements, even though it was clear that the total amount of power being contracted exceed likely demand and distribution capacity."*[8]

In April of 1995 the then CEO of Indonesia's state-owned electricity provider, *Perusahaan Listrik Negara* ("PLN") was summoned to Hanover, Germany to attend a ceremony with Soeharto, Helmut Kohl and then Technology Minister (and later President), Habibie, at which a number of projects involving Germany and Indonesia were signed. At the ceremony he was ordered to sign the contract for the Paiton II electricity generation plant, a substantial project to which he had never agreed[9].

Pressure by the U.S. government is normally aggressive and political in nature, tending to disregard the improprieties of the U.S. companies it is seeking to assist, despite the Foreign Corrupt Practices Act (FCPA)[10]. In 1994 U.S. government officials made several visits to Indonesia to try to push deals through for consortia led by U.S. companies. In January of that year there were three delegations of U.S. officials, one led by then Treasury Secretary Lloyd Bentsen, to try to push the Paiton I project[11]. In

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8 Louis T. Wells, PRIVATE FOREIGN INVESTMENT IN INFRASTRUCTURE: MANAGING NON-COMMERCIAL RISK, *paper prepared for World Bank conference in Rome, Italy, September, 1999;* Section 2.4.

9 See, *inter alia,* THE FATE OF 26 IPP PROJECTS in *Petrominer* Magazine, No. 08 of August 21, 1998, in which former President Director of PLN, Djiteng Marsudi is paraphrased as stating: "*This* (Paiton II) *project owned by Germany's Siemens, Britain's Power Gen and Bumipertiwi Tatapradipta, is controlled by Soeharto's son Bambang Trihatmodjo. The signing of the contract was conducted in 1995 during a state visit of the the then Indonesia's President Soeharto to Germany. Refusing to sign means suicide. This was how on the average the contracts with the IPP's usually came about."*

10 U.S. companies will try to persuade us that their conduct does not violate the FCPA because their payments are made to, and/or partnerships forged with, not the sitting government officials themselves but only their cronies and family members.

11 See Asian Wall Street Journal, 9 February, 1994, and Waldman & Solomon, US DEALS IN INDONESIA DRAW FLAK, Asian Wall Street Journal, 24 December, 1998 .

December of that same year, the late U.S. Secretary of Commerce, Ron Brown, came to visit Indonesia just at the time that the terms of several private geothermal power contracts were being negotiated with U.S. companies. Although many of the commercial terms were still in dispute and PLN could not accept the financial ramifications of the combination of 100% "take-or-pay" provisions with ease to expand scope of production being pushed by the foreign consortia, nor certain other terms, the U.S. government and OPIC, backed by the national oil company, Pertamina, which had a hand in the awarding (without tender) of these contracts in the first place, put political pressure on the Soeharto government to speed up the negotiations so that the contracts could be signed during Brown's visit. Much to the dismay of PLN, its then President Director was "ordered" to sign five such contracts[12] at a ceremony to mark Brown's visit, and to accept the terms being pushed by Pertamina and the foreign investors, regardless of their imbalance and the fact that doing so would result in production of more power than Indonesia would need in the proposed time frame, and for which inflated payment would have to be made in United States dollars in violation of applicable law[13].

Influential Partners

Most infrastructure projects in Indonesia have been granted to consortia involving one or more foreign company and one or more local company. Although most fields do not impose any legal requirement for a local partner, it is often made clear to the foreign party or parties that they will only be awarded the contract if they take a designated local entity as partner. These entities normally belong to a crony or family member of one of the top governing officials: if not of the President, then of the Vice President or a powerful Minister.

> "*The independent power programme attracted a swarm of Suharto cronies in the early 1990's. Virtually all 27 private power contracts have relatives of former President Suharto or cabinet ministers as partners and virtually none of them were awarded on the basis of competitive bidding.* 'The way to get your project approved was to have very strong political back-up , or a member of Suharto family on your team' *says Djiteng Marsudi, a former PLN president who oversaw the contracts. 'I couldn't stop it.' "* [14]

It was recently noted in the international press how surprising it was that there was no participation of the Soehartos in any of the fixed-line telecommunications joint

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12 For the Dieng, Kamojang, Karaha Bodas, Patuha and Wayang Windu projects.

13 Presidential Decree No. 37 of 1992.

14 Dan Murphy, TROUBLE ON THE GRID, *Far Eastern Economic Review*, October 21, 1999.

operations (known as "KSOs") awarded to foreign contractors.[15] Probably the "family" knew at the time that only cellular services, in which they are heavily involved, would prove profitable and thus were not interested in the KSO programme. But the fact remains that it has long been universally understood that without the "right" partner no contractor - foreign or local - would be likely to win a major project, tendered or not. Needless to say, the "right" partner is not an inexpensive proposition.

Free Carry

And make no mistake: the local partners rarely, if ever, make any capital contribution to the project. They will normally be given a share of between 10% and 30% of the project in return for their "liaison" services only. Usually these local partners will also be paid princely sums up front, and/or given the opportunity to convert part or all of their share to cash at an early juncture, such as by selling a portion back to the foreign parties at inflated value. This "free-carry" and other outlays must be grossed-up into the pricing. Other opportunities to profit at initial stages may also be granted. In one major coal-powered electricity project the local partner's affiliate was appointed as the sole supplier of coal. And in many, if not all, private power projects, including those subject to recent arbitrations, the local partners' affiliates or principals were granted various ambiguous consulting contracts at high rates. All of this is costed to the project and will eventually be borne by the populace.

Overpricing and Fictitious Payments

Another form that corruption may take is overpricing in supply and service contracts. Generally one member of a contractor consortium will act as, or designate an affiliate to be, main contractor for the procurement and construction. In this way that partner stands between the project company and its suppliers and service providers, often re-invoicing the project at highly inflated costs for plant, equipment, supplies and services. Japanese, French and German contractors are notorious for such practices, and we are seeing a similar trend with U.S. based companies as well.

The foreign partner, or its parent, may act as intermediary in "arranging" the financing for the project, and charge inordinately large commissions and/or finder's fees for such "services". In one of the cases which went to arbitration more than U.S. $ 40,000,000 of such fees were claimed as "costs", while such funds had simply been moved from

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[15] See Asian Wall Street Journal, 15 April, 2002: TELKOM WILL TAKE CONTROL OF PRIVATE PHONE COMPANY: *"Foreign Bidders: Eager to get a piece of Indonesia's then-booming economy, dozens of foreign companies had bid to be Telkom's KSO partners. In a surprise outcome, none of the foreign winners were partnered with relatives of then-President Suharto, a rare case in which his family didn't get a role in infrastructure development."*

one pocket to the other of the claimant's group. In the end this double windfall to the foreign claimants will fall upon the Indonesian taxpayers to bear.

Project funds may also be siphoned off into private pockets through the creation of fictitious payments and obligations. Fake invoices and receipts are easy to generate, and commonly used to justify skimming of cash in every kind of business, at least in developing countries. Where questioned, the burden of proof to establish the authenticity of these should be shifted to the party claiming reimbursement for any such alleged payments. In one of the recent arbitrations the claimants claimed over U.S. $ 8,000,000 for unexplained consulting fees paid to related parties. In the same reference, claimants were also awarded over $ 7,000,000 as reimbursement for alleged purchases of project-related land, despite the fact that the underlying contracts make it very clear that all land would be provided by, and be and remain the property of, Pertamina. No land title documentation was provided and very substantial payments were justified by the presentation of unofficial receipts allegedly issued by local community officials and some only by book entries with no receipts at all. Those payments were characterised by independent financial advisors from a "Big-5" accounting house as more than suspicious and as one of the more common means applied in Indonesian projects to hide corrupt payments and/or skim off cash.

WHAT SHOULD A TRIBUNAL DO WHEN THERE IS ANY INDICATION OF CORRUPTION?

Jurisdiction

Where the corruption is clear and is of a nature that calls into question the validity of the underlying contract, the question which faces the tribunal is whether or not they have jurisdiction to adjudicate a dispute falling under such contract. If, under the governing law, the corruption or illegality is of a nature that gives rise only to the right to invalidate the contract, clearly under the doctrine of separability the arbitration may continue and the tribunal is then faced with the question of how to treat the corruption as a legal or factual matter. On the other hand, where under the governing law the nature of the corruption voids the contract in its entirely *ab initio,* then the question becomes whether the arbitration clause ever existed and consequently whether the tribunal has jurisdiction to adjudicate at all. The writer is advised that Mr. Kreindler has discussed this issue very thoroughly in his paper for this session and thus we need not cover the the same ground here. We must not neglect to consider, however, the omnipresent potential conflict between the interest of every arbitrator to earn his arbitration fee and the interests of justice which might rightly call for relinquishment of jurisdiction in some such cases.

Let us then consider the situation where the corruption or illegality does not obliterate the arbitral jurisdiction, but indeed calls into question substantive matters affecting the rendering of the award.

In-Depth Examination

It is clear that, like most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected. That is why the kinds of payments referred to above are made in such circuitous manner. It is an unfortunate fact of life that probably the majority of infrastructure projects in developing countries contain elements of such corruption. Possibly all do. How can we, as arbitrators sitting on tribunals established to adjudicate disputes that have arisen under such projects, ensure that we do not allow ourselves to overlook such corruption and, by so doing, perpetuate the damage that has been inflicted thereby?

Requiring a party which was not party to the questionable transaction and who has no access to data or documentation maintained by the other party to present evidence or prove the corruption of such activities is not only unrealistic but may be tantamount to aiding and abetting such corruption. This is particularly true in civil law jurisdictions where there are no discovery procedures to allow access to documentation in the possession of the other party. It is in this kind of situation that we, as arbitrators, must take particular care not to allow ourselves to be "railroaded" or tricked by the same kind of unscrupulous conduct that brought about the corrupt practices in the first place.

Clearly if we are to uphold justice, and not only the letter of questionable contracts, the most rigorous examination must be made in any case which smacks of corruption or illegality. Such an examination cannot be restricted only to documents and evidence presented by the parties themselves. Certainly the corrupt party will make every effort to obscure or disguise the corrupt conduct. And often the party victim of such corruption, which in infrastructure projects may be the government-related party, will have been denied access to the evidence necessary to establish it and/or, worse, prohibited from presenting what evidence they may have by the very officials who benefited. Where there is any indication of corruption at all, it would be nothing short of negligent were we simply to look the other way and reward possible wrongdoers for their misdeeds. Often a study of the history of the institutions involved, and of the local and international press which tends diligently to police such situations in its role as purveyors of transparency, can enlighten us to the reality of the situation when the evidence produced by the parties is lacking. At the very least,

before embarking on an assignment to arbitrate a major infrastructure dispute, we will need to know who holds what power in the subject society and, and how the exercise of such power is funded.

Shifting of Burden of Proof

Because of the near impossibility to "prove" corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met.

For example, where the allegation is failure to tender, had tender in fact been held it would be a simple matter for the tendering party to produce its tender documents and official notice of award to disprove the allegation. But how can the party not involved "prove" the negative: that no tender was in fact held? Where the allegation is overpricing, the party handling the payment need only show that the purchase price paid by it and the price charged to the project do not differ by a material amount. Where true, such proof is easy to obtain. But how can the party who did not handle the transaction prove how much "discrepancy" was pocketed by the contractor?

Sanctions

In many jurisdictions, and certainly in Indonesia, no jurisdiction to impose criminal sanctions is granted to an arbitral tribunal. Their jurisdiction may only cover commercial matters and only those which the parties themselves would have legal authority to settle[16]. Thus only commercial sanctions may be imposed or financial relief denied, as appropriate. Mention of the misconduct may be made in the award and, if verging on serious criminal behavior, the court in which the award is sought to be enforced may take it upon itself to take action against the offender. This writer has not heard of any such case, but it would not be inappropriate in certain situations.

At the very least, whatever action a tribunal deems appropriate to take, it should guard very closely against rewarding an arbitrant for corrupt or illegal practices. Questionable payments which a claimant fails to substantiate and funds that have been siphoned off by a claimant should not, under any circumstances, be awarded to them again.

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16 Article 5, Law No. 30 of 1999 (the Arbitration Law.)

MISCONDUCT/CORRUPTION OF ARBITRATORS

Financial corruption

Of the types of misdeeds that may occur in the conduct of an arbitrator, the most intolerable is financial corruption. We must always keep in mind the omnipresent interest of every arbitrator to earn his fee and the ramifications that may have: tendency to assume or confirm jurisdiction so that the fee may be earned; prolonging and complicating, or allowing a party to complicate, a reference so as to bill more days or hours (where the fee is based on time); leaning towards a party or its counsel that is more likely to have the opportunity to re-appoint the arbitrator in a future reference[17]; as well as the rare (let us hope) but nonetheless occasional case in which an arbitrator's income will be directly proportional to the award. This latter is, by definition, the most difficult to identify and certainly to prove, but it is also the most devastating to balancing the rights of parties and to the interests of justice.

Financial corruption can be all the more likely in references in which each party directly pays the fees of its party-appointed arbitrator and only the fee of the chair is shared. This can lead to a perception on the part of a party-appointed arbitrator that he should be acting as advocate for the party that appointed (and pays) him.

The writer has reviewed a number of contracts, particularly those prepared by UK firms, that call for arbitration before two party-appointed arbitrators and only if those two do not agree will they mutually appoint a third who will act as "referee", while the two party-appointed arbitrators become advocates for their own point of view. This arrangement may have had some success in the "old days", before U.S. litigators got into the act and arbitration was widely understood to be a cooperative effort between gentlemen counsel mutually seeking to reach the "truth", rather than the "no-holds-barred" all out war it has become today. In today's world this system is nothing short of dangerous. It should not be encouraged in any situation for it will certainly breed intellectual corruption if not outright financial corruption.

Intellectual Corruption

Intellectual corruption is certainly far more common. Pre-conceived notions, prejudices and opinions of an arbitrator will always threaten to color his impartiality and ability to see the matter in a clear and balanced manner. We seem to be seeing this more and

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[17] For example the scandal relating to HMO arbitration with Kaiser Permanente and other HMO medical providers in California in recent years (see various reporting by Transparency International: *http://www.transparency.org/press_moni.html*).

more where western arbitrators sit to adjudicate disputes between western and "third-world" parties. Intellectual corruption in these cases may range from simple cultural misunderstanding through cultural bias to actual racism. There is, unfortunately, still a widespread prejudice on the part of many westerners who perceive that third world cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. A western arbitrator may pay greater credence to a western witness than to an Asian one, even where the local witness may be a recognised expert in his or her field. The western witness not only speaks the same, or a similar language, as the western arbitrator, but also approaches his analysis from the western point of view, even though this may be completely irrelevant to the project or contract at hand. Our challenge is to guard against falling into this ethnocentric trap.

The courts of any country are often suspected of being nationalistically biased. But court judgements will be subject to review by a higher court, whereas an arbitral award invariably will not. Therefore, although arbitrators have more freedom to allow their personal prejudices to govern, we must be very much on our guard against such a tendency precisely because there is no effective review of the awards which we render.

It is thus our duty, if we accept an appointment to adjudicate a dispute involving a culture of which we are not conversant, to make every effort to familiarise ourselves with the cultural idiosyncrasies of the parties. And when governments or government-related bodies are involved, a study of the history and political environment is also essential.

For example, a visitor to Indonesia, such as a foreign arbitrator, will see it as a single homogeneous culture. But everyone living or working in Indonesia is aware of the vast cultural diversity to the extent that one needs to know from which of Indonesia's hundreds of ethnic groups[18] a person comes in order even to understand what he or she says. Javanese (from central and east Java) are the most self-contained and courteous people in the world and will rarely give an open and full response to any question, for fear of offending someone. On the other hand, the Bataks (from north Sumatra) are extremely outspoken and forceful. Other cultures fall somewhere in between or have their own idiosyncrasies. How can a foreign arbitrator unfamiliar with the culture hope to assess witness testimony without in-depth study of the local culture?

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[18] According to the U.S. Central Intelligence Agency, there are over 300 distinct cultures. See Vreeland et.al., AREA HANDBOOK FOR INDONESIA, Third Edition, Washington, D.C., 1975.

WHAT SHOULD AN ARBITRATOR DO WHEN FACED WITH CORRUPTION ON THE TRIBUNAL?

This is, of course, the most difficult question to address. If one arbitrator in a panel of three suspects one of the others of corruption, prejudice or even bad faith, the first course of action would be to discuss the matter directly with the offending arbitrator. If after such discussion, the concerned arbitrator is not satisfied, he must look to the law and the rules governing the reference. If the reference is administered by an institution, the matter should be brought to the attention of it supervisory board. If an *ad hoc* arbitration and no guidance is provided in the governing law or rules, however, what can be done? As long as the second arbitrator sees eye to eye with the investigating arbitrator, no harm may be inflicted on the parties if the award reflects the views of their non-corrupt majority. However, if the offending arbitrator is able to influence the third arbitrator to his point view, and a miscarriage of justice will result from the award, the investigating arbitrator is left with a difficult dilemma. Of course he may write a dissenting opinion. Or possibly make a report to the law society with jurisdiction over the offending arbitrator. Unfortunately many arbitrators are not lawyers and there may be no professional organisation to which they are answerable.

There is no easy answer to this question, and as a result it is probable that such conduct normally passes un-remedied and un-sanctioned. But this must, of necessity, result in a miscarriage of justice and leads to perpetuation of the corrupt conduct. One solution might be for the arbitrator who believes there has been corruption by one or more of the others, and that corruption has resulted in an unjust award, not only to write a dissenting opinion, stating his perception therein, but also to step down from the tribunal, making his reasons clear. This may or may not rectify the damage in the instant case, but it would at least bring the offender to the public view and perhaps prevent further such damage.

There has been considerable discussion in recent arbitration conferences about the need for a mechanism for review of arbitral awards which are not otherwise subject thereto. As the New York Convention[19] imposed certain standards for enforcement of foreign arbitral awards, and the UNCITRAL rules have provided an international standard of procedural rules for *ad hoc* arbitrations, perhaps the time has come to go the next step, by providing an UNCITRAL-based award review board to ensure such misconduct as corruption, breach of natural justice and willful disregard for governing law, shall not pass unrectified.

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[19] 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

CONCLUSION

Arbitrators hold a unique position in international commerce. The jurisdiction with which we are often invested spans international cultures and a multitude of diverse laws and legal systems. No judge in any court has such responsibility. Part of that responsibility is to ensure that corrupt practices cannot take hold of the arbitral process. Where arbitrating in a culture with which we are not familiar, it is not an easy task to identify the corruption and deal with it in an effective way. We must exercise the most rigorous degree of sensitivity and scrutiny so as not to fail.

This responsibility seems to feed a growing trend among some western arbitrators to consider that international arbitration stands above the law of any individual jurisdiction, and that such arbitrators are more powerful than the governments and courts of the jurisdictions in which they operate, and thereby qualified to make awards unencumbered by local laws, policies, politics and customs. But arbitrators are only human. But we must not forget that we, too, are fallible and not allow the position of power granted to us as arbitrators to create in us such arrogance as to eclipse the fact that we are still subject to the laws of the lands in which we operate. When we enter into a culture which we do not understand, operating under laws with which we are not familiar, with an attitude towards respect for and compliance with such laws that is also alien to us, and particularly those with a history of corrupt practices, we can no longer rely entirely upon our own judgement and instincts which have been forged in our own and similar societies.

Cultural understanding and sensitivity, or the lack thereof, is perhaps the single major cause of international disputes in the first place. Let us not fall into the same trap as does the western businessman who closes a deal in unknown territory without first doing his homework. Without judicial review of our awards we are under a far higher obligation to be as diligent and vigilant as we are able to ensure that we do not become an unwitting party to corruption and injustice.

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