

## **YCAP 2017 FALL SYMPOSIUM: Panel on Building Your Arbitration Practice in International Arbitration - Post Event Report 2**

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Allegations of corruption are a growing concern in the international arbitration community. Last November, YCAP and YAF members convened at the 2017 Fall Symposium to discuss the topic of Corruption and Money Laundering related to international arbitration. In a discussion moderated by Vasuda Sinha (Freshfields Bruckhaus Deringer LLP), panelists Pierre-Olivier Savoie (Savoie Arbitration) and Eric van Eyken (Clyde & Co) discussed recent trends and developments on this topic.

The panel began by assessing some of the ways in which corruption impacts various actors in investment arbitration, including the roles of tribunals, respondents, and claimants. As allegations of corruption are in most cases difficult to prove, what is the appropriate standard of proof that tribunals should deploy when dealing with allegations of corruption and money laundering? How might tribunals weigh multiple levels and scales of corruption absent a unified standard? *Belokon v. Kyrgyz Republic* (“Belokon”) was raised as an example of a case where tribunals and courts differed on the treatment of corruption allegations. Other notable cases discussed included *Republic of Croatia v. MOL Hungarian Oil and Gas Company Plc*; *Djibouti v. DP World*; and *BSG Resources v. Republic of Guinea*.

Similarly, panelists considered how states may use corruption allegations as a defence to claims brought against them. Implicit and explicit references to the legality defence were contemplated, with specific questions around whether such a defence could be raised at the merits or the jurisdictional stage of proceedings. The key cases discussed were *Alasdair Ross Anderson and others v. Republic of Costa Rica*; *World Duty Free Company Limited v. Republic of Kenya*; and *Niko Resources Ltd. v. Bangladesh*.

In contrast, strategic and evidentiary requirements were raised as considerations for claimants finding themselves accused of corruption. For instance, an award stemming from an inherently corrupt relationship is considered in violation of international public policy, and can be set aside, as illustrated in *Belokon*. *Kim v. Uzbekistan* was another dispute raised under this sub-topic.

Panelists next addressed how corruption impacts the ethical practices of counsel and tribunal members. The example of *Foresti v. South Africa* was raised to highlight the importance of disclosure obligations. The ethical duties for tribunals were also examined by the panelists, including what steps tribunals might take *sua sponte* if they suspect corrupt practices within a relationship giving rise to arbitration. As tribunals are generally reluctant to deal with bribery and corruption issues where they do not form a substantive part of the case before them, it was questioned whether proactive tribunal initiatives to sanction corrupt practices would be curtailed by the principle of *ultra petita*. The cases discussed included *Nova Group Investments, B.V. v. Romania* and *Hydro S.r.l. and others v. Republic of Albania*. The panelists also highlighted state initiatives to dissuade bribery and corruption within arbitral tribunals, including legislation in the UAE and Peru.

The panel concluded with a brief discussion on how issues of corruption risk compromising the finality and enforceability of an arbitral award, including public policy grounds for setting aside or refusing to enforce a corruption-tainted award. As the case in *Belokon* illustrates, allegations of corruption within arbitration will constitute international public policy grounds for setting aside an award, though the proper standard of review of an arbitral award when the legality of the award is challenged based on corruption remains subject to debate. Further arbitral and judicial developments in this field will continue to impact the manner in which the arbitration community ultimately tackles corruption and money laundering.

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