

**CONFERENCE REPORT:
HANDLING ALLEGATIONS OF CORRUPTION IN ARBITRATION AND
JUDICIAL DISPUTE SETTLEMENT**

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I. Introduction

On February 18, 2019, the Center on International Commercial Arbitration¹ (Arbitration Center) and the U.S. & International Anti-Corruption Law Program² (Anti-Corruption Program) co-sponsored a panel titled “Handling Allegations of Corruption in Arbitration and Judicial Dispute Resolution” at American University Washington College of Law (AUWCL). It was the first time the Arbitration Center joined forces with the Anti-Corruption Program to provide expert analysis on the cross-cutting issue of corruption. Thanks to this cooperation, it was possible to bring together an interdisciplinary panel of expert practitioners, including a U.S. district court judge, academics, and arbitration practitioners to explore corruption issues in both international arbitration and domestic litigation and postulate the consequences that such issues can have across diverse legal fields, the economy, and government.

AUWCL Professor Susan Franck opened the event by stating that the panel occurs at a time when the world is witnessing a sharp rise in nationalist sentiment and a “resurgence” in calls for the removal from international legal bodies. Franck acknowledged however, that at the same time, there are increased calls for active arbitral tribunals and judiciaries to parse out the issues in resolving disputes containing allegations of corruption. Examples Professor

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¹ For more information on the Center on International Commercial Arbitration, see online at www.wcl.american.com/arbitration.

² For more information on the U.S. & International Anti-Corruption Law Program, see online at www.wcl.american.com/anti-corruption.

Franck pointed out include the EU proposal for an investment court, calls for an international court of civil justice, and an international corruption court. Quoting a World Bank study that found corruption costs the world economy about \$2 trillion per year,³ Professor Franck acknowledged that corruption still maintains a stronghold in international economics. Franck concluded that because of these ongoing developments, this panel's exploration of complex corruption issues that arise out of international economic law is both timely and relevant.

Nancy Boswell, Director of the US and International Anti-Corruption Law Certificate Program and Adjunct Professor at AUWCL, moderated the panel. In her introductory remarks, Boswell underlined the "central importance" of corruption as an issue that may arise in both arbitration and domestic court proceedings. She pointed out that corruption affects not only the business community, but also environmental and human rights protection efforts.

Boswell continued by taking stock of where the international community currently finds itself in relation to handling allegations of corruption. She emphasized that achieving international consensus on issues of corruption remains a key challenge. Although there is still no universal definition for corruption, Boswell commented that international consensus has been reached on the fact that corruption is harmful, wrong, and an unacceptable cost to pay. She stated that consensus has also been reached in legal regimes, citing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,⁴ Inter-American Convention Against Corruption,⁵ and the UN

³ To illustrate this point, the United Nations (U.N.) Secretary General António Guterres stated on the International Anti-Corruption Day on December 9, 2018, that the World Economic Forum estimates the global cost of corruption is at least \$2.6 trillion, or 5 percent of the global gross domestic product (GDP). He further indicated that according to the World Bank, businesses and individuals pay more than \$1 trillion in bribes every year. See *Secretary-General's Message for 2018*, available online at

<https://www.un.org/en/events/anticorruptionday/messages.shtml>.

⁴ Adopted on December 17, 1997, *U.N.T.S.* vol. 2802, I-49274.

⁵ Adopted on March 29, 1996, *OAS Series B-58*.

Convention Against Corruption⁶ as prime examples. Although none of these conventions explicitly define corruption, Boswell noted that these conventions do enumerate criminal acts, which include active and passive bribery.

Despite these hard-fought developments, Boswell made it clear that the anti-corruption field is a work in progress, highlighted by the significant cultural differences among nations with respect to corruption. She called attention to these differences when looking at some of the provisions of the Foreign Corrupt Practices Act (FCPA).⁷ While this legislation contains an exception for facilitation payments, such payments might be viewed as bribes in other countries or regions of the world. Additionally, while the FCPA prohibits giving gifts to foreign officials, this may be seen as customary in other cultures. Boswell concluded that these cultural differences and approaches to corruption are particularly important when such an allegation arises before a court or arbitral tribunal.

II. Cross-Cutting Issues of Corruption in Judicial and Arbitral Dispute Settlement

Lucinda Low, Partner at Steptoe & Johnson LLP, began her remarks by putting the discussion about corruption into the context of the intersection between white-collar crime and international arbitration. In tracing the development of international standards and national laws on corruption, Low opined that the process began with the concept of criminalization. This process included the criminalization of various acts of corruption, provided infrastructure for cooperation among countries in corruption investigations, and established some limited preventative measures.

Low then noted that criminalization prompted an increase in enforcement activities by national governments for those who have political will and capacity to investigate. She commented that multi-jurisdictional cases are increasing because multiple countries can have jurisdiction over the same criminal conduct, as long as

⁶ Adopted on October 31, 2003, U.N. Doc. A/58/422; *U.N.T.S.*, vol. 2349, p. 41.

⁷ Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1, et seq.

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the crime crossed national borders. This has led to a spillover effect, where some civil cases that included allegations of corruption have prompted criminal prosecutions under national law. Low highlighted this stage of development by the *Aluminum Bahrain B.S.C. (Alba) v. Alcoa, Inc.* case. In this case, Alba, an Alcoa customer, sued Alcoa in the United States claiming that the contracts they entered into were tainted by corruption and sought damages. The civil case led to a criminal prosecution and Alcoa ultimately paid substantial fines.⁸

Low noted that in a majority of international disputes, arbitration is a more popular form of dispute resolution than litigation. In recent years, she commented that there has been a large increase in corruption allegations arising in both commercial and investor-state arbitration disputes. One case that will play out over the coming years and led to new developments in the prevention and sanctioning of corruption is the Brazilian *Odebrecht* case.

Low explained that the corruption issue is typically asserted as a defense in arbitration. In commercial arbitration, it may be an agent suing for money under an agency contract and the respondent's defense is that the agent acted corruptly, or that the contract was procured by corruption. In the investor-state context, Low noted that typically the state claims that the investment was either procured through corruption or performed in a corrupt manner. If the investment treaty requires that the investment be made in accordance with the local law, these state claims raise issues of jurisdiction. Otherwise, Low explained, the corruption defense raises issues of claim admissibility and the question for the tribunal to decide becomes whether corruption is a concept of international public policy. Low noted that sometimes the tribunal raises the issue of corruption by itself. The possibility of *sua sponte* action by the tribunal depends on the powers and duties of

⁸ See Department of Justice Press Release, *Alcoa World Alumina Agrees to Plead Guilty to Foreign Bribery and Pay \$223 Million in Fines and Forfeiture*, January 9, 2014, available online at https://star.worldbank.org/corruption-cases/sites/corruption-cases/files/ALBA_Alcoa_US_DOJ_SEC_Settlement_PR_Jan_9_2014.pdf.

arbitrators. In fact, Low indicated that arbitrators may be at risk if they do not further investigate “red flags”, or indicators of corruption.

Low then discussed how issues of proof are central to dealing with corruption allegations in arbitration. When corruption allegations are raised in arbitration, and the home or host government has done no investigation, the tribunal is left to its own fact-finding resources. In these circumstances, Low commented that there are big debates among parties and institutions as to what the burden or standards of proof are to prove corruption. These are some unanswered and contentious questions that Low stressed are key for the legal community to work out in the coming years.

When a tribunal reaches a finding of corruption, Low stated that the tribunal must determine the consequences of this wrongdoing. An example of the consequences for a finding of corruption may be the dismissal of the claim for lack of jurisdiction, even if the party performed under the contract, or the state received benefits under the contract. Low noted that the key case that dealt with findings of corruption is *World Duty Free v. Kenya*.⁹ In this investor-state case, a principal shareholder of the claimant submitted an affidavit admitting that he paid a bribe to the President of Kenya. The principal shareholder claimed that it was a customary payment for doing business in the country. The tribunal concluded that paying the bribe violated public policy and dismissed the claim. Strikingly, Low mentioned that the tribunal refused to attribute the conduct of the President of Kenya to the state, and as a result, Kenya got to keep benefits conferred under the contract by World Duty Free until that point in time. This decision was highly controversial and left arbitrators, practitioners, and academics wondering what the consequences should be in such cases. Low concluded her comments by highlighting that because states now perceive corruption defenses to be a “get-out-of-jail-free-card,” states will lodge aggressive investigations into investor companies when there are legal disputes in order to build a corruption defense that can defeat an arbitration claim.

⁹ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award of October 4, 2006.

III. Corruption and the Judiciary

The Honorable Judge Carlos Acosta, an Associate Justice at the United States District Court for the District of Maryland, began his discussion of corruption allegations before U.S. courts with a reference to a U.S. Senate Report which stated that when bribes are paid, contracts don't go to the most efficient producer but to the most corrupt. For these reasons, Judge Acosta stated that enforcing anti-corruption measures is sound public policy that also protects taxpayers.

Discussing the history of the FCPA, Judge Acosta mentioned that some of the key reasons why this legislation was passed was due to cases of foreign bribery by Lockheed Martin and Chiquita. These cases gave rise to public uncertainty and dissatisfaction in the conduct of U.S. public companies doing business abroad, and ultimately led to the passage of the FCPA in 1977. Explaining the two central prongs of the FCPA, transparency of securities and bribery of foreign officials, Judge Acosta narrowed the scope of his comments to the latter. Judge Acosta pointed out that when looking at the regulation of bribery of foreign officials under the FCPA, the law does not ban facilitation payments, otherwise known as "greasing the wheel" payments. He stressed that although the FCPA may not prohibit these forms of payments, national laws may, and so any U.S. business or individual doing business abroad should be very cognizant of the legal regime that they are working under.

Delving into some major cases under the FCPA, Judge Acosta highlighted the 2008 Siemens AG case, which resulted in a \$450 million fine.¹⁰ He also noted the 2012 Marubeni Corporation FCPA violation, which resulted in a \$54 million fine for acting as an agent for a joint venture in Nigeria, where the corporation paid \$51 million in bribes to Nigerian officials.¹¹ Judge Acosta noted

¹⁰ See *SEC Charges Siemens AG for Engaging in Worldwide Bribery*, Press Release No. 2008-294, SEC Docket, (2008), available online at <https://www.sec.gov/news/press/2008/2008-294.htm>.

¹¹ See *Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty*, Press Release No. 12-060, Dep't of Just. Docket (2012), available online at

that courts do not often hold formal trials in these cases. Instead, the suspect companies are offered deferred prosecution agreements in order to talk, pay a substantial fine, and ultimately avoid jail time. Reflecting on his time as a prosecutor, Judge Acosta stated that the difficulty in FCPA cases is proving the corrupt conduct or scheme.

Turning to a major government procurement corruption case, Judge Acosta discussed the Fat Leonard scandal. This scandal involved Leonard Glen Francis, a Malaysian national, and his company Glen Defense Marine Asia, which supplied U.S. Navy ships with rations, supplies, and services when they came into ports across the Pacific Rim region. In order to win these resupply contracts, Francis bribed high-ranking members of the U.S. Navy with vacations, shows, prostitutes, cigars, and cash payments. More than 550 members of the U.S. Navy were investigated in this scandal, 33 of whom were prosecuted.¹² Judge Acosta alluded to how the Fat Leonard scandal and other cases in the federal procurement arena highlighted major areas of fraud in government procurement work. These areas include violations of the Buy American Act, unmet labor standards, overbilling, double-billing, price gouging, counterfeit products, and kickback schemes.¹³ Judge Acosta concluded that the U.S. government fortunately has the resources to investigate when there is a complaint of wrongdoing in the U.S., which ultimately leads to court proceedings and convictions under the U.S. anti-corruption legal regime.

IV. Corruption Allegations in International Arbitration

The third speaker, Aloysius (Louie) Llamzon, a Senior Associate in the International Arbitration group at King & Spalding LLP, began by noting that it is alarming to both

<https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546>.

¹² See Craig Whitlock & Kevin Uhrmacher, *Prostitutes, Vacations and Cash: The Navy Officials 'Fat Leonard' Took Down*, Wash. Post, Sept. 20, 2018, available online at

<https://www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/>.

¹³ Buy American Act, 41 U.S.C. §§ 8301–8303 (2012).

arbitrators and practitioners when corruption is alleged, or even when the issue of corruption is raised in international arbitration cases. Llamzon traced some of the history of corruption in international arbitration and commented that it has been an issue in this field since the 1960s. Despite this, the first landmark case that addressed corruption in international arbitration, *World Duty Free Ltd. v. Kenya*, was not concluded until 2006.¹⁴

Llamzon discussed the differences between investment and commercial arbitration in relation to a finding of corruption and noted that the investor-state arbitration system was designed in part to minimize global corruption forces. However, Llamzon highlighted an interesting aspect of how this dynamic has unfolded over the years when he pointed out that states assert corruption defenses against investors for conduct in which public officials are equally complicit more than two-thirds of the time. Distinguishing commercial arbitration corruption cases, Llamzon noted that most of these cases arise out of “contracts for corruption” that take the form of agency agreements between a seller and an agent who helps to secure a contract for the seller by peddling insider influence. When the agency contract is not fully performed or upheld, these contracts are sent to arbitration. A second, less common type of commercial arbitration corruption case is the type of case where corruption taints the consent of a party. Llamzon noted that these cases are similar to common law cases of contractual fraud.

Llamzon next questioned whether there are real differences between the consequences of investor-state and commercial arbitration corruption cases. He started by noting that corruption can be seen as an issue of jurisdiction, admissibility, or the merits in the investor-state context. However, Llamzon noted an interesting caveat related to state responsibility in investor-state corruption cases: in such cases, a finding of corrupt conduct by a public official, or even a head of state, is not attributed to the state

¹⁴ *World Duty Free Co. Ltd. v. Rep. of Kenya*, ICSID Case No. ARB/00/7, Agreement for the construction, maintenance, and operation of duty-free complexes at Nairobi and Mombasa International Airports (Oct. 4, 2006), available online at <https://www.italaw.com/documents/WDFv.KenyaAward.pdf>.

itself. In the commercial context, on the other hand, Llamzon explained that the contract is usually voidable or void ab initio as a principle of public policy because such a case is examined through the lens of national law. Yet even in such circumstances where the contract is voidable or void ab initio, the seller may be able to obtain non-contractual remedies for the cost of the goods they sold or other minor costs they incurred.

Llamzon concluded with a discussion on the impact of domestic proceedings connected to arbitral decisions in which he considered two distinct corruption situations. In the first situation, which is similar to *Siemens v. Argentina*, an investor wins an award and later pleads guilty in a national investigation of corrupt conduct related to the same contract, after which the investor is obligated to withdraw their acceptance of the arbitration award.¹⁵ In the second situation, which is similar to *Niko Resources Ltd. v. Bangl. Petroleum Expl. & Prod. Co. Ltd.*, the arbitral tribunal takes a more nuanced view of corruption. In this situation, the tribunal holds that even if an investor pleads guilty in national courts to engaging in corrupt conduct while securing a contract, the corruption must taint the investment itself through an element of causation for the guilty party to be forced to relinquish all claims to an arbitration award.¹⁶ If the opposing party cannot prove that causation connects the corrupt conduct to the investment, the arbitration can proceed.

V. Proving Corruption: The Role of Financial Experts

The final speaker of the panel, Boris Steffen, the Senior Managing Director of GlassRatner Advisory & Capital Group, discussed the roles and responsibilities that financial experts have responding to corruption allegations and conducting relevant

¹⁵ *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Termination of a contract for Siemens to implement an immigration control, personal identification, and electoral information system, including national identity cards (Jan. 17, 2007), available online at

<https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf>.

¹⁶ *Niko Res. Ltd. v. Bangl. Petroleum Expl. & Prod. Co. Ltd.*, ICSID Case No.

ARB/10/18, Gas purchase and sale agreement, available online at

<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB%2f10%2f18>.

investigations. Steffen first touched on the role of a financial expert in these cases, noting that financial experts must refute allegations of fraud by using their auditing and accounting skills to establish fact patterns and relationships. Steffen stated that there is a clear red line in the role of such experts, cautioning that it is outside of a financial expert's role—and potentially an ethical violation—to draw any conclusions regarding the existence of fraud. Such conclusions require legal interpretation, and therefore are outside of financial experts' realm of expertise.

Steffen then examined the three methods that financial experts use to collect evidence. The first is data mining, whereby the experts electronically review large data sets comprised of emails, ledgers, and other documents to determine relationships between individuals and other pertinent facts about the case. Steffen explained that the second method of evidence collection is an analysis of financial statements, which financial experts use to highlight unexpected or unanticipated financial relationships between assets and liabilities, sales forecasts, and costs. The third method of collecting evidence is by refining the scope of the investigation. Steffen noted the equal importance of interviews when conducting such investigations and stated that strategic interview methodology begins with interviews of third parties who could have pertinent knowledge regarding the facts at issue. After financial experts complete the third-party interviews, they interview any suspected parties followed by direct actors in the dispute.

Steffen explained that financial experts typically disclose “badges of fraud” or “red flags” that are indicative of fraud when reporting or testifying regarding the investigation. Examples of such red flags include unsupported expense reimbursements for charges that occurred around the time that a contract was awarded, or contracts that were awarded to a consultant whose expertise was not consistent with the contract requirements.

Steffen then listed the three methodologies that financial experts use when attempting to trace or recover assets, which include turning an inside witness, executing a covert sting operation, or conducting an asset-tracing operation using auditing

methods. Steffen explained that, depending on whether the corruption scheme is classified as an illicit (on-book) or undisclosed (off-book) scheme, some of these methodologies may be preferred over others.

Steffen ended by commenting on the difference between conducting an investigation in an arbitration setting or in a judicial proceeding. In arbitration cases where an interested individual or entity is not party to the arbitration agreement, financial experts may have to deal with issues that arise regarding safeguarding assets and proving claims. Such issues may require a party to use only information within their possession to prove a claim if a tribunal views an investigation into evidence of alleged corrupt conduct to be outside the scope of the underlying arbitral dispute. In order to safeguard assets, the interested party may have to go outside four corners of the arbitral proceedings and request that a national court freeze the assets. This could alert the opposing party to the corruption allegation and lead to the sale or disposition of the relevant assets.

VI. Conclusions

Nancy Boswell concluded the panel by noting that there is currently some consensus on the harm that corruption causes, the need to do something about it, and the relevant legal framework. However, Boswell stated that we are still in the early stages of standardizing the enforcement mechanisms of corruption actions, both in national courts and in international arbitral tribunals. For these reasons, Boswell noted that it is crucial to continue discussing corruption in international arbitration. In time, this will allow us to work out the modern issues that practitioners face while also bringing new ideas to the table regarding how to generate more widely accepted anti-corruption practices throughout the legal profession.