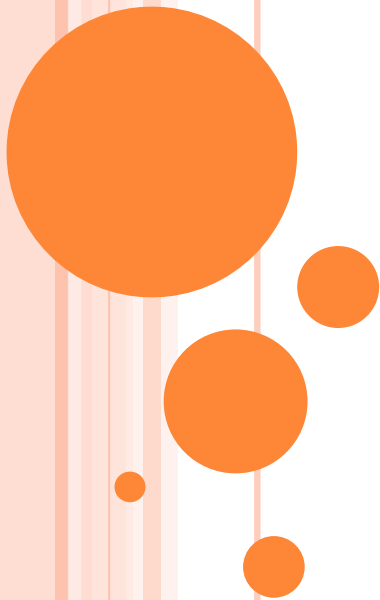


EFFECT OF BRIBERY ON ARBITRATION

DR YARIK KRYVOI

**CIS ARBITRATION FORUM
UNIVERSITY OF WEST LONDON**



TOPICS TO BE COVERED

- Bribery is a serious problem, particularly in transition economies (Russian example)
- How bribery affects enforceability of commercial contracts in such jurisdictions
- Does bribery affect the agreement to arbitrate?
- The social effect of making contracts void in investor-state arbitration

LEGAL DEFINITION OF BRIBERY

- a criminal offence "to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a 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 business.

Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

CORRUPTION IN RUSSIA

- According to Transparency International, in 2011 Russia ranked 143 of 182. Other states of the former Soviet Union were also at the bottom of the list – Ukraine (152), Kazakhstan (120).
- According to one estimate, more than 164bn rubles \$6bn is paid in kickbacks in Russia every year.

PERCEPTION OF CORRUPTION IN RUSSIA

	Dishonest	Honest
Municipal authorities	61	19
Road police	77	10
NGOs	22	45
Orthodox Church	25	50
Local courts	56	22
Highest courts	41	33

IMPLICATIONS OF RUSSIA'S RATIFICATION OF OECD ANTI-BRIBERY CONVENTION

- In February 2012 Russia became a member of the OECD Convention
- To join, Russia had to adopt a number of enactments to bring its legislation in compliance with the Convention:
 - introduced administrative liability for legal persons
 - introduced additional liability for bribing foreign officials
 - removed possibility to claim bribes as expenses

ANTI-BRIBERY PROVISIONS IN RUSSIAN LAW

Liability for individuals

- Giving a bribe (Article 291 of the Criminal Code)
- Accepting a bribe (Article 290 of the Criminal Code)
- Bribery mediation (Article 291.1 of the Criminal Code)

Liability for legal persons

- Russian law establishes administrative responsibility of legal persons for “corruption offences” (Federal Law On Counteracting Corruption and Article 19.28 of the Code of Administrative Offences).
- Specific bribery offence that covers the offer or promise of a bribe

CORRUPTION INCREASES POPULARITY OF ARBITRATION

- The increasing number of arbitration cases involving Russian companies. For example, Russian parties were second only to local Swedish companies before the Stockholm Chamber of Commerce
- Resolving a dispute outside of Russia helps avoid administrative pressure by local officials and allows the appointment of the most suitable arbitrators for a particular case
- enforcement of arbitration awards abroad may be easier than enforcing decisions of Russian courts because of the New York Convention on Recognition and Enforcement of Arbitral

BRIBERY AS A CIVIL LAW CONTRACT

Getting a bribe is regarded as a contract which has an element of consideration because it is directed to transfer of material values from one subject to another actor and related to establishment, changes or termination of civil rights and obligations.

Frunzenski District Court of Ivanovo (Ivanov Region),
Case No 2- 1090/11, 14 June 2011.

EFFECT OF BRIBERY

- In accordance with Article 169 of the Civil Code any contract concluded for the purpose contrary to the basics of legal order or morality is void
- Article 167 of the Civil Code invalid contract has no legal consequences other than those related to its invalidity and is invalid from the moment of its conclusion
- Bribery contracts are void
- Russian law on validity of contracts procured by bribery is unclear – there is no automatic invalidity

WHAT HAPPENS TO THE PROCEEDS OF THE CONTRACT?

- If both the bribe-giver and bribe-receiver has malicious intent to commit bribery then all proceeds of such transactions are subject to confiscation by the state (Article 169 of the Civil Code)
- Request to apply consequences of invalid transaction can be submitted by any interested party. (Article 166 of the Civil Code)
- The prosecutor can claim to the court to protect rights and interests of the State. (part 1, Article 45 of the Civil Procedure Code)

CAN THE ARBITRAL TRIBUNAL CONSIDER CONTRACTS INVOLVING BRIBERY?

- Contracts consist of two parts: the main contract and the arbitration clause
- Arbitration clause is separable from the rest of the agreement under laws of most jurisdictions (including Russia and the UK)
- Invalidity of the contract containing the arbitration clause does not entail invalidity of a the arbitration clause
- If the contract is recognized as not concluded, the clause included in the text remains in force

FIONA TRUST V PRIVALOV [2007]

UKHL 40

- Claimants alleged that Nikitin obtained ship charters on very preferential terms because of bribing Sovcomflot group's senior executives
- Fiona Trust and other claimants sought to recover \$500 million from Nikitin because of fraud and bribery and also requested rescission of time charters
- All charters provided for arbitration of disputes “arising under” and “out of” the contracts in accordance with the rules of the London Maritime Arbitrators' Association

QUESTIONS FOR THE HOUSE OF LORDS

- Whether the arbitration clause covered the question of whether the contract was procured by bribery
- Whether the arbitration clause bound the party alleging that but for the bribery he would never have entered into the contract containing the arbitration clause
- Held: despite allegations of bribery of the main contract, there was no claim that one of the parties' consent was affected by a bribe to enter into the arbitration agreement
- The arbitration agreement remained valid because it "a distinct agreement" which can be void or voidable only on grounds which relate directly to the arbitration agreement (Section 7 of the Arbitration Act)

ENFORCING ARBITRAL AWARDS TAINTED BY BRIBERY

- Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - Article 5.1(a) The arbitration agreement is not valid under the law to which the parties have subjected it or under the law of the country where the award was made
 - Article 5.2(b) If the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

BRIBERY IN INVESTOR-STATE ARBITRATION

- Dispute Settlement with involves private investor and a sovereign state
- Enforceable either in courts on the basis of the New York Convention or on the basis of the ICSID Convention (enforceable as such)
- High stakes (often involving hundreds of millions of US\$)

WORLD DUTY FREE V KENYA

- ICSID case
- Investor sued Kenya for expropriation of its Duty Free shops at Kenya airports
- Kenya itself argued that the underlying contract was procured by bribery and hence there was no jurisdiction
- The tribunal agreed and held that it had no jurisdiction because enforcing a contract obtained by bribery was a breach of international public policy

TRIBUNAL IN WORLD DUTY FREE V KENYA

- “In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.” (para. 157)
- “The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract’s applicable laws.”

CONSEQUENCES OF INVALIDITY OF CONTRACTS TAINTED BY BRIBERY

- States can use bribery as a defense against claims of foreign investors
- Voiding contracts would result in encouragement of further corruption
- Leave investors without proper legal protects in jurisdictions where corruption is pervasive
- Voided and cancelled contracts will affect the population of host countries as well (e.g. infrastructure projects, job creation, new technologies, etc)

BALANCED APPROACH IS NEEDED

- To balance the important goal of deterring corruption and the interests of (1) foreign investors (2) local population (3) incentives of host States
- A contract made through payment of bribe is wrong from the point of view of public policy and might distort fair competition, may not be the best deal for the money from the public point of view. But if the negative externalities are not great, it would, on net, be beneficial to enforce it.
- Instead of declaring contracts void, other approaches should be used, such as:
 - Punishing the State as well, not only the investor
 - Contracts should remain valid unless they are manifestly unfair

Questions?

