

ESSAY

BRIDGING THE CULTURAL GAP IN
INTERNATIONAL ARBITRATIONS ARISING FROM
FCPA INVESTIGATIONS

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INTRODUCTION

In recent years, regulators around the world have increased their focus on investigating and prosecuting corporate corruption. Many governments have recently adopted or enhanced their domestic anti-corruption laws, including the United Kingdom, Germany, Spain, Brazil, Canada, China, and Mexico. In March 2016, the French government will consider the adoption of a new criminal statute creating deferred prosecution agreements in France.¹ In the United

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1. A deferred prosecution agreement is a mechanism to resolve a potential criminal charge before it is asserted, with the prosecution agreeing to defer bringing the charge for a

States, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) have maintained anti-corruption enforcement as a high priority, initiating scores of investigations and obtaining hundreds of millions of dollars in penalties under the Foreign Corrupt Practices Act (“FCPA”). Multiple public statements made by DOJ and SEC officials have left no doubt that this emphasis will continue in the future.²

Against this backdrop, corrupt payments by third-party representatives such as agents, distributors, or consultants are one of the largest and most uncertain risks to companies that are subject to the FCPA or anti-corruption laws of other countries.³ When such corrupt payments do occur, United States regulators have made clear that a corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in an investigation are factors they consider in deciding whether to commence, decline, or otherwise resolve a FCPA matter.⁴ The DOJ and the SEC similarly consider the extent to which the company has identified and disciplined the individuals responsible for the corporation’s alleged malfeasance.⁵ As

period of time while the defendant agrees to satisfy certain conditions, typically including compliance program enhancements, with the expectation that, assuming no further misconduct, upon the successful completion of such enhancements, the prosecution would forego bringing the charge altogether. *See also* Marie Bellan, *Un Nouvel Arsenal de Lutte Contre la Délinquance Financière*, LES ECHOS (Feb. 4, 2016), <http://www.lesechos.fr/economie-france/budget-fiscalite/021673842508-loi-sapin-un-nouvel-arsenal-de-lutte-contre-la-delinquance-financiere-1197812.php>; Marie Bellan, *Corruption Des Entreprises: Le Big Bang de la ‘Transaction Pénale,’* LES ECHOS (Feb. 4, 2016), <http://www.lesechos.fr/economie-france/budget-fiscalite/021674189235-corruption-des-entreprises-le-big-bang-de-la-transaction-penale-1197811.php>.

2. *See, e.g.*, Leslie R. Caldwell, Assistant Attorney General, Remarks at the American Conference Institute’s 32nd Annual International Conference on Foreign Corrupt Practices Act (Nov. 17, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-american-conference>; *see also* Andrew Ceresney, Director, Securities and Exchange Commission Division of Enforcement, Keynote Address at ACI’s 32nd FCPA Conference (Nov. 17, 2015), <https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html>.

3. *See* UNITED STATES DEPT. OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 60 (2012) [hereinafter FCPA RESOURCES GUIDE] (“DOJ’s and SEC’s FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company’s compliance program.”).

4. *See id.* at 53.

5. *Id.*

a result, once a company learns that FCPA violations may have been committed by one of its agents or consultants, the company is under pressure to immediately self-investigate and take internal corrective measures.⁶

Taking such corrective measures will often mean imposing a moratorium on payments to agents or business consultants suspected of wrongdoing, until, at the very least, the agent or consultant has agreed to cooperate in the FCPA investigation, including by agreeing to be interviewed by the company's outside counsel, and more likely, until the suspicion that the underlying transaction was improper is resolved.⁷ While some agents or consultants may indeed cooperate in these efforts, others will not and will instead initiate legal proceedings to get paid, most commonly, through initiating international arbitrations outside the United States based on arbitration clauses that are commonly contained in most consulting agreements. The company is then placed in a difficult position: if it meets the expectations of US regulators and halts all payments to its corrupt contractor agent, the company exposes itself to an arbitration brought

6. For example, Siemens devoted over 1.5 million hours of billable time to its FCPA investigation, which took place in thirty-four countries and involved over 1,750 interviews and over 800 informational meetings. Dept. Of Justice Sentencing Memorandum, *United States v. Siemens AG et al.*, No. 1:08-cr-00367-RJL (D.D.C. Dec. 12, 2008), <http://www.justice.gov/sites/default/files/opa/legacy/2008/12/19/siemens-sentencing-memo.pdf> (stating what Siemens' attorneys spent); *see also* Press Release, Dept. Of Justice, *Ralph Lauren Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$882,000 Monetary Penalty* (Apr. 22, 2013), <http://www.justice.gov/opa/pr/ralph-lauren-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay> (acknowledging in settlement agreement Ralph Lauren's "extensive, thorough, and timely cooperation, including self-disclosure of the misconduct, voluntarily making employees available for interviews, [and] making voluntary document disclosures").

7. When Siemens pled guilty to FCPA allegations in 2008, it agreed to impose "a moratorium on entering into new business consulting agreements or making payments under existing business consulting agreements until a complete collection and review was undertaken of all such agreements." Dept. Of Justice Sentencing Memorandum, *United States v. Siemens A.G.*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008); *see also* Sally Quillian, Deputy Attorney General, Dept. of Justice, *Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing*, (Sept. 10, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school> ("Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, and then provide all non-privileged evidence implicating those individuals.").

by the consultant or agent. On the other hand, if the company keeps paying its corrupt agent, it exposes itself to further criminal liability in the United States.⁸

This growing dilemma for companies subject to the FCPA has raised a number of issues, including (1) what the burden of proof should be in international arbitration proceedings involving claims of corruption or bribery, (2) whether arbitrators should stay arbitrations pending an ongoing FCPA investigation and (3) whether there is anything companies can do to prepare for such arbitrations.

I. *THE BURDEN OF PROOF IN ARBITRATION PROCEEDINGS*

One of the problems with corruption is that it is often very hard to prove. FCPA investigations are often commenced on the basis of circumstantial evidence or so-called “red flags,” indicating that corruption may have occurred. In the United States, such circumstantial evidence or red flags are sufficient grounds for halting payments to an agent or consultant suspected of wrongdoing. In fact, US regulators expect companies to take immediate remedial actions when such circumstantial evidence comes to light.⁹

8. Two 2014 decisions from the Swiss Supreme Court are illustrative of this point: on September 23, 2014, the Swiss Supreme Court dismissed a petition including a request to set aside an arbitral award and a request for a revision of the arbitral award. Pursuant to the award, the petitioner company was to pay a consultant US\$115,000 in outstanding consultancy fees for assistance in preparing a bid for a tender for the construction and renovation of power plants. The company argued that it would likely face criminal sanctions if it were to comply with the award due to ongoing criminal investigations brought under the UK Bribery Act and the FCPA into potential corrupt acts engaged in by the consultant. In dismissing petitioner’s request, the Supreme Court explained that the company’s argument at most indicated that the company could be subject to criminal sanctions in the United Kingdom and the United States, not that the validity of the contract between the consultant and the company was actually affected by the alleged bribery. In addition, the Swiss Supreme Court also held that it had no basis for modifying the outcome of the arbitration because the company had failed to prove that bribery had actually occurred. Bundesgericht [BGer][Federal Supreme Court] Sept. 23, 2014, 4A_231/2014 (Switz.); Bundesgericht [BGer][Federal Supreme Court] Sept. 23, 2014, 4A_247/2014 (Switz.).

9. The DOJ and the SEC have repeatedly emphasized the importance for companies to take immediate action when signs of corrupt acts surface. For example, in 2014, Hewlett-Packard paid US\$108 million in fines after one of its subsidiaries was found to have paid bribes through agents and various shell companies to procure business in Mexico and Eastern Europe. In its press release, the SEC admonished Hewlett-Packard, stating that even though employees within the subsidiary had raised questions about the significant markup being paid to the agent and its subcontractors, the subsidiary had ignored these red flags and gone forward

However, in arbitral proceedings, mere red flags or circumstantial evidence are often not sufficient to establish a defense of corruption for non-payment of fees to an agent or consultant. This is because, in those types of cases, the laws of civil law countries often govern the contracts, the seat of the arbitration is often outside the United States, and a majority of the arbitrators in these arbitrations are often from civil law jurisdictions. Under these circumstances, the governing law will often require actual proof of corruption by clear evidence.¹⁰ Tribunals may primarily expect the parties to submit evidence in support of their claims or defenses with a limited opportunity to seek document disclosure.¹¹ Furthermore, in many civil law jurisdictions, there is no culture of cooperation with law enforcement investigations. It is up to prosecutors and investigating magistrates to prove the existence of criminal conduct. These international arbitrations often highlight cultural differences between arbitrators. Depending on their legal culture and background, they may have very different perspectives on the company's and the consultant's duty to cooperate with law enforcement. They may view the criminal investigation as either central or tangential to the arbitration.

The high burden of proof coupled with the strictly limited ability to obtain documents from the consultant will frequently make it impossible to prove the existence of corruption. This is especially the case because, in most instances, proof of the consultant's activities will reside with him, and he will have no incentive to voluntarily disclose evidence of wrongful conduct.¹² Accordingly, the company

with the deal. See Press Release, SEC, SEC Charges Hewlett-Packard With FCPA Violations: Company to Pay \$108 Million to Settle Civil and Criminal Cases (Apr. 9, 2014), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075>.

10. Case No. 5622 of 1988, 19 Y.B. Comm. Arb. 105 (ICC Int'l Ct. Arb.) (providing that allegations of corruption must be proven "beyond doubt"); Case No. 7047 of 1994, 21 Y.B. Comm. Arb. 79 (ICC Int'l Ct. Arb.) (finding that "[i]f the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere 'suspicion' by any member of the arbitral tribunal . . . is entirely insufficient to form such a conviction of the Arbitral Tribunal.").

11. See Geoffrey C. Jr., Hazard, *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998).

12. In *World Duty Free Company Limited v. the Republic of Kenya*, one of the key decisions to date in the investor-state arbitration context dealing with corruption, the tribunal only had occasion to rule on the effects of corruption on the claims at issue because the petitioning party itself revealed that it had made a US\$2 million dollar personal donation to the

may well have to pay the potentially corrupt agent or consultant's fees as well as arbitration costs, including a portion of the legal fees of the consultant under the prevailing view in international arbitration that costs follow the event.

In those types of cases, some arbitral tribunals have lowered the standard of proof, allowed the introduction of circumstantial evidence or reversed the burden of proof by requiring the agent or consultant to disprove corruption once the company has set forth a prima facie case of corruption.¹³ Other tribunals however have been hesitant to engage in such burden-shifting.¹⁴ And some have found that there has to be a high burden of proof for claims of bribery or corruption on the basis that "fraud can never be taken lightly,"¹⁵ creating further uncertainty

Kenyan president. As a result, the tribunal did not have to consider the appropriate standard of proof for proving corruption. *World Duty Free Company Limited v. the Republic of Kenya*, ICSID Case No. Arb/00/7, Award (October 4, 2006).

13. *See, e.g.*, Case No. 6497 of 1994, 24 Y.B. Comm. Arb. 71 (ICC Int'l Ct. Arb.) (tribunal sitting in Switzerland applying Swiss law held that that even though the party alleging bribery normally has the burden of proof, in some cases, tribunals may allow the party alleging bribery "to bring some relevant evidence for its allegations," and then the tribunal may "exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome"); *see also* Case No. 12990 of 2005, 24 ICC IC Arb. Bull. 52 (ICC Int'l Ct. Arb.) (allowing circumstantial evidence on the basis that unlawful nature of a contract is difficult to prove) as reported in Christian Albanesi & Emmanuel Jolivet, *Dealing with Corruption in Arbitration: A Review of ICC Experience*, 24 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 27, 33 (2013).

14. *See, e.g.*, Case No. 7047 of 1994, 21 Y.B. Comm. Arb. 79 (ICC Int'l Ct. Arb.) (stating "[i]f a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts."); *see also* Case No. 5622 of 1988, 19 Y.B. Comm. Arb. 105 (ICC Int'l Ct. Arb.) (holding that "bribery ha[d] not been proved doubt," and even though circumstantial evidence is allowed to prove facts in contention, there must be "something more than likely facts").

15. Case No. 6401 of 1992 (ICC Int'l Ct. Arb.) (unpublished) *as reported in* Albanesi & Jolivet, *supra* note 13, at 32 (applying "preponderance of the evidence" standard to substantive claims but holding that based on the laws of the United States and the Philippines, the countries to which the dispute was connected, a higher standard had to be applied to the allegations of corruption because "fraud in civil cases must be proven to exist by clear and convincing evidence amounting to more than a mere preponderance, and cannot be justified by a mere speculation"); *see also* *EDF Services Ltd. v. Romania*, ICSID Case No. Arb/05/13, ¶ 221 (Oct. 8, 2009) (stating "corruption must be proven and is notoriously difficult to prove, since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.").

for those companies who are faced with defending FCPA proceedings in the United States and arbitration proceedings elsewhere in the world.

In light of the challenge of proving corruption, the arbitral award in many cases will turn on whether the consultant satisfied its contractual obligations, in particular the consultant's obligation to retain and submit proofs of his services, as well as the contractual obligation to cooperate with audits and investigations. Reviewing proofs of services makes it possible for tribunals to assess whether the consultant performed actual services, or merely funneled payments to foreign public officials (i.e., bribes) in exchange for confidential information about the bids submitted by competitors.¹⁶ Many consulting agreements contain language requiring consultants to retain proofs of their activities, to submit these documents along with their invoices, and to cooperate with audits. In some cases, these terms are identified as "essential" or "material" in the contract itself. In certain civil law jurisdictions, however, such contractual obligations will be viewed as merely ancillary, not main obligations, if the parties' course of conduct demonstrates that compliance was not essential in practice.¹⁷ Therefore, a tribunal may examine the parties' course of conduct, beyond the four corners of the contracts, and,

16. See, e.g., Case No. 12990 of 2005, 24 ICC ICArb. Bull. 52 (ICC Int'l Ct. Arb.) (holding that underlying purpose of agreement was unlawful where claimant was unable to produce evidence that it had performed any of its obligations in relation to the agreements between the parties); Case No. 13914 of 2008, 24 ICC ICArb. Bull. 77 (ICC Int'l Ct. Arb.) (finding that there was "clear and convincing" evidence of bribery based on several red flags raised by claimant's actions, including his inability to disclose bank and tax records, and his inability to prove the legitimacy of several wire transfers from his account to relatives of a state official) as reported in Albanesi & Jolivet, *supra* note 13, at 32-34.

17. In construing contractual obligations, certain decisions of the Swiss Tribunal Federal have focused on whether a contractual obligation was a "main" or "ancillary" obligation. Bundesgericht [BGer][Federal Supreme Court] Sept. 15, 2000, 4C.105/2000, 12, 79 (Switz.). Other decisions have focused on the subjective and objective intent of the parties. SI X. SA c. A., Tribunal Federal 4A 379/2011 (December 2, 2011). The Swiss Tribunal Federal has held that the "apparently clear meaning of the terms is not necessarily determinative, such that a purely literal interpretation is precluded. Even if a contractual term appears to be crystal clear at first sight, it might not precisely convey the meaning of the agreement, depending on other contract terms, the goal pursued by the parties, or other circumstances. It is not appropriate, however, to depart from the literal words adopted by the parties when there is no serious reason to believe that such literal meaning did not actually convey their intent." *Id.* at 5.

depending on the parties' course of conduct, they may excuse the consultant's failure to comply with these obligations.¹⁸

II. *STAYING ARBITRATION PENDING COMPLETION OF FCPA INVESTIGATION*

In 2007, an arbitral tribunal awarded Siemens A.G. ("Siemens") US\$217 million in an ICSID arbitration Siemens brought against Argentina. One year later, Siemens pleaded guilty to FCPA violations in connection with the Argentine contract, paying US\$1.6 billion to regulators in the United States and in Germany. Subsequently, Siemens waived the arbitral award against Argentina.¹⁹ The Siemens arbitration raises the question of whether arbitral tribunals should consider staying arbitration proceedings if there is a parallel criminal investigation ongoing in the respondent's home country. This would prevent situations in which arbitral awards are later called into question on the basis that they rewarded a corrupt party. In addition, a stay would also allow for a fuller development of the facts to meet the greater goal of deterring bribery and corruption, especially since tribunals will often not themselves engage in a deep factual investigation into the consultant's potentially corrupt practices.

That said, a goal of arbitration is efficiency, and tribunals are increasingly focused on resolving disputes without undue delays.²⁰

18. ICC arbitrations have considered course of performance in a variety of contexts. *See, e.g.*, Case No. 8362 of 1995, 22 Y.B. Comm. Arb. 164 (ICC Int'l Ct. Arb.) (assessing whether claimant's course of performance amounted to consent to termination of claimant's distribution agreement with respondent); Case No. 6527 of 1991, 18 Y.B. Comm. Arb. 44 (ICC Int'l Ct. Arb.) ("The attention is therefore to be concentrated on the actions performed and the behaviour adopted by the parties, in order to establish whether the defendant's withdrawal from the [c]ontract was justified under the circumstances."); *see also* Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6 J. OF INT'L DISP. SETTLEMENT 1, 4–41 (2015). In its FCPA Resource Guide, the DOJ also recommends that companies periodically update and review its third-party relationships, including exercising audit rights, providing annual training and requesting annual compliance certification. *See* FCPA RESOURCES GUIDE, *supra* note 3, at 60.

19. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, award, (Jan. 17, 2007); *see also* Press Release, SEC, SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina (Dec. 13, 2011), <https://www.sec.gov/news/press/2011/2011-263.htm> (discussing Siemens waiver of its arbitral award).

20. ICC Rule 30(1) provides, unless the ICC Court sets a different deadline, "[t]he time limit within which the arbitral tribunal must render its final award is six months." The ICDR International Dispute Resolution Procedures also emphasizes the need to promptly resolve disputes. Under article 15.8 of the CPR International Administered Arbitration Rules, "[t]he

Illustrative of this point, in a 2012 arbitration brought in Switzerland under Swiss law by a consultant for payment of outstanding fees, the respondent company sought a stay of arbitration proceedings on the basis that it would expose itself to criminal liability under the FCPA and the UK Bribery Act because criminal investigations had been initiated by the DOJ and the UK Serious Fraud Office concerning potential corrupt projects in which the consultant had participated.²¹ The tribunal refused to issue a stay of proceedings, emphasizing that the DOJ had not indicated a likely timeframe for the completion of the investigation, and that the consultant's interest in obtaining an award outweighed the company's interest in suspending its contractual obligations until the termination of an investigation with an unknown date of completion.²² Similarly, arbitrators might also seek to keep the criminal investigation separate and independent from the arbitral proceedings.²³ As a result, stays continue to be a rare, extraordinary measure in arbitration proceedings, even where allegations of corruption or bribery have already surfaced.

That is particularly true because the rule in many civil law countries that civil proceedings are stayed pending the resolution of related criminal matters is generally not applicable in international arbitration proceedings.²⁴ In France, that rule is embodied in Article 4

final award should in most circumstances be rendered within 12 months of the constitution of the Tribunal.”

21. See arbitral decision cited in Swiss Supreme Court Case Nos. 4A_231/2014 and 4A_247/2014, *supra* note 8.

22. *Id.*; see also Fraport AG Frankfurt Airport Servs. Worldwide, ICSID Case No. ARB/03/25, Award, ¶ 47 (July 19, 2007) (denying request by respondent to stay arbitral proceedings pending outcome of German court proceedings involving documents seized by German prosecutors in connection with investigation into corrupt acts committed by claimant given that it was unknown when the German court would come to a decision regarding whether respondent could get access to the documents).

23. See Yasmine Lahlou & Marina Matousekova, *The Role of the Arbitrator in Combatting Corruption*, INT'L BUS. L. J. 6, 624 (2012) (“Unlike domestic judges, arbitrators do not carry out the public service of justice on behalf of a State. They are not bound by domestic rules of law, including criminal law against corruption. An international arbitrator is not the guardian of the public interest promoted by the criminal statutes of each State connected with the dispute, irrespective of the imperative nature of those laws domestically.”).

24. *Id.* at 625.

of the French Code of Criminal Procedure.²⁵ That rule, however, does not apply to parallel arbitration proceedings.²⁶

CONCLUSION

To prevent corruption from occurring in the first instance, companies should place an emphasis on conducting due diligence on third-party consultants and agents prior to engagement to prevent FCPA or UK Bribery Act violations from occurring in the first place.²⁷ Companies should of course build anti-corruption protections into their agreements with such consultants and agents by including provisions that, for example, contractually require consultants and agents to provide periodic representations that they are in compliance with anti-corruption laws, retain records, provide meaningful proofs of services, and personally cooperate with audits and investigations as material conditions precedent to receiving payments, as well as payment suspension and contract termination provisions tied to compliance. In light of the different rules of contract interpretation, companies also should make sure that these contract terms are respected and actually enforced as part of the ordinary course of the parties' performance of their obligations.

25. CODE DE PROCEDURE PENALE [C. PR. PEN] art. 4, (Fr). Article 4 of the French Code of Criminal Procedure states that, when criminal proceedings are initiated, related civil proceedings are stayed and, in particular, no civil judgment may be issued.

26. See Lahlou & Matousekova, *supra* note 23, at n.18.

27. See FCPA RESOURCES GUIDE, *supra* note 3, at 60.