

ALLEN & OVERY

*Corruption:
Justifications and excuses*

Kiev Arbitration Days
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Starting point: there are unlikely to be any justifications or excuses

- “An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State’s law”

Hamester v. Ghana, ICSID ARB/07/24, Award, 18 June 2010

Failed justifications

- Payment is “*a gift of protocol*” (*WDF v Kenya*)
- Payment is the only way to do business (*WDF v Kenya*)

Other possible justifications or responses

- Payment was lawful under the applicable law
 - E.g. facilitation payments are lawful under some national laws
 - But transnational public policy against corruption may take precedence
- State should be estopped from relying on corruption defence if it condones (expressly or tacitly) the corrupt behaviour
 - Unlikely on the facts that state would condone covert corruption
- Payment was made under duress
 - Arguably duress would be a breach of State's international obligations

Key battleground: proof of corruption

- Once corruption is proven, it is very hard to justify
- This makes proof of corruption a key battleground
- Difficulties of proof have led to controversies over:
 - Burden of proof
 - Standard of proof

Fallback options for the allegedly corrupt party

- Counterclaim for restitution?
- Each party should bear its own costs
 - Recipient with unclean hands should not recover its costs

Mitigating the risk of corruption – beware third party consultants

- What are the “*common red flags*” of corruption in this area?
 - The consultant’s commission is excessively high
 - The consultant is in a different line of business from the investment
 - The consultant is associated with or related to a public official
 - The consultancy agreement describes the services to be provided only vaguely
 - The third party requests payment to an offshore account
 - There is no evidence of the actual services delivered

Thank you



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