



HOT TOPICS IN EUROPE

Compliance – „Corruption“

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BUSINESS & LAW

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Compliance

one term for various legal areas



- Antitrust
- Tax Compliance
- Non-Discrimination
- Data-Protection
- IP Compliance
- Corporate Governance Issues (like insider rules)
- Anti Corruption

In Europe: daily work for lawyers

- starting with drafting of Code of Conducts
- ending to assist “whistle blower”



Today only one aspect: Anti-Corruption



The Case:

- Tender Process
- Corruption “Event” (“Hard corruption” or “influence paddling”)
- The Main Contract is entered into
- “Commercial” post signing dispute between Investor and state owned and governed entity

Question: To what extent is the contract still valid?



Legal Consequences of Corruption:

- Prison
- Fines

❖ No mention of legal impact of corruption or concerned contracts in most of the Regulations and instruments dealing with corruption e.g. OECD Recommendation and Conventions; EU Convention

Therefore: we have to stick to general rules the private contract law.

Germany: Section 134 German Civil Code

“A legal transaction which violates the law is invalid, unless otherwise provided by the law”

As a result: the “Contract containing the corruptive agreement” is null and void

But how about the “**Main Contract**” regarding the investment?

Validity of the Main Contract

To take into account:

- National law of the host state
“Invalid or unenforceable”

- “Ipso iure nullity” as consequence of international anti-corruption policies?

No transnational consensus on the validity of the main contract

- **Problems:**

- State responsibility
- Already implemented projects

- **The way out:** Modification and adaption of the main contract reflecting the status of the contractual relationship – commonly used in arbitration proceedings -



ARTICLE 3.3.1

“(Contracts infringing mandatory rules)

(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to:

- (a) the purpose of the rule which has been infringed;*
- (b) the category of persons for whose protection the rule exists;*
- (c) any sanction that may be imposed under the rule infringed;*
- (d) the seriousness of the infringement;*
- (e) whether one or both parties knew or ought to have known of the infringement;*
- (f) whether the performance of the contract necessitates the infringement; and*
- (g) the parties’ reasonable expectations.”*

ARTICLE 3.3.2

“(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.

(2) In determining what is reasonable, regard is to be had, with the appropriate adaptations, to the criteria referred to in Article 3.3.1(3).

(3) If restitution is granted, the rules set out in Article 3.2.15 apply with appropriate adaptations.”

- International Arbitration dealt with the issue of corruption since 1960
 - Important cases:** Infrastructure projects: e.g. energy plants, telecommunication systems, construction of military training facilities
- Arbitrability of corruption cases
 - Public law and Criminal law
 - Enforcement not possible only if it is against international public policy



Lessons to be learned?



In our daily practice:

Inform the clients on the risks

- With regard to the main contract
 - Validity of the main contract
- The question whether the arbitration clause is enforceable

■ Still Enjoy !



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