

*World Duty Free Company Ltd. v The Republic of Kenya*

The *World Duty Free Company Ltd. v The Republic of Kenya* case involved a contractual claim by the World Duty Free Company Ltd., the claimant, against the Republic of Kenya, the respondent, for the latter's effective expropriation of the company without compensation.<sup>1</sup> The claim was submitted to the International Centre for the Settlement of Investment Disputes (ICSID), pursuant to the relevant agreement's arbitration clause, and an arbitral tribunal consisting of three persons was duly constituted. The claimant contracted with the President of Kenya, Daniel arap Moi, to obtain licenses to operate and equip certain duty free complexes at Nairobi and Mombassa airports, and also to renovate and upgrade the passenger facilities of these two airports. The complexes were opened in 1990.<sup>2</sup> In 1992, however, President Moi placed further pressure on the company to participate in a fraud scheme that would have allowed at least US\$438 million to be claimed by an agent company from the Kenyan state in the form of export credits for transactions that never occurred.<sup>3</sup> When the company refused to participate in this transaction and offered to give evidence in a criminal prosecution against Mr. Moi's emissary (Mr. Pattni), the latter arranged to take legal control of the company by way of receivership through Kenyan courts.<sup>4</sup> Mr. Pattni refused to return the property and restore the claimant's contractual rights until the claimant refused to give evidence for the criminal prosecution.<sup>5</sup> The claimant thus sued at ICSID, claiming breach of contract.

However, Kenya counter-claimed, showing that, *inter alia*, that the claimant procured the contracts at issue by payment of a US\$2 million bribe to the President. As such, they claimed, it was a breach of international, English and Kenyan public policy and was therefore a voidable contract that Kenya had taken proper steps to avoid.<sup>6</sup> It was accepted by both parties that the claimant had made a 'personal donation' in that amount to the President, by presenting him with a suitcase of full of cash at a meeting between them, and to have it returned to him full of fresh corn.<sup>7</sup> The claimant responded that

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<sup>1</sup> *World Duty Free Company Ltd v. The Republic of Kenya* (ICSID Case No. ARB/00/7) Award, 4 October 2006.

<sup>2</sup> *Ibid.* para. 67.

<sup>3</sup> *Ibid.* para. 68.

<sup>4</sup> *Ibid.* paras. 69-71.

<sup>5</sup> *Ibid.* para. 73.

<sup>6</sup> *Ibid.* paras. 105-109.

<sup>7</sup> *Ibid.* para. 130 (statement of Mr. Ali). The cash amounted to US\$500,000 drawn against a US\$2 million letter of credit.

this formed part of a local system of custom (“Harambee”), and that in Kenyan practise, a donation of this type “was not only acceptable, but fashionable.”<sup>8</sup>

The tribunal made two principal findings, both in the course of applying English, Kenyan and international law. First, it found that the ‘donation’ was a bribe notwithstanding any local practise suggesting that it was consistent with domestic public policy. It noted that the concept of Harambee had been abused<sup>9</sup> and that it was (a) probably not, in Kenyan law and custom, inclusive of bribery, and (b) even if it were, would still likely be regarded as a breach of international public policy.<sup>10</sup> Further, it was clear from the one of the company’s statements that its agent was uncomfortable about the arrangement, and that he knew that he had to pay the money in order to obtain the contract. Thus the existence of the bribe was not in doubt.<sup>11</sup> Second, the tribunal found that bribery constituted a breach of international public policy, as well as of English and Kenyan public policy. The concept of ‘international’ public policy meant, effectively, that of transnational public policy, meaning a breach of the policy concerns of all or most states.<sup>12</sup> After reviewing a number of authorities, including various tribunal decisions,<sup>13</sup> decisions of national courts,<sup>14</sup> and international conventions and declarations,<sup>15</sup> the tribunal concluded thus:

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 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.<sup>16</sup>

It went on to find a similar prohibition in English and Kenyan law. The basic position in these legal systems, substantially the same on this point, is that the legal maxims of *ex dolo malo non oritur actio* and *ex turpi causa non oritur actio* both stand for the principle that a one

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<sup>8</sup> Ibid. para. 120.

<sup>9</sup> Ibid. para. 134.

<sup>10</sup> Ibid. paras. 170, 172.

<sup>11</sup> Ibid. para.135-136.

<sup>12</sup> Ibid. para.141-142. The tribunal is at pains, at paras. 138ff., to distinguish this idea from the international public policy occasionally used in reference to Article V.2 of the New York Convention on the Recognition and Enforcement of Foreign Judgments and Awards.

<sup>13</sup> Ibid. at paras. 140, 148-156.

<sup>14</sup> Ibid. at paras. 147.

<sup>15</sup> Ibid. paras. 143-145.

<sup>16</sup> Ibid. para. 157.

cannot found a cause of action on an immoral or illegal act. The reason is that, in the words of a English Court of Appeal judge, “it would be an affront to public conscience ... because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.”<sup>17</sup>

Three further points of general interest emerge from the decision. First, the tribunal rejected the claim that the corruption contract was severable from the contract to run the airport complexes. It rather found that the bribe was “an intrinsic part of the overall transaction, without which no contract would have been concluded between the parties.”<sup>18</sup> This means that where some obligation undertaken by the debtor can be shown to have been procured by a bribe, the entire obligation will become voidable at the behest of the debtor. Second, the knowledge of the agent acting for the companies was regarded as imputable to the companies themselves under the circumstances. Whether such knowledge is imputable in all similar cases remains unclear.<sup>19</sup> Third, the bribe was not viewed as one paid to the state of Kenya, but rather, to the President acting as the agent of the state. This thus recognizes that the relationship between government and statehood is necessarily one of agency. Therefore concepts familiar in the law of agency, which require among other things that agents are by law required to act in the interests of the principals they represent, are at least *prima facie* applicable to the relationship between government and state.

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<sup>17</sup> Ibid. para. 161, citing *Euro Diam Ltd v. Bathurst* [1990] QB 1 (per Kerr L.J).

<sup>18</sup> Ibid. para. 167.

<sup>19</sup> Ibid. para.168. Presumably, domestic cases will help decide the question of when the knowledge of an agent is attributable to the principal in cases of contracts obtained by fraud or corruption.