

In the
Supreme Court of the United States

UNIVERSAL TELEPHONE EXCHANGE, INC.,

Petitioner,

v.

ZTE CORPORATION and ZTE USA, INC.,

Respondents.

**On a Petition for Writ of Certiorari to the
Court of Appeals for the Fifth Circuit of Texas**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 10 of the Federal Arbitration Act (“FAA”) provides that an arbitration award may be vacated where the award “was procured by corruption, fraud, or undue means.” Texas Civil Practices and Remedies Code Section 171.088 provides that the court shall vacate an award “obtained by corruption, fraud, or other undue means.” Texas Civil Practices and Remedies Code Section 171.088 is Uniform Arbitration Act Section 12, which is almost identical to Revised Uniform Arbitration Act Section 23. Those form the basis of all U.S. states arbitration laws.

THE QUESTION PRESENTED IS:

Does an admission by a party of contemporaneous illegal activity at the time of the issues in dispute in arbitration, or contemporaneous with the time of the arbitration, or both times, or admission of illegal activities affecting the integrity of adjudicative processes establish “fraud, corruption or undue means” sufficient to vacate an arbitration award under FAA Section 10(a)(1), Texas Civil Practices and Remedies Code Section 171.088(a)(1) Uniform Arbitration Act Section 12, or Revised Uniform Arbitration Act Section 23?

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state the petitioner Universal Telephone Exchange, Inc. has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. Universal Telephone Exchange, Inc. is a privately owned company.

LIST OF PROCEEDINGS

Supreme Court of Texas

No. 19-0269

*Universal Telephone Exchange, Inc. v.
ZTE Corporation and ZTE USA, Inc.*

Date of Final Order: October 4, 2019

Court of Appeals of Texas Fifth District, Dallas

No. 05-17-00781-CV

*ZTE Corporation and ZTE USA, Inc. v.
Universal Telephone Exchange, Inc.*

Date of Judgment: November 19, 2018

Date of Memorandum Opinion: November 19, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Universal Telephone Exchange, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the Court of Appeals of Texas, Fifth Circuit.



OPINIONS BELOW

The opinion of the court of appeals, dated November 19, 2018 is catalogued at *ZTE Corp. v. Universal Tel. Exch., Inc.*, 2018 Tex. App. LEXIS 9436, 2018 WL 6039694. Pet.App.4a. The Texas Supreme Court order, dated October 4, 2019, denying petition for review was not published. Pet.App.1a.



JURISDICTION

The Texas Supreme Court denied a timely petition for review on October 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 10(a)(1)—

The Federal Arbitration Act, in relevant part

(a) In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

1. Where the award was procured by corruption, fraud, or undue means.

Tex. Civ. Prac. Rem. Code § 171.088, in relevant part

(a) On application of a party, the court shall vacate an award if:

- (1) the award was obtained by corruption, fraud, or other undue means;

Texas Civil Practices and Remedies Code Section 171.088 is Uniform Arbitration Act Section 12, which is almost identical to Revised Uniform Arbitration Act Section 23. Together those are the basis of all U.S. states arbitration laws.



STATEMENT OF THE CASE

This case presents aspects and events usually encountered in the novels of Ian Fleming or John LeCarre. The Supreme Court's unique position at the apex of the American legal system, with the security

clearances to oversee the United States Foreign Intelligence Surveillance Court, and ability to consider the activities of the entire federal judiciary gives it insights into ZTE’s activities denied arbitral parties like Petitioner, UTE, and the Texas courts. The Trial Judge, Bonnie Goldstein correctly understood the implications of the evidence, admissions of ZTE, admissions of ZTE counsel and arguments presented. She then properly vacated the arbitration award in favor of “ZTE” as obtained by “fraud, corruption or undue means” under FAA Sec. 10(a)(1), and Texas Civil Practices and Remedies Code Section 171.088(a)(1). Petitioner humbly asks the court to exercise its unique position and authority to consider the totality of the evidence, circumstances, admissions, actions of the President of the People’s Republic of China to protect ZTE, the reactions of the President of the United States and Secretary of Commerce, and information revealed in the intrepid investigative reporting of Nick McKenzie of the Sydney Morning Herald to reinstate Judge Goldstein’s decision.

Arbitration is critical to the resolution of disputes, but only if it is fair, insusceptible of manipulation, reliable and trustworthy. If arbitration achieves notoriety as the favorite forum of criminals and the ethically challenged, then no sane business will use it. Serious allegations of arbitration victories achieved through fraud and undue means deserve the best analysis and consideration of the judiciary to prevent arbitration from being an “Ethics Free Zone.”

This Court has regularly stated the “emphatic federal policy in favor of arbitral dispute resolution” of the Federal Arbitration Act (“FAA”). *Mitsubishi Motors*

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1425 (2017). Those arbitration policies were derived from domestic arbitrations and have never seriously addressed the bribery, corruption, dissimulation and obstruction encountered in international arbitration.

International arbitral tribunals regularly adjudicate matters involving legitimate allegations of bribery or corruption. Arbitration tribunals grappling with these issues sit in Dallas, Houston, Miami or New York to decide disputes worth billions of dollars. Parties engaged in illegal activities have always acted to conceal, confuse, deceive, lie and obstruct investigations. Unsurprisingly, they use the same strategies in arbitration. This case offers the Court the opportunity to authoritatively interpret “corruption, fraud or undue means.” All courts, arbitral tribunals, and parties in arbitration will then know the consequences and parameters of relief available when parties conceal evidence, frustrate full adjudication or employ stonewalling tactics in arbitrations.

This Court’s jurisprudence does not adequately address the consistent chicanery and duplicity regularly engaged in by People’s Republic of China State Owned Enterprises such as ZTE.¹ The mandatory presence in senior corporate management of the obligatory *in situ* Communist Party Committee effectively makes

¹ ZTE was established in 1985 from “a handful of state-owned companies affiliated with the Ministry of Aerospace Industry.” *A Global Telecom Titan Called . . . ZTE?*, Bloomberg Business Week, March 7, 2005. http://www.businessweek.com/magazine/content/05_10/b3923071.html.

ZTE, and other Chinese State Owned Enterprises such as Huawei, arms of the Chinese state unaccountable and immune from inconvenient laws or rules, unlike the parties in any previously considered arbitrations.² The National Security Institute of George Mason University reported to Congress “Both Huawei and ZTE have their origins in the Chinese state, remain integrated with the Chinese Communist Party, and are bound by Chinese law and policy to serve state security and economic interests.” <https://thehill.com/policy/cyber-security/overnights/426886-hillcon-valley-report-calls-for-trump-action-on-chinese-firms-google>

China uses theft of trade secrets and intellectual property by military and security agencies to benefit State Owned Enterprises. Chinese corporate espionage has targeted telecommunications and engineering documents for more than a decade, the time frame of ZTE’s activities in Liberia and nearby Benin. <https://www.cbsnews.com/news/60-minutes-great-brain-robery-china-cyber-espionage/> If American companies such as UTE even detect the thefts of their trade secrets and intellectual property, their only opportunity for redress is in an arbitration against the State Owned Enterprise. To their credit, ZTE, and other Chinese State Owned Enterprises ascertained, and effectively exploit the weaknesses of contemporary arbitration

² A ZTE company website states that “Although a listed company, [ZTE] is still very much a state-owned enterprise (SOE), with more than 69 percent of its shares owned by government-affiliated entities.” *See Why Zhongxing is the CDMA Leader in China*, China Online News, September 13, 2006. Posted on the ZTE “Press Center” webpage at http://wwwen.zte.com.cn/en/press_center/press_clipping/200106/t20010622_156932.html.

intended for deciding disputes among reasonably honest, rule abiding parties.

The existing arbitration process now pits American companies in battles against opponents with the resources of, and free to use the techniques of, the Chinese state military and security services. It is a very unfair fight. As a former assistant attorney general for National Security responsible for counterterrorism, cyberattacks and economic espionage, John Carlin, stated: “A private company can’t compete against the resources of the second largest economy in the world.” The battle is even more unfair when the arbitration process rewards brazen concealment or destruction of evidence, lying, and obstruction of justice. It is unlikely to be coincidental that Chinese State Owned Enterprises understand the secrecy and confidentiality of arbitration also conceal thefts of intellectual property and trade secrets from the U.S. Department of Justice and Federal Bureau of Investigation.

The arbitration at issue arose from disputes concerning ZTE’s theft of UTE’s Build, Operate and Transfer Project in the African country of Liberia. Liberia was then attempting to recover from a civil war under a transitional government led by President Guyde Bryant. Pet.App.31a. It was a faction ridden, dysfunctional country where the previously warring factions had recently transferred their activities from military operations into politics via the Accra Peace Accord. Pet.App.31a-32a Control of sections and entities of the transitional government were divided among the hostile political factions. UTE learned of the telecommunications opportunity, which was unknown to ZTE. Pet.App.33a. UTE obtained the concession.

However, the Contracts and Monopolies Commissions recommended President Bryant not approve the Liberian Telecommunications Corporation/UTE contract. Pet.App.38a. President Bryant prevented consummation of the contract. The Liberian Congress investigated and repeatedly voted to override Bryant's decision, once by a 2/3 majority, but was ignored. Pet. App.38a. UTE did not know ZTE had bribed Liberian Telecommunications Corporation Managing Director, Amara Kromah, and his Deputy Director, Alfred Bargor with secret "5%" consulting agreements Pet.App.35a and \$75,000 in bags of cash. Pet.App.36a. Kromah was also given an all expenses trip to China and \$1,000 cash. During that trip he signed a Memorandum of Understanding for LTC to purchase equipment directly from ZTE. Pet.App.40a. (UTE also unsuccessfully pursued actions in the Liberian courts. Pet.App.38a-39a. UTE's contract stalled because of the conflicts between LTC, National Transitional Legislative Assembly and President Bryant. Pet.App.39a.

A Build Operate Transfer contract between ZTE and a dormant company AFRIPA/A-Link was revived by Kromah and used to purchase equipment from ZTE. Pet.App.39a-40a.

UTE asserted ZTE obtained Petitioner's concession by bribing numerous Liberian officials and concealing evidence of its actions to divert UTE' contracts. Pet. App.42a-44a. ZTE denied any wrongdoing and specifically stated "The government of Liberia deprived Claimant of its prospective contract with the LTC." Pet.App.47a. A Sydney Morning Herald article years later revealed ZTE knew during the arbitration it had paid \$12,800,000 in bribes to Liberian officials to

divert UTE's contracts. \$6.8 Million in bribes were paid for the \$29 Million GSM contract and a further \$ 6 Million to obtain the \$36 Million CDMA contract. Arbitration testimony proved \$76,000 was paid to Kromah and Bargor. The other remaining \$12.7 Million of bribe payments are unaccounted for. *See* Nick McKenzie & Angus Grigg, *Corrupt Chinese Company on Telstra Shortlist*, Sydney Morning Herald (Australia), May 13, 2018, <https://www.smh.com.au/business/companies/corrupt-chinese-company-on-telstra-shortlist-20180512-p4zexr.html>.

ZTE's activities against UTE were revealed to be paralleled by the similar activities at the same times in the adjacent country of Benin. There ZTE made 39 payments to 29 people from the President and his family to ministers, telecommunications executives and bureaucrats to "get contracts signed and kick out competitors." The payments to officials in Benin happened in 2005 and 2006, but, according to the documents, they were part of an elaborate bribery system set up inside the company, which has never been investigated or disclosed. The source said these bribes had to be approved by multiple managers within ZTE, including senior executives at its Shenzhen headquarters and senior staff in the firm's African division. *See* Nick McKenzie & Angus Grigg, *Corrupt Chinese Company on Telstra Shortlist*, Sydney Morning Herald (Australia) (May 13, 2018), <https://www.smh.com.au/business/companies/corrupt-chinese-company-on-telstra-shortlist-20180512-p4zexr.html>.

ZTE knew all of this, yet represented to and convinced the arbitrator that ZTE did not cause UTE to lose the contracts. Pet.App.49a. Rather the arbitrator

was misled by ZTE into concluding that, “Claimant lost the contract because the Contracts and Monopolies Commission concluded that Claimant was not qualified and President Bryant did not approve the contract.” Pet.App.49a. The award further stated, “Respondents (ZTE) did not tortuously interfere with Claimant’s prospective business relationship.” Pet.App.50a. That was capped by, “Adverse inferences against Respondents are not warranted because Claimant failed to prove that Respondents acted with subjective intent to conceal or destroy discoverable evidence.” Pet.App.50a.

It is logical to assume the exact Liberian officials’ decisions and actions relied upon by the arbitrator were the recipients of the unaccounted for \$12.7 Million. At all relevant times relating to the arbitration, ZTE knew exactly which Liberian officials it had bribed and the amounts of each of those bribes for each and every witness that it relied upon. The ZTE “evidence” and actions are the exact kinds of “fraud, corruption and undue means” FAA Sec. 10(a)(1) and TX RCP 171.088(a)(1) exist to provide relief from.

Nineteen days after publication of the award at issue, ZTE pled guilty to multiple federal felonies involving activities affecting the integrity of the judicial process. Pet.App.72a-74a, calculated destruction and manipulation of evidence at the direction of senior ZTE officials, Pet.App.86a-90a, and lying under oath to federal authorities. Pet.App.86a-90a. ZTE deceived its own American lawyers. Pet.App.88a, Par.63. ZTE’s opaque relationship with the government of the People’s Republic of China led the United States Department of Justice to agree ZTE is entitled to assert the “State Secrets Privilege” of the People’s Republic of China.

In addition, the plea agreement specifies that ZTE's legal department warned potential ZTE employee targets of the Federal Bureau of investigation so that they could leave the country ahead of the FBI. This the same legal department that was instructing counsel in the arbitration, and which instructed counsel in the United States District Court for the Southern District of New York which has accused ZTE of misleading the federal court. The plea bargain required termination of four specified senior ZTE officials. Pet. App.22a and 81a. (That was not done and resulted in further sanctions.) One of the required to be terminated officials was the ZTE General Counsel the office instructing U.S. counsel. Pet.App.81a, Par.40. ZTE counsel Davis engaged in an extensive colloquy regarding the former ZTE general counsel in the United States Ashley Yablon. Pet.App.61a. He confirmed that UTE was unable to successfully subpoena Mr. Yablon. Pet. App.61a. At that time Mr. Yablon had been offered protection and participation in the federal witness protection program. Pet.App.57a and 59a. It was hardly surprising that UTE was unable to successfully subpoena Mr. Yablon or obtain his testimony.



REASONS FOR GRANTING THE PETITION

THIS PETITION WILL RESOLVE CONFLICTS WITH OTHER FEDERAL CIRCUIT COURTS, DISTRICT COURTS, AND INFORM ALL STATE COURTS

The jurisprudence explaining “fraud, or . . . undue means” is sparse. ZTE’s egregious activities offer an excellent opportunity for a careful analysis of the meaning and standards for vacating arbitration awards obtained by “fraud, or . . . undue means.” The Court should find that the proper standard for determining when an award should be vacated must consider all of the facts and circumstances then available or later obtained. The determination of “fraud or undue means” should be whether the award could have been affected. *Odeon Capital Group v. Van Alstyne*, 864 F.3d 191 (2nd Cir. 2017).

The essence of this case is:

How far can an arbitral process be abused or corrupted by the dishonesty of a party before an award will be vacated for fraud and undue means?

Arbitration parties must know they have to arbitrate honestly or risk vacatur of awards for fraud or undue means. The court of appeals failed to recognize that comprehensive evidence of chicanery will almost never be available documenting a party’s perversion of an arbitration by corruption, fraud, or other undue means. It focused on the absence of a transcript, which is seldom available in arbitration. It ignored and gave short shrift to the fact that parties in arbitration are

not usually discovered creating elaborate schemes to eliminate emails or falsify evidence. Pet.App.89a. The FBI had a whistleblower, legions of agents and unlimited money for its' case against ZTE. UTE did not.

Multiple federal courts have found that a party who seeks to vacate an award on the basis of undue means "must show immoral, illegal, or bad-faith conduct." *See LeFoumba v. Legend Classic Homes, Ltd.*, No. 14-08-00243-CV, 2009 Tex. App. LEXIS 7573, 2009 WL 3109875, at *2 (Tex.App.-Houston [14th Dist.] 2009, no pet.); *See also In re Arbitration Between Trans Chemical Ltd. and China National Machinery Import & Export. Corp.*, 978 F.Supp. 266, 304 (S.D. Tex. 1997), citing *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403-04 (9th Cir. 1992).

Those courts correctly held that the best reading of the term "undue means" under the maxim *noscitur a sociis* is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either. *See PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 991 (8th Cir. 1999) ("The term 'undue means' must be read in conjunction with the words 'fraud' and 'corruption' that precede it in the statute."). The most appropriate application remains in the decision in *Odeon Capital Group v. Van Alstyne*, 864 F.3d 191 (2nd Cir. 2017) where the court stated, "[a] petitioner seeking to vacate an award on the ground of fraud must adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the

arbitration. *See Karppinen*, 187 F.2d at 34-35.” *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32 (2d Cir. 1951).

Petitioner submits ZTE’s activities and admissions in the Plea Agreement a mere 19 days after the Final Award, establish elements 1 and 2. The materiality of the “undue means” should be analyzed similar to that of fraud. Therefore for “undue means” to be material within the meaning of Section 10(a)(1) of the FAA, Petitioner had to, and did, demonstrate a nexus between the “undue means” employed by ZTE and the decision made by the arbitrator. However, Petitioner should not be required to prove that the arbitrator(s) would have reached a different result. *Id.* 187 F.2d at 34

UTE proved ZTE’s bribery of Liberian officials to divert Appellee’s project as part of its underlying claims. UTE showed the trial court that ZTE engaged in immoral, illegal, and bad-faith conduct during the arbitration through its obstructive, dishonest behavior and failure to disclose its own criminal conduct which could have had the impact of preventing the arbitrator’s proper evaluation of every aspect of ZTE’s defenses and UTE’s claims. The subsequent revelations of ZTE’s continued duplicitous activities and the elaborate bribery schemes disclosed in the Sydney Morning Herald show that the arbitration award was obtained through “undue means” as defined in both the federal and Texas law.

ZTE’s Plea Bargain and associated agreements sufficiently proved to the Trial Court that as of March 7, 2017, UTE’s assertions about ZTE’s obstruction and lack of credibility were factual. ZTE admitted that the very things UTE complained of were exactly what

it had been doing for a decade on an institutional scale that far eclipsed and assuredly encompassed this arbitration.

Every court and arbitral tribunal would consider it highly relevant to know that a party before it, such as ZTE, admitted creation and use of a corporation wide system of evading authorities, destroying, concealing, and disavowing evidence, hiding witnesses, lying under oath, using empty shell companies to cover their activities, and lying to their own attorneys. Any confession or knowledge of the arbitrator that those practices were part of an institution wide culture permitting and facilitating corrupt practices would unquestionably have had a direct impact on the arbitration. It is beyond belief that knowledge of this would not have had an impact on the arbitration.

ZTE's practices and abuse of the arbitration process are the prohibited ills constituting the corruption, fraud, and undue means justifying the trial court vacating the arbitration award. If ZTE's activities are not fraud or undue means, then UTE asks this Court, "are any activities so reprehensible that they are fraud or undue means?"

The evidentiary record before the trial court and this court establishes that at the relevant times in this case and underlying arbitration Appellants only complied with inconvenient laws, federal court orders and arbitration discovery solely to the extent they believed that they could not successfully evade them. Appellants stonewalled discovery in this matter and tricked the arbitrator. The astonishing extent of Appellants' protection by the Chinese government and deceptive activities were unknown and unknowable

to the Appellee and to the arbitrator at the time of the arbitration. Appellee could do nothing more at that time beyond asking for the arbitrator to draw the adverse inferences as it did, and which is recited in the award as being refused.

Had ZTE revealed what it knew about the existence of the Plea bargain negotiations, the existence of the “FBI “Mirrored” computer system and files, the contents of its own records regarding the Liberia transactions or the astonishing extent of the Liberian and Benin bribery schemes, no reasonable arbitrator would have accepted ZTE’s representations or denied Appellee’s request for adverse inferences. No possible record would reveal Appellants’ duplicity, deliberate frustration of Appellee’s ability to obtain a fair, honest hearing as clearly as subsequent events revealed ZTE’s repeated and continued deception of the FBI, United States Department of Justice and Department of Commerce.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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