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Summary of the OGEMID Symposium "Corruption in/on International Arbitration" (January/February 2024)

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Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

Summary of the OGEMID Symposium “Corruption in/on International Arbitration” (January/February 2024)

Introduction

Dr Petra Butler, January 2024 -- This year’s first OGEMID Symposium will discuss the impact of corruption in/on international arbitration. You will all agree that this is an important topic that affects the legitimacy and credibility of arbitration as a dispute resolution mechanism.

The schedule of the Symposium is as follows:

1. the management of corruption allegation/suspicious by arbitral tribunals: should the arbitrators be proactive?
2. the annulment, recognition & enforcement of arbitral awards suspected to give effects to a corruption contract (or to a contract concluded through bribes): how state courts should proceed?
3. the corruption of the arbitral tribunal
4. asset recovery
5. matters of evidence and conclusion

We are really looking forward to a lively discussion.

The Symposium “speakers” from around the world are:

- **Olufunke Adekoya**, independent arbitrator.
- **Martin Kenney**, founder and managing partner of Martin Kenney & Co (MKS).
- **Sébastien Manciaux** is Law Professor (Maître de conférences HDR) at the Université de Bourgogne, Dijon (France), and a member of the Research Centre on Investment and International Trade Law (CREDIMI).
- **Cesar Pereira C.Arb FCiarb** is a partner at Justen, Pereira, Oliveira & Talamini, Sao Paulo (Brazil), and co-head of his firm’s infrastructure and arbitration practices.
- **Rina See**, barrister at Bankside Chambers in Singapore.



Topic 1: Management of Corruption Allegation / Suspicious by Arbitral Tribunals:
Should the Arbitrators be Proactive?

Olufunke Adekoya is an independent arbitrator, having retired as Head of the Disputes Practice Group at AELEX, a Lagos, Nigeria based law firm. She is regularly appointed as an arbitrator in commercial and investment related disputes in the energy and construction sectors. She is a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators and sits on the Court of the Singapore International Arbitration Centre. She is listed on the panel of arbitrators of the Kigali International Arbitration Centre, SIAC, ICSID and CIETAC amongst others. She is also a member of the African Users Council of the London Court of International Arbitration and ArbitralWomen.

Funke Adekoya SAN, 29 January 2024

The statements made by Justice Knowles in his October 2023 judgement in the English Commercial Court in the NIGERIA v P&ID case¹ have reignited the debate within the arbitration community regarding the role of the arbitrator in disputes where the possibility of corruption exists. As a general question, he asks explicitly, "Could and should the Tribunal have been more direct and interventionist...", and then referencing the efficacy of the arbitration process generally, he concluded his judgement by stating that: "Unless accompanied by public visibility or greater scrutiny by arbitrators, how suitable is the process in a case such as this where what is at stake is public money amounting to a material Percentage of a state's GDP or budget?"

His position seems to be that arbitration as a dispute resolution method may not be suitable for investor-state disputes in situations where the possibility of corruption may exist unless arbitrators exercise greater scrutiny. "Greater scrutiny" will most likely require that if the arbitrator suspects elements of corruption in the dispute, such an arbitrator must intervene in a manner they deem appropriate in order to ascertain whether any suspicions are justified. Arbitrators are appointed to adjudicate disputes between parties and render impartial decisions. One pillar upon which the integrity of the arbitration process rests is the neutrality of the arbitrator; as such, neutrality is fundamental to maintaining the confidence of the business community in arbitration as a dispute resolution process. To what extent, then, could the intervention of an arbitrator in these circumstances affect the perception of their neutrality, especially where corruption has not been alleged as a defence by the Respondent?

In some investor-state arbitrations from emerging economies, the State party that has alleged acts of corruption may be under-resourced legally. The probing intervention of an arbitrator in such a situation adds another dimension to the issue of neutrality; can such probing intervention be termed evidence of partiality towards the State party? Could this become a ground for seeking to set aside an unfavorable award? The extent of any such intervention must also be carefully determined by the arbitrator, as if they decide to pursue any suspicions of corruption, such intervention has to be balanced against the obligation to resolve the dispute expeditiously. In any case, arbitrators must determine the allegation as a factual matter. Issues of evidence and the burden of proof to be applied then become a hurdle to be decided.

A further issue to consider is whether the extent of the intervention should be different depending on whether the arbitration is within the ISDS system or purely commercial arbitration. The P&ID arbitration was a commercial arbitration, even though it involved foreign investors and a State; so should the extent of any intervention by the arbitrators be different depending on whether the corruption allegations were framed against the backdrop of commercial or investor-state arbitration? Do arbitrators determining investment disputes within the ISDS system have a greater responsibility to uphold an international legal order when compared with arbitrating a commercial dispute where the parties have voluntarily and freely entered into the relationship which has resulted in the dispute? Explicit allegations of corruption made in an investment arbitration would certainly be within the arbitrator's remit as a jurisdictional issue, which, if successfully made, would make the investor's claims

¹ Federal Republic of Nigeria v Process & Industrial Development Ltd (Re Ruling on Leave to Appeal) [2023] EWHC 3320 (Comm) (21 December 2023) <<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=34272>>

admissible. However, this may not be the case in commercial arbitration resulting from a contractual relationship between the parties.

Arbitrators have to ensure the effectiveness of the award, and this is confirmed by Article 42 of the ICC Rules, which states that "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law." One of the grounds upon which enforcement of an award can be refused under the framework of the New York Convention is that the recognition or enforcement of the award would be contrary to the public policy of the country of recognition or enforcement. Many countries are signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention against Corruption, which brings acts of corruption into the realm of both international and national public policy.

If this is the case, then to ensure the effectiveness of its award, an Arbitral Tribunal, whether in an ISDS or commercial arbitration, should be able to raise and investigate suspicions of corruption *sua sponte*. The arbitral framework does not, however, give the arbitrator the power to compel the production of documents, and a party engaged in corrupt acts is unlikely to volunteer the evidence required to invoke criminal liability, something which the arbitrator cannot impose. This is a definite disincentive to a *sua sponte* approach by arbitrators.

Because corrupt acts are notoriously difficult to prove, arbitrators usually look for the 'red flags of corruption' when corruption is suspected. These include agency relationships between private individuals and government entities with disproportionate commission or remuneration, a lack of proper documentation concerning the contract, the location of the contract in a country where people are more susceptible to bribery, and the industry sector of the relationship between the disputing parties. These are usually industry sectors that are government-controlled or funded; such as the telecoms, public health or defence sectors. However, even where these red flags exist, and the arbitrator suspects acts of corruption based on the relationship between the parties, the lack of coercive measures available to the arbitrator makes it harder to obtain evidence. In light of this, some arbitrators are reluctant to investigate any suspicions of corruption, even where 'red flag' situations exist, seeing the issue, especially where not explicitly alleged, to be outside their remit.

Be that as it may, arbitrators can be guided by the finding of the arbitrator in the 1963 Award in ICC Case 1110, a commercial arbitration arising out of the non-payment of agreed agency fees. No allegations of corruption were explicitly made; however the arbitrator suspected and investigated the existence of corrupt acts underlying the agency fees agreement. In dismissing a claim in which he found evidence of corruption, the arbitrator stated that "a case such as this, involving such gross violation of good morals and international public policy, can have no countenance in any court. . nor in any arbitral tribunal."



Mark Kantor, 30 January 2024

Funke and All,

Most corruption allegations arise from opposing parties, disaffected employees (often anonymously) and competitors of the alleged malefactor (again, often anonymously),

who bring those claims to law enforcement officials and maybe to the tribunal. You correctly note that, as an arbitrator, I do not have the power in most jurisdictions to subpoena third parties or their documents. Therefore, I cannot reach disaffected employees or competitors unless a party calls them as a witness (something few are interested in doing). Additionally, third parties are often said to be reluctant to come forward for fear of retaliation. I also usually have to rely on the opposing party to challenge inadequate document production by the allegedly corrupt party. Moreover, often both sides have engaged in the corrupt conduct, and neither has an incentive to volunteer information that could implicate that side as well as the other.

You say that the consequence of the Nigeria vs. P&ID judgement is that “an Arbitral Tribunal, whether in an ISDS or commercial arbitration, should be able to raise and investigate suspicions of corruption *sua sponte*.” With those thoughts in mind, exactly what steps should an arbitrator take to raise and investigate suspicions of corruption? Should I instead refer the suspicion to a competent and independent law enforcement authority (if one has jurisdiction) that actually does have investigatory tools I lack?

By the way, I note that the World Bank Group Sanctions Board, on which I was privileged to serve with you, and the World Bank investigatory arms are known to handle far more contractor misrepresentation and fraud cases than corruption cases. The World Bank investigators also lack subpoena power or the ability to compel government officers and third parties to come forward. Those are the reasons usually offered to explain why only a few corruption cases make their way through the World Bank system. That weakness seems analogous to the weaknesses I face as an arbitrator.

Thoughts?

I hope this is useful.



Funke Adekoya SAN, 30 January 2024

Mark,

You have raised some interesting points. I am doubtful as to the role that third parties [whether former staff or disgruntled competitors] would play in an arbitration process, unless, as you say, they are witnesses appearing for a party. In that case, their evidence of corruption would be subjected to passing whichever evidentiary burden the tribunal deems adequate. As you remember, the World Bank Sanctions Board uses a ‘more likely than not’ standard of proof, rather than the higher standard of ‘beyond reasonable doubt’, which those denying a corruption claim will obviously prefer.

In my view, where red flag situations exist, the arbitrator should be more enquiring, perhaps by questioning why certain payment methods were agreed on in agency contracts, why fees should be paid even without evidence that the work was done, enquiries as to the reason for or effect of political or familial relationships in agency or commission relationships. An arbitrator’s relationship with the parties is contractual, and as such they do not have the

power to report suspicions of corruption to the relevant government authorities. For that very reason, an arbitrator called to determine a dispute in a ‘red flag’ situation needs to ensure that his award is not enabling or rewarding corrupt acts; turning a blind eye to any suspicions is not in the best interests of the arbitration process.



Topic 2: Annulment, Recognition & Enforcement of Arbitral Awards Suspected to give Effects to a Corruption Contract (or to a Contract Concluded Through Bribes): How State Courts Should Proceed?

Cesar Pereira C.Arb FCIarb is a partner at Justen, Pereira, Oliveira & Talamini, Sao Paulo (Brazil), and co-head of his firm’s infrastructure and arbitration practices. He is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators - Ciarb, and immediate past chair (2019-2022) of the Ciarb Brazil Branch. His work as counsel, arbitrator or legal expert focuses on infrastructure projects, regulated industries, public procurement, and international contracts, and he has authored or edited articles, book chapters and books in these fields. He holds a doctorate and a master’s degree in public law from PUC-SP (Brazil) and has been a visiting scholar at Columbia University, University of Nottingham, and George Washington University. He is a Fellow of the University of Nottingham’s Public Procurement Research Group and is on the editorial board of its Public Procurement Law Review - PPLR.

Cesar Pereira, 30 January 2024

Following up on Funke’s post and the ensuing discussion, I am tasked with introducing the topic of the contractual impacts of corruption in the context of arbitration. Since it is self-evident that arbitrators will never prosecute corrupt practices as a criminal court would (and leaving for later the topic of a possible duty to report), the remedies available to arbitrators are contractual ones. These include declaring contracts void, voidable or unenforceable; awarding damages; determining reduction of prices; ordering disgorgement of profits; mandating restitution or addressing unjust enrichment.

What I find particularly fascinating in this topic is how nuanced the approaches can be. Once we go past the initial view that anything touched by corruption is unworthy of protection by an arbitral tribunal, there are multiple aspects that make an arbitrator’s role much more complex (and interesting).

The first step is to distinguish between contracts providing for corruption, also known as bribe agreements (e.g. hiding bribes as consultancy fees or as prices in a sham supply agreement), and those procured through corruption. Although both categories of contracts are tainted by corruption, the outcome and appropriate remedies differ depending on the law applicable to the dispute. For a more detailed discussion of the ideas mentioned here, see SCHWENZER, Ingeborg and PEREIRA, Cesar, ‘International Sales, Arbitration and Corruption’, Kluwer Arbitration Blog, 2023.²

² International Sales, Arbitration and Corruption: A CISG perspective, Ingeborg Schwenzer and Cesar A. Guimarães Pereira <<https://arbitrationblog.kluwerarbitration.com/2023/03/15/international-sales-arbitration-and-corruption-a-cisg-perspective/>>

In neither category will the arbitration agreement within a contract tainted by corruption be automatically invalid. Competence-competence and separability protect the enforceability of the arbitration agreement. The power to determine the validity of the arbitration clause remains in the hands of the arbitrators, depending on the specific facts of each case. In any case, the arbitrators are the first to have the authority to render a decision regarding their own jurisdiction.

Bribe agreements (the first category) are generally seen as invalid and unenforceable, and prohibition of bribe agreements amounts to transnational public policy. Since bribe agreements are unenforceable, the practical principle in these cases is that “the money stays where it is”. This is in line with the well-known and widely accepted Roman law principle “*in pari turbitudine melior est causa possidentis*” (in cases of equal wrongdoing, the position of the party currently possessing the item in question is stronger). Neither party to a bribe agreement may seek enforcement or restitution, for instance. In this sense, the arbitral tribunal in *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7³ found that claims based on contracts tainted by corruption could not be upheld, as it would be contrary to transnational public policy. A similar reasoning could be used in commercial cases.

As for the second category, there are three possible outcomes: first, the main contract, obtained through corruption, is declared void; second, the injured party has the option between the invalidity of the agreement or its continuity; and third, the main contract is deemed binding and effective, which limits the injured party’s rights to other remedies, such as damages or price reduction (BONELL, Michael Joachim; MEYER, Olaf. *The Impact of Corruption on International Commercial Contracts - General Report*. In: BONELL, Michael Joachim; MEYER, Olaf (Ed.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing, 2015, p. 20). In a very interesting study on the disgorgement of profits related to corrupt contracts, Ewoud Hondius also points out to a trend “toward a solution that places the fate of the contract in the hands of the principal as the direct victim of corruption” (HONDIUS, Ewoud. *Corruption in Contract Law and Disgorgement of Damages*. In: UNIDROIT (Ed.). *Eppur si muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, vol. 2. Rome: UNIDROIT, 2016, pp. 1045-1046).

Alexis Blois notes that “[t]he central question is to determine whether the corrupt payment is detachable from the contract concluded” (*Contracts and Corruption: Kickbacks and Claims*. *International Business Law Journal*, no. 4, 2008, p. 472). If a supply contract provides for an overprice to hide funds intended for bribery, it may be possible to determine the amount attributable to the overprice and hold the seller liable for the performance of the contract for a price that is net of the bribery funds. This leads to further questions. How does one accurately calculate the extent of overpricing within a contract, and what methodologies are reliable in isolating the corrupt component from the legitimate aspects of the deal? Additionally, at what threshold of overpricing does the principal amount of the contract become significantly tainted, calling into question the validity of the entire agreement? Furthermore, what criteria do we use - if any - to know whether a contract is fundamentally a farce, designed solely for corrupt purposes, or if it is a legitimate agreement that unfortunately has a corruption scheme attached to it, potentially capable of being detached?

³ *World Duty Free Company Limited v The Republic of Kenya* (ICSID CASE NO. ARB/00/7) - Award - 4 October 2006 <<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=1849>>

Corruption-related contracts with States generally fall under the category of contracts procured through corruption, such as bid-rigging or collusion between State officials and private contractors or their agents.

Sometimes States can enter into bribe agreements. A government contract may be intentionally overpriced to hide subsequent kickbacks to government officials. This will be an example of a bribe agreement involving a State entity - and possibly also an example of detachable corrupt portions of a valid contract. Except in the situations that corruption contaminates a contract as a whole, a government contract tainted by corruption is not necessarily invalid or unenforceable, since its ultimate purpose - supply of goods or service, public works - is a valid one. Normally the fate of the contract will be in the hands of the injured party, subject to constraints of unjust enrichment or other similar remedies to protect the contractor's rights to restitution or compensation. As Blois concludes, “[a]ccording to the most widely accepted solution under English law, reprised by the arbitrators in relying on an opinion of Lord Mustill, if A concludes a contract with B by making a corrupt payment to a third party, employed or representing B, the contract is neither void nor unenforceable, but voidable by B. Contracts contaminated by corrupt acts are therefore not 'void' but 'voidable'. They remain legally valid but the State has the choice to either rescind the contract or indeed to waive that right to rescind” (op. cit. p. 472).

Lastly, we should also be mindful that corruption and related practices, such as collusion, bribery, bid-rigging, kickbacks and the like are not subject to an all-or-nothing solution even under the applicable domestic or international criminal, anticorruption, or antitrust legislations, as well as development banks and agencies rules. There are numerous opportunities for non-prosecution or leniency agreements, self-cleaning or other arrangements by which governments ensure that even parties that have been involved in corrupt practices can be considered as having overcome their misconduct, reorganized their business and corporate structure, and restored their present responsibility to remain as viable government suppliers in current or future contracts. This awareness underscores the need for arbitrators to hear the parties and allow them to provide all appropriate clarifications before adopting absolute or categorical conclusions regarding the impact of corruption on the subject matter of arbitral proceedings. The shift away from black-and-white solutions increases the burden on arbitrators to exercise judgment. We must apply not only our legal expertise but also a fine sensibility. This task demands not just knowledge, but wisdom, to balance the strict letter of the law with the subtle nuances of human behavior. Here, more than ever, arbitrators are carefully observed by the watchful eyes of our peers.

The vast literature on this topic is a good indication that there are many other aspects and examples to be considered. Recent large-scale corruption scandals such as Operation Car Wash (*Operação Lava-Jato*) involving Brazil's state-controlled Petrobras contributed many of them, with ramifications spreading over several countries. If there can be a bright side to them, it will certainly be the increased sophistication and practical awareness in the approach taken by courts, arbitrators and agencies dealing with corrupt practices.

I thank the OGEMID organizers and especially Petra Butler for this opportunity and look forward to any further discussion.



Dr Luke Nottage, 31 January 2024

Thanks for a great topic and points of view already.

I've just finished a co-edited book project on "*Corruption and Investment Arbitration in Asian Investment Arbitration*"⁴ that includes quite a few professors, lawyers and arbitrators on or known on this listserv. The book should be out from Springer's "*Asia in Transition*" series in April and will be Open Access, so freely available including to less well-resourced organisations and states.⁵

We mostly ended up focusing on investment treaty arbitrations, as questions of corruption have been increasingly raised in awards from around 2010 globally and there have been now several cases involving Asian parties (and/or involving other types of serious illegality by or involving investors, which often raise overlapping issues). These types of arbitration also tend to have much wider ramifications than cases involving one-off investment contracts containing arbitration clauses, even with government parties, because eg (a) if corruption is proven in an investment treaty arbitration, there can be immediate impacts or longer term ones on other projects or investors, (b) there is greater interest generally in such arbitrations from stakeholders especially in host states, and indeed more concerns about the legitimacy of this procedure compared to investment contract arbitrations, and (c) greater transparency exists around the awards and sometimes other aspects of the proceedings.

For such reasons it also seems to me that in investment treaty arbitrations there is or should be more scope for arbitrators to consider their role as not just to resolve the dispute narrowly based on parties' allegations, but eg indeed to be more pro-active in looking for and querying red-flag indicia of potential corruption. (At the same time, they have greater responsibility to do this carefully, maybe therefore adopting a standard of proof closer to "beyond reasonable doubt" that can generate more evidence and argumentation.) This may also come more naturally to (at least some) civil law tradition arbitrators who are used to being more pro-active - although usually discussed instead in the context of trying to rein in resurgent costs and delays across international arbitration generally (which is a competing concern if we go down this path). By contrast, I wonder if the narrower approach is favoured by arbitrators from the common law tradition, especially from the more "formal reasoning" prone English law sub-tradition (compared to the US more open-textured "substantive reasoning" prone sub-tradition, as expounded by Atiyah and Summers in their 1987 OUP book⁶, or maybe arbitrators from the wider Anglo-Commonwealth jurisdictions where corruption is better-known in practice).

It's interesting nonetheless to consider, as some in our book do, corruption allegations that crop up in cross-border contractual contexts. As Cesar suggests, some courts

⁴ See for more information <<https://japaneselaw.sydney.edu.au/2022/03/corruption-and-illegality-in-asian-investment-arbitration/>>

⁵ *Corruption and Illegality in Asian Investment Arbitration*, editors: Nobumichi Teramura, Luke Nottage, Bruno Jetin <<https://link.springer.com/book/9789819993024>>

⁶ *Form and Substance in Anglo-American Law - A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions*, P. S. Atiyah and R. S. Summers, Clarendon Press, Published: 1987, 448 Pages, ISBN: 9780198255772 <<https://global.oup.com/academic/product/form-and-substance-in-anglo-american-law-9780198255772>>

applying national laws are trying to find nuanced solutions. By contrast in investment treaty arbitrations, if there is an explicit legality provision (covered investments are those made in accordance with host state law), most awards simply tend to conclude that proof of corruption deprives the tribunal of jurisdiction to offer substantive treaty protections. (Some awards even do so for weaker or implicit legality provisions in treaties.) A problem then is that this can perversely incentivise host states to ensure someone asks for and keeps (records of) a bribe as the investment is being made, with that person never prosecuted but instead the bribery defence wheeled out if and when there is ever an investment treaty arbitration claim. An awareness of such problems, of bribery requiring two or more to tango, underlies attempts by some arbitrators and/or commentators to favour dealing with such issues instead as questions of admissibility, merits, damages scope and/or costs allocations. Yet, given the decentralised nature of the investment treaty arbitration system (including only persuasive precedent), maybe we need some new / model treaty provisions and/or Rules drafting around such questions? Have these topics drawn much specific discussion in say the UNCITRAL ISDS reform deliberations underway since (!) late 2018?

Dr Luke Nottage



Mark Kantor, 31 January 2024

To All

For those of you interested in the authority of arbitrators to make referrals to law enforcement, I draw to your attention the article *The Potential for Arbitrators to Refer Suspicions of Corruption to Domestic Authorities*, by Kiera Gans and David Bigge, available on TDM at <https://www.transnational-dispute-management.com/article.asp?key=1955> (subscription required) as part of TDM's 2013 Issue on Corruption and Arbitration.

The authors began their analysis by stating:

"commentators generally agree that arbitral tribunals are uniquely ill-suited to ferret out corruption, particularly when compared to domestic regulatory and judicial authorities. This article will establish a framework for determining whether arbitral tribunals can and should refer suspicions of corruption to domestic authorities, which (it is assumed) have more tools for and experience in investigating corruption."

After considering applicable law and rules in detail, Gore and Bigge concluded:

Reporting allegations of corruption that arise in the context of an arbitration to domestic authorities remains a tool in the arbitrator's toolbox. In our view, it has been an underexplored possibility for resolving corruption allegations in an arbitration, given the significant limitations on fact discovery in the context of arbitration.

I hope this is useful, and also belatedly thank Kiera and David for their helpful TDM contribution.



Martin Kenney, 31 January 2024

Dear Mark,

1. I agree with the conclusion reached by Kiera Gans and David Bigge in the article you refer to below - that arbitrators should use criminal referrals to law enforcement as a tool in their anti-corruption tool kit.
2. A query: When making a criminal referral, how can a tribunal avoid an accusation of violating arbitral confidentiality in those instances where a rule or a duty not to disclose confidential information obtained during arbitral proceedings to third parties, exists?
3. Under the English common law of confidence, an exception to a duty of confidentiality exists for apparent criminal or fraudulent conduct. For example, in *Gartside v Outram* [1857] 26 LJ (NS) 113, the court held that "... there is no confidence as to the disclosure of an iniquity."
4. Do Kiera Gans and David Bigge address this issue in their article you took us to?

Regards

Martin Kenney



Mark Kantor: I refer you to Kiera and David's article, which offers their views on how to address the confidentiality obligations of an arbitrator.



Sébastien Manciaux, 31 January 2024

Dear Martin, Mark and all,

the possibility for arbitrators to refer suspicions of Corruption to domestic authorities raises several issues:

- 1) in the case of an institutional arbitral procedure, is it necessary for the arbitral tribunal to notify the arbitral institution (such as the ICC International Arbitration Court for ICC arbitral proceedings), or even to ask it the authorisation to refer suspicions of Corruption to domestic authorities?
- 2) if domestic authorities are seized, I imagine that arbitration proceedings are suspended pending their decision on the corruption suspicions. The length of this suspension (given the time needed for domestic courts (including courts of appeal, supreme court) to rule on these cases) is another problem...
- 3) and finally, are international arbitral tribunals bound by the ruling of the domestic authorities?

Views from different legal systems will be interesting...



Martin Kenney, 31 January 2024

Dear Sébastien,

You raise an interesting query about the possibility of parallel criminal and arbitral proceedings.

By way of analogy, I have been involved in many instances where there are parallel criminal and civil fraud and asset recovery or civil damages claims running concurrently.

Up until the late 1990s, under English law (and under many common law legal systems in the broader Commonwealth), judges overseeing civil cases were quick to stay their prosecution pending the completion of any parallel criminal case. Stay orders were frequently said to be justified on the basis that a civil case might disrupt the more 'important' case involving public order; or there was a fear that the accused would be oppressed by having to face one or more civil actions brought by victims of an alleged crime at the same time as having to defend themselves from an attack against their liberty. Public prosecutors worried about a loss of control over their cases if parallel civil actions were running pregnant with the risk that witnesses may say or do something in the civil case which might impair or discredit their criminal case.

However, with the rise in the late 1990s of civil fraud and asset recovery as a practice area - and a corresponding increase in the number of victims of fraud and corruption seeking economic justice in the civil courts, the law governing stays of civil proceedings in favour of parallel criminal cases began to change substantially.

Today, under English and many other common law systems of justice, stays of civil actions are very hard to obtain. The default rule is now that a victim has the lawful right to pursue compensation in the courts, and their civil rights should not be subordinated to the public order or to criminal justice.

My firm acts for the government of a sovereign victimised by the bribery of a trusted outside legal advisor to government. The corrupt lawyer placed his client government into harm's way in connection with a failed public works project. This resulted in the loss of millions of dollars of public money; and a secret 6 figure back-hander in the pocket of the lawyer. We ran a highly contentious pre-action discovery proceeding against the lawyer resulting in the disclosure of incriminating documents. This evidence allowed us to properly frame a civil action for disgorgement of the bribes and damages to repair the harm done. We were also instructed by government to make a criminal referral of the case to the local DPP (director of public prosecutions). She sought to stay the civil action in favour of a criminal prosecution on the basis of the fear of loss of control alluded to above. She was unsuccessful in this endeavour.

I am uncertain how arbitrators ordinarily treat applications to stay arbitral proceedings in favour of parallel criminal proceedings. However, modern English or Commonwealth case law on point might be looked to by arbitrators as a guide in instances where the arbitral proceedings are seated in a common law jurisdiction.

I believe that, in general, US Courts are now disinclined to stay civil actions in favour of parallel criminal proceedings.

I am in general uncertain how civil law judges approach the same issue. However, in Switzerland, as asset recovery lawyers, we frequently file local criminal money laundering complaints on behalf of victim clients of frauds perpetrated outside Switzerland to gather Swiss bank records and to freeze Swiss assets connected to a fraud - all of which is ordinarily done in aid of non-Swiss venued civil proceedings seeking compensation for the affected victims.



Cesar Pereira, 30 January 2024

Dear All,

Just to illustrate how pressing this topic is, the IBA is having a conference right now in Sao Paulo precisely under the title “When Arbitration Meets Crime”. On Friday morning, one of the panels will deal with parallel proceedings.⁷ There may be other ideas coming up from the conference to be shared here before this discussion is over.

...

⁷ Parallel proceedings - arbitrators between a rock and a hard place. The panel will discuss different issues arising from the intersection between criminal proceedings (investigation, prosecution, trial) and commercial or investment arbitrations. Should arbitrators stay arbitrations pending the outcome of criminal proceedings? How should they treat for purposes of the arbitration the evidence given and the result that may issue in criminal proceedings? How should they deal with a request to share outside of the arbitration the information gathered in the arbitration? Do criminal investigations deserve a different treatment in investment arbitrations when the state is relying upon an investigation as a defence?

Session Co-Chairs

- Cristián Francos Lewis Baach Kaufmann Middlemiss, Washington, DC; Co-Chair, IBA Business Crime Committee.
- Dietmar W Prager Debevoise & Plimpton, New York City, NY; Vice Chair, IBA Arbitration Committee.

Speakers:

- Francisco Castex Terramara Pauls Abogados, Buenos Aires; Latin American Regional Forum Liaison Officer, IBA Business Crime Committee.
- Jose Feris Squire Patton Boggs, Paris.
- Ludmila Leite Florencio Filho & Camargo Aranha Advogados, São Paulo; Diverstiy and Inclusion Officer, IBA Business Crime Committee.
- Thais Vasconcellos de Sa Sergio Bermudes Advogados, Rio de Janeiro.

When arbitration meets crime, 31 January - 2 February 2024 <<https://www.ibanet.org/conference-details/CONF2440>>

Regarding the duty to report, I find this quote enlightening:

Whether arbitrators have an accompanying duty to report suspicious of corruption to national authorities is somewhat controversial. Some consider that such obligation 'would be totally incompatible with the private nature of their mission and the trust the parties have in them', while the opposing views is that arbitrators have duties to the international community beyond their responsibilities to the parties. But, as a commentator sensibly puts it 'if there is a duty, it must come from statute, regulation or similar and not from the views of the arbitration community' (Domitille Baizeau & Tessa Hayes).⁸

In Brazil, article 40 of the Code of Criminal Procedure mandates judges from non-criminal courts to report *sua sponte* criminal actions that arise in non-criminal cases. Although it is far from unanimous among Brazilian scholars and practitioners whether this rule applies to arbitrators, it may well do, especially if coupled with article 17 of the Brazilian Arbitration Act (arbitrators are equated to public officials for the purposes of criminal law). The contrary opinion is also quite sound: if a rule should exist to place such a serious burden on arbitrators, disrupting their fundamental role of merely resolving the dispute between the parties outside the judiciary system, it should be clear and unmistakable, not arise from the interpretation of provisions designed for other purposes.

Be it as it may, confidentiality is not be an absolute obstacle if one considers that (i) the legal duty to report trumps privately agreed confidentiality, (ii) there are procedural means to protect confidentiality, such as sealed records, and (iii) many arbitrations in which corruption is an issue are already subject to transparency and not confidential.

What I find especially intriguing is what measures an arbitrator should take within the arbitration prior to coming to the conclusion that the evidence of corruption is serious enough to trigger a possible duty to report. The balance between the arbitrator's duty to the parties and the arbitral process and their duty to the law enforcement system requires special caution. It seems appropriate for the arbitrator to raise the issue first with the parties, who may well provide evidence of ongoing criminal measures or even of non-prosecution agreements or other mechanisms able to overcome the issue under the applicable criminal law.

Even in theory, a duty to report only makes sense regarding facts that are not known to the national authorities, regardless of what they do with this knowledge. It does not seem to be within the arbitrator's remit to judge the adequacy of the measures taken or the efficacy of the law enforcement system. Hearing the parties and considering carefully the explanations they provide before making any report outside the arbitral proceedings seems like a reasonable precaution.



⁸ BAIZEAU, Domitille; HAYES, Tessa. The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In: MENAKER, Andrea. International Arbitration and the Rule of Law: Contribution and Conformity. Kluwer Law International, 2017 (ICCA Congress Series). p. 248 <https://www.lalive.law/data/publications/Duty_and_Power_to_Address_Corruption.pdf>

Esine Okudzeto, 6 February 2024

Dear All;

The issue can be looked at from two dimensions;

First will be the challenge to the award which a judge will have to make a decision on and the second is outside the ambit of the enforcement of the award where an arbitrator or a public official is prosecuted for corruption.

With the second there is no link to arbitration or the award. It is the state institution(s) that will be conducting the investigation to determine whether there was fraud or corruption. The first instance above will deal with the issue of the challenge to the award based on lack of jurisdiction, admissibility or public opinion.

Funke Adekoya SAN, 7 February 2024

Dear Esine,

In the P&ID Case, the allegations of corruption were in respect of how the contract was procured, which at best would make the contract voidable but not void. In Ghana, what would the judge consider where allegations of corruption have been raised during the hearing, and the arbitrator decided there was insufficient evidence etc and decided not to void the contract. Would the public policy defence stand, and if so, would this not amount to allowing the respondent who had unsuccessfully raised the defence, have a second bite at the cherry?



Esine Okudzeto, 8 February 2024

Dear Funke;

I agree that in the P & ID case, based on the manner in which the contract was procured it was voidable not void.

Although there is no precedent in Ghana, based on practice, if there is no cogent evidence of corruption or fraud in the proceedings before the tribunal and especially where the arbitrator states that there was insufficient evidence, then the public policy defence will not stand/will fail in our local courts.

However if there is evidence that an official has been convicted of fraud or corruption in the award of the contract, that evidence if brought before the court, will permit the judge to make a decision based on public policy.

I do agree that it allows the respondent a second bite at the cherry but in light of the history of Ghana, most often contracts were awarded by a different government/political party which is seeking to set aside the contract. Should they not then be given a second bite at the cherry? Especially where corruption is involved and there is ample proof of it..



Cesar Pereira, 7 February 2024

Dear All,

As you may recall, last year's Vis Moot Problem dealt in part with corruption and its impacts on the arbitral proceedings. In a webinar organized by the Ciarb Brazil Branch in early 2023 about the procedural issues in the Moot (available online)⁹, Sophie Nappert made an interesting observation about the "*Alstom Saga*" before French courts, namely whether the recognition court could conduct a de novo review on the corruption issues based on the NY Convention public policy exception, even though the tribunal had received evidence and addressed the issues in its award. If my memory serves me well, her point was that, since courts have broader investigative powers, it could make sense for recognition or enforcement courts to exercise those powers and go beyond what the arbitral tribunal had or even could have done.

What I have seen in most situations is criticism of the tribunal's omission to address or investigate corruption as being contrary to public policy. Invoking the public policy exception under the Article V(2)(b) of the NY Convention to allow the recognition court to review broadly the tribunal's findings after hearing evidence on the corruption issues does not seem as common. What is your experience in the jurisdictions you are familiar with?

In the IBA conference on arbitration and crime in Sao Paulo last week, one of the speakers reported a case in which the tribunal ordered *sua sponte* the parties to address the issue of possible corruption, which had not been argued by either party but the tribunal sensed could be relevant. One of the parties argued it half-heartedly, the other responded in the same vein, and the tribunal was forced to dismiss the allegation of corruption for lack of evidence. The speaker did not mention whether this case went on for recognition under the NY Convention. Regardless of the actual outcome, would this scenario be a good example of an award that could deserve a de novo review by a recognition court under the public policy exception? Or should the recognition court consider that allowing the parties to simply go through the motions of making corruption allegations was not enough for the tribunal to fulfill its duty (arising from the transnational public policy of fighting corruption) to prevent collusion between the parties to disguise their possibly corrupt practices?



⁹ https://www.youtube.com/watch?v=I38y_hbSWhE

Funke Adekoya SAN, 7 February 2024

Cesar,

Very interesting point. In Nigeria, I am not aware of any case prior to P&ID in which corruption issues were raised, so there is no court record to refer to. I have just asked Ezine what the Ghana courts would do in a similar situation. I have seen commentary on OGEMID however that wonders whether the Knowles J decision would have received similar worldwide applause if it had been a decision of a Nigerian court refusing enforcement of the award. Perhaps the Nigerian court would be seen as protectionist?

Funke.

Dr. Emilia Onyema, 7 February 2024

In *IPCO v NNPC*, NNPC alleged fraud at some stage to resist enforcement and the CA in England ([2015] EWCA Civ 1144 and 1145) remitted the enforcement application to the commercial court to determine the fraud (and non fraud) issues as the Nigerian courts had overly delayed the enforcement proceedings in Nigeria. The UKSC [2017] UKSC 16 agreed with this view though the CA decision was set aside on other grounds. The parties settled so we did not get a P&ID type decision but the judgement of Field J [2014] EWH 576 (Comm) came close (in my view).



Rina See, 1 February 2024

Dear all,

Thank you for all these great points. On the duty to report, I found interesting the discussion by Koh Swee Yen SC in “*Duty or Right of Arbitrators to Report Suspicion of Corruption to Authorities?*” at the 2019 ASA Annual Conference (published in Andrea Meier and Christian Oetiker (eds), *Arbitration and Corruption*, Kluwer Law International)¹⁰, where she discusses the position in Singapore, amongst other jurisdictions, along with the interplay with the duty of confidentiality.

In Singapore, section 45(1) of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (“CDSA”)¹¹ imposes a duty to report on a person who, in the

¹⁰ *Arbitration and Corruption*, Kluwer Law International, ISBN 9789403535340, <<https://law-store.wolterskluwer.com/s/product/arbitration-and-corruption/01t4R00000OjRz8QAF>>

¹¹ *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992*, Duty to disclose knowledge or suspicion <<https://sso.agc.gov.sg/Act/CDTOSCCBA1992?ProvIds=P15-#pr45->>>

course of their profession or employment, knows or has reasonable grounds to suspect that property was used in connection with any act which constitutes criminal conduct, including corruption. It is an offence to fail to do so. However, section 45(4) specifically provides that it is not an offence “for an arbitrator to fail to disclose any information or other matter which came to the arbitrator’s attention in the course of any arbitral proceedings in which the arbitrator acted as an arbitrator.” Section 45(7) then goes on to say that if a person does disclose in good faith to an officer, such disclosure is not to be treated as a breach of any restriction imposed by law, contract, or rules of professional conduct. So ultimately it leaves it to the arbitrator to decide whether to report or not, but conferring protections either way.

I wanted to come back to Luke’s post (which raises an interesting point concerning standard of proof, which I will come back to in our final topic on matters of evidence). Luke mentioned an interest in finding nuanced solutions that could be adopted in the investment treaty arbitration context in recognition of the perverse incentives arising from the legality provision in treaties. In *Spentex v Uzbekistan* it appears that the Tribunal sought to address the “two or more to tango” issue by urging the State to make a donation to an anti-corruption NGO or face an adverse costs order. It has been reported that the State paid voluntarily. This seems a novel approach that no other tribunal has publicly adopted. Presumably there are questions over the Tribunal’s competence to make such an order, nor does it seem likely to be an outcome that the parties would suggest - but perhaps similar questions arise from tribunals being more active in raising potential corruption allegations *sua sponte*.

Are there other examples of these kinds of novel outcomes in the treaty arbitration context? Also, are these types of outcomes that don’t favour one party or another (in some ways, like a fine) one way to address this issue beyond damages and cost shifting? This would also presumably raise questions of annulment and challenges to enforcement where there is no voluntary compliance...



Cesar Pereira, 2 February 2024

Thank you, Rina. Coincidentally, I have just met Swee Yen here at the IBA Conference on Crime and Arbitration. She made excellent remarks yesterday about the duty to report, comparing multiple jurisdictions and raising the fundamental point of what the applicable law is. Is it the law of the seat? The national law of each arbitrator? Even if one accepts the premise that a legal duty must come from an applicable rule, determining which law applies is not an easy task.



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proceedings (ICSID, ICSID-AF, ICC, CCJA or ad hoc arbitration proceedings) and as an expert for UNCTAD.

Sébastien Manciaux, 2 February 2024

Dear Cesar, Rina and others,

thanks for all of these relevant information and insightful comments.

Much has been already said while this seminar is far from being over, Cesar having just addressed the following related topic.

One thing is clear: it is not enough to say that international arbitration should not encourage corruption. The question of how arbitrators should handle alleged or proven cases of corruption is actually a question with many shapes and trying to reply to it drives many consequences, all of which must be weighed.

I just would like to add some elements to some of the issues that has been already raised.

1) A consensus seems to be agreed upon the necessity for an arbitrator to be proactive when it comes to corruption suspicions.

I would add an additional (legal and not moral) reason for backing such a behaviour, a reason drawn from the contractual mission conferred on the arbitrator by the parties: having their dispute settled.

This mission will not be fulfilled if the arbitral tribunal renders an award which will be annulled for not having addressed and resolved the suspicion of corruption that tainted the case.

Of course, this recommendation (injunction?) made to arbitrators raises the issue of the clues which should lead arbitrators to wonder about a possible corruption, but this point has already been addressed and several (classic) clues have been recalled.

2) Regarding arbitrators' power or duty to report suspicions of corruption to the relevant government authorities, this question has been dealt with in terms of legal source: *'if there is a duty, it must come from statute, regulation or similar and not from the views of the arbitration community'*.

It seems to me that we can approach this question in a more flexible way. Whether or not, at the end of their investigation, the arbitrators find the existence of a case of corruption, due to the consequences resulting from the arbitrators' decision on this issue, the award will very often be brought before a state court, for purposes of enforcement or annulment. The government authorities will therefore be informed in this way.

3) About the possibility of parallel criminal and arbitral proceedings, Martin told us about the evolution that occurred under English and many other common law systems of justice.

I just want to add that under French law and for decades (with several ruling From the Paris Court of appeal and the French Cour de cassation), it is clear that there is no obligation for international arbitral tribunals to stay arbitral proceedings pending criminal suits. It's a mere

possibility, left to the arbitrators' discretion. The rationale behind this case law is that arbitral tribunals are not within the French Judicial system and are therefore not bound by the principle "*le criminel tient le civil en l'état*". For the same reason, the solution is different for domestic arbitration proceedings.

Some information about other legal systems would be very interesting in this respect.



Michael Hwang, 4 February 2024

Dear All

I may perhaps assist the present discussion about what a tribunal can do specifically where it suspects that there may be issues of corruption in play in the dispute before it.

In 2018, I wrote a short essay on this topic entitled "*Investigation into Corruption on the Initiative of the Tribunal*" which was published in a book of my essays entitled "*Selected Essays on Dispute Resolution*", published by the Singapore International Arbitration Centre ("SIAC") and available for free download on my website www.mhwang.com.¹² The relevant pages are 405-419.

In that essay, I appended two case studies where I had to raise the issue of corruption *sua sponte* on two occasions, one as sole arbitrator, and the other as a member of a 3-member tribunal. On both occasions, the tribunal, after hearing the evidence of some of the Claimant's witnesses, raised the question directly with the parties as to whether or not the Respondent wished to raise corruption as a defence. In both cases, the Respondent asked for overnight consideration, and returned with a proposed amendment to the pleadings to plead corruption. However, in both cases, the Respondent's defence was somewhat unenthusiastic (possibly because the Respondent had participated in the arrangements for the transactions in question willingly without protest). Ultimately, because the pleaded defences of corruption were not vigorously argued, the tribunal in each case was obliged to make its finding that there was no proven case of corruption on the evidence placed before the tribunal,

But at least this offers the tribunal a positive answer to the dilemma that arises when it feels that some unsavoury facts are being hidden from it. By asking the parties directly if there is going to be an amendment to the pleaded case, the tribunal has at least raised the issue for consideration. After that, the ball goes back into the parties' respective courts, and the parties have to decide how to play the game from then on, and ultimately the tribunal has to accept that it can only decide issues that have been clearly put before it for decision.

If this question were asked of a common law court, the answer might not be the same, because common law courts usually have an inherent power to order an amendment to the pleadings on their own motion based on what they see as the relevant legal issues, based on the facts that are placed before them. However, state courts are guardians of public justice, and I think that an international arbitration tribunal would be hesitant to exercise such a power to impose its own

¹² *Selected Essays on Dispute Resolution*, SIAC, available for free via www.mhwang.com or <https://www.transnational-dispute-management.com/about-author-a-z-profile.asp?key=709>

will on a reluctant party to direct that party to run a case of corruption (whether as claimant or respondent) which that party expressly declines to accept as part of its own case.

As an aside, at a GAR event in 2014 held in London, I addressed this topic, and, when asked about the extent of the tribunal's duty to investigate corruption, made the comment (which was quite spontaneous) that "Arbitrators are watchdogs, not bloodhounds. Their job is not to go around sniffing for signs of corruption simply because they sense that there may be evidence of it in the case. But if there comes a point when the evidence starts to give off a stench which is impossible to ignore, then the arbitrators should start to press the parties to answer certain questions which demand answers, without which the tribunal may find itself assisting corruption or covering it up." When the proceedings of the conference were reported by GAR in its print copy, the cover picture showed a pair of bloodhounds!



Sébastien Manciaux, 5 February 2024

Dear all, dear Michael,

thanks for your views and I must say that I share your recommendations.

Let's turn now to domestic courts and the review by them of international arbitral award rendered in cases in the which suspicions of corruption arise or have been dealt with.

Again, several questions arise and let's start with some of them.

1) The role of state courts

When reviewing arbitral awards rendered in cases in the which suspicions of corruption arise or have been dealt with, state courts often start by clarifying that they do not act as criminal courts, the only issue before them being whether the award will be annulled (or the exequatur given), or not.

I understand that this is the position of many domestic courts in Common Law countries, as it is in other legal system such as the French one.

On the one hand, and at least within the French legal system, this statement is reassuring since the ruling of the court in such a case is not the result of a complete criminal inquiry with long and in-depth investigations.

On the other hand, the lack of a criminal complete inquiry may be regretted since it normally goes with strong guarantees intended to respect the fundamental rights of the accused persons.

And it can be added that the outcome of the review may be that corruption occurred, the award being therefore declared null and void.

I don't know how it works in your legal systems, but in the French one, « corruption » is a criminal offense, not a concept of civil or commercial law.

More precisely, in such cases, the Paris Court of appeal uses a definition of the corruption closely inspired by those contained in the 1997 *OECD Convention on Combating Bribery of Foreign Public Officials in international Business Transactions* and in the *UN Convention Against Corruption* (signed in Merida in December 2003), and these definitions are proposed for being included in the criminal legislation of member states.

It means that while stating that they are not criminal courts, domestic courts reviewing arbitral awards in such a case assess the existence, or the absence, of a criminal offense, with all the consequences that such a conclusion carries.

Shouldn't a special procedure for reviewing the award then be put in place to guarantee parties' rights?

2) The moment the suspicion of corruption is raised does matter

If corruption has been an argument developed before the arbitral tribunal and dealt with in the award, the reviewing domestic court has « only » to control the work done by arbitrators (but the way this control must be done is another interesting issue).

If corruption is an argument raises for the first time before domestic courts, other considerations may be taken into account. Is referring the case to the arbitral tribunal a possible good solution given the fact that arbitrators already know the case and would be able to rule on this new argument quicker than any state court?

This also may be a good reply to the tactic consisting for a party to forge means for setting aside an arbitral award in the event the arbitral procedure does not lead to the expected result.

Moreover, it seems to me that not raising before an arbitral tribunal suspicion of corruption if it exists (in order to keep it for the following step) is contrary to procedural fairness and constitutes a violation of procedural public policy rules.

I imagine nevertheless that giving effect to a contract tainted by corruption is considered as a more important violation of public policy rule than the respect of procedural fairness.

Actually, it is the way French judges consider such a situation.

I wonder if other ways to proceed have been developed elsewhere...

Your views and comments are more than welcome,



Sébastien Manciaux, 6 February 2024

Dear all,

The review by state courts of international arbitral award rendered in cases in the which suspicions of corruption arise (or have been dealt with) raises other questions.

I would like today to address the issue of the power of state courts in investigating corruption.

In a previous post, Mark quoted a paper by Kiera Gans and David Bigge in the which the authors began their analysis by stating "*commentators generally agree that arbitral tribunals are uniquely ill-suited to ferret out corruption, particularly when compared to domestic regulatory and judicial authorities* ».

I think that this point of view deserves further discussions.

It is certainly true that when a suspicion of corruption arises, domestic authorities (notably prosecutors or specific state agencies) have more power to investigate compared to arbitral tribunals.

But when it comes to the domestic courts in charge of the control of international arbitral awards, things may be different.

Legal culture, workload and financial means may drive to different ways to proceed.

For instance, in France and regarding corruption allegations, the Paris Court of appeal uses to explain that « it is up to the judge to seek in law and in fact all the elements enabling him/her to rule on this allegation ».

But, having participated as counsel in several annulment procedures, having commented on others for various legal journals, I can say that, very often, the Paris Court of appeal makes moderate use of this power: no additional investigation, a hearing reduced to the pleadings of the lawyers (and not too long ones), no witnesses, no cross-examination obviously; everything is based on the filings and evidence produced by the parties.

I think that, in such a context, arbitrators may make more in depth investigations and achieve more satisfactory rulings.

What are your views and how state courts are dealing with allegation corruptions in the judicial systems you know?



Mark Kantor, 6 February 2024

Sébastien,

Judicial review of arbitration awards is limited in most countries. But, so long as jurisdiction and an injured party exist, a claim based on the allegedly corrupt conduct can be brought in court independent of judicial proceedings related to the award. That is clearly the case for investigations and proceedings brought

by law enforcement agencies. All of the tools of a modern judiciary, as well as the tools available to law enforcement, are available in those circumstances.



Sébastien Manciaux, 6 February 2024

Dear Mark,

thanks for your reply and of course, judicial review of arbitration awards is limited in most countries. But to what extent?

And this limitation may go against the stated will of some state courts, like the Paris court of appeal, to seek all elements establishing the existence (or the absence if the allegation is groundless) of corruption.

Therefore, my question is how state courts in charge of the control of international award deal **in practice** with corruption allegations?

To put it another way, my question does not focus on investigations and proceedings brought by law enforcement agencies, even if this other question is interesting as well.

Insights from Ogemiders coming from different legal systems would be very interesting, with practical consequences regarding notably the choice of the arbitration seat.



Dante Figueroa, 15 February 2024

Indeed, and by way of exemplification, we are aware that last month a proceeding was expedited before the Cour de Cassation asking the Cour to vacate a judgment of the Paris Appellate Court that had confirmed an arbitral award issued by a panel allegedly plagued with conflict of interest/corruption issues. The underlying matter involves a -now defunct- joint venture agreement between a North American company and a Latin American company. Perhaps Sébastien can review the Cour's docket and provide more information, as I can't.



Topic 3: Corruption within the Arbitral Tribunal

Cesar Pereira, 2 February 2024

Dear All,

Moving on with our topics, the issue now is corruption within the arbitral tribunal.

It is impossible to talk about corrupt arbitrators without remembering the mythological judgement of Paris of Troy, who was bribed with Helen of Sparta to grant Aphrodite the golden apple as the fairest of three goddesses. Have modern arbitrators managed to escape the entanglements that once captured Paris, or are they doomed to cyclically retrace his steps? Has arbitration evolved with the tools to escape this eternal return?

Arbitrator corruption comes in many forms, from subtle biases and conflicts of interest to blatant acts of bribery and collusion. Undisclosed relationships between arbitrators and parties, law firms, or entities may compromise their impartiality and lead to exchanges of favors or other benefits. The most infamous form of arbitrator corruption are bribery and undue influence. Parties and counsel may attempt to sway arbitrators through financial incentives, gifts, or other perks, compromising the arbitrator's ability to render an impartial decision.

Acts of corruption are mentioned expressly in Article 52(1)(c) of the ICSID Convention as a ground for annulment of an award, but this provision has not been used yet. Even though no similar provision exists in the New York Convention, corruption affects one's ability to present its case before an honest and unbiased arbitrator and is recognized as contrary to public policy. An arbitral award tainted by corruption is unenforceable pursuant to Article V(1)(b) (party "otherwise unable to present his case") or Article V(2)(b) (public policy) of the New York Convention. Although the UNCITRAL Model Law is silent on the issue, national legislation such as the FAA in the United States or the Brazilian Arbitration Act expressly provide for vacatur of awards procured by corruption or when there is corruption in one or more arbitrators.

The circumstances of the case are key factors. Whether the corrupt practice has been completed or only attempted may lead to different results as for the validity of the arbitral award, since in the latter case there may not be an effective harm or jeopardy to the parties' substantive and due process rights. Could there be situations in which an award could remain valid despite proof of corruption within the arbitral tribunal? Probably only in extremely exceptional cases, if any.

Combating arbitrator corruption involves both preventive measures and responsive actions. Arbitration institutions and national legal systems must implement robust ethical standards, disclosure requirements, and sanctions for arbitrators engaging in corrupt practices. Transparency and accountability are thus crucial in maintaining the credibility of the arbitration process. Bodies that are designed to oversee professional conduct and take their role seriously, such as the Chartered Institute of Arbitrators - Ciarb, may help in this regard. This is a key difference from the Judgment of Paris, an ad-hoc proceeding in which a deity orchestrated the event, lacking any overseeing authority or ethical standards to govern it.

What about the misuse and weaponization of criminal legislation to interfere in the arbitration proceedings or the enforcement of the arbitral award? How serious can that be as a threat? Frivolous allegations of corruption may be used as dilatory tactics within the arbitration. Arbitrators rely on their reputation, which is an easy thing to stain or even destroy. Accusations of misconduct by arbitrators easily make headlines and newscasts. The misuse of criminal law can manifest as the wrongful prosecution of arbitrators. This situation was evident during an extensive corruption investigation in Peru, which focused on foreign construction companies. In such cases, there's often a fervent pursuit of those involved, resembling a witch-hunt. Within this context, some arbitrators faced accusations of "indirect bribery" simply because their fees exceeded the standard rates established by the Arbitration Center of the Chamber of Commerce of Lima. This scenario is highlighted in the work of Carlos Ríos Pizarro, "Mixing Righteous

and Sinners," published on the Kluwer Arbitration Blog in 2019. Indictments, accusations, and prosecution can be simply a tactic to intimidate arbitrators that are brave enough to face the political, economic, or even physical pressure that may come in high-stakes cases. In an environment that rightly abhors corruption and boasts "zero tolerance" with wrongdoings, will the arbitration community and industry organizations have the fortitude to stand by those abusively accused? Not always, or not fast enough to avoid irreparable harm.

The issue of arbitrator corruption was put under the spotlight in a request for revision of an arbitral award in the ICC Case n. 16257/EC/ND/MCP/AZO/SP between *Commisimpex* (a Congolese company with alleged links to Iran or its proxies) and the *Republic of Congo*.¹³ The Republic of Congo's application for revision of a 2013 award in favor of the *Commisimpex* was based on allegations that the chairperson of the arbitral tribunal had been bribed and had undisclosed ties with Iran through his law firm's representation in other cases involving Iranian entities. The arbitral tribunal appointed for revising the proceedings found in October 2023 these allegations to be unsupported by evidence and deemed them unreliable as mere "hearsay". As a result of this unfortunate course of events, the wrongly accused chairperson initiated criminal proceedings for defamation after the accusations had been widely disseminated by the press and other channels.

What is more pressing in international practice, arbitrator corruption or the weaponization of criminal prosecution and of the risks of reputational damage? Can one prevail over the other? The international arbitration community must remain vigilant. To maintain and enhance its reputation as a just, unbiased, and dependable method for resolving international disputes, it is essential to confront the problem of arbitrator corruption directly and fully understand its complexities. We must remember the lesson of Paris' corruption, which led to a decade-long devastating war, resulting in the fall of his city and the obliteration of his culture, plunging it into obscurity. There is insight to be gained from myth.

Looking forward to your thoughts.



Topic 4: Asset Recovery

Martin Kenney is one of the world's leading asset recovery lawyers, specialising in multi-jurisdictional economic crime and international serious fraud. He has acted for international banks, insurance companies, individual investors, and other private and governmental institutions. Based in the British Virgin Islands (BVI), Martin is founder and managing partner of *Martin Kenney & Co (MKS)*. The firm's work lies at the intersection of cross-border insolvency, creditors' rights, and complex commercial litigation - *WIRED* has styled *MKS* as among "the world's sharpest fraud busters". Leading a team of lawyers, investigators and forensic accountants, Martin is widely regarded as a ground breaker in the use of pre-emptive remedies, multi-disciplinary teams, and professional litigation funding in response to global economic crime, uprooting bank secrets and freezing hidden assets in multiple jurisdictions.

¹³ Award, *Commerciale Commisimpex v Republic of the Congo* - ICC Arbitration Case No 16257-EC-ND-MCP - Final Award - English and French - 21 January 2013 <<https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=31182>>, "Award on the Admissibility and the Merits of the Respondent's Application for Revision" <<https://jsumundi.com/en/document/decision/en-commission-import-export-s-a-v-republic-of-the-congo-reconstitution-of-the-tribunal-pending-monday-13th-december-2021>>

He is a practising solicitor advocate of the senior courts of England & Wales and the Eastern Caribbean at the BVI and at St Vincent & the Grenadines, and a licensed foreign legal consultant in the state of New York. He is also a Visiting Professor at the University of Central Lancashire School of Justice and ranked among the world's leading asset recovery lawyers by Chambers and Partners, plus is a Who's Who Legal "global elite" Thought Leader.

Martin Kenney, 8 February 2024

1.0 Introduction

- For the last 33 of my 40 years of legal professional practice, I have acted as a lawyer for creditors and victims of fraud or corruption in order to attempt to marshal out recoveries of value to their account.
- The following elements ordinarily characterise the cases that I have worked on:
 - High value and complexity;
 - Facts and legal issues crossing multiple national frontiers; and
 - Sophisticated methods of taking, laundering and concealing substantial sums of value.
- My work frequently involves the representation of arbitration award creditors or the holders of final money judgments based on an underlying arbitral award.

2.0 Opening observations on the subject of corruption in/on international arbitration proceedings

2.1 The learned contributors to other elements of this online symposium have provided a series of insightful comments concerning the subject of corruption 'on/in' cross-border arbitral proceedings:

- Many of the contributions have concentrated, quite understandably, on the jurisdictional, practical and legal limitations on arbitral tribunals to ferret out, investigate or act upon incidents of suspected corruption. Most usually, suspected corruption or fraud is to be found by means of a critical examination of the underlying facts in dispute between the parties to a dispute. Some of the contributors have considered whether an arbitral tribunal has a legal or perhaps ethical obligation to refer acts of suspected corruption by one of the parties to a set of arbitral proceedings to law enforcement.
- Some contributors have also directed their submissions on the vexing issue of suspected corruption from within an arbitral tribunal itself.
- Unlike an investigating criminal magistrate within a civil law jurisdiction like France - arbitral tribunals do not have independent powers of investigation with which to gather facts and evidence either in support of, or which are exculpatory in respect of, allegations of corruption - whether within or without a tribunal.

2.2 As an asset recovery lawyer, I have many years of experience in investigating suspected acts of bribery, corruption, dishonest breach of the fiduciary duty of loyalty, serious fraud and other forms of iniquity.

2.3 From my perspective, there are three primary risks that attend the just resolution of any civil or private dispute - whether the tribunal be judicial or arbitral in nature:

‘L’ - for the risks associated with the question of liability. In each instance, a tribunal (whether judicial or arbitral) is invited by a claimant to consider its allegations that a respondent is liable to pay damages or to provide some other form of remedy to answer for an actionable wrong. In what are arguably the majority of disputes, most of the energy and resources of the parties and of the adjudicative tribunal are directed to resolving the question of whether a respondent is liable under applicable law to a claimant and must remediate their wrong.

‘Q’ - for the risks that attend quantifying loss. In many disputes, the primary or secondary question involves issues of causation, proximity and the measure of the loss suffered by a claimant at the hands of a defendant found liable for a wrong.

‘C’ - for the collection risk. In cases involving fraud or corruption of a serious nature perpetrated by a defendant on a claimant, the collection risk can be the most confounding one. If a party is willing to commit acts of dishonesty to either procure or retain value that it has not honestly come by or should not retain, as night follows day the proceeds of such unworthy activity will be laundered and concealed in heavily fortified, vertically-stacked legal structures in multiple jurisdictions when substantial sums of value are involved. An aggrieved claimant before an arbitral tribunal who faces an underlying factual matrix involving dishonesty on the part of the respondent will almost inevitably be faced with an extreme form of collection risk. Millions of dollars in costs may be spent on a cross-border arbitration proceeding by a claimant leading to a final award. In the claimant’s search for justice, they may then face a daunting gauntlet to traverse to realise value sufficient to satisfy their award. Management of this area of risk - ‘C’ for collection - is the work of asset recovery professionals.

2.4 The balance of this note is devoted to setting out some of the primary methods used in the current day to manage the risk of ‘C’ - collection - where arbitral award creditors face the risk that they may, at the end of the day, receive no value and therefore no justice.

3.0 What are the most important tools in the tool chest of an asset recovery team when seeking to enforce an international arbitral award?

3.1 Preamble. My comments on this subject do not attempt to address the legal issues that are peculiar to the recognition and enforcement of foreign arbitral awards under the New York Convention, the Washington Convention for ICSID awards, and the like. Moreover, my comments do not address the highly complex issues of sovereign immunity as to liability, and execution, or immunity against non-commercial activity assets of a sovereign arbitral award debtor. Those issues would require their own symposium to identify and reveal potential solutions in that respect.

3.2 Introduction. I will now concentrate on the over-arching strategy and tactical tools used by asset recovery professionals in the current day when seeking to recover substantial value in order to satisfy an, inter alia, final international arbitral award against a recalcitrant or dishonest award debtor who poses an asset flight risk, or otherwise will likely seek to evade an award.

3.3 The fable of the tortoise seeking to catch the hare. Asset recovery professionals are slow and lumbering. We are akin to a tortoise - who is tasked with the unenviable mission of:

- Discovering the location and manner of holding of concealed assets; and
- To do so under circumstances where the hare (a recalcitrant award debtor) will take evasive action at the earliest sign of an asset recovery team undertaking its work.

3.4 Strategically, it is not possible for the tortoise to catch the hare (or the hare's illicitly concealed pools of value) unless the tortoise's work is done under the protection of utmost secrecy. I will revert back to this over-arching strategic requirement below.

3.5 **Where to start?** An asset recovery team is best composed on the basis of a multi-disciplinary and multi-jurisdictional model. Comparative pre-emptive remedy lawyers, forensic accountants and former law enforcement detectives or investigators are typically weaved together into a composite team in all relevant jurisdictions to undertake a complex asset recovery mission successfully.

3.6 Experienced leadership of such a team is of crucial moment.

3.7 Many complex asset recovery cases reach a successful result by reason of a careful and forensic examination of all information relevant to an award debtor held by the award creditor and its team. If a case involves an underlying dishonest act in the taking of value from the award creditor as well as in respect of its onward concealment; we must start from the point of origin of the wrong, or where and how value was wrongfully taken or retained. This will allow the team to commence a 'following' exercise - whereby it will trace the movement of value from the point of the scene of a fraud or wrong into an asset laundering and concealment matrix. This is called a forward trace.

3.8 In his 2013 book styled '*Rethinking Money Laundering & Financing of Terrorism in International Law - Towards a New Global Legal Order*' (Martinus Nijhoff Publishers)¹⁴, Dr Roberto Durrieu of Argentina posits the theory that money laundering investigations should concentrate at the point of ultimate destination of illicit value - or at the point of either the consumption or the expression of dominion or control over the same.

3.9 Dr Durrieu's thesis is that it is highly laborious, overly expensive and oftentimes impossible to develop and prove a pure trace, or to connect value from the point of it being taken illicitly to the point of its ultimate destination. Monies can be transferred through banks in countries such as Belarus, Mongolia, or Beijing making it a great challenge to obtain disclosure of bank records in jurisdictions of that kind to develop the Holy Grail of asset recovery - a pure trace.

3.10 I advocate the use of dual-directional tracing. This involves following money in a forward direction from the point of taking and, concurrently, in reverse from the point of destination or consumption of the *fructus sceleris* (or the fruits of fraud).

3.11 **OSINT.** At the beginning of each asset tracing and recovery case, an asset recovery team should undertake an open-source intelligence ("OSINT") data gathering and analytic piece of work. There are specialist firms which produce OSINT reports based on deep-web data scraping technology together with sophisticated AI search algorithms to ferret out data relevant to a delinquent debtor or obligor, and all companies or persons related to a debtor that can be identified as possible asset holding vehicles or nominees. The typical cost of such a product ranges between \$5,000 and \$10,000 per subject.

3.12 **GreyList Trace.** This is a firm in the UK that was established by a number of computer scientists and mathematicians to assist asset recovery teams. They have developed an algorithm

¹⁴ Rethinking Money Laundering & Financing of Terrorism in International Law, Roberto Durrieu, ISBN: 978-90-04-20714-1 <<https://brill.com/display/title/20280> >

that lawfully permits a search to be undertaken on the internet to detect whether the subject of an asset recovery inquiry has been in email contact with one or more of the approximately 220,000 bank branches in the world. Essentially, this firm takes the known email addresses of a subject and sends electronic probes to all of the 220,000 (+/-) bank branches in the world to their customer service servers to discern whether the email addresses of a subject have been 'white-listed' by the spam filters of a bank's customer service email server (meaning that they are recognised as being that of a person permitted to gain entry into a bank's email server). Within approximately four weeks and at a cost of £2,500, a report is generated showing all bank branches in the world that a subject's email address has been in contact with. This modern electronic investigative product does not solve a complex asset recovery case, but it does help to accelerate an investigation.

3.13 Intermediary bank discovery ("IBD"). Nearly all foreign or domestic US dollar wire transfers are settled (or netted out) in New York among 13 money centre banks and The Clearing House Payments Company LLC ("CHIPS"). When seeking to enforce a foreign arbitral award, an award creditor can ordinarily seek recognition of their award in a New York court. Once recognised, an award becomes a New York State or Federal money judgment. As such, discovery of information which may lead to assets of a debtor may be undertaken on foot of such a judgment (including intermediary bank discovery ("IBD")). IBD involves serving a subpoena on each of the approximately 13 money centre banks in New York and CHIPS compelling the disclosure of what are typically Excel spreadsheets loaded with US dollar electronic funds transfer data showing all US dollar wire transfers settled amongst these banks or CHIPS over a specified period of time (upwards of 10 or more years). Such payment data shows (a) the name of the sender of a wire, (b) the bank account number of the sender, (c) the name and address of the sender's bank, (d) the sender's bank's New York correspondent bank, (e) the bank used by the beneficiary of a wire, (f) the name of the beneficiary and its account number at its bank, (g) the name of the New York correspondent bank for the beneficiary's foreign or domestic bank and (h) the ostensible purpose of the wire. This information can hyper-accelerate the pace and accuracy of a global asset recovery effort. Bank accounts of offshore or onshore companies linked to an award debtor are revealed in jurisdictions as far flung as Singapore, Dubai, Switzerland, Brazil - virtually anywhere. When dealing with award debtors that trade in US dollars, IBD is an imperative tool to uncover substantial concealed assets as well as corporate or other holding structures. It can take approximately 4 months to obtain the USD EFT data relevant to a debtor, analyse it and begin to act upon it.

3.14 Norwich Pharmacal / Bankers Trust document disclosure orders wrapped in seals and gags. In England & Wales as well as most of the British Commonwealth, there exists an exception to the common law mere witness rule styled, in the 18th century, as an equitable bill of discovery. In *Norwich Pharmacal v HM Customs and Excise* [1974] AC 133, Lord Reid of the English House of Lords 'rediscovered' the equitable bill of discovery. Although at common law a mere witness has no obligation to come to the assistance of a wronged party, at equity an innocent facilitator of a wrong does. Thus, for example, a company formation agent forming a company in the service of a fraudster comes under a duty at equity under this principle to lend assistance to the victim of the fraud by disclosing full information concerning the formation of the company, its ownership, or its directorships. Equally, a bank, when receiving value illicitly obtained through a fraud comes under a similar obligation to 'unlatch the banker's door' and to allow the victim to see what happened to its funds. This latter principle can be discerned from Lord Denning's judgment in *Bankers Trust v Shapira* [1980] 1 WLR 1274. Today, *Norwich Pharmacal / Bankers Trust* disclosure orders are used, in many asset recovery cases, and on multiple occasions, to trace, define the manner of holding, and to objectively document

the whereabouts of value wrongfully concealed either from an award creditor or the victim of some other form of iniquity.

3.15 In keeping with the over-arching strategy of conducting asset recovery investigations under the protection of utmost secrecy, *Norwich Pharmacal / Bankers' Trust* ("NP/BT") disclosure orders can be made covertly by seeking *ex parte* ancillary secrecy orders consisting of:

- An order sealing the court's file such that members of the public will be unable to inspect the record of an NP/BT application for disclosure;
- An order of anonymisation directing the court's registry to identify the case on its cause list as, for example, *A v C*;
- A gagging injunction enjoining a third-party NP/BT disclosure respondent (such as a bank; accounting firm, law firm, or company formation agent or trust company) from tipping off their underlying customer, or from disclosing any information concerning the disclosure proceedings or the fact of the respondent's compliance with a disclosure order; and
- An order directing that all hearings concerning the disclosure proceedings be held *in camera* (or secretly).

3.16 Of all of the tools available to an asset recovery team, this package of secrecy relief can have a profoundly positive effect on any attempt at recovering value to meet an obligation presented by, for instance, an international arbitration award. These secrecy orders allow a tortoise to catch a hare's concealed assets.

3.17 In one high value international arbitral award enforcement matter, my firm obtained an NP/BT disclosure order protected by ancillary secrecy relief from the High Court of the British Virgin Islands in order to prove a theory that a British Virgin Islands corporate structure was ultimately beneficially owned by the award debtor. This application was successful. It also led to follow-on secret NP/BT disclosure order applications in the high courts of Singapore, Hong Kong, the Isle of Man and Jersey. Thousands of confidential asset and company ownership records were obtained under the protection of utmost secrecy sanctioned by multiple courts. This allowed the award creditor to pre-emptively freeze substantial value in multiple jurisdictions on the same day which led to a significant recovery.

3.18 **The discovery of concealed assets in civil law jurisdictions.** Commencing in 2010, and working with Brazilian insolvency counsel, our team exported the concept of judicial secrecy cloaking asset discovery orders before the Bankruptcy Court in Sao Paulo, Brazil. Today, there are a number of appellate authorities in Brazil which have sanctioned the use of judicial secrecy as a measure to meaningfully discover, freeze and recover concealed assets in favour of creditors.

3.19 In Switzerland, we frequently file local criminal money laundering complaints when we have developed a reasonable basis to allege that assets representing the proceeds of a fraud or of a wrongful attempt to fraudulently evade an obligation – which can result in the victim of an iniquity obtaining standing in local criminal proceedings; access to bank records of Swiss financial institutions, asset freezing relief and restitution.

3.20 **Search orders.** Under the principles articulated in the English Court of Appeal judgment of *Anton Piller K.G. v. Manufacturing Processes Ltd.*, [1976] Ch. 55 (C.A.), a claimant may

apply for an order requiring a defendant to permit a search to be carried out in its office or residential premises in search for documents relevant to a dispute which are subject to a risk of destruction or concealment. Frequently, asset recovery lawyers use this private search jurisdiction as an instrument in aid of the discovery of concealed assets (or documents leading to the same). It is a pre-emptive remedy available in England & Wales and most of the British Commonwealth. Lord Justice Jeffery Donaldson once referred to it as the ‘nuclear bomb’ of civil justice.

3.21 Pre-emptive freezing orders/ the Mareva injunction. Under the judgment of the English Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213, English courts developed a pre-emptive remedy to secretly freeze assets of a defendant or debtor - whether pre-action, pending a proceeding or post judgment - where:

(a) The claimant can show a good arguable case on the merits of its claim. Once a final arbitral award or judgment has been obtained, this requisite element will have been met; and

(b) The presence of a demonstrated asset flight risk on the part of the award debtor or defendant.

3.22 The *Mareva* Injunction is no longer called that in England - it is now simply referred to as a freezing order. Today in many common law jurisdictions there is a statutory basis to obtain a satellite freezing order in aid of civil proceedings abroad. Moreover, many domestic Arbitration Acts contain provisions conferring a power on local courts to provide a satellite freezing order in aid of a foreign arbitral claim where the requisite elements of a freezing injunction can be met.

3.23 Ancillary civil liability damages claims against deep pocketed defendants. Traditional asset recovery involves dual directional forward and reverse tracing of assets of an award debtor or other obligor for the purpose of freezing and recovering the same. Non-traditional asset recovery is embodied in identifying and suing third party facilitators of wrongdoing including banks; accounting firms, law firms, and trust companies which may cross a line of accountability sounded in negligence, recklessness, knowing assistance in the breach of a fiduciary duty; aiding and abetting the breach of a fiduciary duty, or civil conspiracy. When tracing concealed value around the globe, an asset recovery team will identify third party facilitators who are ripe for suit and to be held accountable in damages to an award creditor or other wronged party.

4.0 Conclusion.

4.1 The purpose of this note is to provide the reader with some insight into the modern-day approach to complex asset recovery - with a view to providing economic justice to a wide spectrum of claimants, creditors, victims and the like. Many international arbitration awards are held by award creditors who are confounded by complex corporate or trust asset protection models used to conceal and protect value in order to evade the rights of a creditor.

4.2 The strategies and tactics identified above represent but a part of the arsenal of remedies available to asset recovery professionals today. Hopefully, this note will provide the reader with some insight into this growing and dynamic field. Thirty years ago, there was no such thing as an ‘asset recovery lawyer’. That has changed substantially since.



Martin Kenney, 13 February 2024

Dear Rina,

Thank you for your email ... I restate your question as follows:

***Rina (8 February):** It is interesting that an asset recovery team would include both legal professionals and former law enforcement detectives or investigators, and that investigation plays a significant role during this phase. This contrasts with what we had previously discussed, where arbitrators and private parties lack investigative or coercive powers, and that it may be more appropriate (or mandatory) for an arbitrator to report suspicions of corruption to a competent and independent law enforcement agency. I would be interested to know if evidence of corruption has surfaced for the first time only at the asset recovery stage, and how that is handled.*

MK: In many cases, an asset recovery team should be brought in before a claim is launched. The strategies and tactics of investigation that I have described in my submission are relevant and can be used whether an arbitral proceeding has commenced, during the currency of the life of such a proceeding, or once a final award has been entered by a tribunal.

Equally in instances where a claim is a good and arguable one, and the claimant can demonstrate that the respondent poses an asset flight risk, an asset freezing injunction may be sought at any time during the temporal spectrum of a dispute (e.g. before, during or after its conclusion).

This leads me to an observation. Many of the contributors to this symposium have focused on the limitations facing arbitral tribunals in the pursuit of suspected acts of corruption. In my experience, where there are suspicions of corruption, they are normally directed to one party before a tribunal. I submit that the affected party (a putative victim) to the acts of suspected corruption should - all things being equal - build its own cross-border investigative team to discover objective evidence of the suspected acts of iniquity complained of. In fact, I am not quite certain why the preponderance of the discussion during this seminar has been focused on what the tribunal should do or not do in the face of serious forms of suspected wrongdoing. Perhaps this comes from the civil law tradition where criminal investigating magistrates act in a dual investigative and adjudicative role. In contrast, in common law countries, a tribunal or court has no independent investigative function. Rather, it falls to the parties to investigate acts of wrongdoing by the other side - albeit where appropriate - with the assistance of courts (such as through pre- or post-arbitral claim Norwich Pharmacal disclosure order applications).

I now turn my attention to your specific question as to whether evidence of corruption has “surfaced for the first time only at the asset recovery stage, and how that is handled”.

My short answer is ‘yes’ - sometimes corruption is not discovered until the time comes to enforce an award or a judgment. But ordinarily, an affected party or victim will have a good inkling of its presence well before a final award is obtained. For example, if a respondent is going to evade payment of an award, the asset protection and concealment activities of such a party will frequently take place before an arbitral proceeding has commenced. Because the risk of ‘C’ - for collection - can be high or extreme in some instances, it falls to any sensible claimant to carry out a pre-arbitral proceeding asset inquiry into a prospective respondent’s financial affairs (unless it is plain and obvious that there is no collection or enforcement risk based on the financial profile of and the jurisdictions where a respondent is to be found).

I hope that my comments in response are helpful.



Barry Leon, 8 February 2024

Thanks, Martin, for this interesting overview of the asset recovery component of this symposium on corruption and international arbitration, which is interesting, and at least part of which may not be known to many of us.

Before coming to two questions that I would like to ask you, I can confirm that from my experience as the Presiding Judge of the Commercial Court in BVI, the use of *Norwich Pharmacal / Bankers Trust* Document Disclosure orders, Search (*Anton Piller*) orders, and Pre-emptive Freezing Orders / *Mareva* injunctions is an important part of asset preservation and recovery in large commercial disputes involving assertions of wrongdoing.

Turning to my questions, first, if an award creditor or claimant is facing a real risk that it may not be able to have its claim or award satisfied due, for example, to the respondent/debtor being predisposed to evade payment, do third party funders absorb what you call the "C" - for “collection risk”?

Second, if so, what does the capital cost to lay this risk off to a funder and how do you approach the raising of funding in your area of practice?



Martin Kenney, 13 February 2024

Dear Barry,

Thank you for your two questions.

Question No. 1: You asked:

Turning to my questions, first, if an award creditor or claimant is facing a real risk that it may not be able to have its claim or award satisfied due, for example,

to the respondent/debtor being predisposed to evade payment, do third party funders absorb what you call the "C" - for "collection risk"?

MK's Reply: To use my risk matrix which I submit is involved in nearly all international arbitral or commercial litigation disputes - there are, again, three core risks to be managed:

‘L’ for liability;

‘Q’ for quantum of damages or loss; and

‘C’ for collection - or will a claimant’s award be capable of being satisfied?

Firstly, professional third party funding did not exist in any form similar to what we have today, 20 years ago. Funding of disputes became organised with capital being aggregated into the hands of a number of funds dedicated to take risk in the resolution of disputes starting with judge made reforms to the common law rule against champerty and maintenance in England & Wales in cases such as *R (Factortame Ltd) v Secretary of State for Transport Local Government and the Regions (No 8)* [2003] QB 38 (Court of Appeal) and *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655 (26 May 2005). However, the momentum for funding did not begin to really take off until approximately 2010.

Next, until approximately five years ago, I estimate that 90% of litigation or arbitration funders in the market concentrated on taking ‘L’ for liability or ‘Q’ for quantum risks. Many funds would simply tell me as an asset recovery lawyer that they were not prepared to look at any form of ‘C’ for collection risk cases. That has since changed where a number of the larger funders are willing to look at collection risk cases embodied, for instance, in unpaid final awards or judgments. Two weeks ago at a conference styled ‘C-5 Miami - Fraud and Asset Recovery’, there was a panel session of funders speaking specifically to the issue of collection risks. They submitted that when considering any opportunity for funding a dispute, they now look at all three areas of risk that I have identified above before agreeing to fund.

Question No. 2: Next, you ask:

Second, if so, what does the capital cost to lay this risk off to a funder and how do you approach the raising of funding in your area of practice?

The cost of funding collection risk cases can vary along a spectrum. Generally, I have seen capital priced under a waterfall of distribution of proceeds of recovery along the following lines:

In first priority: to the funder - a return of all capital advances made into an asset recovery claim.

In second priority: to the funder - a preferred return marked at between 1x and 3x of the value of capital advances. Ordinarily, this multiplier may open at 1x and close at 3x (or more) depending on the duration of time that it takes to return

a funder's capital advances. Thus, if a recovery is achieved during year 1 of the use of capital, the preferential return might be marked at 1x, while if it takes 4 years to recover, it might be marked at 3x.

In third priority: either (1) all of the remaining proceeds of recovery fall to the account of the claim holder or, (2) in some instances (particularly if the funder perceives a high-risk on the collection side), the funder will expect a share of perhaps 20% of the remaining proceeds of recovery - with the balance being paid to the claim holder.

I recommend that claimants or award creditors issue a formal request for funding proposals to four or five pre-qualified and reputable funders. Claimants should invite proposals to be submitted within a set deadline of say 45 days. A request for proposals should be supported by a detailed claim summary; a costs plan; a projected timeline for recovery; and a data room containing all of the core documents material to a case. I suggest that no request for funding proposals should ever be disclosed to a prospective funder absent a signed non-disclosure agreement between the claim holder and the prospective funders to preserve legal professional privilege and the confidential nature of the material.

I find that using what is in effect a competitive tender process can ameliorate the cost of capital quite materially.

I hope my responses are helpful.



Topic 5: Matters of Evidence

Rina See is a barrister practising from Bankside Chambers in Singapore. She specialises in international dispute resolution, and has experience in a wide range of industries, including in financial services, technology, energy, and mining disputes. Rina has represented States, state entities and multinational corporations in high-stakes international commercial and investment arbitrations, under ICC, SIAC, LCIA, UNCITRAL, NAI and ICSID Rules, in both common law and civil law jurisdictions. She regularly advises on issues involving conflict of laws, as well as cross-border enforcement of arbitral awards and judgments. Prior to relocating to Singapore, Rina was counsel in the international arbitration practice of Wilmer Cutler Pickering Hale and Dorr in London. Rina was also previously a prosecutor and solicitor for one of New Zealand's Crown Solicitors, focusing on commercial, regulatory, and criminal litigation.

Rina See, 8 February 2024

Dear all,

Thanks very much to Martin for these insightful perspectives on asset recovery, including all the tools available in a global asset recovery effort.

It is interesting that an asset recovery team would include both legal professionals and former law enforcement detectives or investigators, and that investigation plays a significant role

during this phase. This contrasts with what we had previously discussed, where arbitrators and private parties lack investigative or coercive powers, and that it may be more appropriate (or mandatory) for an arbitrator to report suspicions of corruption to a competent and independent law enforcement agency. I would be interested to know if evidence of corruption has surfaced for the first time only at the asset recovery stage, and how that is handled.

This also leads to our final topic, **matters of evidence**. Investigative limitations and issues of proof lie at the heart of many of the conceptual and practical difficulties where issues of corruption arise in arbitration. This has already been covered in some detail by previous panellists and contributors, but I attempt a high-level summary below:

The arbitral framework does not lend itself to effective investigation of allegations of corruption. Several examples have been given where tribunals have raised the issue *sua sponte* but the response has been lukewarm, and corruption is not established due to insufficient proof.

A distinction should be made between the different functions of State courts and arbitrators. State courts have law enforcement functions and criminal jurisdiction to sanction corruption. Arbitrators serve a dispute resolution function and have only contractual remedies at their disposal.

Arbitrators must nevertheless be proactive, particularly in red flag situations. This arises from transnational public policy and because not addressing issues of corruption may lead to the award being set aside on public policy grounds. A state court may then review the tribunal's findings and scrutinise the evidence of corruption from a setting aside perspective.

In this context, the question arises: what is the appropriate burden and standard of proof in establishing corruption in international arbitration?

I will focus on the standard of proof. Funke mentioned in a previous post that evidence of corruption would need to pass whatever standard the tribunal deems adequate. Luke suggested that, because of different considerations in an investment treaty arbitration context, arbitrators may be required to be more proactive but should perhaps adopt a higher standard of proof closer to "beyond reasonable doubt" to generate more evidence and argument.

Tribunals have adopted a range of standards, ranging from on the "balance of probabilities", to "clear and convincing evidence", to "beyond reasonable doubt" and other standards in between. The standard adopted can make a difference to the outcome. In *Sanum v Laos*, PCA Case No. 2013-13, Award, 6 August 2019¹⁵, the tribunal had found that fraud and bribery had occurred on a balance of probabilities, but this did not meet the standard of clear and compelling evidence of corruption (paras. 160-161).

I would suggest that, because arbitrators are not imposing criminal sanctions, the burden of proof should not be beyond reasonable doubt. This is also because private parties (and arbitral tribunals) do not have the investigative powers to be able to meet that standard. At the same time, difficulty of proof does not mean the standard should be lowered. The type of evidence relied on and considered may need to be broader (e.g., circumstantial evidence, adverse

¹⁵ Award available at <<https://www.italaw.com/sites/default/files/case-documents/italaw10708.pdf>>

inferences, presumptions from red flags). (I note this is the view adopted in Hwang and Lim, *Corruption in Arbitration - Law and Reality*¹⁶ (2011), para. 38.)

Would the position be different depending on the legal system and applicable law? What about in the investment treaty context - does the fact that States have investigative powers make a difference? What about in the asset recovery context - would there also be a higher standard of proof if seeking to gain standing in criminal proceedings to access information?



Conclusion

Rina See, 19 February 2024

Dear all,

I would like to wrap up what has been a thoroughly informative discussion on the various facets of corruption in/on international arbitration. Thank you to all the panellists and contributors for their insightful posts.

To recap:

Management of corruption by arbitral tribunals. *Funke* kicked off the discussion on whether arbitrators should be proactive, referring to the striking statement by Knowles J in *Nigeria v P&ID* [2023] EWHC 2638 (Comm) on whether the tribunal there could and should have been more direct and interventionist. This raises thorny questions of how such intervention fits with the tribunal's role, whether there is a difference where ISDS is concerned, the extent of the intervention, and what tools tribunals have if they were to intervene.

The symposium proceeded to examine (a) a duty to intervene versus a duty to report; (b) different approaches between ISDS and commercial arbitration; and (c) potentially different approaches between different legal traditions. We considered specifically the existence, extent, and role of a duty to report in different jurisdictions, and the impact of criminal proceedings on arbitral proceedings.

Cesar also introduced the contractual impacts of corruption, distinguishing between bribe agreements and contracts procured through corruption. The possible outcomes and remedies differ, and we are reminded that tribunals operate within a contractual framework, but that operates in tandem with many other domestic or international laws, rules and practices where corruption and related practices are concerned. This led to a discussion of how tribunals have been attempting to find more nuanced outcomes and remedies than an all-or-nothing approach.

Corruption of the arbitral tribunal. In an artful comparison with the bribery of Paris of Troy as an ad hoc arbitrator, *Cesar* presented the topic of arbitrator corruption. He covered the

¹⁶ Michael Hwang S.C. and Kevin Lim "Corruption in Arbitration - Law and Reality"<https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media013261720320840corruption_in_arbitration_paper_draft_248.pdf>

safeguards against arbitrator corruption, but also the very real danger of false accusations of arbitrator corruption as a way of derailing arbitral proceedings or the enforcement of awards.

State court approach in annulment, recognition and enforcement of arbitral awards. *Sébastien* then raised the role of state courts in dealing with suspicions of corruption in the context of international arbitration. Drawing from the French legal system, *Sébastien* distinguished between domestic criminal proceedings investigating allegations of corruption, and domestic proceedings reviewing an arbitral award tainted by corruption.

However, domestic courts have more power to investigate corruption allegations than a tribunal, and in assessing the public policy exception to recognition and enforcement - as in *Nigeria v P&ID* - courts will have to address the issue head on. State courts could potentially have a more significant role in exposing corruption at this stage, and perhaps this calls for a *de novo* review.

Asset recovery. *Martin* provided a lucid overview of the complex area of asset recovery, and the interplay with corruption in/on international arbitration proceedings. Thinking in terms of three primary risks (“L”, “Q” and “C”), the process of “C” collection is additionally confounding when corruption is involved - as assets and proceeds are laundered and concealed and even more difficult to trace. Comparing asset recovery professionals with tortoises seeking to catch hares, the tortoise should have a multi-disciplinary, multi-jurisdictional team, and be aware of all the tools in the toolkit, including Norwich Pharmacal disclosure orders, search/Anton Piller orders, and pre-emptive freezing orders/Mareva injunctions.

Matters of evidence. We then recapped matters of evidence, which is a recurring theme of each topic. At the heart of each debate is the question of who is best placed to investigate suspicions of corruption - the parties, the tribunal, state courts, law enforcement agencies. This relates also to the burden and standard of proof that must be met to establish corruption. The seriousness of the allegation, but also the difficulty of proof, can and have affected tribunals’ views on the standard that is adopted.

I have certainly come away with lots more food for thought (and a renewed interest in myths and fables!). Many thanks especially to OGEMID and Petra for the opportunity to participate.



Dr Petra Butler thanked the panellists for taking the time to share their experiences to the members of the listserv, as well as everyone who participated in the symposium.