THE TABOOS IN INTERNATIONAL ARBITRATION

CORRUPTION IN INTERNATIONAL ARBITRATION
LA CORRUPCIÓN: LO QUE SE DICE… LO QUE SE HACE.

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TOPICS AND RELEVANT QUESTIONS

1. **The evidentiary burdens and standards of proof surrounding corruption / admissibility of evidence** (John Adam / Fernando Lanzón)

2. **The consequence of a finding of corruption and its conformity to international public policy** (Ana Morales Ramos / David Guerra Bonifacio)

3. **The duty of arbitrators to investigate corruption and to report corruption** (Gustavo Scheffer da Silveira / Mónica Fernández-Fonseca)

4. **Judicial scrutiny of arbitral awards in setting aside and enforcement proceedings involving issues of corruption** (Miguel Oural / Pedro Metello de Nápoles)

5. **Attribution** (Bingen Amezaga / José Ángel Rueda)

6. **Corruption of the arbitrators** (Antoine Romanetti)

1 – THE EVIDENTIARY BURDENS AND STANDARDS OF PROOF SURROUNDING CORRUPTION / ADMISSIBILITY OF EVIDENCE

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- Dado que los actos de corrupción están especialmente diseñados para no ser detectados, ¿deberían los tribunales arbitrales invertir la carga de la prueba cuando la parte que alega que hubo corrupción presenta prueba *prima facie* de que sí hubo corrupción? De manera precisa, ¿qué debe considerarse prueba *prima facie* en este contexto? ¿Qué grado de prueba debe exigirse a esta prueba *prima facie*?

- En el caso de que la prueba *prima facie* aportada por un abogado que acusa de corrupción sea temeraria, notoriamente insuficiente o falsa, ¿debe derivarse de ello alguna consecuencia negativa para el abogado/parte (por ejemplo, sanción vía costas), o una conclusión desfavorable severa?

- ¿La inversión de la carga de la prueba perjudica el principio de igualdad entre las partes o algún otro principio de derecho procesal? En caso afirmativo, ¿la importancia que la lucha contra la corrupción ha cobrado en años recientes justifica la relajación de estos principios?

- Una alternativa sería aplicar un grado de prueba **flexible** de *balance de probabilidades*, según el cual los árbitros podrían apoyarse en pruebas indirectas y extraer inferencias, incluyendo conclusiones desfavorables. Según algunos autores este estándar implicaría que, tan pronto como la parte que alega corrupción logre probar *prima facie* que hubo corrupción, la contraparte ha de probar lo contrario de una manera satisfactoria, so pena de que el tribunal extraiga conclusiones desfavorables. ¿Técnicamente, no es esto una inversión de la carga de la prueba?

- ¿Es verdaderamente el *balance de probabilidades* algo distinto del convencimiento personal del juzgador? ¿En la práctica, no es superflua la discusión sobre el grado de prueba aplicable dado que los árbitros primero decidirán si hubo corrupción, y después utilizarán el estándar que les permita justificar su decisión?

- ¿Qué tipo de pruebas indirectas podría o debería utilizar un tribunal? ¿Qué peso ameritan esas pruebas indirectas? Teniendo en cuenta la gravedad de una alegación de corrupción, ¿debería un tribunal tomar una decisión basándose exclusivamente en indicios?

- ¿Es el contexto general (por ejemplo, país, sector empresarial, o empresa con fama de corruptos) una buena prueba *prima facie* o indirecta que deba ser considerada? ¿Se trata éste de un punto de partida "injusto"?

- ¿Existe un grado de prueba uniforme en el arbitraje comercial, de inversión y deportivo ante casos de corrupción? ¿Las características propias de cada tipo de arbitraje exigen la aplicación de un grado de prueba distinto? ¿El arbitraje de inversión ha influenciado al arbitraje comercial (o *vice versa*) a este respecto?

- ¿Deberían los tribunales arbitrales aplicar consistentemente las reglas probatorias del derecho sustantivo aplicable a la controversia? O por el contrario, ¿deberían aplicar un estándar autónomo?

- La mayoría (si no todos) los contratos de agencia que generalmente dan lugar a arbitrajes con alegaciones de corrupción prevén arbitraje con sede en Suiza o Francia, aplicando derecho sustantivo suizo o francés. ¿Qué conclusiones se pueden extraer de esto? ¿Qué dicen las reglas probatorias de derecho suizo y francés sobre el grado de prueba en general, y en relación con alegaciones de corrupción u otras formas de ilegalidad?

- ¿Un grado de prueba más alto unido a la natural limitación del poder coercitivo en arbitraje puede contribuir a que éste se convierta en terreno abonado para sustanciar los casos de corrupción?

- ¿Podría el hecho de exigir un grado de prueba más elevado en arbitraje llevar a que las partes "reserven" sus alegaciones de corrupción para la fase de ejecución del laudo o para un recurso de nulidad?

- ¿Existe un *duty of candour* del abogado en casos de corrupción? ¿Qué valor ha de darse a la declaración de un abogado "en cumplimiento" de su *duty of candour?*

- ¿Qué similitudes y diferencias hay entre casos con alegaciones de corrupción y casos con alegaciones de fraude (u otro tipo de actos ilegales)? ¿Qué lecciones se pueden aprender de la práctica de tribunales en casos con alegaciones de fraude?

- ¿Cómo de importante es la fase de producción de documentos para la parte que alega corrupción? ¿Son las herramientas de *discovery* el arma más útil para dicha parte? ¿Opera en la práctica una inversión de la carga de la prueba una vez dicha parte ha presentado sus pruebas y ha solicitado a la contraparte producir las suyas?

- ¿Qué ocurre cuando la parte acusada de corrupción es quien tiene la información relevante para probar las alegaciones? ¿Cómo reacciona la parte que alega corrupción? ¿Cómo reaccionan los tribunales en tales casos, siendo proactivos en la búsqueda de pruebas y extrayendo las conclusiones desfavorables a que haya lugar?

- ¿Los tribunales arbitrales actúan de manera “diplomática” ante alegaciones de que un Estado o un oficial estatal han actuado corruptamente? ¿Son los tribunales arbitrales más reacios a establecer que un Estado ha actuado corruptamente, a que un individuo lo ha hecho? ¿Acaso no ameritan los Estados un trato igual al dado a los individuos (por ejemplo, la aplicación del mismo grado de prueba, la extracción de conclusiones desfavorables en su contra, etc.)?

- ¿Deberían los tribunales flexibilizar las restricciones relativas a la admisibilidad de prueba cuando hay alegaciones de corrupción? Por ejemplo, si una de las partes presenta de manera extemporánea pruebas *prima facie* pertinentes, ¿debería el tribunal admitirlas para evaluar si las acusaciones de corrupción son ciertas?

2 – THE CONSEQUENCE OF A FINDING OF CORRUPTION AND ITS CONFORMITY TO INTERNATIONAL PUBLIC POLICY

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1. Is there a particular effect to be given to a finding of corruption in investment disputes because these are disputes governed primarily by international law?

    a. What law should govern the existence and consequences of corruption?

        i. National law (and if so, which?) or international law?

2. Why is the prohibition of corruption part of international public policy?

    a. Is the reasoning in World Duty Free, Niko and Metal-Tech satisfactory?

3. Is any and every act of corruption however related to the contract/investment necessarily contrary to international public policy?

4. If not all acts of corruption are contrary to « international public policy », how do we draw the distinction?

5. Assuming that corruption and the ensuing breach of international public policy is established:

    a. Is it desirable to treat allegations of corruption as a preliminary matter or together with the merits of the dispute?

        i. Should the objection of contrariety to international public policy give rise to a proper jurisdictional objection?
        ii. Should the objection of contrariety to international public policy give rise to a proper objection as to the admissibility of the claim (as a result of a lack of clean hands – nemo auditur propriam turpitudinem allegans – or a breach of transnational public policy)?
        iii. It seems there is a distinction to be made between corruption incurred to obtain a contract/investment and corruption while the contract/investment is being performed/made. Is this distinction desirable from a policy perspective?

b. What are the consequences to the merits of the claims?

i. Should liability be excluded?
ii. Should the extent of the infringement have any impact on the consequences thereof?
iii. What is the role of the doctrine of contributory negligence?

6. Can the parties by agreement exclude the relevance of corruption for the determination of the merits of the dispute?

3 – THE DUTY OF ARBITRATORS TO INVESTIGATE CORRUPTION AND TO REPORT CORRUPTION

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A – Is there a duty to investigate and report?

- Should we make a distinction between international / domestic and commercial / investment arbitration for this analysis?
- On the investment front (where more awards are public), what can we learn about arbitrator's attitudes towards dealing with allegations of corruption from past decisions?
- Are arbitrators well placed to identify illegal practices related to international commerce?
    - What elements / tools / resources do arbitrators have to investigate issues of corruption in (international) arbitration proceedings?
- If yes, does this means that arbitrators have any kind of duty to investigate the existence of corruption?
- If the one of the parties raises the issue of corruption the answer seems to be straight forward. The arbitrators should investigate. Or should they?
- What if none of the parties raise the issue of corruption?
- How to coordinate articles V(1)(C) and V(2)(B) of the NY Convention which seem to conflict?
- What are the bases for the duty to investigate?

B – Basis for the duty to investigate

1. Is there a moral duty to investigate?
2. Is there a legal duty to investigate?

3. If there is such a duty, what is its purpose? In other words, what is the arbitrator / tribunal to do with its findings and how do such findings fit within the arbitrator's the tribunal's mandate? Consider the distinction international / domestic and commercial / investment.

   Indirect duty

   a. Duty arising from the law of the countries which may control the validity of the award

   b. Some commentators (tribunals?) consider that anti-corruption regulations form part of "international public policy" – under such an interpretation, would this serve as a further basis for a direct duty to investigate? Consider specially in the context of investment arbitration.

   Direct duty

   a. Duty arising from a possible liability of the arbitrator

      i. Criminal liability

      ii. Disciplinary

      iii. Are there other sources for a possible duty to investigate?

4. The qualification of corruption

   In order to investigate the existence of corruption, arbitrators need to qualify the acts as corruption.

   According to which law should this qualification be done?

   How to react when more than one law may applicable to the qualification of corruption?

C – Consequences of the duty to investigate

1. Can an arbitrator be held liable for not complying with his duty to investigate?

   a. Criminal liability?

   b. Civil liability?

2. Is there a duty to report corruption?

   a. Is there any national law providing for a duty to report? Not to my knowledge.

b. Should or could national laws provide for such a duty? How would be its territorial scope of application?

c. Could the duty to report imposed to certain authorities under different national laws be extended to arbitrators?

3. Possible exceptions to duty to report

a. Duty to report *vs*. confidentiality of the proceedings? Is there a real conflict?

b. Could one consider that arbitrators are under the exception of "*secret professionnel*"?

4. Should there be a stay of the arbitration if investigations being conducted by national authorities into corruption?

It would seem that the arbitrators are under no obligation to stay the proceedings. However, they can if they consider it appropriate.

Are there risks of conflicting decisions?

D – Duty to report

- Is there a duty report to domestic authorities instances of corruption in international arbitration proceedings?

- What is the applicable law to make such a determination?

- Consider, particularly, arbitrator's duties arising from the bar regulations of their jurisdiction of incorporation.

- Consider also the consequences of the absence of a duty to report.

4 – JUDICIAL SCRUTINY OF ARBITRAL AWARDS IN SETTING ASIDE AND ENFORCEMENT PROCEEDINGS INVOLVING ISSUES OF CORRUPTION

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I. Behaviors that could be criminally relevant in the context of arbitration proceedings

A. Portuguese law

- Corruption
  - Corruption (Articles 372-374-B of the Portuguese penal code)
  - Is the geographical/cultural context relevant?
- Corruption of the arbitrators - Arbitrators as civil servants (Article 386 of the Portuguese penal code)

B. Swiss law

- Corruption
  - Public corruption (Art. 322*ter* – 322*septies* of the Swiss criminal code)
  - Private corruption (Art. 4a of the Swiss act against unfair competition)
- Corruption of the arbitrators (Art. 322*ter* – 322*sexies* of the Swiss criminal code)

II. Setting aside a sentence tainted by corruption

A. In Portugal

- No case law
- Articles 46.3.a.ii (equal treatment) and 46.3.b.ii (international public policy) of the arbitration law

B. In Switzerland

- Appeal against the award to the Federal Court *vs* request for review of the award with the Federal Court
- Corruption of the arbitrators: no case law
- Suspicion of corruption revealed to the arbitrators: ATF 119 II 380 / ATF 119 II 386 / ATF 4P.208/2004 / ATF 4A_103/2011 / ATF 4A_538/2012
- Suspicion of corruption *not* revealed to the arbitrators: ATF 4A_42/2008 / ATF 4A_596/2008

III. Illustration and discussion

5 – ATTRIBUTION

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Introduction:

By focusing on investment arbitration (including contracts, investment laws and investment treaties), we would like to discuss the attribution of corrupt acts involving States and the consequences thereof for the parties involved in the corrupt act (the investor/private party and the State).

Questions:

a. In general:

   i. Is there any asymmetry in the attribution of a corrupt act from the point of view of the parties involved (private [foreign] party and State)? Is it easier in investment arbitration to attribute a corrupt act to the private (foreign) person rather than to the State?

   ii. Is it easy, in the event of a corrupt act, for a State to avoid liability in international law?
   - What if the corrupt act is invoked by the private (foreign) investor as a breach of the State's obligations under international law?
   - What if the corrupt act is invoked by the State as a defence against the private (foreign) investor's claims?

   iii. Which kind of acts and from which state organs can engage the State's international responsibility?

   iv. What kind of international responsibility of the State is engaged when a tribunal finds that a State was involved in a corrupt act?
   - Breach of international anti-corruption standards?
   - Breach of standards of protection under investment treaties?

b. In particular (everything that was not yet discussed under Topic 2):

i. What are the consequences of corruption when the corrupt act is attributed to the private (foreign) person?

ii. What are the consequences of corruption when the corrupt act is attributed to the State…
- … and the private (foreign) person agrees to participate in the corrupt act freely? (contribution)
- … and the private (foreign) person is forced to participate in the corrupt act under duress?
- … but the private (foreign) person refuses to participate in the corrupt act (and nothing more happens)?
- … but the private (foreign) person refuses to participate in the corrupt act and the State retaliates against the private (foreign) person?

iii. Which are the consequences of corruption when a State accepted the corrupt act outside the arbitration (acquiescence/waiver/estoppel)?

6 – CORRUPTION OF THE ARBITRATORS

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- Rare phenomenon / or more common that one would think? Distinction institutional arbitration vs. ad hoc arbitration: are the known cases the tip of the iceberg?

- Examples of potential cases of corruption of an arbitrator.
  Tapie v. CDR (CREDIT LYONNAIS) ?

- **Definition** of the concept: what do we mean by "corruption" of the arbitrators? Criminal law (money laundering, tax fraud etc.) vs. selection process of the arbitrators by an arbitration institution ; ex parte communication between a party and the arbitrator appointed by that party; non-disclosure by an arbitrator of a long running business relationship with a party

- How should one react when there exists strong suspicions/evidence that an arbitrator is « corrupt » (i) if one is counsel to a party, (ii) an arbitrator (iii) a third party? In writing / orally?

- **Evidence**/burden and **standard of proof**: how one can prove that an arbitrator is "corrupt"? A *probatio diabolica*? Low standard of proof / circumstantial evidence / high standard of proof vs. presumption of innocence?
  Should one hire an intelligence expert (private detective) to investigate the matter / Should not one wait that a prosecutor and the police do its job, and that a proper criminal investigation be carried out, and that the arbitrator be condemned by a State court?

- **Timing**: when a person may or ought to denounce a "corrupt" arbitrator? (i) challenge as early as possible, (ii) after the issuance of the award?; (iii) only at the enforcement stage?

- **To whom one** should denounce a "corrupt" arbitrator? To the parties, to the Chairman of the Tribunal, to the other arbitrator, the arbitration institution, on internet (OGEMID)? To the criminal authorities of the country of nationality of the potential corrupt arbitrator, the authorities of the country of the place of arbitration , or the country where enforcement of the underlying contract was carried out?

- A straightforward and immediate sanction against a "corrupt" arbitrator: same sanction as for a biased arbitrator: the chairman and the "non-corrupt" arbitrator run the show / Duty of the arbitrators to render an enforceable award – Art. 25(1) of the ICC Arbitration Rules

- **Reporting obligations** of the arbitrators under anti-corruption and anti-money laundering legislation? Role of the arbitration institution?

  To what extent the acts of the arbitrators could fall within the scope of the UN Convention against corruption, the US FCPA 1977, the UK Bribery Act 2010 or the OCEDE Convention on Combatting Bribery of Public officials? What is the impact of extra-territorial legislation?

- What are the risks for the « whistle blower »? Could the « whistle blower » be manipulated by a party?

- Accusation of corruption of an arbitrator as a delaying tactic 7 required standard of proof

- The role of the arbitration community in the fight against corrupt arbitrators: disciplinary control?

- The role of the arbitration institution in refusing to register a case where the institution entertains suspicions that the single arbitrator chosen by the parties will cover up bribery, corruption or money laundering / to approve an award

- The *Bernard Tapie vs. CDR (CREDIT LYONNAIS)* case – pending criminal investigation – secrecy of the investigation