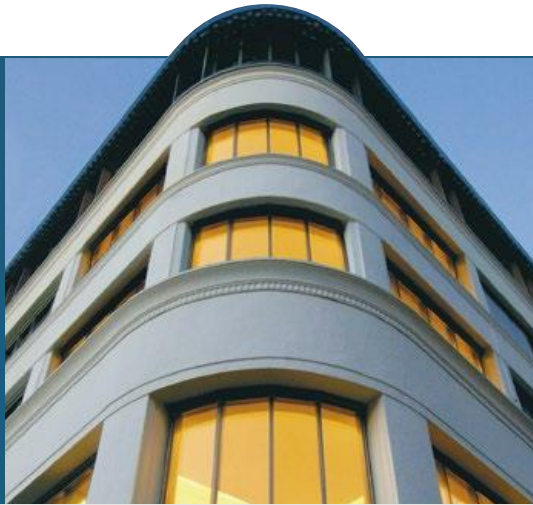


LALIVE



The Corruption Defence: Burden, Standard, and Types of Proof

The Arbitral Tribunal's duty and power to raise the corruption defence and investigate corruption *sua sponte*

Domitille Baizeau

1. Scope of the question

- Corruption is a grave international harm
- International arbitration cannot condone or ignore it
- Challenging for arbitrators:
 - Sensitive allegations (criminal wrongdoing)
 - Difficult evidentiary issues (usually hidden)
 - Drastic consequences (outcome determinative)

1. Scope of the question

- Particularly difficult questions :
 - whether arbitrators can/should raise the legal defence of corruption *sua sponte* where neither party has pleaded or raised it
 - to what degree arbitrators can/should pursue factual investigations of corruption *sua sponte*
(including when raised in passing but unsatisfactorily pleaded and/or substantiated)

1. Scope of the question

- Very few known instances of corruption addressed *sua sponte*
- Why?
 - Although “the challenge to the tribunal in assessing when such independent investigation is appropriate and permissible is considerable,” (R. Kreindler) the exercise is one which arbitrators should not systematically shy away from.

1. Scope of the question

Three questions arise:

- Why arbitrators can and should raise/investigate corruption *sua sponte*?
 - Arbitrator's duties
 - Arbitrators' powers
 - Limits – real and perceived – to arbitrators' powers
- When to investigate corruption *sua sponte*?
- How to investigate corruption *sua sponte*?

2. Why investigate: arbitrators' duty

Why arbitrators **should be** prepared to raise and investigate corruption *sua sponte*?

- Public responsibility to the administration of justice
- Support the international fight against corruption
- Ensure that the international arbitration system does not perpetuate corruption

2. Why investigate: arbitrators' duty

- Duty to render an enforceable award / public policy nature of corruption
- Risk of complicity
- Improper effect on decision-making process

3. Why investigate: arbitrators' power

Arbitrators' **powers to raise issues of law** *sua sponte*

- Arbitration laws and rules
- Civil law principle *jura novit curia*
- Contracts against public policy void *ab initio*
- Broad grants of procedural authority
 - arbitral tribunals can and should address the application of international public policy *sua sponte*

3. Why investigate: arbitrators' power

Arbitrators' **powers to investigate facts** *sua sponte*

- Arbitration laws
- Arbitration rules
- 2010 IBA Rules on the Taking of Evidence
- Impact of legal background and culture

3. Why investigate: arbitrators' power

Limits – real and perceived – to arbitrators' power

- Perceived risk of rendering an *ultra petita* award
 - The real limit: investigating corruption to determine validity of claims, not punish it as a wrongful conduct (*FWO v. Trinidad and Tobago*)
 - The issue of voidable contracts: the effect of a finding of corruption

3. Why investigate: arbitrators' power

Limits – real and perceived – to arbitrators' power (*con'd*)

- **Due process** concerns: equal treatment / right to be heard
 - Finding of corruption *favourable* to one party different from the tribunal's *favouring* that party.

E.g. Metal-Tech v. Uzbekistan: “The idea [...] is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.”

- Need for sufficient suspicion
- Need for equal and reasonable opportunity to present its response to any suspicion of corruption

3. Why investigate: arbitrators' power

Limits – real and perceived – to arbitrators' power (*con'd*)

- Arbitrators' **lack of police powers**
 - Arbitrators' task: determine the legality of contract / validity of claims, not impose criminal sanctions
 - Impact on individuals implicated
 - Powers actually available

Conclusion

- Difficult area: arbitrators should act with care but not systematically assume they cannot address and thus avoid the issue
- Corruption should be directly relevant to tribunal's decision on the legal claims before it
- Inquiry must be justified on basis of evidence available / red flags
- Tribunal must be careful about communicating / giving both parties an opportunity to address the issue, produce evidence, make submissions
- Tribunal should avail itself of the full range of fact-finding tools available, and be prepared to draw reasonable, logical inferences from circumstantial evidence or parties' refusal to produce evidence

THANK YOU

Domitille Baizeau
dbaizeau@lalive.ch