MASARYK UNIVERSITY
FACULTY OF LAW

Klára Drličková (ed.)

COFOLA INTERNATIONAL 2018

Conference Proceedings

ACTA UNIVERSITATIS BRUNENSIS

IURIDICA
Editio Scientia vol. 633

PUBLICATIONS
OF THE MASARYK UNIVERSITY

theoretical series, edition Scientia
File No. 633

COFOLA INTERNATIONAL 2018

(Conference Proceedings)

Klára Drličková (ed.)

Masaryk University
Brno 2018

Vzor citace:
DRLIČKOVÁ, Klára (ed.) *Cofola International 2018 : Conference Proceedings*. 1st editions. Brno: Masaryk University, 2018. 119 p. Publications of the Masaryk University, theoretical series, editions Scientia, File No. 633. ISBN 978-80-210-9064-4 (print), 978-80-210-9065-1 (online), ISSN 2464-8485.

CIP - Katalogizace v knize

Cofola international 2018 : (conference proceedings) / Klára Drličková (ed.). -- 1st edition. -- Brno: Masaryk University, 2018. 119 stran. -- Publications of the Masaryk University, theoretical series, edition Scientia ; File. No. 633. ISBN 978-80-210-9064-4 (tištěná), 978-80-210-9065-1 (online), ISSN 2464-8485

34* 341.61* 341.63* 062.534*
- právo
- mezinárodní spory
- mezinárodní arbitráž
- sborníky konferencí

34 – Právo [16]

This publication was written at Masaryk University as part of the project MUNI/B/1095/2017 "COFOLA INTERNATIONAL 2018" with the support of the Specific University Research Grant, as provided by the Ministry of Education, Youth and Sports of the Czech Republic in the year 2018.
The conference proceedings follows the Principles of publication ethics for the conference proceedings published by the Faculty of Law of the Masaryk University that are available here: http://cofola.law.muni.cz/content/en/publication-ethics/
The authors of the respective papers themselves are responsible for the content and for the language quality of the papers.

Editor:
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Reviewers:
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ISBN 978-80-210-9064-4
ISBN 978-80-210-9065-1 (online : pdf)
ISSN 2464-8485

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PREFACE

The conference "COFOLA = Conference for Young Lawyers" is annually organized by the Masaryk University, Faculty of Law from 2007. The main aim of this conference is to give floor to the doctoral students and young scientists at their early stage of career and enable them to present the results of their scientific activities.

Since 2013 COFOLA has been enriched by a special part called "COFOLA INTERNATIONAL". COFOLA INTERNATIONAL focuses primarily on issues of international law and the regulation of cross-border relations and is also oriented to doctoral students and young scientists from foreign countries. COFOLA INTERNATIONAL contributes to the development of international cooperation between students and young scientists from different countries. It constitutes the platform for academic discussion and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so important in current days.

COFOLA INTERNATIONAL 2018 had two sections. The first one focused on the issue of corruption in international arbitration. The second one dealt with contemporary challenges to international law and policy on sustainable development, energy, climate change, environmental protection, intellectual property and technology transfer. The second section of was organised in cooperation with gLAWcal – Global Law Initiatives for Sustainable Development (United Kingdom), the European Society of International Law (ESIL) Interest Group on International Environmental Law and the American Society of International Law (ASIL) Interest Group on Intellectual Property Law. Same as in previous years the participants from several countries had very lively discussions and covered various current and interesting topics. The conference proceedings unfortunately contain only a limited number of papers. There were more applications to the conference and more oral presentations. Only the following papers have been submitted in written form and have been recommended by reviewers for publication.

Klára Drličková

(scientific and organizational guarantor of COFOLA INTERNATIONAL)

ABOUT THE AUTHORS

Klára Drličková is holding the position of an assistant professor at the Masaryk University, Faculty of Law, at the Department of International and European Law. Her expertise lies mainly in the field of Private International Law and international commercial arbitration. Currently, she focuses mainly on the issue of protection of public interests in international commercial arbitration and on confidentiality in international commercial arbitration. She also serves as a coach of the Masaryk University team in Willem C. Vis International Commercial Arbitration Moot. Full list of her publications is available from: http://www.muni.cz/people/61143/publications

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Marek Pivoda is a student of law currently finishing his degree at Masaryk University. He spent one semester at UNSW in Sydney where he among other things undertook an International Arbitration course led by respected arbitrators and other prominent experts. He has successfully participated in several moot courts including Lex Infinitum and EHRMCC. In 2018/2019, he takes part in Willem C. Vis International Commercial Arbitration Moot as a member of the team of Masaryk University. Additionally, he has published several articles concerning the enforcement of various rights on the Internet.

Martina Pohanková is a Ph.D. student at the Faculty of Law, Charles University, Department of International Law. In her academic research, she focuses mainly on the area of international investment law and international arbitration. Publications: POHANKOVÁ, Martina. Dopad mezinárodních dohod o ochraně investic na pravomoci ČNB [Impact of International Investment Treaties on Regulatory Powers of the Czech National Bank]. *Právník,* 2016, Vol. 155, no. 12. pp. 1074–1091.

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LIST OF ABBREVIATIONS

EU	European Union
IBA	International Bar Association
ILA	International Law Association
ICC	International Chamber of Commerce
ICC Rules	2017 Rules of Arbitration of the ICC
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965
LCIA	London Court of International Arbitration
LCIA Rules	2014 LCIA Arbitration Rules
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration

UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	2010 UNCITRAL Arbitration Rules (with new Article 1, paragraph 4, as adopted in 2013)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006
WIPO	World Intellectual Property Organisation
Vienna Convention	Vienna Convention on the Law of Treaties of 23 May 1969

THE ISSUE OF CORRUPTION IN INTERNATIONAL ARBITRATION

CORRUPTION IN INTERNATIONAL COMMERCIAL ARBITRATION – INTRODUCTORY REMARKS

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International commercial arbitration is currently the preferred method of resolution of disputes originating from international business transactions, and it represents a full-fledged alternative to dispute resolution before national courts. With the growing volume of international trade, the international commercial arbitration has become an increasingly utilized instrument. It is not only the number, but also the diversity and complexity of disputes that have been growing. Arbitrators often face disputes going beyond the individual interests of the parties to arbitration. They also deal with disputes related to public interests, e.g. disputes requiring the application of competition rules including the EU ones, disputes involving insolvency proceedings or disputes concerning intellectual property rights. For our purpose is important that arbitrators also deal with disputes affected by criminal conduct such as corruption. It is not disputed that decisions on criminal sanctions remain exclusively in the hands of national courts. However, this does not mean that arbitrators are precluded from deciding such disputes and applying criminal laws.

Criminal law is mandatory and part of public law. It is not in the disposition of the parties and it expresses the strongest public interests. On the other hand, arbitration is private dispute resolution. Arbitrators are not public authorities. They have primarily the responsibility to the parties. Their main obligation is to decide a private dispute between the parties. At first sight, there is clear tension between the nature of criminal law and the nature of arbitration. However, it is now assumed in the practice of international

commercial arbitration that with the increasing area of arbitrable disputes the arbitrators are expected to do more than just resolve a private dispute between the parties.[1]

The occurrence of criminal conduct within the context of international commercial arbitration is a complex issue raising a lot of questions, e.g. arbitrability of such disputes, validity of arbitration agreement, applicable criminal law, evidence, burden of proof, duties of arbitrators, review of arbitral awards etc. Some of them will be analysed in the following papers.

The relationship between criminal law and arbitration mainly concerns, but is not limited to, economic crimes (e.g. corruption, money laundering, fiscal crimes, falsification of documents, violation of foreign trade regulations etc.). In principle, it is possible to distinguish two situations. First, arbitrators face disputes affected by the criminal conduct that has arisen outside arbitration, usually prior to the commencement of arbitration. Secondly, a crime occurs during the arbitration itself and is committed either by parties (e.g. falsification of a document or another evidence, false statement, embracery of an arbitrator, money laundering) or by arbitrators (e.g. fraud, bribery taking, money laundering). The former situation is more probable and is more often discussed. In the area of international commercial arbitration, the issue of corruption is most often debated.

Allegations of corruption in international commercial arbitration are not a new issue.[2] The landmark *ICC case no. 1110* dates back to 1963. The literature dealing with this topic regularly cited the conclusions of the well-known Swedish arbitrator *Lagergren*. The plaintiff was an important Argentinian businessman; the defendant was a British company operating on the Argentinian market. The defendant had been interested in supplying electrical equipment to the Buenos Aires region. It asked the plaintiff, who was an influential person in the politics and business, to support its offer. The parties entered into an agreement, under which the plaintiff was to obtain a certain percentage from contracts concluded by the defendant

1 MOSES, Margaret. *The Principles and Practice of International Commercial Arbitration*. 2nd ed. New York: Cambridge University Press, 2017, p. 90.

2 BETZ, Kathrin. *Proving Bribery, Fraud and Money Laundering in International Arbitration*. Cambridge: Cambridge University Press, 2017, p. 3.

with Argentinian authorities as a commission. In the end, the defendant only concluded one contract, and refused to pay the commission to the plaintiff. Subsequently, the parties entered into an arbitration agreement and referred the dispute to a sole arbitrator in accordance with then valid ICC Rules. The venue of arbitration was France. The arbitrator, on his own motion, decided to review his jurisdiction and looked into the issue of arbitrability from the viewpoint of the French as well as Argentinian law. He concluded that he had no jurisdiction in the matter, because the case involved gross violation of good morals and international public policy and could not be tolerated by any court or arbitral tribunal in a civilized country.[3]

Corrupt practices are usually mentioned in connection with public funds, although the phenomenon is not restricted to that area. It may play a negative role also in private-law relations.[4] National regulations enable sanctioning corrupt practices both at the level of private and criminal law. Several important instruments have been adopted at the international level to fight corruption.[5] There is no doubt that fight against corruption expresses a strong public interest.

There is no universal definition of corruption. Corruption occurs in many different forms. For the purpose of international commercial arbitration, foreign public bribery and private bribery are probably the most important. Foreign public bribery includes both active and passive bribery of a foreign public official. How can foreign public bribery be manifested in international commercial arbitration? Two situations may appear: disputes from contracts concluded for the purpose of bribery and disputes from contracts concluded as a result of bribery. In the former case, the parties enter into

3 ICC Arbitration Case of 1963, no. 1110. In: VAN DEN BERG, Albert J. (ed.). *Yearbook Commercial Arbitration 1996: Volume XXI*. Kluwer Law International, 1996, pp. 47–53.

4 VALDHANS, Jiří, Naděžda ROZEHNALOVÁ, Klára DRLIČKOVÁ and Pavel MÁLEK. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, Michael J. and Olaf MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Basel: Springer International Publishing, 2015, p. 99.

5 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997. *OECD* [online]. [cit. 29. 8. 2018]; Civil Law Convention on Corruption of 4 November 1999. *Council of Europe* [online]. [cit. 29. 8. 2018]; Criminal Law Convention on Corruption of 27 January 1999. *Council of Europe* [online]. [cit. 29. 8. 2018]; United Nations Convention against Corruption of 31 October 2003. *United Nations Office on Drugs and Crime* [online]. [cit. 29. 8. 2018].

a contract whose subject is the provision of certain "services", which are only fictitious. For example company A from state X concludes a "consultancy" agreement with company B from state Y. Based on the agreement company A pays commission to company B in order that B induces a public official in state Y (through the forwarding of a part of the commission) to a certain behaviour that favours company A. Consultancy agreement contains arbitration clause. After that there is disagreement between A and B over the payment of the commission and B commences arbitration.[6]

The latter situation concerns a real business transaction, which is usually realized. However, its conclusion or fulfilment is affected by the provision of a bribe.[7] For example company A from state X is involved in a bidding process for public works in state Y. Company A bribes an official in state Y and the bid is awarded to company A. The main contract is then concluded between company A and state Y containing arbitration clause and the state Y finds out about the bribe.[8]

Private bribery included both active and passive bribery of a person who directs or works in any capacity for a private entity. Similar scenarios as in the case of public bribery can arise in international commercial arbitration. For example, company A bribes an employee of company B in order that the employee favours company X against his duties. A dispute arises between company A and the employee concerning the payment of commission. Or company A and company B conclude a contract and company B finds out that the contract was procured through bribery of one of its employees.[9]

Are arbitrators allowed to decide a dispute affected by corrupt practices? Literature dealing with this issue usually starts with the conclusions of the arbitrator *Lagergren* from *ICC case no. 1110*. It is possible to derive from the above award that a dispute affected by corrupt practices of the parties is not

6 BETZ, Kathrin. *Proving Bribery, Fraud and Money Laundering in International Arbitration*. Cambridge: Cambridge University Press, 2017, p. 43.

7 ARMESTO, Juan F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, pp. 166, 168 [cit. 20. 3. 2018].

8 BETZ, Kathrin. *Proving Bribery, Fraud and Money Laundering in International Arbitration*. Cambridge: Cambridge University Press, 2017, p. 44.

9 Ibid., p. 46.

arbitrable. The literature also mostly derives this conclusion.[10] However, we can at least raise doubt whether this conclusion really ensues from the award. Certain parts of the award suggest that the award does not in fact deal with arbitrability, but with the admissibility of the claim.[11]

This corresponds to the contemporary trend. Disputes affected by corrupt practices are arbitrable.[12] Arbitrators are in such cases entitled to decide on the merits of the dispute. In other words, they have the jurisdiction to decide on the private-law sanction of such practices.[13] Such approach was confirmed by arbitrators as well as by national courts. However, there are various definitions of arbitrability, and thus some countries may apply opposite approach.[14] Decisions on criminal sanction remain exclusively in the hands of national courts. Arbitrators may assess the criminal nature

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10 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford: Oxford University Press, 2015, p. 120; BORN, Gary B. *International Commercial Arbitration. Volume II.* 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 990; LEW, Julian D. M., Loukas A. MISTELIS and Stefan M. KRÖLL. *Comparative International Commercial Arbitration.* The Hague: Kluwer Law International, 2003, p. 215.

11 MOURRE, Alexis. Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal. In: MISTELIS, Loukas A. and Stavros L. BREKOULAKIS (eds.). *Arbitrability: International & Comparative Perspective.* Alphen aan den Rijn: Kluwer Law International, 2009, p. 211.

12 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford: Oxford University Press, 2015, p. 119; BANAIFTEMI, Yas. The Impact of Corruption on „Gateway Issues“ of Arbitrability, Jurisdiction, Admissibility and Procedural Issues. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 16 [cit. 20. 3. 2018]; NUEBER, Michael. Corruption in International Commercial Arbitration – Selected Issues. In: ZEILER, Gerold and Irene WELSER (eds.). *Austrian Yearbook on International Arbitration*. 2015, p. 4; ZIADÉ, Nassib G. Addressing Allegations and Findings of Corruption. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 119 [cit. 20. 3. 2018]; BORN, Gary B. *International Commercial Arbitration. Volume II.* 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 990.

13 MOURRE, Alexis. Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal. In: MISTELIS, Loukas A. and Stavros L. BREKOULAKIS (eds.). *Arbitrability: International & Comparative Perspective.* Alphen aan den Rijn: Kluwer Law International, 2009, p. 216.

14 BORN, Gary B. *International Commercial Arbitration. Volume II.* 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, pp. 990–991.

of the conduct only as a preliminary question necessary for the resolution of the dispute.[15]

More often than with arbitrability, this issue is connected with the validity of the arbitration agreement. This issue is dealt in one of following the papers. In connection with corrupt practices, the contemporary theory and the practice deal with issues concerning the resolution of the disputes before arbitrators, in particular under which law to assess corrupt practices, arbitrator's responsibility to ascertain corrupt actions on their own motion, burden of proof and its standard, notification duties of arbitrators and the impact on the recognition and enforcement of arbitral awards.[16]

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15 BESSON, Sébastien. Corruption and Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 103 [cit. 20. 3. 2018].

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Legal acts

Civil Law Convention on Corruption of 4 November 1999. *Council of Europe* [online]. Available from: https://rm.coe.int/168007f3f6

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United Nations Convention against Corruption of 31 October 2003. *United Nations Office on Drugs and Crime* [online]. Available from: https://www.unodc.org/unodc/en/treaties/CAC/

IMPACT OF CORRUPTION ON VALIDITY OF THE ARBITRATION AGREEMENT

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Abstract

According to the doctrine of separability, the arbitration clause in a contract is considered to be separate from the main contract. In such case only invalidity of the arbitration agreement may be detrimental to further arbitral proceedings. The author discusses if other aspects should be analysed in this matter, for instance – the importance of the public policy and its potential impact on validity of the arbitration agreement. Consequently, the article touches the issues of private law arising in relation to corruption and its impact on validity of the arbitration agreement as the source of the jurisdiction for the arbitral tribunal. It also investigates consequences of the corruption in relation to the conclusion of the underlying main contract. For comparison purposes the paper briefly mentions impact of corruption on forum selection agreements.

Keywords

Arbitration Agreement; Arbitration Clause; Corruption; Public Policy; Validity.

1 Introduction

The issue of corruption in international arbitration has been a somewhat popular topic among scholars in the recent years. Such interest may exist due to various factors. Firstly, corruption respects neither international

boundaries nor national laws,[1] thus arbitration practitioners often run across corruption and are forced to recognise it. Secondly, business and legal communities have become highly sensitive towards corruption practices. Finally, certain features of international commercial arbitration may appear to attract corruption matters, such as confidentiality.[2]

Given the fact that corruption is generally perceived one of the most considerable enemies of international trade, the international community has therefore undertaken serious efforts to deal with this problem.[3] Corruption is manifested in various forms, however the most common allegations concern the subject of bribery.[4]

Most often corruption plays a role in international arbitration inasmuch underlying contract is influenced by, or is a result of, corruption. Nonetheless, tribunals may determine only matters of private law and draw civil[5] consequences thereof.[6]

1 MILLS, Karen. Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto. In: VAN DEN BERG, Albert J. (ed.). *International Commercial Arbitration: Important Contemporary Questions, ICAA Congress Series, Volume 11*. The Hague: Kluwer Law International, 2003, p. 288.

2 PAVIĆ, Vladimir. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review,* 2012, Vol. 43, p. 662.

3 BONELL, Michael J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, Michael J. and O. MEYER. (eds.). *The Impact of Corruption on International Commercial Contracts.* Switzerland: Springer International Publishing, 2015, pp. 1–2.

4 Bribery is also considered to be a threat to the international public order. See WILSKE Stephan and Todd FOX. Corruption in International Arbitration and Problems with Standard of Proof – Baseless Allegations or Prima Facie Evidence? In: KRÖLL, Stefan, Loukas A. MISTELIS, Pilar PERALES VISCASILLAS and Viki ROGERS (eds.). *Liber Amicorum Eric Bergsten. International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*. Kluwer Law International, 2011, p. 491. See also BETZ, Kathrin. *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence*. Cambridge: Cambridge University Press, 2017.

5 See also: MEYER, Olaf. *The Civil Law Consequences of Corruption*. Baden-Baden: Nomos, 2009.

6 PAVIĆ, Vladimir. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review,* 2012, Vol. 43, p. 661. See also ZACHARIASIEWICZ, Maciej. Korupcja w arbitrażu międzynarodowym: zdatność arbitrażowa sporu i prawo właściwe. In: POCZOBUT, Jerzy and Andrzej WIŚNIEWSKI (eds.). *Prawo prywatne i arbitraż. Księga jubileuszowa dedykowana doktorowi Maciejowi Tomaszewskiemu*. Warszawa: Sąd Arbitrażowy przy Krajowej Izbie Gospodarczej, 2016, p. 443.

Present article aims to briefly outline the validity of the arbitration agreement as the source of the jurisdiction for the arbitral tribunal and investigate consequences of the corruptive acts on its validity in relation to the conclusion of the underlying main contract.[7]

2 Validity of the Arbitration Agreement

Arbitration agreement allows the parties to decide on the way the arbitration has to be conducted – either by incorporation of an arbitration clause[8] or by the conclusion of a submission agreement.[9]

In general, validity of the arbitration agreement affects further proceedings. If arbitration agreement is invalid, there is simply no basis for the arbitration.[10]

When it comes to determining the law which governs the arbitration agreement itself, both the New York Convention and UNCITRAL Model Law determine that validity of the arbitration agreement has to be decided pursuant to the substantive law chosen by the parties in the first place. As a substitute reference, the law of the seat of arbitration may be applied. Although, there is a great uncertainty in this matter as a result of different approaches of various jurisdictions.[11]

National laws recognise that the arbitration tribunal has the primary responsibility for determining any objections with respect to the existence

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7 In Poland there is no statutory regulation that would deal specifically with the civil law consequences of corruption. More PAZDAN, Maksymilian and Maciej ZACHARIASIEWICZ. Civil Law Forfeiture as Means to Restrict the Application of the In Pari Delicto-Principle and Other Private Law Consequences of Corruption Under Polish Law. In: BONELL, Michael J. and O. MEYER (eds). *The Impact of Corruption on International Commercial Contracts*. Switzerland: Springer International Publishing, 2015, p. 229.

8 See FRIEDLAND, Paul. *Arbitration Clauses for International Contracts. Huntington*. NY-Bern: Juris Publishing-Staempfli Publishers, 2004.

9 Nevertheless, term "arbitration agreement" in this article refers to the arbitration clause included in a main contract as well as the arbitration agreement concluded in a separate document. Both of those terms are used interchangeably.

10 BORN, Gary B. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 5.

11 WEIGAND, Frank-Bernd. *Practitioner's Handbook on International Commercial Arbitration*. New York: Oxford University Press, 2009, pp. 5–6.

or validity of the arbitration agreement.[12] The following rule is also allowed in main international arbitration rules.[13]

However, it should be emphasized that there is a strong reluctance on the part of arbitrators to declare null and void contracts by the parties – this is so even when the contract appears illegal (i.e. an agreement aiming at security a contract through corruption).[14]

Meanwhile, one of essential concerns relates to the issue of verifying whether the nullity of the main contract may lead to the conclusion that arbitration agreement is infected by such nullity.

3 Mechanisms Implying the Validity of the Arbitration Agreement in Case of Corruption

In order to determine the impact of the corruption on the arbitration agreement, it is indispensable to cover two issues. Namely, the separability of the arbitration clause and secondly, international concept of public policy. In addition, given that corruption constitutes a violation of public policy rights, to what extent does such violation affect the existence of the separability rule and the arbitration agreement?

3.1 The Principle of Separability of the Arbitration Agreement

Separability[15] is based on the concept that the arbitration agreement may conceptually be separated from the underlying contractual relationship between the parties. It means that arbitration agreement is treated

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12 Article 16(1) of the UNCITRAL Model Law states: "*An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*"

13 Pursuant to Article 21(2) of the UNCITRAL Arbitration Rules: "*The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract.*"

14 MAYER, Pierre. Reflections on the International Arbitrator's Duty to Apply the Law. In: LEW, Julian and Loukas MISTELIS (eds.). *Arbitration Insights – Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfields Bruckhaus Deringer*. Kluwer Law International, 2007, p. 301.

15 Also referred to as "the autonomy of the arbitration clause" or "severability".

as a separate contract. Its validity does not affect validity of the remaining terms of a main contract.[16]

The doctrine of separability emerged in order to address the practical impediment to arbitration of disputes when one party challenged the overall validity of the contract.[17] It is also intended to divide the arbitration agreement from the fate of the underlying contract. As a result, it constitutes a barrier that prevents issues of nullity of the underlying contract to infiltrate the arbitration agreement.[18] Therefore, arbitration agreement may remain valid even if the main contract is recognised to be null and void.

The concept of separability of the arbitration agreement is appealing in theory and useful in practice.[19] Consequently, an increasing number of countries have incorporated this principle as part of their laws.[20] This fundamental, and now universally accepted, principle of arbitration law is reflected in both – national arbitration law[21] and in arbitration rules[22]. Although it had difficulties in establishing itself in domestic arbitrations.[23]

The principle of separability has been also considered in the domestic court's decisions. In the *Gosset case*,[24] French *Cour de Cassation* admitted for the first time the principle of the separability of the arbitration agreement

16 RAWDING, Niger and Elizabeth SNODGRASS. Global Overview – An Introduction to International Commercial Law. In: NAIRN, Karyl and Patrick HENEGHAN (eds.). *Arbitration World. International Series*. Thomson Reuters, 2015, p. 19.

17 Ibid.

18 SAYED, Abdulhay. *Corruption in International Trade and Commercial Arbitration*. The Hague-London-New York: Kluwer Law International, 2004, pp. 43–47.

19 See: PAULSSON, Jan. *The Idea of Arbitration*. New York: Oxford University Press, 2013.

20 Opposite view: LANDOLT, Philip. The Inconvenience of Principle: Separability and Kompetenz-Kompetenz. *Journal of International Arbitration,* 2013, Vol. 30, no. 5, pp. 511–530.

21 Under Polish law it is well established that the arbitration agreement may remain valid even if the main contract is determined to be invalid. Article 1180 (1) of the Code of Civil Procedure ("CCP") states that "*the arbitral tribunal may rule on its own jurisdiction, including the existence, validity or effectiveness of the arbitration agreement. Invalidity or expiration of the underlying contract in which the arbitration agreement was included shall not in and of itself mean the invalidity or expiration of the arbitration agreement*".

22 See e.g. Article 23(2) of the LCIA Rules and Article 6(9) of the ICC Rules.

23 More on how the opinions evolved first in the realm of international and later also in the realm of domestic arbitration: POUDRET, Jean-Francois and Sebastien BESSON. *Comparative Law of International Arbitration*. London-Zurich: Sweet & Maxwell, 2007, p. 136.

24 Decision of the Supreme Court, France of 7 May 1963. In: *Rev. Arb.* 1963, p. 60.

and it was recognised in very broad terms. This judgement has since been confirmed by numerous others and is beyond discussion in international and domestic arbitration.[25] Likewise, U.S. Supreme Court also recognised the separability of the arbitration clause in the *Prima Paint* judgement in 1967[26] and in 2006 the U.S. Supreme Court confirmed that separability rule applies equally in state and federal courts.[27]

When it comes to challenging the arbitration agreement directly, in some old United States courts' resolutions[28] it was determined that the court, not the arbitrator, shall resolve claims that an underlying contract containing an arbitration clause is illegal.[29]

However, it shall be stressed that in most jurisdictions the principle of separability implies that only a claim that the arbitration agreement itself is invalid will call into question the jurisdiction of arbitrators to address the matter of validity.[30]

According to the principle of separability, an arbitration agreement shall be perceived as distinct and autonomous from the contract in which it is contained. Therefore, even if the main contract is tainted by corruption, the arbitration agreement would still be held effective and as a result – valid.[31]

Consequently, allegations concerning corruption are not likely to deprive the arbitrator of jurisdiction and hence, courts and arbitral tribunals uphold the power to exercise jurisdiction in cases where allegations of corruption have been made. However, it needs to be underlined that there are rare cases where illegality renders the separate arbitration agreement void

25 POUDRET, Jean-Francois and Sebastien BESSON. *Comparative Law of International Arbitration*. London-Zurich: Sweet & Maxwell, 2007, p. 140.

26 Decision of the U.S. Supreme Court of 12 June 1967, *Prima Paint Co. v. Flood Conklin Manufacturing Corporation*. In: *JUSTIA US Supreme Court* [online]. [cit. 28. 4. 2018].

27 Decision of the U.S. Supreme Court of 21 February 2006, *Buckeye Check Cashing Inc. v. John Cartegna et al.* In: *Court Listener* [online]. [cit. 28. 2. 2018].

28 More recent cases have held that the arbitrator shall resolve such issues.

29 However, most of these decisions were rendered before aforementioned *Prima Paint* case, see for instance: Decision of the U.S. Court of Appeals of the State of New York of 30 December 1965, Durst v. Abrash. In: *CASEMINE* [online]. [cit. 28. 4. 2018].

30 RAWDING, Niger and Elizabeth SNODGRASS. Global Overview – An Introduction to International Commercial Law. In: NAIRN, Karyl and Patrick HENEGHAN (eds.). *Arbitration World. International Series*. Thomson Reuters, 2015, p. 19.

31 BONELL, Michael J. and Olaf MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, Michael J. and Olaf MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Switzerland: Springer International Publishing, 2015, p. 399.

ab initio. Exceptions (such as mistake of identity, forgery, threat) may apply as voidness *ab initio* of the contract affects the arbitration agreement *ab initio*. Although, it seems justified to conclude that corruption and illegality issues do not undermine the rule of separability.[32]

On the other hand, the doctrine does not preclude the arguments that the arbitration clause is null and void for specific factual and legal grounds. *Weigand* states that in such cases it has to be indicated why and to which extent those reasons did imply the arbitration clause.[33] Accordingly, it must be stressed that arbitration clause as such is a contract itself and its validity may be affected by the same range of defects as invoked in regard to main contract.

Meanwhile, in the light of the corruption and arbitration, the persistence of separability frequently depends upon the measuring of the seriousness of the offense that corruption carries against public policy.[34] The question for further discussion arises as to what extent are the ideas that uphold separability able to resist the negative impact of corruption?

3.2 The Importance of the Public Policy

The issue of corruption in the performance of a contract raise important questions of public policy (*ordre public*).[35]

Defining the term "public policy" itself is not possible as to its vague concept, however it constitutes a general principle of private international law which exists in all legal systems. It consists of a series of rules or principles which form a core for legal and moral values.[36]

In an attempt at harmonization the law, in 2002 the Committee on International Arbitration of the ILA reviewed the development

32 Ibid. Although the authors state that mentioned exceptional cases do not include bribery.

33 WEIGAND, Frank-Bernd. *Practitioner's Handbook on International Commercial Arbitration*. New York: Oxford University Press, 2009, p. 89.

34 RAWDING, Niger and Elizabeth SNODGRASS. Global Overview – An Introduction to International Commercial Law. In: NAIRN, Karyl and Patrick HENEGHAN (eds.). *Arbitration World. International Series*. Thomson Reuters, 2015, p. 47.

35 Under the Polish Law see: ZACHARIASIEWICZ, Maciej. Klauzula porządku publicznego jako podstawa odmowy uznania lub wykonania orzeczenia sądu polubownego w polskim prawie arbitrażowym. *Problemy Prawa Prywatnego Międzynarodowego*, 2010, no. 6.

36 LALIVE, Pierre. Transnational (or Truly International) Public Policy and International Arbitration. In: SANDERS, Pieter (ed.). *Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series*. New York: Kluwer Law International, 1987, p. 263.

of the doctrine of public policy and reached the conclusion that there was an international consensus stating that corruption and bribery are contrary to international public policy.[37] Therefore, although national laws perceive acts of corruption differently, contracts aimed at corruption shall be null and void, despite used set of rules.

Nevertheless, concerns remain about the attitude of the arbitrators in corruption cases when an arbitrator would be required to rule on issues related to the performance of the agreement. *Sayed* states: "*There are two possible scenarios pertaining to the issue of the further arbitrator's actions.*" First, when the parties may explicitly exclude matters relating to the validity of the agreement and second, when the parties declare that they accept the jurisdiction of the arbitrator in connection with the subject matter of the dispute.[38]

As a result, in order to protect public policy,[39] the arbitral tribunal shall at first determine that suspected bribery is prohibited by the applicable rules (national, international, transnational). Then, if the tribunal finds out that bribery took place under the applicable public policy rules, this contract shall be recognised null and void.[40] However, it cannot justify piercing the shield of separate arbitration agreement, which is recognised by national and international laws as well as the case law.

To sum up, the general conclusion is drawn that corruption is prohibited by a wide range of international conventions and domestic legal systems,[41] and since great majority of these prohibitions form transnational public

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37 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford University Press, 2015, p. 119.

38 SAYED, Abdulhay. *Corruption in International Trade and Commercial Arbitration*. The Hague-London-New York: Kluwer Law International, 2004, p. 59.

39 This issue was also raised in a dispute before a sole arbitrator from Sweden – judge Lagergren in well-known ICC Arbitration Case of 1963, no. 1110. In: *Trans-Lex* [online]. [cit. 28. 4. 2018].

40 PAVIĆ, Vladimir. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review,* 2012, Vol. 43, p. 670.

41 Likewise, *Kreindler* claims that in England the illegality (such as corruption) offends the public policy and such offence outweighs the "competing mandate" of ensuring the finality of international arbitral awards. See KREINDLER, Richard. Aspects of Illegality in the Formation and Performance of Contracts. In: VAN DEN BERG Albert J. (ed.). *International Commercial Arbitration: Important Contemporary Questions, ICAA Congress Series, Volume 11*. The Hague: Kluwer Law International, 2003, p. 246.

policy, it may be applied in case of suspected corruption and potentially influence the agreement, although the practical approach seems to differ in respect of the arbitration agreement.[42]

4 The Impact of Corruption on Arbitration Agreements

Beyond regulatory aspects of the principle of separability and public policy in regards to impact of the corruption, additional arguments shall be raised. In particular – practical aspects of the connection between corruption and arbitration, but also comparison of validity of forum selection clauses.

Since nullity of the main contract cannot imply the nullity of the arbitration agreement, an arbitration agreement is deemed to be independent of the main contract. Such scenario seems to be possible when main contract is tainted by the corruption exclusively. Despite the importance of the separability rule in this matter, arbitration agreement may still be affected by the same corruptive defects as analyzed in relation to main contract. These would be defects related to such aspects as representation (e.g. third person acting on behalf), purpose of the agreement, the existence of the will to be bound by the agreement, defects of consent.

Nowadays it is suggested for contracts or clauses of a contracts providing for corruption to be null and void.[43]

Nevertheless there are two crucial factors that should also be taken into consideration from the practical point of view while deciding on impact of corruption on the arbitration agreement. Namely, previous engagement of an arbitrator in proceedings and secondly, conventional practice.

42 E.g. Decision of U.S. Courts of Appeals for the Third Circuit of 18 November 1991, Republic of Philippines, National Power Corporation v Westinghouse Electric Corporation and others. In: *JUSTIA US Law* [online]. [cit. 28. 4. 2018]. Similar approach appeared in many ICC cases, for instance ICC Arbitration Case of 1998, no. 8891. In: *ICC Digital Library* [online]. [cit. 28. 4. 2018].

43 Article 8(1) of the Civil Law Convention on Corruption states that each Contracting State should "*provide in its internal law for any contract or clause of a contract providing for corruption to be null and void*". Civil Law Convention on Corruption of 4 November 1999 [online]. *Council of Europe* [cit. 5. 5. 2018]. Given the historical perspective, approach in relation to activities related to corruption seems to be more rigorous. To compare – in Poland, as a result of the invalidity clause, the dispute used to be settle by a common court.

First and foremost, as far as the corruption is involved it may seem as a nonsense for an arbitrator to engage in a long process of evidence taking leading to establish the corruptive contract, and then to declare the arbitration agreement as null and void. Hence, it is important to confirm in the first place that a proposed arbitration agreement would be valid and binding contract as it affects its jurisdiction.

It is also the tribunal's power to initiate investigation in case suspicion of corruption by verifying the legality of the contract containing the arbitration clause. Such power of the tribunal derives from the urge for arbitrators to ensure the validity of their own mandate and therefore, establishing jurisdiction and that the claim is properly arbitrable.[44]

What is more, arbitration is well established as a conventional practice. There is no doubt that together with prosperity, unparalleled expansion of global trade and investment has brought international commercial disputes.[45] Arbitration is currently the principal method of resolving disputes which involve states, corporations and individuals.[46] Therefore, parties to international contracts frequently include contractual dispute resolution provisions in their arrangements. For this reason, it may be concluded that parties would have agreed on arbitration with or without a suspicion of corruption, *e.g.* bribery.[47]

4.1 Validity of the Forum Selection Agreements

The position is different as regards forum selection clauses. A forum selection clause is an agreement which either permits or requires its parties to pursue their claim against one another in chosen national court. In general,

44 CAVE, Bryan and Leighton PAISNER. Bribery and Corruption in International Arbitration. *Lexology* [online]. [cit. 5. 5. 2018].

45 BORN, Gary B. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. Alphen aan den Rijn: Kluwer Law International, 2006, p. 1.

46 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration*. 6th ed. Oxford University Press, 2015, p. 1.

47 For comparison, Polish law provides for the sanction of invalidity of the contract that is contrary to the rules of law or the principle of social conduct (Article 58 of the Polish Civil Code). Provisions of the criminal law penalizing corruption frequently leads to the invalidity of the civil law contracts. See MARKOWSKI, Michał. Wpływ przestępstwa przekupstwa na postępowanie arbitrażowe w międzynarodowym arbitrażu handlowym. *E-Przegląd Arbitrażowy* [online]. 2011, no. 2, pp. 27–39 [cit. 28. 4. 2018].

most of them are governed by domestic laws. Also, similar to different contractual provisions, forum selection clauses raise problematic subject matters of validity and enforceability.[48]

National courts may refuse to uphold a forum selection clause which violates public policy or applicable mandatory rules. What is more, there are different approaches subject to various jurisdictions to the exceptions (for instance – fraudulent inducement, mistake) to the presumptive enforceability of a forum clause. *Born* states: "*The initial invalidity exception sometimes includes more expansive defences such as undue influence.*" As a result, it is possible to challenge the initial validity of forum clause itself instead of underlying contract.[49]

Consequently, in some jurisdictions it is possible to challenge the validity of the underlying contract which would provide a basis for impeaching the parties' forum selection clause.[50]

5 Conclusion

The separability presumption in international law is understood as providing for the validity an arbitration clause notwithstanding defects in underlying contract and the potential validity of the underlying contract, notwithstanding defects in the arbitration clause.[51] As a result invalidity of arbitration agreement resulting from corruptive acts of the party does not necessarily mean invalidity of main or underlying contact. The principle of separability has now received a widespread acceptance both nationally and internationally, therefore even corruptive acts cannot affects its existence and determine the arbitration agreement to be null and void. However, when the arbitration clause is deemed to be null and void itself for particular legal and factual reasons, it has to be demonstrated why and to which extent those reasons did affect the arbitration agreement itself.[52]

48 More BORN Gary B. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. Alphen aan den Rijn: Kluwer Law International, 2006.

49 Ibid.

50 Ibid., pp. 100–101.

51 BORN Gary. *International Arbitration: Law and Practice*. Alphen aan den Rijn: Wolters Kluwer Law & Business, 2012, p. 51.

52 WEIGAND, Frank-Bernd. *Practitioner's Handbook on International Commercial Arbitration*. New York: Oxford University Press, 2009, p. 89.

Also, corruption may be perceived as contrary to the public policy, hence contract tainted by corruptive acts shall be recognised null and void.[53] However, it cannot justify piercing the shield of separate arbitration agreement, which is recognised by national and international laws as well as the case law. In addition, there are two crucial factors that shall be taken into consideration from the practical point of view while deciding on impact of corruption on the arbitration agreement. Firstly, previous engagement of an arbitrator in proceedings and secondly, conventional practice.

As a consequence, invalidity of the arbitration agreement due to corruption seems to be possible only in exceptional circumstances, notwithstanding the validity of the main or underlying contract.

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INTERNATIONAL ARBITRATION AND CORRUPTION – THE ARBITRATORS' RIGHT TO INVESTIGATE CORRUPTION *SUA SPONTE*

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Abstract

Arbitration is a dispute resolution mechanism which is constituted upon party's autonomy to settle a dispute in a private and confidential way. Criminal law on the other hand can be considered as a restriction on party's autonomy since it protects general interests. Nevertheless, the paths of these two disciplines cross on the way to a fair and square decision. Arbitrators participate in this proceeding as private persons appointed through the arbitration agreements by parties. On the other hand, they are still playing an important role on the field of the international commercial business. The arbitration may be considered as a potential tool for a criminal conduct since arbitrators are measured as servants of individual private interests of parties. However, as globalization reflects itself in the growth of international trade and transactions, the same applies to the international arbitration. Arbitrators are servants of parties as much as they are guardians of ethics and moral behavior within the international trade. One may argue that arbitrators are ill-suited for an adjudication of such claims because of the nature of arbitration. The reason behind this statement is that rights and duties of arbitrators in combat with corruption during arbitral proceedings are limited. This paper focuses exactly on this issue. What is the position of arbitrators when they are facing corrupt activities of the parties? Could they commence the investigation and resolve this matter on their own?

Keywords

Arbitration; Corruption; Duty to Report; Powers of Arbitrators; Right to Investigate.

1 Introduction

Arbitrators are not national judges. But usually they are in a similar position as national public authorities when it comes to dispute settlements. Unfortunately, arbitration stays on the edge when it comes to dealing with criminal activities of individuals. Besides the fact, that the arbitration represents a private and confidential way of dispute settlements, the result of arbitral proceedings is a final and binding decision – determination of parties' rights and duties – which is capable of recognition and enforcement in more than 150 countries all over the world.[1] To put it in another way, arbitrators perform a function that is sometimes considered to be a part of the state monopoly.[2] But when it comes to a comparison of rights and duties of judges and arbitrators, including an investigative apparatus, in relation to corruption or other criminal behaviors of individuals, the state of resemblance is kind of lost. Moreover, the position of arbitrators when it comes to comparison with the position of national judges may vary in different states. Some of the countries perceive arbitrators as the servants of individual and private interests which result into picturing arbitration as a potential tool for criminal activities of individuals. Therefore, when it comes to the protection of public interests, a tight and strong control mechanism over arbitral proceedings by states exists.[3]

Notwithstanding the above consideration, arbitrators are well suitable for combating criminal activities in the international trade. As *Mourre* said: "*Arbitrators are naturally sensitive to the need for morality in international business. States should on their side acknowledge the autonomy of arbitration and the difference between arbitrators and judges*."[4] Consequently, arbitrators are considering

1 For the list of all contracting states see: *Contracting States* [online]. New York Arbitration Convention [cit. 8. 29. 2018].

2 MOURRE, Alexis. Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator. *Arbitration International* [online]. 2006, Vol. 22, p. 96 [cit. 17. 4. 2018].

3 Ibid., p. 97.

4 Ibid.

themselves as natural guardians of ethics and good morals in the international trade. The fact that they may be challenged by difficult questions, as a consequence of limited powers and mandate of arbitrators over criminal issues, cannot deter them.

Arbitration has been a leading dispute resolution in the field of the international trade. Although it has been used to settle criminal matters just sporadically and its nature and purpose is geared to resolve civil disputes, a proper dispute resolution cannot just turn a blind eye on an illegal behavior and other matters failing outside its primary, civil scope.[5]

There are two potential scenarios how the arbitral tribunal gets aware of corruption. Firstly, one of the parties raises allegations and consequently, the arbitral tribunal will be obliged to investigate, resolve and draw consequences of corruption in order to settle a dispute. The arbitrators' ability and duty to investigate corruption in case when this issue is raised by one of parties is not disputed. On the contrary, when neither party alleges corruption, but the arbitral tribunal itself raises a suspicion based on "red flags" that such actions have been carried out in the present case, the powers of arbitrators to investigate illegal behavior in the absence of parties' allegations are not that clear.[6]

The paper deals with a pressing issue in international arbitration – the right of arbitrators to investigate corruption in the course of arbitration on their own motion. The scenario that parties of a contract will hide their illegal and immoral behavior behind the private and confidential nature of a dispute resolution such as arbitration is not unusual. Consequently the question whether the arbitral tribunal, having evident suspicions about the existence of corruption, has a right to investigate parties' behavior although parties did not put the issue of corruption forward, arises.[7]

The aim of this paper is to analyze the position of arbitrators when they, on their own, find out about corruption which leads to disruption

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5 HIBER, Dragor and Vladimir PAVIĆ. Arbitration and Crime. *Journal of International Arbitration* [online]. 2008, Vol. 25, p. 462 [cit. 17. 4. 2018].

6 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, pp. 14–15 [cit. 17. 4. 2018].

7 ALBANESI, Christian and Emmanuel JOLIVET. Dealing with Corruption in Arbitration: A Review of ICC Experience [online]. In: *ICC Digital Library* [cit. 17. 4. 2018].

of a performance of a contract, find out the legal basis for their power to investigate such behavior *sua sponte* and consequently, consider the limits arbitrators must deal with. The analysis of duties imposed on arbitrators by ethical codes stays outside the scope of this paper.

2 What Are the Difficult Questions Arbitrators Must Face When Dealing With Corruption?

There are many obstacles which arbitrators must take into consideration when deciding whether to investigate the specific behavior or rather not. Parties of arbitral proceedings count on the private and confidential nature of arbitration too much. Although the arbitral tribunal is appointed only because of the parties' will, they still are decision-makers who cannot turn a blind eye on a criminal manner of conduct. Ignorance is not a solution.

First of all, corruption is inherently difficult to prove and the allegations are of sensitive nature. Besides the difficulties with the existence of sufficient quantity of evidence and relevant standard of proof, arbitrators must consider whether they have a right to investigate the legal issue of corruption *sua sponte* when neither party has raised it. At the same time, they may ask themselves whether they have a duty to report such an illicit behavior to a competent law enforcement authority of a particular state.

These questions must be answered so arbitrators would have a straightforward picture of how to deal with corruption in arbitral proceedings. Even though there are obstacles which may deter them from dealing with this phenomenon, none of those are insurmountable.[8] There are opinions, as *Crivellaro* summed up in his article on corruption and arbitration that the primary duty of arbitrators is to settle the dispute in accordance with the arbitration agreement of parties and not to act as a public authority of the international trade entrusted with enforcing ethics and good moral.[9] Unfortunately, this is the result of a mistrust of the insufficient powers of arbitrators to deal with corruption which stems from an inadequate and

8 CRIVELLARO, Antonio. Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence. In: KARSTEN, Kristine and Andrew BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud.* Paris: ICC Publishing s.a., 2003, p. 116.

9 Ibid., p. 118.

incomplete national and international legislative considering the relation between arbitration and corruption. The investigative apparatus of arbitrators is limited and it leads to a conclusion that arbitration is not well-suited for deciding criminal behavior and consequently, considered as a safe harbor for corruption.

2.1 Investigative Powers of Arbitrators

The presumption that arbitration is a safe harbor for illicit actions of individuals and some other dilemmas lead arbitrators to the conclusion that they should consider whether they want to take the initiative and start the investigation of corruption, or rather to avoid such a waste of time and refuse their jurisdiction over such disputes in the beginning of the whole process.

In my opinion, the investigation powers of arbitrators result from finding an equilibrium between their allegiance of the commitment to the parties and parties' will on one side, and their allegiance of loyalty to the international legal order formed by anti-corruption norms and rules, on the other.

If we take a closer look on the obligation that arbitrators owns to the parties, we found out that truly, the mandate and scope of their powers in defined by parties' will. The party' autonomy, however, has limitations. These limitations can be seen as the allegiance of arbitrators to the international legal order. In other words, arbitrators must take into considerations in the course of arbitration, regardless of parties' will, a certain set of rules. As long as arbitrators draw their jurisdiction to decide a certain dispute from states, they must consider their public interests.

3 The Right to Investigate Sua Sponte?

In order to contradict the conclusion that arbitration provides safe harbor for corruption, arbitrators must be cautious about irregularities related to dealings between individuals, whose only aim is to hide their illegal relations behind the private nature of arbitral proceedings.

What is the next move of the arbitral tribunal when a strong suspicion occurs among arbitrators, but neither party raises the allegation? The tribunal may find itself on a crossroad. One way would lead to ignorance of illegal actions and letting the uncertain yet damaging suspicions unsolved.

The other would result in expanding the arbitral tribunal's right to enquire beyond the disputed claim, but on the other hand, it would show the arbitrators' efforts to protect the international trade community against criminal and immoral disruptions.

In principle, when a certain dispute arises, the parties expect from arbitrators to determine their rights and duties, because they are the ones who know best the practices and the usage in the international trade. Unfortunately, the parties' expectation that the arbitrators will turn a blind eye on criminal behavior and ignore the international consensus of states on the condemnation of corruption exists as well. Moreover, such expectation is based on arbitration case law on the issue of corruption.[10]

There have been opinions that the arbitral tribunal has no duty to investigate corruption unless one of the parties explicitly raises such an issue.[11] The Tribunal in the *Westacre case* took a position that bribery as a fact must be alleged and the sufficient evidence must be submitted to the Tribunal. The Tribunal stated, that it is the role of defendant who has to present the fact of corruption. Therefore, if the defendant *"does not use it in his presentation of facts, an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentations of facts that decides what direction the arbitral tribunal has to investigate"*.[12] The position of arbitrators, that as long as parties do not bring the issue of corruption in the course of arbitral proceedings, they will ignore series of indicators showing that corruption certainly took a place, is confronted by more proactive approach delivered by a number of cases. As *Crivellaro* summarized in his work, arbitrators take serious indications of potential corruption into their consideration and investigate such

10 CREMADES, Bernardo and David CAIRNS. Transnational Public Policy in International Arbitral Decision-making: The Case of Bribery, Money Laundering and Fraud. In: KARSTEN, Kristine and Andrew BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud*. Paris: ICC Publishing s.a., 2003, pp. 80–81.

11 See Westacre case. In: CREMADES, Bernardo and David CAIRNS. Transnational Public Policy in International Arbitral Decision-making: The Case of Bribery, Money Laundering and Fraud. In: KARSTEN, Kristine and Andrew BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud*. Paris: ICC Publishing s.a., 2003, p. 80.

12 See decision of Court of Appeal, England and Wales of 12 May 1999, *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd. 1958 New York Convention Guide* [online]. [cit. 29. 8. 2018].

a behavior *sua sponte*.[13] *Ad exemplum* in the *ICC case no. 6248* the Tribunal investigated its suspicions about an illicit behavior of one of the parties based on the evidence they gathered on their own and certain documents provided by one of the parties. Therefore, the Tribunal could establish the basics for allegations of bribery and drawn civil consequences of such behavior in their arbitral award.[14]

Therefore, today's suggestions how to approach the question whether arbitration, as a private dispute resolution mechanism, is capable of settling corruption should and are pointing the more proactive way. There are some cases when the parties, knowing that corruption occurred in relation to the performance of a contract, either hided their behavior or explicitly claimed that the arbitral tribunal should settle a dispute without looking onto corruption. The certitude of parties was reasoned by a threat of non-enforceability of an award, which lies in arbitrators acting *ultra petita* – beyond their mandate limited by parties' will.

The international community, including professionals, scholars and lawyers agrees on the existence of an inquisitorial role of an arbitrator. Although the possibility to draw criminal consequences in the course of arbitration for a corrupt behavior of individuals is undoubtedly impossible and definitely against the nature of this private dispute resolution, the ability to establish the existence of corrupt actions and rule upon the civil consequences of it is necessary.[15]

The right to further enquiry by the arbitral tribunal may be necessary to confirm or dispel the potential, but still uncertain and damaging suspicions of corruption which is hanging in the air and therefore improperly affect arbitrators' deliberations.[16] Unfortunately, it is not clear whether the tribunal

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13 CRIVELLARO, Antonio. Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence. In: KARSTEN, Kristine and Andrew BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud*. Paris: ICC Publishing s.a., 2003, p. 114.

14 Ibid., pp. 129–130.

15 SPRANGE, Thomas. Corruption in Arbitration: Sua Sponte Investigations – Duty to Report. In: *ICC Digital Library* [online]. [cit. 17. 4. 2018].

16 BAIZEAU, Domitille and Tessa HAYES. The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series*, *Volume 19*. The Hague: Wolters Kluwer, 2017, p. 237.

may trigger its investigative powers on their own and rule upon the consequences of corrupt actions. Arbitrators are risking that the final award will be challenged, set aside or refused to be enforced if they step into *ultra petita* territory by investigating the existence of corruption and establish the consequences.[17] Therefore, we must closer examine the arbitrators' right to raise a new legal issue in the course of arbitral proceedings without the risk of acting outside the parties' disputed claim.

3.1 The Source of the Power to Investigate Corruption Sua Sponte

In order to declare that arbitrators have the power to investigate corruption *sua sponte*, the analysis of potential legal sources is in place. Generally, arbitrators will consider, at first, the public international law regulations regarding anti-corruption rules and secondly applicable laws on the arbitral proceedings and the substantive matters of the dispute.

The international community has reached an admirable consensus on the condemnation of transnational corruption. The first step in combating corruption worldwide was made by the OECD. In 1997 the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[18] which covers active foreign public bribery by individuals and corporations and constrain one side of corruption.[19] The most remarkable development within the international community was carried into effect by the United Nations in 2003. The way the United Nations approached the transnational corruption problem in the United Nations Convention against Corruption[20] was more elaborate. The United Nations Convention of Corruption recognized not only the active side of bribery – the individual offering or paying the bribery, but also passive side – the public official receiving or soliciting the bribery.[21]

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17 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, pp. 14–15 [cit. 17. 4. 2018].

18 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997. *OECD* [online]. [cit. 29. 8. 2018].

19 BETZ, Kathrin. Economic Crime in International Arbitration. *ASA Bulletin* [online]. 2017, Vol. 35, p. 284 [cit. 10. 5. 2018].

20 United Nations Convention against Corruption of 31 October 2003. *United Nations Office on Drugs and Crime* [online]. [cit. 29. 8. 2018].

21 FORTIER, L. Yves. Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'. *Arbitration International* [online]. 2015, Vol. 31, p. 370 [cit. 17. 4. 2018].

Nevertheless, the question is whether arbitrators are bound by the above-mentioned international regulations. The bone of contention is that almost all treaties combating corruption lack the international enforcement mechanism that is left to national legislation and the courts.[22] All treaties mentioned above are not "self-executing" which leads to the need of implementation of provisions of conventions into domestic laws by each state. Leaving this important part of the combat against corruption on each state leads to uneven application of anti-corruption rules among countries, which makes the whole idea of dealing with transnational corruption insufficient.

Nevertheless, the criminal rules such the ones that prohibit and incriminate corruption are generally considered as mandatory rules which create public policy of any given state. Contrary to national judges, the arbitrators do not have the duty to apply such provisions automatically, but they may take them into considerations if they have a reasonable title why such rules must be applied in a pending case.[23]

The imperative to protect public policy known from the litigation practice in similar cases arises in arbitral proceedings only if the arbitral tribunal finds that there is a certain public policy rule which prohibits a particular criminal conduct and according to applicable law, this public policy rules must be applied. Nowadays a general consensus on the matter of applicability of public policy exists. The arbitrators, generally, have a duty to observe public policy rules and draw civil consequences of a potential violation of the mentioned provisions. [24]

Abovementioned international rules, unfortunately, do not include an explicit provision on arbitrators to investigate corruption *sua sponte*. However, what it includes is an obligation of states to develop and maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law.[25] Each state shall implement

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22 FORTIER, L. Yves. Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'. *Arbitration International* [online]. 2015, Vol. 31, p. 370 [cit. 17. 4. 2018].

23 MOURRE, Alexis. Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator. *Arbitration International* [online]. 2006, Vol. 22, p. 109 [cit. 17. 4. 2018].

24 PAVIĆ, Vladimir. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review* [online]. 2012, Vol. 43, pp. 669–670 [cit. 17. 4. 2018].

25 See Article 5 of the United Nations Convention against Corruption.

rules that would improve the fight against corruption. The power to investigate corruption *sua sponte* is such a rule.

Whether a particular state will include into its national legislation a rule that would allow arbitrators to investigate corruption *sua sponte*, depends exclusively on the state. Since the possibility to analyze all national legal rules is not a goal of this paper, the focus will be aimed on the UNCITRAL Model Law, that has been a leading set of rules adopted among national laws regarding arbitral proceedings.

3.2 UNCITRAL Model Law

The UNCITRAL Model Law has been adopted, not always as the whole concept, by many national legislators.[26] It states the basic conception of arbitral proceedings, from the appointment of arbitrators to the enforcement of arbitral awards. Besides that, it defines arbitrators' powers and duties.

Unfortunately, a provision that would explicitly establish and describe the arbitrators' power to investigate *sua sponte* related matters to the dispute is not included. Nevertheless, *Hayes* and *Baizeau* provide further analysis of other provisions that evoke the existence of such right.

They argue that *"while it does not explicitly address sua sponte investigations, the UNCITRAL Model Law does provide that "[a]ll statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party" and that "any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties".*[27] The closer analysis of this provision provides an implication that the arbitral tribunal has a right to seek additional evidence from the parties subjected to the requirement of communication among the parties. According to this provision, the existence of investigative powers of arbitrators that are based on their own volition could be drawn.

To conclude whether arbitrators have a legal source for their powers to investigate, I would say, they do. Firstly, they have the duty to apply public

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26 The UNCITRAL Model Law has been adopted by 80 states.

27 BAIZEAU, Domitille and Tessa HAYES. The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series*, *Volume 19*. The Hague: Wolters Kluwer, 2017, p. 241.

policy of a particular state that, if the state is a contracting party of one of abovementioned international treaties on the combat with corruption, includes the international rules on combat with corruption in. Consequently, they have a duty to apply such rule in order to prevent a breach of public policy. Secondly, if the particular state's national arbitration law is based on UNCITRAL Model Law, high probability exists that the abovementioned provision, that evoke the arbitrators' power to investigate relevant matters on their own motion, is concluded in the national law. In other words. Based on the duty to observe public policy and the provision on the investigative powers of arbitrators included in UNCITRAL Model Law, I assume that the power to investigate corruption *sua sponte* by arbitrators prevails.

4 The Issue of "Red Flags"

In order to approach any further conclusions about an investigation or an enquiry of corruption, I consider important to look at the situation from arbitrators' point of view. Therefore, in this part I will, in a nutshell, describe the most common warning signs or red flags that arbitrators are aware of and that can lead them to a proper investigation of parties' irregularities.

So how do arbitrators know that they are facing corrupt actions? The international community has created a list of indicators or warning signs that helps arbitrators to categorize the illicit behavior of individuals as corruption or bribery. The usual scenario is that the parties try to hide their unlawful dealings under the cover of a seemingly legitimate contract such as agency agreement. Consequently, they do not leave any trails of documentation that would prove their acts. Therefore, agreements based on corruption are typically not in writing form and even if they are, they are written in a form of a legitimate transaction. Disputes arising from mentioned contracts are then referred to arbitration process since the nature of arbitration can provide a sufficient cover for such illegal behaviors.[28]

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28 KHVALEI, Vladimir. Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption. In: *ICC Digital Library* [online]. [cit. 17. 4. 2018].

The "red flags" can arise at different stages of a relationship, including contract negotiations or terminations. The ICC Guidelines on Agents, Intermediaries and Other Third Parties[29] state general warning signs which may be considered in the course of arbitration. For example, the applicable law chosen by the parties is the law of a country known for corrupt payments and low anti-corruption law regulations, the agreement includes a remuneration which is completely out of proportion to the value of a contract, or unusual contract terms or payment arrangements that raise local law issues, payments in cash, advance payments and so forth.[30]

In principle, not every warning sign about a potential illegal behavior, which may disrupt the performance of a contract, should set the tribunal on an investigation mission. The first step after finding out about a suspicious behavior should be seeking an explanation from an involved party since arbitrators are obliged to ensure the due process and the parties' right to be heard. Any given information about the assumed corrupt behavior should either eliminate or confirm the arbitrators' doubts of illegal actions.[31] In the absence of any information or submissions provided by the parties, the arbitral tribunal shall approach to use its powers to establish the existence of corruption and rule upon the consequences.

5 The Limitations of Arbitrators' Power to Investigate Corruption Sua Sponte

The process of investigating corruption has many limits that can at first sight seem absolute. However, a closer analysis reveals that these limits are getting into a conflict with general duties of arbitrators which consequently prevail over the limits. There are three main grounds that can consequently

29 ICC Guidelines on Agents, Intermediaries and Other Third Parties. *ICC* [online]. [cit. 17. 4. 2018].

30 HIBER, Dragor and Vladimir PAVIĆ. Arbitration and Crime. *Journal of International Arbitration* [online]. 2008, Vol. 25, p. 468 [cit. 17. 4. 2018]. For the purpose of the issue of red flags indicating that a certain contract is tainted or otherwise related to corruption, see ICC Guidelines on Agents, Intermediaries and Other Third Parties.

31 CREMADES, Bernardo and David CAIRNS. Transnational Public Policy in International Arbitral Decision-making: The Case of Bribery, Money Laundering and Fraud. In: KARSTEN, Kristine and Andrew BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud*. Paris: ICC Publishing s.a., 2003, pp. 80–81.

result in the breach of the arbitrators' obligation to ensure that the final arbitral award is enforceable.

5.1 The Right to Raise a New Issue of Law v. Acting Ultra Petita

Investigating corruption of parties in the course of arbitral proceedings will mostly lead to raising a new issue of law. In principle, the arbitral tribunal's right to raise a new legal issue is based either on the arbitration agreement, the applicable arbitration law, or the applicable arbitration rules.

It is recognized today that the arbitral tribunal has a right to raise a new issues of law in the pending arbitral proceedings. Such a conclusion applies especially when these issues concern mandatory rules and public policy rules.[32] Unfortunately, the explicit provision in national laws concerning the power is not that common.[33] The same applies to arbitration rules. The most leading arbitration rules are silent on this matter, however, the LCIA is an exception. The arbitral tribunal acting according to the LCIA Rules has an additional power *"to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."*[34] The right to investigate however does not mean that arbitrators now must seek evidence only on their own. On the contrary, they must require evidence, proving the allegations, from parties and moreover, give them a reasonable opportunity to state their opinions and views on that matter.[35]

The arbitrators' mandate is limited by the parties' submission, the arbitration agreement. Unless the parties will show that a certain claim is included in the scope of an arbitration agreement, the arbitrators are risking to act beyond

32 VEIT, D. Marc. Proving Legality Instead of Corruption. In: SHAUGNESSY, Patricia and Sherlin TUNG. *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer.* Alphen aan den Rijn: Kluwer Law International, 2017, p. 381.

33 An exception is for instance England, see Section 34 of the Arbitration Act 1996.

34 See Article 22(1)(iii).

35 VEIT, D. Marc. Proving Legality Instead of Corruption. In: SHAUGNESSY, Patricia and Sherlin TUNG. *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer.* Alphen aan den Rijn: Kluwer Law International, 2017, p. 381.

the terms of submission. Such a conclusion leads to potential threat of non-enforceability of the arbitral awards, or being set aside.

The issue of acting *ultra petita* has been discussed among scholars and lawyers for decades. In relation to the matter of corruption, the general understanding is that the arbitral tribunal investigating the corruption *sua sponte* does not exceed its authority as long as the matters or claims of corruption must be *a priori* resolved in order to settle the dispute submitted to arbitration.[36]

Moreover, considering that corruption can have a great impact on the enforceability of an award, and as long the primary duty of the arbitrators is to issue an enforceable award, the matters which may affect this issue must be taken into account and resolved by arbitrators in order to prevent future difficulties with the arbitral award. Consequently, the arbitrators' mandate includes the matters of corruption since resolving it can be considered to be a part of the claim. Therefore, the *sua sponte* investigation of corruption falls within the mandate of arbitrators, even if neither party put if forward as a part of the claim, in order to consider and settle the submitted dispute.[37]

5.2 Considering the States' Legitimate Interests

The prevailing decision-making role and *"public responsibility to the administration of justice"*[38] is in the field of the international trade conferred on arbitrators. Consequently, the responsibility to ensure that anti-corruption rules protecting the international community, are properly applied also lies on their shoulders.[39] Moreover, the efforts of the international community, including states and corporations, to eliminate the occurrence of corruption must be supported by arbitrators by their proactive, anti-corruption combat

36 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, p. 16 [cit. 17. 4. 2018].

37 Ibid., p. 18.

38 BAIZEAU, Domitille and Tessa HAYES. The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series*, *Volume 19*. The Hague: Wolters Kluwer, 2017, p. 235.

39 MARTIN, Timothy. International Arbitration and Corruption: An Evolving Standard. *Transnational Dispute Management* [online]. 2004, Vol. 1, p. 5 [cit. 17. 4. 2018].

in the course of proceedings rather than to be seen as a weak tool and a certain opportunity for individuals to hide their illegal actions.[40]

Corruption is *"considered to act as a threat to the international public order as it enables individuals to exert the influence over other areas of business (…)"*.[41] Therefore, the general and international condemnation of corruption that is reflected in the existence of international public policy prohibiting corruption is not surprising. Evidently, the existence of international public policy cannot be denied since many authorities all over the world accept such a set of rules and oblige the national courts and tribunal to respect it when a particular behavior is in breach. Consequently, the duty of arbitrators to observe the international public policy of a state, wherein the arbitral award is issued, is an absolute essential since arbitrators are not the servants of party' autonomy and individual interests that can ignore the rule of universal prohibition. If the arbitrators would allow a claim tainted by corruption and skip the application of international public policy, they could risk its violation and subsequently, the non-enforceability of the award.[42]

5.3 The Duty to Ensure the Enforceability of an Arbitral Award

The primary duty of the arbitral tribunal is to settle and determine the submitted dispute and issue an arbitral award. Such an award is then capable of recognition and enforcement by a national court in a particular state based on New York Convention unless the award is challenged by parties or by a national court *ex officio*. If the arbitral tribunal does not bring the issue of corruption and does not settle it and draw consequences, it risks the potential non-enforceability of the present award since it is in a breach of public policy rules of a country, wherein the enforcement is seek. The primary question would be where the recognition and enforcement will

40 BAIZEAU, Domitille and Tessa HAYES. The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series*, *Volume 19*. The Hague: Wolters Kluwer, 2017, p. 235.

41 WILSKE, Stephan. Sanctions for Unethical and Illegal Behavior in International Arbitration: A Double-Edged Sword. *Contemporary Asia Arbitration Journal* [online]. 2010, Vol. 3, p. 216 [cit. 17. 4. 2018].

42 SRINIVASAN, Divya, Harshad PATHAK, Pratyush PANJWANI and Punya VARMA. Effect of Bribery in International Commercial Arbitration. *International Journal of Public Law and Policy* [online]. 2014, Vol. 4, p. 137.

be sought, and whether the particular country has ratified any of the anti-corruption international conventions, which would definitely lead to conclusion that the universal condemnation of corruption forms a part of its international public policy.

Generally, arbitrators do not know in which country an arbitral award will be enforced and therefore they do not know whether the relevant anti-corruption norm should be taken into account when facing corruption. The most secure way how not to risk the non-enforceability of an award is to raise new legal issue of corruption, investigate the behavior which brings up suspicions and draw the relevant consequences.[43] Nevertheless, this conclusion leads us to another essential inquire. What if one of the parties will challenge the arbitral award based on a ground that it *"(…) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration (…)"*.[44]

6 Conclusion

In this paper the focus was to analyze the position of arbitrators and practical reasons why when why arbitrators only rarely reach the conclusion that the investigation of corrupt actions of the parties should be invoked *sua sponte*.

When the arbitrators suspect corrupt actions of the parties, they may step back in this conclusion because they are risking that by dealing with the matter of corruption they may exceed their mandate which is constituted upon them by the parties. The powers and the legal duties of arbitrators are set out in the arbitration agreement – the materialization of the parties' will, and by the applicable procedural arbitration rules.[45] These rules determine the necessary minimum of what the arbitrators must follow and obey in order not to risk the non-enforcement of their arbitral awards. But there

43 FOX, William. Adjudicating Bribery and Corruption Issues in International Commercial Arbitration. *Journal of Energy & Natural Resources Law* [online]. 2009, Vol. 27, pp. 499–500 [cit. 17. 4. 2018].

44 See Article V(1)(c) of the New York Convention.

45 FORTIER, L. Yves. Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'. *Arbitration International* [online]. 2015, Vol. 31, p. 375–376.

is still something more beyond this basic framework of rights and duties. *Fortier* noticed that *"at some point the morality of duty ends and the higher demands of the morality of aspiration begin"*.[46] According to him, the international condemnation of corruption can be included into the morality of aspiration. In my opinion the morality of aspiration, as *Fortier* sees it, involves the ideals of international justice and good morals – the allegiance that the arbitrators own to the international community. As a number of rulings addressing the issue of corruption growths, the international anti-corruption norms are becoming more concrete on this matter. The rules set up by arbitrators during arbitral proceedings which are firstly categorized within the morality of aspiration are becoming more frequent and recognized by others so they are gaining an obligatory nature and becoming the duties.[47]

Today, it is generally accepted that the condemnation of corruption constitutes a part of international public policy of states, that focuses on the prohibition of the main international criminal behaviors of individuals and therefore protects the general and public interests of each state and the international community.

The truth is that the arbitrators must follow their duties. They must find a balance between the allegiances to the parties – to settle their dispute and issue an enforceable arbitral award, and the duties they own to the international community of states that enables this alternative dispute resolution mechanism and provides the same possibility of recognition and enforcement of an arbitral award as it provides for a judicial decision. The arbitrator therefore has a duty to face and a right to investigate corruption.

However, as mentioned in this paper, there are some issues that direct the arbitrators to the conclusion that they should consider whether they want to take the initiative and start the investigation of corruption, or rather to avoid such a waste of time and refuse their jurisdiction over such disputes in the beginning of the whole process. On one hand, we are arguing that the arbitrators are the guardians of justice and morality in the international business transactions world, but on the other we do not make it easier for them to achieve what they are here for. The solution to this unbalance

46 Ibid., p. 376.
47 Ibid., p. 376.

and injustice is to agree, once and for all, that they have the ability to face and resolve disputes tainted by corruption and consequently, they control specific powers and possess relevant tools to combat corruption.

Arbitrators must ensure that arbitration proceedings will not become tools for reckless and illegal conduct of individuals to gain an advantage from the private nature of arbitration and minimal judicial intervention. However, every suspicion must be firstly explained by parties and consequently based on a sufficient amount of evidence. Not only the ignorance of criminal behaviors allowed in arbitration compromises the institution of international arbitration, but unnecessary and disproportional demands of information and explanations from parties who are probably innocent of wrongdoing as well.

Acknowledgements

The paper has been created with the project "MUNI/A/1124/2017 Riešenie sporov dotknutých korupciou v medzinárodnej obchodnej arbitráži".

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PROVING CORRUPTION: INTERNATIONAL ARBITRATION PERSPECTIVE

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Abstract

Corruption is considered to be one of the most important problems in today's world. Corruption occurs in international commercial arbitration, too, despite the existence of various international conventions and national laws prohibiting corruptive behaviour. In this paper we focus on proving corruptive behaviour in context of international arbitration. We analyse the concepts of burden of proof and standard of proof and the difficulties associated with the two concepts. Thus, we evaluate whether reversal of the burden of proof should be applied in relation to proving corruptive behavior and we estimate the impact of lowering and heightening the standard of proof. We suggest a solution to overcome the issues associated with both concepts.

Keywords

Burden of Proof; Corruption; Standard of Proof.

1 Introduction

Corruption is considered the most important problem facing the world today, especially in the developing countries.[1] Corruption is also a crucial

[1] Corruption is "Public Enemy Number One" in Developing Countries, says World Bank Group President Kim. *The World Bank Group* [online]. 2018 [cit. 10. 3. 2018].

matter in international arbitration.[2] In several recent ICC and ICSID cases parties have alleged corruption as the basis for claims or defences.[3]

Corruption is, however, by its nature a secret act and relies on disguise and deception, which is why it is hard to prove corruptive behaviour.[4] Evidence plays a crucial role in investigation of corruptive behaviour as its outcome is determined by the facts of the case or at least by some combinations of factual and legal issues.[5] Among the issues encompassed in the field of evidence, the question of burden and standard of proof must be taken into account and analysed.[6]

The notion of "burden of proof" describes the duty which lies on one or other of the parties to establish the facts upon a particular issue, whereas the "standard of proof" demonstrates the degree to which the proof must be established.[7]

As for the concept of burden of proof, majority of arbitral tribunals follow the principle that each party bears the burden of proving the facts on which

2 MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 77 [cit. 30. 8. 2018].

3 It is important to emphasize that we are going to focus primarily on proving corruption in international commercial arbitration. Having said that, we will also use numerous materials arising from or dealing with international investment arbitrations, mainly because investment arbitration awards are not as confidential as the awards arising from commercial arbitrations. Even though that when assessing the questions of burden of proof and standard of proof, we have to always keep in mind their characteristic features, it may be concluded that there are no substantial differences and that quite similar conclusions in matter of proving the corruption may be made for both types of arbitration. If there are any particular differences, we will try to identify them individually in the article, but it is not in the scope of this article to compare such differences in detail.

4 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 375 [cit. 16. 3. 2018]; or see also FATHALLAH, Raed. Corruption in international Commercial and Investment Arbitration: Recent Trends and Prospects for Arab Countries. *International Journal of Arab Arbitration* [online]. 2010, Vol. 2, no. 3, p. 69 [cit. 16. 3. 2018].

5 CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 49, p. 82 [cit. 16. 3. 2018].

6 Ibid.

7 MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 77 [cit. 30. 8. 2018].

it relies.[8] Notwithstanding the wide acceptance of this principle, it was suggested that tribunals should shift the burden of proof to the accused party if there is *prima facie* evidence of corruption.[9] If the alleged party then does not bring counter-evidence, the tribunal may conclude that the facts alleged are proven.[10] The logic behind this is related to the nature of the bribery, which might be difficult to prove for the alleging party.[11] In this paper we compare both attitudes and evaluate whether reversal of the burden of proof is acceptable or compatible with the right to a fair trial.[12]

In the second part of the article, the notion of standard of proof is analysed under various legal approaches typical for specific jurisdictions. Furthermore, the standard of proof and its application is evaluated in relation to corruptive behaviour in commercial arbitration. Moreover, in this paper we estimate the impact of lowering and heightening the standard of proof on parties and describe main advantages and disadvantages associated with both alternatives.[13]

Finally, a solution consisting in arbitral tribunal's entitlement to draw adverse inferences is introduced to eliminate the negatives associated with both burden and standard of proof.[14]

The main objective of this paper is to describe various theoretical approaches towards the issue of proving corruption, assess these approaches and

8 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 374 [cit. 16. 3. 2018].

9 VON WOBENSER, Claus. The Corruption Defense and Preserving the Rule of Law. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series*, *Volume 19*. The Hague: Wolters Kluwer, 2017, p. 208.

10 ICC Arbitration Case of 1994, no. 6497. In: *ICC Digital Library* [online]. [cit. 29. 8. 2018]; LAMM B. Carolyn et al. Fraud and Corruption in International Arbitration. In: FERNANDEZ-BALLESTER, Miguel and David ARIAS (eds.). *Liber Amicorum Bernardo Cremades*. La Ley: Wolters Kluwer, 2010, p. 699.

11 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 375 [cit. 16. 3. 2018].

12 BETZ, Kathrin. Economic Crime in International Arbitration. *ASA Bulletin* [online]. 2017, Vol. 35, no. 2, p. 285 [cit. 16. 3. 2018].

13 See e.g. HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, pp. 1–119 or FOX, William. Adjudicating Bribery and Corruption Issues in International Commercial Arbitration. *Journal of Energy & Natural Resources Law*. 2009, Vol. 27, No. 3, pp. 487–502.

14 BORN, Gary B. *International Arbitration: Cases and Materials.* Alphen aan den Rijn: Wolters Kluwer, 2011, p. 1082.

propose the most appropriate way to prove corruption in international arbitration. The aim of this paper is to confirm or refuse the following hypothesis: "*The application of burden and standard of proof is modified when proving corruption in international arbitration due to specific nature of corruptive behaviour*."

2 Burden of Proof

2.1 General Rule

The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by national courts under various legal jurisdictions.[15] This is often indicated as a maxim: he who asserts must prove (*onus probandi incumbit* or *actori incumbat probation*).[16] International arbitration tribunals are, however, not bound to adhere to judicial rules of evidence.[17]

In the context of international commercial arbitration, the principle that each party has the burden of proving the facts on which it relies is rarely addressed by instruments that regulate arbitral proceedings.[18] Arbitral rules provide relatively little guidance on evidentiary matters, such as which party has the burden of proof.[19] An exception can be found in Article 27(1) of the UNCITRAL Arbitration Rules which states that: "*Each party shall have the burden of proving the facts relied on to support its claim or defence*."

Commentators, however, agree that arbitrators may regard this principle as a general principle of law and apply it without any reference to any

15 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 374 [cit. 16. 3. 2018].

16 TEZUKA, Hiroyuki. Corruption Issues in the Jurisdictional Phase of Investment Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 56 [cit. 30. 8. 2018].

17 COSAR, Utku. Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions. In: VAN DEN BERG, Albert J. (ed.). *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18*. The Hague: Wolters Kluwer, 2015, p. 531.

18 CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 9, p. 86 [cit. 16. 3. 2018].

19 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 187 [cit. 16. 3. 2018].

national law or any set of formal arbitral rules since the concept of burden of proof is applied in legal systems of different traditions.[20] This was also confirmed by the case law in the case *Metal-Tech Ltd. v. Uzbekistan* as the Tribunal stated: "*The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals. The International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the NAFTA have characterized this rule as a general principle of law.*"[21] Moreover, this view was confirmed in *Asian Agricultural Products Ltd. v. Sri Lanka*.[22]

Additionally, the principle is applied in the context of corruption which was confirmed in *ICC case No. 7045* as the Tribunal held: "*If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant.*"[23]

Similarly, in case *ECE Projektmanagement v. The Czech Republic* it is stated: "*Corruption is a serious matter and when it is alleged, a tribunal must weigh the evidence with care, both to see whether the allegation is made out (and if it is, to then determine the legal consequences that follow) and at the same time to safeguard those against whom corruption is alleged, if the allegations turn out to be unproven.*"[24]

20 CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 49, p. 86 [cit. 16. 3. 2018].

21 Award of 4 October 2013, ICSID Case no. ARB/10/3, *Metal-Tech Ltd. v. Republic of Uzbekistan*. In: *italaw* [online]. [cit. 29. 8. 2018].

22 Award of 27 June 1990, ICSID Case no. ARB/87/3, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*. In: *italaw* [online]. [cit. 29. 8. 2018].

23 ICC Arbitration Case of 1994, no. 7047. *ICC International Court of Arbitration Bulletin* [online]. Vol. 8, no. 1, p. 62 [cit. 29. 8. 2018]; MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 78 [cit. 30. 8. 2018].

24 Award of 19 September 2013, PCA Case No. 2010-5, ECE Projektmanagement v. The Czech Republic. In: *italaw* [online]. [cit. 29. 8. 2018]; or see FATHALLAH, Raed. Corruption in international Commercial and Investment Arbitration: Recent Trends and Prospects for Arab Countries. *International Journal of Arab Arbitration* [online]. 2010, Vol. 2, no. 3, p. 69 [cit. 16. 3. 2018].

2.2 Burden Shifting

As was mentioned above, the party who affirms is expected to come to arbitration with sufficient evidence to sustain it.[25] Nevertheless, it may be hard to provide evidence of corruptive behaviour by the alleging party, as it is likely that the party other than the one making allegation has better access to evidence proving corruption.[26]

Therefore, it has been suggested that it might be appropriate for tribunals to shift the burden of proof to the allegedly corrupt party where *prima facie* evidence of corruption exists.[27] *Prima facie* evidence, which is necessary for a burden shifting to occur,[28] may be defined as evidence "*which, unexplained or uncontradicted is sufficient to maintain the position affirmed*".[29] The opposing party that is the subject of the allegations would bear the burden of proof and would have to disprove the allegations.[30] This procedure was described in *Reza Said Malek v. the Government of the Islamic Republic of Iran* in a following way: "*It is the Claimant who carries the initial burden of proving the facts upon which he relies. There is a point, however, at which the claimant may be considered to have made sufficient showing to shift the burden of proof to the respondent.*"[31]

It is presumed that if the accused party of corruption is innocent, it can easily produce evidence exonerating itself without much effort.[32] This may

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25 CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 49, p. 100 [cit. 16. 3. 2018].

26 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 375 [cit. 16. 3. 2018].

27 Ibid.; HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, p. 7 [cit. 16. 3. 2018].

28 WOBENSER, Claus von. The Corruption Defense and Preserving the Rule of Law. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series. Volume 19*. The Hague: Wolters Kluwer, 2017, p. 209.

29 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018].

30 Ibid.

31 WOBENSER, Claus von. The Corruption Defense and Preserving the Rule of Law. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series, Volume 19*. The Hague: Wolters Kluwer, 201, p. 208.

32 Award of 1 September 2009, ICSID Case no. ARB/01/12, *Azurix Corp. v. The Argentine Republic*. In: *italaw* [online]. [cit. 29. 8. 2018].

involve, for example, evidence of how it spent a usually large commission in a legitimate manner; evidence of its capacity, as an organization to provide the stipulated services; or evidence of how a non-transparent ownership structure is not for the purpose of concealing corruptive behaviour.[33] The alleging party, on the contrary, often cannot produce direct physical or documentary evidence of corruption, and must rely on witnesses' oral testimony.[34] Furthermore, it is expected that an arbitral tribunal would explicitly inform the parties of a shift in the burden of proof.[35]

In *ICC case no. 6497* the Tribunal endorsed shifting the burden of proof stating that: "*The alleging party has the burden of proof (to demonstrate the existence of bribery). The alleging party may bring some relevant evidence for its allegations, without these elements being conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven. However, such change in the burden of proof is only to be made in special circumstances and for very good reasons.*"[36] Unfortunately, the tribunal did not explain what sort of exceptional circumstances would justify such a shift in burden of proof.[37]

Moreover, institutions such as the World Bank employ burden shifting as well in their fraud and corruption investigations, partly in appreciation of the fact that they have no contempt powers similarly to the arbitral tribunals.[38]

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33 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018].

34 Award of 8 October 2009, ICSID Case no. ARB/05/13, *EDF (Services) Limited v. Romania*. In: *italaw* [online]. [cit. 29. 8. 2018].

35 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018].

36 ICC Arbitration Case of 1994, no. 6497. In: *ICC Digital Library* [online]. [cit. 29. 8. 2018]; LAMM B. Carolyn et al. Fraud and Corruption in International Arbitration. In: FERNANDEZ-BALLESTER, Miguel and David ARIAS (eds.). *Liber Amicorum Bernardo Cremades*. La Ley: Wolters Kluwer, 2010, p. 699.

37 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018].

38 LIAMZON, Aloyisius and Anthony C. SINCLAIR. Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct. In: VAN DEN BERG, Albert J. (ed.). *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18*. The Hague: Wolters Kluwer, 2015, p. 462.

Arguments against the proposition of shifting the burden of proof, however, appear and do not cease to appear.[39] It is argued that allegations of corruption must like any other allegations be proven.[40] Furthermore, shifting the burden of proof is considered to be too radical to depart from such a basic and widely accepted rule that a party must prove the facts upon which it wishes to rely.[41] It must be emphasized that this rule exists for good reason – to prevent parties from making baseless allegations.[42] Shifting the burden of proof could lead to parties raising allegations of corruption in an abusive manner, or without adequate evidence.[43] It was also pointed out that shifting the burden of proof in relation to proof of corruption implies shifting the burden of proof in relation to all the issues for which a proof is difficult to obtain.[44]

Furthermore, a *prima facie* showing evidence of corruption represents the lowest possible standard of proof and would greatly alleviate the evidentiary burden on the party alleging corruption.[45] Moreover, another argument against this procedure is that *prima facie* evidence is usually used for jurisdictional purposes, and not in merits stage.[46] Therefore, using *prima facie* standard for allegations of corruption could result in erroneous factual findings that would go uncorrected in the absence of a formal review mechanism in international arbitration.[47]

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39 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018].

40 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, p. 8 [cit. 16. 3. 2018].

41 Ibid.

42 Ibid.

43 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018].

44 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, p. 8 [cit. 16. 3. 2018].

45 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 195 [cit. 16. 3. 2018]; for the question of standard of proof see Chapter 3.

46 WOBENSER, Claus von. The Corruption Defense and Preserving the Rule of Law. In: MENAKER, Andrea (ed.). *International Arbitration and the Rule of Law: Contribution and Conformity*, *ICCA Congress Series, Volume 19*. The Hague: Wolters Kluwer, 2017, p. 209.

47 Ibid.

The attitude of shifting the burden of proof was also rejected in the *Rompetrol Group N. V. v. Romania* case where it was held that such a procedure confuses "*the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence*". Furthermore, it was held: "*The burden of proof is absolute and if, according to basic principle, it is for the one party, or for the other, to establish a particular factual assertion, that will remain the position throughout the forensic process, starting from when the assertion is first put forward and all the way through to the end.*"[48]

In majority of the cases, the idea of shifting the burden of proof was rejected and was even considered as breaching the principle of due process and contrary to the right to fair trial.[49] This was also pointed out in *Siag v. Egypt* as the Tribunal held: "*The reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards.*"[50]

As a result, the concept of burden shifting has not been given much credence although the difficulties in obtaining evidence persist.[51]

3 Standard of Proof

3.1 General Rules and Principles

As it has been already stated, the notion of standard of proof may be defined as the degree to which the particular proof must be established, or in other

48 Award of 6 May 2013, ICSID Case no. ARB/06/3, *The Rompetrol Group N. V. v. Romania case*. In: *italaw* [online]. [cit. 29. 8. 2018].

49 BETZ, Kathrin. Economic Crime in International Arbitration. *ASA Bulletin* [online]. 2017, Vol. 35, no. 2, p. 285 [cit. 16. 3. 2018]; HAUGENEDER, Florian and Christoph LIEBSCHER. Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof. In: KLAUSEGGER, Christian, Peter KLEIN et al. (eds.). *Austrian Arbitration Yearbook*. 2009, p. 544; MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 79 [cit. 30. 8. 2018].

50 Award of 1 June 2009, ICSID Case no. ARB/05/15, *Siag v. Egypt*. In: *italaw* [online]. [cit. 29. 8. 2018].

51 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 375 [cit. 16. 3. 2018].

words as the degree of necessary persuasion.[52] Before analysing the standard of proof from the perspective of international arbitration, we must first briefly identify some of the traditional legal approaches typical for specific jurisdictions.

In the Anglo-American legal system, there are usually three applicable standards of proof recognized: (i) the standard of proof "beyond a reasonable doubt" which is used in criminal proceedings and which embodies "the need to reach a subjective state of near certitude of the guilt of the accused"[53]; (ii) the standard of proof "preponderance of the evidence" or "balance of probabilities" which is necessary in most civil cases and which represents the standard reaching the persuasion that the fact is more probable than not[54]; and (iii) the intermediate standard of "clear and convincing evidence" which is usually used in cases involving issues such as a commitment to a mental institution, loss of citizenship, termination of parental rights or criminal conduct such as fraud and which requires the proposition to be highly probable yet not beyond reasonable doubt.[55]

Unlike in the common law countries, the civil law system does not seem to apply multiple standards of proof. The standard of proof is rather general and same in all cases as it only requires the fact to be proven to the level at which an adjudicator is persuaded and satisfied.[56] As *Carreteiro* points out, such "inner conviction" principle has a negative meaning and it basically does not prescribe any positive standard of proof, but rather reinforces the principle of free evaluation of the evidence.[57] Before accepting

52 See e.g. CLERMONT, Kevin M. and Emily SHERWIN. A Comparative View of Standards of Proof. *American Journal of Comparative Law*. 2002, Vol. 50, no. 2, pp. 243–276.

53 SHEPPARD, Stephen. The Wolters Kluwer Bouvier Law Dictionary, Desk Edition. In: *Lexis Nexis* [online]. 2018, the entry "Burden of Proof (Standard of Proof)" [cit. 3. 4. 2018].

54 REDMAYNE, Mike. Standards of Proof in Civil Litigation. *Modern Law Review*, 1995, Vol. 62, no. 2, p. 168.

55 See e.g. MCCORMICK, Charles T., Edward W. CLEARY and Kenneth S. BROUN. *McCormick on Evidence*. 4th ed. St. Paul, Minn: West Publishing, 1992, pp. 441–445.

56 CLERMONT, Kevin M. and Emily SHERWIN. A Comparative View of Standards of Proof. *American Journal of Comparative Law*. 2002, Vol. 50, no. 2, p. 246.

57 "*Judges must find the prevailing version according to their personal conscience and free evaluation of the evidence (no fixed standard of proof), but must be cautious in their task of evaluating the evidence.*" In: CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 49, p. 90 [cit. 28. 3. 2018].

a certain piece of evidence, a judge simply needs to be persuaded about the true nature of the assertion. However, certain objective criteria still apply in order to secure predictability and to avoid arbitrary decisions. Subjective inner conviction of the judge about the truthfulness of a factual assertion must not be incompatible with the rules of logic, natural laws or findings based on experience.[58]

Even though it is commonly recognized that levels of standard of proof differ depending on the particular legal framework and that the outcome of the case might be diverse at certain instances due to the specific approach, it has been argued that no substantial difference in practice between the civil and common law standards exists.[59] Nevertheless, it is important to bear the above-mentioned theoretical concepts in mind when focusing on standards of proof in international arbitration in the following part as it is very common that not only arbitrators but also parties tend to apply the same standards which are well known to them due to their legal background.[60]

3.2 Standard of Proof in International Arbitration

In the context of international arbitration, the commentators affirm that there is little authority on the subject of standard of proof.[61] Firstly, it must be highlighted that parties are generally free to agree on the rules by which the arbitrators have to assess the evidence, provided that such choice is in accordance with the mandatory rules of the applicable law.[62] Regardless of which law (international or municipal) governs the arbitration, the procedure of most international tribunals is characterized by a lack of restrictive

58 See more about so called Wahrheitsüberzeugungstheorie e.g. in BAUMGÄRTEL, Gottfried, Hans-Willi LAUMEN and Hans PRÜTTING. *Handbuch der Beweislast*. 3rd ed. Köln: Carl Heymanns Verlag, 2010, p. 92 and subseq.

59 Ibid., p. 91.

60 SMITH, Jennifer and Sara NADEAU-SÉGUIN. The Illusive Standard of Proof in International Commercial Arbitration. In: VAN DEN BERG, Albert J. (ed.). *Legitimacy: Myths, Realities, Challenges*, *ICCA Congress Series, Volume 18*. 2015, p. 136.

61 See BORN, Gary B. *International Commercial Arbitration*. 2nd ed. Austin: Kluwer Law International, 2014, p. 2312.

62 Substantive or procedural law – depending on the fact whether the question of the standard of proof is considered to be substantive or procedural issue (as argued below). See VAN HOUTTE, Vera. Adverse Inferences in International Arbitration. In: GIOVANNINI, Teresa and Alexis MOURRE. *Written Evidence and Discovery in International Arbitration New Issues and Tendencies*. Paris: ICC, 2009, p. 198.

rules governing the form, submission and admissibility of evidence.[63] The arbitral tribunal holds the power to evaluate the evidence, to set time limits and to make procedural orders. Even though priority is given to documentary evidence (for the sake of time efficiency and low financial costs), all kinds of evidence qualified to demonstrate certain facts and persuade an adjudicator are admissible.[64]

Aside from the above-mentioned principles, there are some provisions of the commonly used arbitration rules which address the issue of standard of proof. For instance, Article 27(4) of the UNCITRAL Arbitration Rules states that "*the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered*". Similarly, such power of the tribunal is declared in the Article 19(2) of the UNCITRAL Model Law and in Article 9(1) of the IBA Rules on the Taking of Evidence.[65] According to the Article 22(1)(vi) of the LCIA Rules the tribunal shall have the power "*to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion*". Rather general approach can be seen in Article 25(1) of the ICC Rules as it states that the arbitral tribunal may establish the facts of the case by "all appropriate means" while emphasizing the time efficiency. Finally, due to Article 34(1) of the ICSID Arbitration Rules,[66] the adjudicator has the power to assess "*the admissibility of any evidence adduced and of its probative value".*[67]

As it has been shown above, the arbitral rules leave the arbitral tribunals with no specific guidance for establishing the standard of proof in various cases and thus, arbitrators can basically decide discretionarily on the evidentiary weight of each and every element of proof including those elements that

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63 PIETROWSKI, Robert. Evidence in International Arbitration. *Arbitration International,* 2006, Vol. 22, no. 3, p. 374.

64 Ibid., pp. 374–376.

65 2010 IBA Guidelines on Taking of Evidence in International Commercial Arbitration. *IBA* [online]. [cit. 30. 8. 2018].

66 2006 ICSID Rules of Procedure for Arbitration Proceedings. *ICSID* [online]. [cit. 30. 8. 2018].

67 For further examples see Article 24(2) of the 2012 Swiss Rules of International Arbitration. *Swiss Chambers' Arbitration Institution* [online]. [cit. 30. 8. 2018] or Article 50 of 2014 WIPO Arbitration Rules. *WIPO* [online]. [cit. 30. 8. 2018].

they have not received.[68] Yet, in practice it seems that in most international arbitration cases tribunals tend to refer to the "balance of probabilities" standard.[69] In ICSID case *Bernhard von Pezold and others v. Republic of Zimbabwe,* the Tribunal explicitly stated that in general, if there are no special circumstances that would warrant the application of a lower or higher standard of proof, the standard of proof applied in international arbitration is that a claim must be proven on the "balance of probabilities".[70] Similarly, in case *Tokios Tokelés v. Ukraine*, the Tribunal referred to the usual standard of proof according to which the party making an assertion is required to persuade the decision-maker that it is more likely than not to be true.[71]

To conclude this section, arbitrators generally seem to apply the "balance of probabilities" standard. On the other hand, it can be also argued that tribunals only assess the weight to be given to evidence by reference to the nature of the proposition to be proved. As commentators point out, "*the more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established*".[72] One could claim that in order to prove a quite absurd or improbable assertion, the standard shall be necessarily higher. However, at the end of the day an arbitral tribunal still needs to be persuaded that the fact is more likely to be true than not despite the fact that it is probable that arbitrators will assess the evidence more thoroughly in order to determine whether such standard has been met. Therefore, it is more important to focus on the nature of the cases which require more thorough consideration and not to focus on the traditional

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68 As it is in the case of adverse inferences. See VAN HOUTTE, Vera. Adverse Inferences in International Arbitration. In: GIOVANNINI, Teres and Alexis MOURRE. *Written Evidence and Discovery in International Arbitration New Issues and Tendencies.* Paris: ICC, 2009, p. 199.

69 See e.g. REDFERN, Alan, Claude REYMOND, Andreas REINER et al. The Standards and Burden of Proof in International Arbitration. *Arbitration International* [online]. 1994, Vol.10, no. 3, pp. 317–364 [cit. 31. 8. 2018].

70 Award of 28 July 2015, ICSID Case no. ARB/10/15, *Bernhard von Pezold and Others v. Republic of Zimbabwe,* para. 177. In: *italaw* [online]. [cit. 30. 8. 2018].

71 Award of 26 July 2007, ICSID Case no. ARB/02/18, *Tokios Tokelés v. Ukraine,* para. 124. In: *italaw* [online]. [cit. 30. 8. 2018]. See also award of 3 March 2010, ICSID Case no. ARB/07/15, *Ron Fuchs v. The Republic of Georgia*, para 229. In: *italaw* [online]. [cit. 30. 8. 2018].

72 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration.* 6th ed. New York: Oxford University Press, 2015, pp. 69–70.

perception of standard of proof as we know it. In the next part of the article, we will consider the question of standard of proof in corruption cases.

3.3 Standard of Proof: Corruption Context

The question whether standard of proof in arbitration cases involving allegations of serious misconduct such as bribery or corruption should be heightened or lowered is often matter of rich debate.[73] There is substantial inconsistency among arbitral tribunals regarding this issue as some arbitrators believe that a lower standard of proof should be applied (i.e. "more likely than not" or "balance of probabilities") and others keep adopting a stricter approach demanding higher standard (i.e. "clear and convincing" or "beyond reasonable doubt").[74]

As *Menaker* correctly identifies, there are three main justifications proffered in support of applying higher standards of proof: (i) higher standard prevents the parties from abusing the corruption defence in order to cause harm to the other party; (ii) a finding of corruption may result in serious consequences, including stigma or a criminal investigation, therefore, the standard of proof should reflect the serious nature of the allegation; and (iii) allegations of corruption are inherently unlikely, as a result of presumptions that contracts are valid and that high-ranking officials do not generally violate mandatory national laws.[75] On the contrary, it is often argued that international commercial arbitrations are civil rather than criminal and thus

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73 See e.g. HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, pp. 1–119; or FOX, William. Adjudicating Bribery and Corruption Issues in International Commercial Arbitration. *Journal of Energy & Natural Resources Law,* 2009, Vol. 27, no. 3, pp. 487–502.

74 See e.g. the research of ICC case-law which shows that 14 out of 25 tribunals referred to a higher standard when deciding cases involving corruption allegations. In: CRIVELLARO, Antonio. Arbitration Case-Law on Bribery. In: KARSTEN, Kristine and Andrew BERKELEY. *Arbitration: Money Laundering, Corruption and Fraud.* Paris: Institute of International Business Law and Practice, 2003, pp. 114–115. See also ZIADÉ, G. Nassib. Addressing Allegations and Findings of Corruption. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 122 [cit. 30. 8. 2018].

75 MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 89 [cit. 30. 8. 2018].

tribunals lack the authority to impose criminal sanctions as well as they lack power to force the parties to produce the evidence. Therefore, the standard should be lower in order to secure efficient protection to party the harmed.[76] Furthermore, corruption is also difficult to prove due to its very nature. In corruption cases, it is usual that "*senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best*".[77] In order to be able to assess the above-mentioned various approaches towards necessary standard of proof of corruptive behaviour in international arbitration cases, we will now focus on some case-law and practical examples.

In *ICC case no. 16090*, the sole arbitrator pointed out that if the party that accuses the other of corruption is itself party to the contract involving bribery, the standard of proof is high. Nevertheless, the sole arbitrator also highlighted that arbitrators are not in a position of a criminal authority and therefore should not intervene in support of any such authority.[78] In *EDF (Services) Limited v. Romania*, the investor alleged that two senior Romanian officials demanded bribes while only relying on the testimony of its employees. The Tribunal specifically referred to the "clear and convincing evidence" as it was required by the "seriousness of the accusation of corruption". The question is how the investor could possibly present clear and convincing evidence when trying to prove oral conversations without any records whatsoever.[79] Similarly, in a well-known corruption case *Westinghouse v. Philippines* which involved the president of Philippines himself, the Tribunal applied strictly higher standard of proof and declined the allegation due to the fact

76 ZIADÉ, G. Nassib. Addressing Allegations and Findings of Corruption. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 123 [cit. 30. 8. 2018].

77 LAMM B. Carolyn et al. Fraud and Corruption in International Arbitration. In: FERNANDEZ-BALLESTER, Miguel and David ARIAS (eds.). *Liber Amicorum Bernardo Cremades*. La Ley: Wolters Kluwer, 2010, p. 720.

78 ICC Arbitration Case of 2016, no. 16090. *ICC Dispute Resolution Bulletin* [online]. 2016, no. 1, p. 147 [cit. 30. 8. 2018].

79 Award of 8 October 2009, ICSID Case no. ARB/05/13, *EDF (Services) Limited v. Romania*. In: *italaw* [online]. [cit. 30. 8. 2018].

that such serious conduct cannot be established by referring to "mere speculations".[80] Even though the Tribunal explicitly observed that the defendants, who claimed that the contract was invalid due to the corruptive behaviour, had presented a fair amount of evidence, it concluded that there was no direct evidence and the circumstantial evidence was insufficient.[81]

On one hand, arbitral tribunals often seem to emphasize the notorious difficulty to prove corruptive behaviour, but on the other hand, they require parties to prove it even more precisely than in other cases. Such approach might be perceived as incoherent and as troubling mainly because it leaves the parties with only an abstract possibility to raise the question of corruption since they have practically no chance to bring any direct evidence to the table.

Due to the very nature of corruptive behaviour, some arbitral tribunals tend to apply lower or usual standard of proof. In the case *Libananco Holdings Co. Limited v. Turkey*, the Tribunal stated that despite the serious nature of the fraud, it cannot be argued that the higher standard of proof should be applied as "*it may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged*".[82] This only proves the idea that it is important better to focus on the nature of the fact to be proved while preserving the same standard of proof in general. Moreover, the following arguments against heightening standard of proof exist: (i) baseless allegations will be rejected regardless of which standard of proof applies; and (ii) the findings do not necessarily indicate the potential results of criminal investigations as the national authorities are not bound by the arbitral awards and will still be obliged to fully investigate the conduct of the party.[83]

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80 MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 86 [cit. 30. 8. 2018].

81 Ibid.

82 Award of 2 September 2011, ICSID Case no. ARB/06/8, *Libananco Holdings Co. Limited v. Turkey*, para. 125. In: *italaw* [online]. [cit. 30. 8. 2018].

83 MENAKER, Andrea. Proving Corruption in International Arbitration. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 90 [cit. 30. 8. 2018].

To conclude this section, it is obvious that there is no clear consensus between arbitral tribunals in regard to which standard of proof should be applied in cases concerning corruptive behaviour. However, it should be argued that instead of applying lower or higher standard of proof, the standard of proof should remain the same due the nature of the fact to be proven, i.e. corruptive behaviour.

4 Drawing Adverse Inferences

As was pointed out, it is difficult for the alleging party to provide evidence of corruptive behaviour in compliance with the maxim *actori incumbat probatio*.[84] At the same time, however, the idea of shifting the burden of proof has been rejected.[85] Moreover, inconsistency exists with regards to the issue of lowering and heightening the standard of proof.[86] A compromise between these concepts is the arbitral tribunal's entitlement to draw adverse inferences from an impugned party's failure to provide evidence requested by the tribunal.[87]

Arbitration is a private process; therefore, arbitrators do not have the same powers of a judge to enforce compliance with evidentiary rulings.[88] By contrast, they may advise the parties that a failure to comply with an order to produce evidence may lead to adverse inferences.[89] As a result, where

84 CONCEPCIÓN, F. Carlos. Combating Corruption and Fraud from an International Arbitration Perspective. *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* [online]. 2016, Vol. 9, no. 2, p. 375 [cit. 16. 3. 2018].

85 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, p. 7 [cit. 30. 8. 2018].

86 See e.g. the research of ICC case-law which shows that 14 out of 25 tribunals referred to a higher standard when deciding cases involving corruption allegations. In: CRIVELLARO, Antonio. Arbitration Case-Law on Bribery. In: KARSTEN, Kristine and Andrew BERKELEY. *Arbitration: Money Laundering, Corruption and Fraud.* Paris: Institute of International Business Law and Practice, 2003, pp. 114–115. See also ZIADÉ, G. Nassib. Addressing Allegations and Findings of Corruption. In: BAIZEAU, Domitille and Richard H. KREINDLER. *Addressing Issues of Corruption in Commercial and Investment Arbitration. Dossiers of the ICC Institute of World Business Law* [online]. 2015, Vol. 13, p. 122 [cit. 30. 8. 2018].

87 BORN, Gary B. *International Arbitration: Cases and Materials.* Alphen aan den Rijn: Wolters Kluwer, 2011, p. 1082.

88 CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 49, p. 90 [cit. 16. 3. 2018].

89 Ibid.

a party requests disclosure of specific documents by the other party and the arbitral tribunal orders production of such document by that party, in case that the requested party does not produce the required document without sufficient justification, the tribunal may draw adverse interferences from such failure.[90]

This is also confirmed in Article 9(5) of the IBA Guidelines on Taking of Evidence which states: "*If a party fails without satisfactory explanation to produce any document requested in a request to produce to which it has not objected in due time or fails to produce any document ordered to be produced by the arbitral tribunal, the arbitral tribunal may infer that such document would be adverse to the interests of that party*." In addition, Article 34(3) of ICSID Arbitration Rules states: "*The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures. The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure*."

When deciding to draw adverse inferences, the tribunal must determine that: (i) the alleging party has presented all relevant evidence which constitutes sufficient indicia of corruption; (ii) the party against whom the adverse inferences are being made has refused to produce evidence which it likely has access to; and (iii) the interference being drawn is consistent with the fact in the record and logically related to the evidence.[91]

Such a procedure is different from reversing the burden of proof. Adverse inferences only arise from a failure by the impugned party to adduce evidence which can be reasonably considered as an attempt to conceal corrupt activities.[92] It provides the party alleging corruption with an additional inferred fact to discharge its burden of proof, which burden remains on that party throughout the proceedings.[93] A reversal of the burden of proof, however, is effected upon mere provision of some *prima faci*e evidence of corruption

90 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration*. 6th ed. New York: Oxford University Press, 2015, p. 317.

91 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, p. 7 [cit. 16. 3. 2018].

92 Ibid., p. 9.

93 Ibid.

by the alleging party, even if there is no suspicion withholding of or refusal to adduce evidence by the impugned party.[94]

In *Europe Cement v. Republic of Turkey*, the respondent provided evidence and expert testimony that share purchase agreements produced by the claimant had been backdated in order for its investments to have been made legally at that time.[95] Consequently, the Tribunal requested the respondent to provide the Tribunal with originals of those share purchase agreements.[96] Since claimant could not rebut respondent's evidence by producing the originals of share purchase agreements, the Tribunal drew adverse inferences against the claimant.[97]

More arbitration decisions concerning wrongdoing seem to draw conclusions on the basis of inference, either because a party did not produce evidence when asked to do so by the tribunal or because that party should have had within its possession exonerative evidence but did not produce it.[98]

Adverse inferences were drawn also in cases related to corruptive behaviour. In *ICC case No.* 3916 the Tribunal held that the impugned party's repeated refusal to disclose the "personal actions" taken to procure a public contract gave rise to corrupt activities being concealed.[99] Accordingly, adverse inferences were applied in *ICC Case no. 6497*.[100]

Similarly, in the case *Metal-Tech Ltd. v. Uzbekistan* the Tribunal considered that adverse inferences can indeed be drawn in appropriate instances to prove corruption when it stated: "*The Tribunal may draw appropriate inferences from a party's non-production of evidence ordered to be provided. In a number of cases,*

94 CARRETEIRO, Mateus A. Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability. *Revista Brasiliera de Arbitragem* [online]. 2016, Vol. XIII, no. 49, p. 90 [cit. 16. 3. 2018].

95 Award of 13 August 2009, ICSID Case no. ARB(AF)/07/2, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*. In: *italaw* [online]. [cit. 30. 8. 2018].

96 Ibid.

97 Ibid.

98 LIAMZON, Aloyisius and Anthony C. SINCLAIR. Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct. In: VAN DEN BERG, Albert J. (ed.). *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18*. The Hague: Wolters Kluwer, 2015, p. 463.

99 HWANG, Michael and Kevin LIM. Corruption in Arbitration – Law and Reality. *Asian International Arbitration Journal* [online]. 2012, Vol. 8, no. 1, p. 9 [cit. 16. 3. 2018].

100 ICC Arbitration Case of 1994, no. 6497. In: *ICC Digital Library* [online]. [cit. 30. 8. 2018].

tribunals have indeed stated that they would draw inferences from non-production." This case is considered as a particularly instructive precedent for future tribunals demonstrating that utilization of procedural orders to seek further information, coupled with the reminder that failure to cooperate may lead to adverse inferences.[101]

The arbitral tribunals, however, must proceed with extreme caution before drawing adverse inferences.[102] Due to considerations of fairness the tribunals should only draw adverse inferences after having explicitly requested the production of evidence, and in situations where the party subject to the interference has refused to produce evidence to which it likely has access.[103] The arbitral tribunal should bear in mind that silence can often be motivated by innocent reasons and even if it gives rise to a suspicion of wrongdoing, it must be weighed against the weaknesses in the complainant's case.[104] Even if the party fails produce the evidence, it does not necessarily mean that the corruptive behaviour is proved. The tribunal needs to assess the failure to produce the requested evidence and it needs to include it into its evaluation of the evidence. That is the question of standard of proof. As it has been argued above, the standard of proof in such case should remain the same and the arbitral tribunal should consider all aspects together before making the decision.

To conclude this section, it may be argued that drawing adverse inferences might demonstrate an alternative way to dissolve the corruption cases while preserving the fairness to the widest extent possible. If arbitral tribunals drew adverse inferences more regularly in cases involving corruption,

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101 LIAMZON, Aloyisius and Anthony C. SINCLAIR. Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct. In: VAN DEN BERG, Albert J. (ed.). *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18*. The Hague: Wolters Kluwer, 2015, p. 463.

102 Award of 8 October 2009, ICSID Case no. ARB/05/13, *EDF (Services) Limited v. Romania*. In: *italaw* [online]. [cit. 30. 8. 2018].

103 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 194 [cit. 16. 3. 2018].

104 Award of 8 October 2009, ICSID Case no. ARB/05/13, *EDF (Services) Limited v. Romania*. In: *italaw* [online]. [cit. 30. 8. 2018].

then perhaps parties would generally be more forthcoming, at least in cases where no wrongdoing occurred.[105]

5 Conclusion

The arbitral tribunal's entitlement to draw adverse inferences from an impugned party's failure to provide evidence requested by the tribunal was suggested as the most appropriate way of proving corruptive behaviour. Not only is such a solution implemented in some arbitration rules and soft law, it has also been adopted by arbitral tribunals in numerous cases.

Drawing adverse inferences in relation to burden of proof means that the arbitral tribunal does not apply the general principle that each party bears the burden of proving the facts on which it relies to the fullest. At the same time, however, drawing adverse inferences does not equate shifting burden of proof as the burden remains on the alleging party throughout the proceedings. Therefore, the hypothesis set in this paper that "*the application of burden and standard of proof is modified when proving corruption in international arbitration due to specific nature of corruptive behaviour*" is confirmed with regards to burden of proof.

Considering the standard of proof, it was pointed out that arbitrators seem to apply the "balance of probabilities" standard. Moreover, it was highlighted that the standard applicable depends on the nature of the case and the likeliness of an allegation to be true rather than on the traditional perception of standard of proof as we know it. This approach, however, is equivalently applicable when drawing adverse inferences. Even if the party fails to produce the evidence, it does not necessarily mean that the corruptive behaviour is proved. The tribunal needs to assess the failure to produce the requested evidence and it needs to include it into its evaluation of the evidence. The standard of proof, however, remains the same. Therefore, the hypothesis set in this paper is refused with regards to standard of proof.

To conclude, in this paper we have described various theoretical approaches towards the issue of proving corruption and analysed the difficulties

105 ROSE, Cecily. Questioning the Role of International Arbitration in the Fight against Corruption. *Journal of International Arbitration* [online]. 2014, Vol. 31, no. 2, p. 194 [cit. 16. 3. 2018].

associated with these approaches. Furthermore, we have proposed the most appropriate way to prove corruption in international arbitration which consists in drawing adverse inferences. The hypothesis of this paper that "*The application of burden and standard of proof is modified when proving corruption in international arbitration due to specific nature of corruptive behaviour*," was confirmed in relation to burden of proof and refused with regards to standard of proof.

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ARBITRATOR'S DUTIES TO REPORT AND TESTIFY UNDER CRIMINAL LAW IN RELATION TO CORRUPTION[1]

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Abstract

The aim of this paper is to analyse arbitrator's duties to report and to testify under criminal law and the impact of arbitrator's duty to maintain confidentiality on such duties. It is generally accepted that an arbitrator is bound by the duty to maintain confidentiality. The duty of arbitrators to maintain confidentiality is wide in scope, however, not absolute. One of its limits may result from criminal laws. In the Czech Republic, the arbitrator's duty to maintain confidentiality is provided for by the Section 6(1) of the Czech Arbitration Act. An arbitrator may have the reporting duty under the Section 368 of the Czech Criminal Code if he/she gains credible knowledge about accepting bribes and bribery during arbitration even though he/she is bound by the duty to maintain confidentiality. Otherwise he/she risks his/her own criminal liability under Section 368. Under Section 99 the Czech Code of Criminal Procedure the questioning of an arbitrator is prohibited as regards the information covered by his/her duty to maintain confidentiality resulting from Section 6 of Czech Arbitration Act. This is not applicable in the case of accepting bribes and bribery in the scope to which the arbitrator has the reporting duty. In such a case the arbitrator has to testify. Section 99 refers only to the duty of confidentiality imposed by the Czech Republic.

Keywords

Arbitrator; Confidentiality; Criminal Law; Duty to Report; Duty to Testify.

[1] The author would like to thank to doc. JUDr. Marek Fryšták, Ph.D. for consultations. It goes without saying, all the mistakes and omissions in this paper are solely hers.

1 Introduction

International commercial arbitration is traditionally perceived as a private and confidential way of dispute resolution. Privacy and confidentiality are also indicated as the advantages of international commercial arbitration and as one of the main reasons why parties prefer arbitration to litigation.[2] The privacy and confidentiality of arbitration are mainly in the interest of the parties to arbitration. If they were absolute third parties would never participate in arbitration and no information about arbitration would be divulged to third parties (including public authorities). However, it is clear from the previous papers that disputes affected by criminal behaviour, in particular corruption may be solved in arbitration. These disputes go beyond the individual interests of the parties to arbitration and touch upon the public interests. These premises can constitute tension as regards the criminal proceedings. Is arbitrator obliged under criminal law to report to the competent authorities about the criminal behaviour if he becomes aware during the arbitration that one of the parties (or both) has committed a crime? Is arbitrator obliged under criminal law to testify about the circumstances concerning a crime and its offender?

The aim of this paper is to analyse arbitrator's duties to report and to testify under criminal law and the impact of arbitrator's duty to maintain confidentiality on such duties. The paper will focus only on crimes relating to corruptive behaviour, in particular bribery. First, arbitrator's duty to maintain confidentiality and its scope will be analysed.[3] The focus will be given to the Czech

2 BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN and Martin HUNTER. *Redfern and Hunter on International Arbitration.* 6th ed. Oxford: Oxford University Press, 2015, p. 30; NOUSSIA, Kyriaki. *Confidentiality in International Commercial Arbitration.* Berlin – Heidelberg: Springer – Verlag, 2010, p. 1; BUYS, Cindy G. The Tension between Confidentiality and Transparency in International Arbitration. *The American Review of International Arbitration.* 2003, Vol. 14, p. 121; see also *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* [online]. White & Case, School of International Arbitration Queen Mary University of London, 2015, p. 7 [cit. 16. 6. 2018].

3 The author dealt with the confidentiality also in her previous publications. See DRLIČKOVÁ, Klára. Legal Basis of Parties' Duty to Maintain Confidentiality in International Commercial Arbitration. In: DRLIČKOVÁ, Klára and Tereza KYSELOVSKÁ (eds.). *COFOLA INTERNATIONAL 2016* [online]. Brno: Masarykova univerzita, pp. 21–37 [cit. 16. 6. 2018]; DRLIČKOVÁ, Klára. Confidentiality of the Materials Used in the Course of Arbitral Proceedings. In: BĚLOHLÁVEK, Alexander and Naděžda ROZEHNALOVÁ (eds.). *Czech (& Central European) Yearbook of Arbitration. Volume VII.* The Hague: Lex Lata, 2017, pp. 45–66; DRLIČKOVÁ, Klára. Veřejný zájem a transparentnost v mezinárodní obchodní arbitráži. Časopis *pro právní vědu a praxi.* 2017, Vol. XXV, no. 3, pp. 403–420; NOVÝ, Zdeněk and Klára DRLIČKOVÁ. *Role veřejného zájmu v mezinárodní obchodní a investiční arbitráži.* Praha, C. H. Beck, 2017, pp. 51–70. The part of this paper concerning the arbitrator's duty to maintain confidentiality is based on these previous publications.

regulation. Second, duty to report and duty to testify will be analysed. In this part, only the regulation contained in Czech criminal law will be dealt with.

2 Arbitrator's Duty to Maintain Confidentiality

2.1 Arbitrator's Duty in General

Even though the confidentiality is often automatically connected with international commercial arbitration[4] or is perceived as its inherent part,[5] the reality is more complex. At present there is no uniform attitude to the confidentiality in international commercial arbitration. Its existence, scope or limits are conditioned by the nature of information, arbitration agreement, arbitration rules, law applicable to arbitration agreement and *lex arbitri*.

The duty of arbitrators to maintain confidentiality is less problematic that the duty of parties.[6] It is generally accepted that an arbitrator is bound by the duty to maintain confidentiality.[7] The existence of this duty results from the very nature of arbitrators' function. It would be incompatible with the mandate

4 FORTIER, Yves L. The Occasionally Unwarranted Assumption of Confidentiality. *Arbitration International* [online]. 1999, Vol. 15, no. 2, p. 131 [cit. 16. 6. 2018].

5 LAZAREFF, Serge. Confidentiality and Arbitration: Theoretical and Philosophical Reflections. Special Supplement of the ICC International Court of Arbitration Bulletin 2009: Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice. In: *ICC Digital Library* [online]. [cit. 16. 6. 2018].

6 To the parties' duty see in more details e.g. DRLIČKOVÁ, Klára. Legal Basis of Parties' Duty to Maintain Confidentiality in International Commercial Arbitration. In: DRLIČKOVÁ, Klára and Tereza KYSELOVSKÁ (eds.). *COFOLA INTERNATIONAL 2016* [online]. Brno: Masarykova univerzita, pp. 21–37 [cit. 16. 6. 2018]; DRLIČKOVÁ, Klára. Veřejný zájem a transparentnost v mezinárodní obchodní arbitráži. Časopis *pro právní vědu a praxi*. 2017, Vol. XXV, no. 3, pp. 407–408; NOVÝ, Zdeněk and Klára DRLIČKOVÁ. *Role veřejného zájmu v mezinárodní obchodní a investiční arbitráži*. Praha, C. H. Beck, 2017, pp. 52–56 and all the sources cited there.

7 LEW, Julian D. M., Loukas A. MISTELIS and Stefan M. KRÖLL. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law International, 2003, p. 283; SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 142; BORN, Gary B. *International Commercial Arbitration. Volume II*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2004; DE LY, Filip, Mark FRIEDMAN a Luca RADICATI DI BROZOLO. International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2012, Vol. 28, no. 3, p. 373 [cit. 16. 6. 2018].

of an arbitrator to divulge information about arbitration to third parties. [8] The duty to maintain confidentiality is the key part of arbitrator's role.[9]

The arbitrators' duty regularly results also from other sources. For example, it can be expressly provided in national arbitration law. If the arbitration is seated in that state, there are no doubts about this duty.[10] The duty can be also provided by arbitration rules[11] or by arbitration agreement. If the arbitrator accept his/her function based on such rules or arbitration agreement, he/she will be bound by the duty to maintain confidentiality.[12]

Concerning the scope of the duty to maintain confidentiality, it is necessary to take into account if the duty of parties or of arbitrators is at stake and also the source of the duty. The existence of the duty can be assessed as regards three "areas" of information: first, information about the existence of arbitration including basic information about the dispute and proceedings, secondly, materials, documents or information created or used during the arbitration proceedings and finally arbitral award.

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8 SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 142; BORN, Gary B. *International Commercial Arbitration. Volume II*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2004.

9 BORN, Gary B. *International Commercial Arbitration. Volume II*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2004; DE LY, Filip, Mark FRIEDMAN a Luca RADICATI DI BROZOLO. International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2012, Vol. 28, no. 3, p. 373 [cit. 16. 6. 2018].

10 BORN, Gary B. *International Commercial Arbitration. Volume II*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2003.

11 See e.g. Article 22 of 2016 Australian Centre for International Commercial Arbitration Rules. *Australian Centre for International Commercial Arbitration* [online]. [cit. 16. 6. 2018]; Article 44.1 of 2018 German Arbitration Institute Arbitration Rules. *German Institute of Arbitration* [online]. [cit. 16. 6. 2018]; Article 8(1) of 2010 Arbitration Rules of the Milan Chamber of Arbitration. *Milan Chamber of Arbitration* [online]. [cit. 16. 6. 2018]; Article 38(2) of 2015 China International Economic and Trade Arbitration Commission Arbitration Rules. *China International Economic and Trade Arbitration Commission* [online]. [cit. 16. 6. 2018]; Article 44 of 2012 Swiss Rules of International Arbitration. *Swiss Chambers' Arbitration Institution* [online]. [cit. 16. 6. 2018]; Article 3 of 2010 Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules. *Arbitration Institute of the SCC* [online]. [cit. 16. 6. 2018].

12 BORN, Gary B. *International Commercial Arbitration. Volume II*. 2nd ed. Alphen aan den Rijn: Kluwer Law International, 2014, p. 2003; SMEUREANU, Ileana M. *Confidentiality in International Commercial Arbitration*. The Hague: Kluwer Law International, 2011, p. 143.

If there is a duty relating to the very existence of arbitral proceedings, such a duty covers also information about dispute and arbitral proceedings as such, in particular about the identity of the parties, subject matter of the dispute, claims and counterclaims, value of dispute, composition of the tribunal, identity of counsels, witnesses or experts. It can also cover further information about proceedings, e.g. date of the hearing.[13] The arbitrators have the duty in this scope which can be deduced from their generally respected duty. The scope of their duty may be specified in national regulations[14] or arbitration rules.[15]

The arbitrators have wide duty also as regards documents and information created or used during arbitral proceedings which is confirmed by both national regulations and arbitration rules.[16] This is especially relevant for the purpose of this paper. The arbitrators usually become aware of criminal behaviour from the information and documents used by the parties during arbitral proceedings. The arbitrators have duty to maintain confidentiality also about arbitral award.[17]

The duty of arbitrators to maintain confidentiality is not absolute. One of its limits may result from criminal laws.

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13 DE LY, Filip, Mark FRIEDMAN a Luca RADICATI DI BROZOLO. International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration. *Arbitration International* [online]. 2012, Vol. 28, no. 3, p. 371 [cit. 16. 6. 2018].

14 Rule 26 of Scottish Arbitration Rules which are part of Arbitration Act (UNITED KINGDOM. Arbitration (Scotland) Act 2010. *legislation.gov.uk* [online]. [cit. 16. 6. 2018]; Section § 14 B of NEW ZEALAND. Arbitration Act 1996, Public Act 1996 No 99, reprint 1 January 2011. *New Zealand Legislation* [online]. [cit. 16. 6. 2018]; Section 23C of AUSTRALIA. International Arbitration Act 1974, Act no. 136 of 1974 as amended in 2011. *Federal Register of Legislation* [online]. [cit. 16. 6. 2018]; Article 24(2) of SPAIN. Act 60/2003 of 23 December on Arbitration. *Ministerio de Justicia* [online]. [cit. 16. 6. 2018].

15 See e.g. Article 22 of 2016 Australian Centre for International Commercial Arbitration Rules. *Australian Centre for International Commercial Arbitration* [online]. [cit. 16. 6. 2018]; Article 44(1) of 2018 German Arbitration Institute Arbitration Rules. *German Institute of Arbitration* [online]. [cit. 16. 6. 2018]; Article 8(1) of 2010 Arbitration Rules of the Milan Chamber of Arbitration. *Milan Chamber of Arbitration* [online]. [cit. 16. 6. 2018]; Article 38(2) of 2015 China International Economic and Trade Arbitration Commission Arbitration Rules. *China International Economic and Trade Arbitration Commission* [online]. [cit. 16. 6. 2018]; Article 3 of 2010 Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules. *Arbitration Institute of the SCC* [online] [cit. 16. 6. 2018].

16 See above mentioned examples of national regulations and arbitration rules.

17 Ibid.

2.2 Arbitrator's Duty under Czech Arbitration Act

Section 6(1) of the Act. no. 216/1994 Coll., on arbitration and on enforcement of arbitral awards[18] ("Czech Arbitration Act") obliges arbitrators to maintain confidentiality about circumstances about which they have become aware within the context of their function. Section 6(1) is applicable to all arbitration proceedings seated in the Czech Republic. The scope of the duty is wide. Arbitrators are not allowed to provide any information about the dispute or situation of the proceedings. The duty covers not only the questions directly related to the proceedings or to the disputes, but also all circumstances and information about which the arbitrators have learned during arbitration. The duty to maintain confidentiality covers information acquired in the period from the commencement of arbitration to its completion. It covers also all information acquired during the period in which a person can be regarded as arbitrator (from the moment he/she accepts the function).[19]

Under Section 6(2) an arbitrator can be released from his/her duty. The arbitrator can be released by the agreement of the parties. If the parties do not release the arbitrator, it is the president of the district court who decides. He can release the arbitrator from serious reasons. The power to release rests in the hand of the president of the district court as a natural person, not in the hand of the court as such. There is no court proceedings about the release, the decision is in the discretion of the president. It is the power *sui generis* resulting exclusively from the Czech Arbitration Act.[20]

First, the president of the district court in whose district the respective arbitrator has his/her permanent residence decides. If the arbitrator has not the permanent residence in the Czech Republic (e.g. a foreigner serves as an arbitrator in the Czech Republic) or it is not possible to find out his/her permanent residence, the president of the district court in whose district the award was rendered decides. If it is not possible to find out where the award was rendered or if it was rendered abroad, the president of the District

18 CZECH REPUBLIC. Act no. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards.

19 BĚLOHLÁVEK, Alexander J. *Zákon o rozhodčím* řízení *a o výkonu rozhodčích nálezů: komentář*. 2nd ed. Praha: C. H. Beck, 2012, pp. 343–344.

20 Ibid., p. 346.

court for Prague 1 decides. The last possibility is rather theoretical. As was stated above, Section 6 is applicable only in the case in which the arbitration is seated in the Czech Republic. If the award is rendered abroad, then the arbitration must have been seated also abroad. In such a case Section 6 is not applicable at all.[21]

Section 6(2) does not define serious reasons. The president of the district court has to assess the existence and importance of the reasons within the context of the particular circumstances. The application to the president of the district court may be submitted by the arbitrator, any of the parties or by anybody who will benefit from the provided information. For example, the authorities involved in the criminal proceedings may apply for the release if the information shall be used in the criminal proceedings.[22]

3 Arbitrator's Duties under Criminal Law v. Duty to Maintain Confidentiality

Criminal laws of states contain legal instruments and means which aim to ensure the widest possibility of early detection and punishment of criminal behaviour, in particular in the case of more serious crimes or crimes of certain nature. It is the state who regularly has a monopoly to prosecution of crimes. However, the state authorities are not both objectively and subjectively able to find out all cases of criminal behaviour. Therefore, the right of every person to report the authorities about the commitment of a crime exists. Moreover, in some cases, certain persons or authorities have duty to report. These rights and duties are important prerequisite of effective application of criminal law. It is generally known that in many areas high rate of latent criminality exists. This also the case of corruption.[23]

3.1 Arbitrator's Duty to Report

Criminal laws can provide for reporting duties regarding the criminal conduct of other persons. The violation of such a duty can in some cases constitute a crime. Section 368 of the Act no. 40/2009 Coll., Criminal Code

21 Ibid., p. 347.

22 Ibid., pp. 347–348.

23 PÚRY, František. Poznámky k oznamování trestné činnosti státními orgány, právnickými a fyzickými osobami. *Trestněprávní revue* [online]. 2013, no. 7–8 [cit. 16. 6. 2018].

("Czech Criminal Code") provides that a person commits a crime if he has gained credible knowledge that another person has committed one of the criminal acts named in this provision and fails to report such criminal act to the police authority or to the public prosecutor.

Among the criminal acts named in this provision we can find both accepting bribes and bribery covered by Sections 331 and 332 of the Czech Criminal Code. Indirect bribery under Section 333 is not mentioned in Section 368. The object of criminal act covered by the Section 368 is the interest of the society on the fight with the most serious criminality by detection and sanction of the most serious criminal acts and their offenders. Only a natural person can be the offender of this crime. What is important, also the natural person bound by the duty to maintain confidentiality has the reporting duty. Section 368(3) then specifies who does not have the reporting duty. Arbitrator is not covered by this exception. Non-reporting is an intentional criminal offense. It is not necessary that the offender exactly knows the legal qualification of the particular action, it is enough if he knows the factual circumstances which constitute the elements of a criminal offense. The criminal offense is committed if the offender gained the credible knowledge and fails to report immediately. The reporting duty exists also in the situation in which a person has gained credible knowledge about the criminal act, however does not know the offender of this act. The credible knowledge must include all circumstances which are decisive for the criminality of the act.[24]

From the above mentioned we can conclude that an arbitrator may have the reporting duty under the Section 368 if he/she gains credible knowledge about accepting bribes and bribery during arbitration even though he/she is bound by the duty to maintain confidentiality. Otherwise he/she risks his/her own criminal liability under Section 368.

This does not mean, of course, that Section 368 is of universal application. The reporting duty only concerns criminal acts falling within the local scope of Czech Criminal Code and also the local scope of Section 368 must be met. The basis of the local scope is the principle of territoriality. Thus,

24 ŠÁMAL, Pavel et al. *Trestní zákoník: komentář. II.* část. 2nd ed. Commentary to Section 368, pp. 3364–3370.

the criminality of an act committed in the territory of the Czech Republic shall be assessed pursuant to the Czech Criminal Code.[25]

The Czech Criminal Code shall also apply to assessment of criminality of an act committed abroad by a citizen of the Czech Republic.[26] Also the principle of subsidiary universality under Section 8(2) may play a role. Under this principle the Czech Criminal Code shall apply to assessment of criminality of an act committed abroad by a foreign national[27] when the act was committed in favour of a legal entity with a registered office or branch in the territory of the Czech Republic.

In the author's opinion, an arbitrator (without regard to his/her nationality) has the reporting duty under Section 368 if he/she in the Czech Republic gained the credible knowledge about accepting bribes or bribery taking place in the Czech Republic, about accepting bribes or bribery committed by a Czech national abroad and also in the situation in which accepting bribes or bribery may be assessed pursuant to the Czech Criminal Code under its Section 8(2). In most cases, the arbitrator gains the credible knowledge in the Czech Republic if the arbitration takes place here. The arbitrator also has the reporting duty if he/she is a national of the Czech Republic and gained the credible knowledge (about the same situations mentioned) abroad (typically during the arbitration taking place abroad). Section 368 may be also applicable if the arbitrator is a foreigner, gained the credible knowledge abroad and non-reporting is in favour of the legal entity with its registered office or branch in the Czech Republic. In this case, it is, however, not very probable that the Czech authorities will have the possibility to prosecute such an offender.

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25 Section 4 of the Czech Criminal Code. Section 4 further provides rules for distant delicts.

26 The same applies to a person with no nationality who has been granted a permanent residence in the territory of the Czech Republic.

27 The same applies to a person with no nationality who has not been granted permanent residence in the territory of the Czech Republic.

3.2 Arbitrator's Duty to Testify

3.2.1 Arbitrator's Duty to Comply with the Request of Authorities

Criminal procedure laws usually provide for various obligations of natural and legal persons concerning the cooperation with public authorities including the obligation to testify. Are arbitrators also bound by these obligations? In this part the paper focuses on the regulation contained in the Act no. 141/1961 Coll., Code of Criminal Procedure ("Czech Code of Criminal Procedure").

Section 8(1) of the Czech Code of Criminal Procedure states that natural persons are obliged to comply without undue delay, and unless a special legal regulation provides otherwise, also without a consideration, with request of authorities involved in criminal proceedings in the performance of their tasks.

However, Section 8(4) states that a natural person may refused the fulfilment of obligations according to Section 8(1) with a reference to the obligation to maintain confidentiality imposed or recognised by the state. Duty to maintain confidentiality recognised or imposed by state means the duty imposed or recognised by another legal act. As Section 6(1) of the Czech Arbitration Act expressly provides for the arbitrators' duty to maintain confidentiality, it is a duty recognised or imposed by state.[28] In the following parts the paper deals with the situation in which the arbitrator is covered by Section 6(1) (for its scope see above).

Concerning the relationship between the obligation to comply with the request under Section 8(1) and the obligation to maintain confidentiality, Section 8(1) itself does not break through the confidentiality obligation. Except of expressly stated exceptions in Section 8, it is only the legal act regulating the duty to maintain confidentiality which may break through this duty either directly or indirectly.[29] This is also the case of Section 6(2) of Czech Arbitration Act (see above). For the purpose of this paper, Section 8(4)(a)

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28 See also ŠÁMAL, Pavel et at. *Trestní řád: komentář. I. část.* 7th ed. Commentary to Section 99, pp. 1449–1471.

29 ŠÁMAL, Pavel et at. *Trestní řád: komentář. I. část.* 7th ed. Commentary to Section 8, pp. 120–145.

is important. Under this provision the refusal under Section 8(4) is not possible if the person having the obligation to maintain confidentiality would otherwise be exposed to a threat of criminal prosecution for non-prevention or non-reporting of a criminal offense. This provision refers *inter alia* to reporting duty under Section 368 of the Czech Criminal Code. Thus, if the arbitrator has the reporting duty under Section 368 (see above), he also has to comply with the request under Section 8(1) of the Czech Code of Criminal Procedure. As was stated above, this is the case of both accepting bribe and bribery. If the arbitrator gains credible knowledge about indirect bribery, he does not have the reporting duty and therefore may refuse to comply with the request under Section 8(1) unless he is released from his duty to maintain confidentiality under Section 6(2) of Czech Arbitration Act.

3.2.2 Arbitrator's Duty to Testify

Under Section 97 of the Czech Code of Criminal Procedure everyone is obliged to appear and testify when summoned as a witness about matters known to him that are related to a criminal offence and its offender or about circumstances essential for criminal proceedings. Section 97 is the basic provision on witness testimony which is applicable to all phases of criminal proceedings. It is general provision which is specified in further provisions of the Code of Criminal Procedure.[30]

First, everyone is obliged to appear before the authority involved in the criminal proceedings. In order to fulfil this obligation, the witness must be properly summoned. If a witness, despite being properly summoned, fails to appear to questioning without a sufficient excuse, he may be compelled to appear.[31] Secondly, generally everyone has the obligation to testify. However, there are exceptions from this obligation. For the purpose of this paper the prohibition of questioning under Section 99 is the most relevant. Under this provision, a witness must not be questioned if by giving the testimony he would breach a duty of confidentiality imposed by the state, unless he was relieved of this duty by a competent authority or by the person for whose benefit was this duty imposed. Prohibition of questioning,

30 ŠÁMAL, Pavel et at. *Trestní řád: komentář. I. část.* 7th ed.. Commentary to Section 97, pp. 1431–1443.

31 Section 98 of the Czech Code of Criminal Procedure.

however, does not apply to a testimony related to a criminal offence, regarding which has the witness a reporting duty according to the Czech Criminal Code. Even though the questioning is prohibited, the witness has the obligation to appear. The authorities involved in the criminal proceedings take prohibition of questioning into account on their own motion.[32] They have to consider the existence of the circumstances relevant for the prohibition as a preliminary question.[33]

Generally, the questioning of an arbitrator is prohibited as regards the information covered by the duty to maintain confidentiality. This is not applicable in the case of accepting bribes and bribery in the scope to which the arbitrator has the reporting duty. In such a case the arbitrator has to testify. This is applicable in the case that the arbitrator is covered by Section 6 of the Czech Arbitrator Act.

What about the situation if the Czech authorities summon the arbitrator who is not covered by Section 6? This may be in the case that the arbitrator gained relevant knowledge during the arbitration which took place abroad. In that state, the confidentiality duty may result from the legal act, however must not. It may only result from the agreement of the parties or most generally from the nature of arbitrator's role (see above). Section 99 refers only to the duty of confidentiality imposed by the Czech Republic. If the arbitrator is not covered by the Section 6 of the Czech Arbitration Act, the prohibition of questioning under Section 99 is not applicable.

4 Conclusion

It is generally accepted that an arbitrator is bound by the duty to maintain confidentiality. The existence of this duty results from the very nature of arbitrators' function. The arbitrators' duty regularly results also from other sources. The duty of arbitrators to maintain confidentiality is wide in scope, however, not absolute. One of its limits may result from criminal laws. In the Czech Republic, the arbitrator's duty to maintain confidentiality is provided for by the Section 6(1) of the Czech Arbitration Act. Section 6(1)

32 FRYŠTÁK, Marek. Procesní postavení svědka (poškozeného) a jeho výslech v přípravném řízení. *Trestněprávní revue* [online]. 2014, no. 10 [cit. 16. 6. 2018].

33 ŠÁMAL, Pavel et at. *Trestní řád: komentář. I. část.* 7th ed.. Commentary to Section 99, pp. 1449–1471.

is applicable to all arbitration proceedings seated in the Czech Republic. The scope of the duty is wide. Section 6(2) regulates how an arbitrator can be released from the duty.

Criminal laws can provide for reporting duties regarding the criminal conduct of other persons. The violation of such a duty can in some cases constitute a crime. Section 368 of the Czech Criminal Code is an example of such reporting duty. An arbitrator may have the reporting duty under the Section 368 if he/she gains credible knowledge about accepting bribes and bribery during arbitration even though he/she is bound by the duty to maintain confidentiality. Otherwise he/she risks his/her own criminal liability under Section 368. Of course, the local scope of Section 368 must be met.

Under Section 99 of Czech Code of Criminal Procedure the questioning of an arbitrator is prohibited as regards the information covered by his/her duty to maintain confidentiality resulting from Section 6 of Czech Arbitration Act. This is not applicable in the case of accepting bribes and bribery in the scope to which the arbitrator has the reporting duty. In such a case the arbitrator has to testify. Section 99 refers only to the duty of confidentiality imposed by the Czech Republic. If the arbitrator is not covered by the Section 6 of the Czech Arbitration Act, there is no prohibition of questioning under Section 99.

Acknowledgements

The paper has been created with the project "MUNI/A/1124/2017 Riešenie sporov dotknutých korupciou v medzinárodnej obchodnej arbitráži".

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CONTEMPORARY CHALLENGES TO INTERNATIONAL LAW AND POLICY ON SUSTAINABLE DEVELOPMENT, ENERGY, CLIMATE CHANGE, ENVIRONMENTAL PROTECTION, INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER

THE REFLECTION OF ENVIRONMENTAL PROTECTION IN INTERNATIONAL INVESTMENT LAW – GRADUAL DEVELOPMENT?

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Abstract

The paper analyses the reflection of environmental questions in current international investment law. Firstly, the focus is given to the wording of international investment agreements, its historical evolution and the introduction of clauses emerging in the texts in recent years to specifically allow for environmental measures being adopted by states. The second part turns the attention to the approach of investment tribunals to environmental questions in disputes where a tension between investment and environmental protection has emerged and also mentions alternative ways of bringing environmental protection to the centre of consideration in investment disputes even independently of the wording of the respective treaty.

Keywords

Environmental Protection; International Investment Law; Investment Arbitration; ISDS.

1 Introduction

Environmental protection represents one of the major public policies that states pursue in various ways, such as designating certain areas as natural reserves, introducing laws that set limits on the exercise of private rights associated with environmental risks, adopting administrative decisions based on environmental standards or offering incentives to promote ecologically friendly but costly solutions. There is no doubt that environmental protection is nowadays one of the underlying state objectives.

Constantly mounting environmental concerns are also apparent from the number of binding and non-binding international instruments in which states undertake to prevent harmful impacts of human activity on the environment and natural resources. Gradually, the ever-growing body of such instruments gave rise to a distinct area of law, namely international environmental law.

International investment law is a very specific area of international law that is based on investment agreements ("IIAs"), mainly bilateral ("BITs") but also multilateral – such as the North Atlantic Free Trade Agreement ("NAFTA") or trade agreements negotiated by the EU. Investment agreements grant private investors of the contracting states that the other state would observe certain substantive standards with regards to its conduct towards investors. Thus, investment treaties protect investors from state acts that might harm their investment, primarily by way of expropriation or failure to uphold fair and equitable treatment, a broad standard that has been interpreted to include protection of legitimate expectations, non-discrimination and transparency. A distinctive feature unique to investment law is the right of investors, i.e. private individuals of one contracting state, to commence arbitral proceedings directly against the other contracting state in case of a breach of the granted protection. Investment treaties thus severely limit sovereign regulatory powers of contracting states, including state actions in the field of environmental protection.

The apparent contradiction between environmental and investment protection has originally been accorded surprisingly little attention both in the treaties themselves and during the subsequent enforcement of the rights arising thereunder by way of investment arbitration. Investment treaties concluded in the 80 s and 90 s contain no or little reference to environmental topics. Although many of those treaties are regrettably still in force, a major shift can be traced in the current practice of drafting investment treaties as they often contain express provisions that take account of environmental issues. Nevertheless, questions remain about the enforceability of such newly introduced clauses or chapters and the references to environmental protection often remain merely proclamatory.

The difficulty of finding a balance between environmental protection and other public interests has arisen in several investment cases as protection of the environment is one of the areas with strong state interference. Although the obligations of environmental protection often stem from international treaties and thus should have the same importance as investment protection, raising environmental issues as defence by states has not always been successful.

Investments often flow from developed to developing countries with low levels of environmental protection, which may even represent one of the reasons for making the investment. However, strengthening environmental protection is a global trend and implementation of this goal is inevitably more rapid and significant in the developing countries. For that reason, states will most probably face a growing number of cases in this area.

The paper aims to evaluate both the current drafting trends and approaches of arbitral tribunals to environmental questions in order to identify the reasons for the often-ignored importance of environmental issues in investment protection and to indicate ways for future development.

2 The Reflection of Environmental Protection in Investment Agreements

An interesting survey was carried out in 2011 by the OECD analysing more than 1,500 international investment agreements with regards to environmental issues. Strikingly, it was found that only 8 % of the analysed treaties contained any reference to environmental concerns. However, the survey also showed that the practice is gradually changing, and such references are becoming more and more common in newly concluded treaties, especially in free trade agreements and other instruments concluded on multilateral basis.[1]

The survey showed that the reflection evolved over the years as each of the periods of investment law development reflected the needs at the time. References to the environment in the first-generation IIAs, concluded often between capital importing and capital exporting states, were virtually absent.

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1 GORDON, Kathryn and Joachim POHL. Environmental Concerns in International Investment Agreements: A Survey. *OECD Working Papers on International Investment* [online]. 2011, no. 1, p. 3 [cit. 5. 11. 2018].

Later, IIAs ceased to be dominated by relations between the "rich north" and the "poor south" and became more oriented to facilitate general economic growth while ensuring sustainable development, which may be perceived as a first attempt to import concerns such as environment into investment relations. The very first BIT containing a reference to environmental protection is considered to be the China-Singapore BIT dating back to 1985. However, the reference therein is merely granting the parties a *"right to apply prohibition or restrictions to take actions directed to protection of diseases and pests in animal and plants"*.[2] Although this provision can be found in many BITs, it has, to my knowledge, never been subject to interpretation by an arbitration tribunal and in my opinion falls rather within medical concerns than environmental ones.

In the most recent generation of treaties the right of the states to regulate became more prominent. With regards to environmental questions, such transformation is often manifested by the inclusion of carve-out clauses, general exceptions, no-lowering-of-standard clauses or other instruments, as will be shown below.

These findings uncover two problems: there is clearly a great mass of treaties with little or no reflection of environmental concerns. As IIAs are often concluded for decades to come, states will not be able to significantly change this situation within the next few years, with the exception of trying to re-negotiate them. This fact may slow down the acceptance and consideration of environmental protection in arbitration practice. Secondly, it is not entirely clear how to reflect environmental concerns in order for them to be effective and bring the intended consequences.

2.1 Different Ways to Grant Environmental Protection in the Treaties

States are becoming aware of the clashes between investment protection and environmental protection and of the adverse effects that such clashes might have on their regulatory powers. The ideal scenario would be to resolve such problems *ex ante*, i.e. at the moment of conclusion of investment treaties.

2 Article 11 of the Agreement on the promotion and protection of investments between China and Singapore of 21 November 1985. *Investment Policy Hub* [online]. UNCTAD [cit. 5. 11. 2018].

Gradually, several more or less effective answers to those clashes have evolved in the treaty drafting practice.

2.1.1 Reference in Preambles

According to the OECD survey, preambular references are among the most common.[3] For example, the 2016 Czech model BIT reads in its preamble: *"Desiring to achieve these objectives* [esp. of economic cooperation] *in a manner consistent with the protection of health, safety, and the environment, and with promotion of consumer protection and labour standards"*.[4] One shortcoming of preambular references is the fact that preambles do not give rise to rights or obligations of the contracting parties and are merely of proclamative nature. However, the very same fact also brings some positive effects. Firstly, it might enable to reach an agreement between the contracting parties in the process of the treaty conclusion more easily especially when one of the contracting parties is economically less motivated to include environmental exceptions. Nevertheless, it might be willing to accept a reference in the preamble exactly due to its non-binding nature. Secondly, although no direct obligations of the contracting parties shall arise, preambles serve as an important means of interpretation of the treaty as a whole[5] and the tribunal might consequently interpret its exceptions and limits of protection more extensively, even if the treaty does not specifically contain environmental references. Nevertheless, preambular references generally cannot be deemed a sufficient tool of environmental protection if there are no further references in the subsequent text of the treaty.

2.1.2 Carve-out Clauses

The inclusion of carve-out clauses represents a more suitable approach to addressing environmental questions. Such clauses might occur in different variations, but their aim is to provide exceptions from protective substantive

3 GORDON, Kathryn and Joachim POHL. Environmental Concerns in International Investment Agreements: A Survey. *OECD Working Papers on International Investment* [online]. 2011, no. 1, p. 12 [cit. 5. 11. 2018].

4 Preamble of the Czech Republic Model BIT. *Investment Policy Hub* [online]. UNCTAD [cit. 5. 11. 2018].

5 See Article 31 of the Vienna Convention on the Law of Treaties: *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

standards, i.e. to justify a breach of these standards. For that reason, they might be present in relation to basically any guaranteed standard. Most typically they will establish exceptions to unlawful expropriation, fair and equitable treatment, national treatment or to performance requirements (i.e. clauses requiring investors to use certain technology, in this case not harmful to the environment). For instance, an exception clause could be drafted in the following way:

"Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations." [6]

Another example can be found in the Czech model BIT where the exception imposes additional requirements on the nature of the measure and raises the question whether such clause is not unnecessarily restrictive:

"Except in rare circumstances, non-discriminatory, proportionate measures adopted in a good faith by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as national security, financial stability, public health, safety, and the environment, do not constitute indirect expropriations." [7]

Such clauses give tribunals manoeuvring space to consider environmental defences presented by states if the contested state action was made in order to protect the environment. The apparent problem of the clauses is that they apply exclusively to the standard from which they provide exception. For example, if a treaty included only the above-cited provision, environmental reasons could not be raised as defences regarding the breach of fair and equitable treatment. Because claims of indirect expropriation and breach of fair and equitable treatment are often overlapping, such a carve-out clause could thus prove to be insufficient.

2.1.3 General Exception Clauses

The widest respect to environmental issues can be secured by a general exception in the treaty referring to environmental questions. Such clause might, for example, read:

"Nothing in this Agreement shall be construed to affect the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate

6 Annex B Article 4(b) of the USA Model BIT. *US Department of State* [online]. [cit. 5. 11. 2018].

7 Article 5(3) of the Czech Republic Model BIT.

policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.'[8]

The inclusion of general exceptions is recommended as they provide effective means to secure legitimately adopted state measures protecting the environment. However, it is clear, that merely referring to environmental aims will not be sufficient for states to be BIT compliant. Most likely, the measure in question will still be scrutinised by the tribunal, meaning that it will examine for instance whether it was adopted in order to secure the proclaimed aims and whether it was proportionate in order to reach its proclaimed goal.

2.1.4 Obligations of Investors?

It seems that some states are willing to go further than only strengthening and legitimising their rights to regulate in the newly concluded treaties. Would it be possible, for instance, to bind investors to respect and follow the local environmental protection in the text of the treaty itself? The question of obligations of investors is a tricky one, especially because investment treaties are concluded between the states themselves and investors are merely third-party subjects that can exploit the granted benefits. In this regard, is it possible to impose any obligations on them?

Probably not in the strict sense. However, it should be recalled that it is possible to make the benefits available only to certain investors. In the definition of a protected investment, the treaties often limit its applicability only to investments *"made in accordance with law"*.[9] This might thus be interpreted as meaning that an investment made in breach of local environmental laws will not be perceived as a protected investment in the first place.

A further step was made by Norway, which tried to incorporate soft-law documents, namely OECD Guidelines on Multinational Enterprises, into its model BIT but only in the form of an obligation of the states to encourage investors to conduct their investment in compliance with such guidelines.[10]

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8 Article 12(1) of the Czech Republic Model BIT.

9 With a specific reference to the environment see e.g. Article 10 of the Netherlands-Costa Rica BIT: *"The provisions of this Agreement shall, from the date of entry into force thereof, apply to all investments made, whether before or after its entry into force, by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including its laws and regulations on labour and environment."*

10 Article 32 of the Norway Model BIT. *Investment Policy Hub* [online]. UNCTAD [cit. 5. 11. 2018].

Nevertheless, this might indicate a possible future direction of drafting practices and, to me personally, imposing stricter requirements with regards to respect of local laws (and in this way creating "obligations" of investors) seems perfectly legitimate and legal.

3 Consideration of Environmental Issues by Investment Arbitration Tribunals

A surprisingly small number of investment arbitrations in which the tribunal had to consider a clash between investment and environmental protection has arisen. Although some authors suggest that some reference to the environment can be found in number of cases,[11] most often they represent only a minor issue in the merits of the case. Some of the cases with a clear environmental-investment clash have been settled before the tribunal could consider the environmental defences (such as *Ethyl v. Canada*).

The principal approaches to environmental questions in the practice of investment tribunals can be demonstrated on two cases, namely an "investment oriented" case (*Santa Elena v. Costa Rica*[12]) and an "environmentally oriented" case (*Methanex v. USA*[13]). However, this comes with a disclaimer that the *Santa Elena v. Costa Rica* proceedings were administered by the ICSID but the claim itself was not based on a BIT but was brought after an agreement between the parties to the dispute in order to identify a fair amount of compensation in accordance with international law. *Methanex v. USA* was brought on the basis of the NAFTA that does include an express reference to environmental measures in its article 1114, which reads:

"Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing <u>*any measure otherwise consistent with this Chapter*</u> [Chapter 11 – the investment chapter] *that it considers appropriate to ensure that investment activity in its territory is* <u>*undertaken in a manner sensitive to environmental concerns*</u>*."*

11 PARLETT, Kate and Sara EWAD. Protection of the Environment and Investor Protection – A Double Edged Sword. *Essex Street Bulletin* [online]. 2017, Vol. 20, p. 1 [cit. 5. 11. 2018].

12 Award of 17 February 2000, ICSID Case no. ARB/96/1, *Compañia del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica*. In: *italaw* [online]. [cit. 5. 11. 2018].

13 Award of 3 July 2005, UNCITRAL, *Methanex Corporation v. United States of America*. In: *italaw* [online]. [cit. 5. 11. 2018].

However, because of the underlined part, Article 1114 of the NAFTA does not in fact create a general exception clause but only emphasizes an already implied exception for (any) measure that is consistent with requirements imposed in Chapter 11 only with an express reference to the environment.[14] Thus, the measures were claimed to be inconsistent with Chapter 11, as any other measure disputed by an investor under the NAFTA, and not specifically with article 1114.

3.1 *St. Elena v. Costa Rica*

A US company CDSE bought 30 km of Costa Rica's coastline aiming to establish a tourist complex there. Eight years later, Costa Rica expropriated the CDSE's property for environmental reasons and used the land to establish a national park in order to protect endangered sea turtles. On that basis a long-term dispute between the company and Costa Rica as to the amount of compensation arose. Finally, Costa Rica agreed to submit the question to an ICSID Tribunal that concluded *inter alia* that:

"While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference."[15]

Based on this reasoning the tribunal decided to proceed with reference to "full compensation of losses" doctrine, disregarding any environmental implications of the case, and later in the text of the award reinforced such approach by holding that:

"Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even

14 GAINES, Snaford E. *NAFTA Chapter 11 as a Challenge to Environmental Law Making – One View From the United States* [online]. University of Toronto, 2000, p. 4 [cit. 5. 11. 2018].

15 Award of 17 February 2000, ICSID Case no. ARB/96/1, *Compañia del Desarrollo de Santa Elena S. A. v. Republic of Costa Rica*, para. 71.

for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."[16]

Despite the unusual nature of the claim in the context of the ICSID, the cited conclusions were later referred to and followed in other investor-state arbitrations such as *Marion Unglaube v. Costa Rica*[17] or *Tecmed v. Mexico*[18] and thus virtually established one stream of tribunals' reasoning characterised by giving no relevance to environmental issues of the case.

3.2 ***Methanex v. USA***

A reverse attitude was adopted by the Tribunal in *Methanex v. USA*. A gasoline additive MTBE was banned in California due to medical and health safety concerns as it was found to be carcinogenic in a scientific report. The investor was a producer of methanol – a component of MTBE – and claimed indirect expropriation because it was virtually impossible to sell the component in California. All claims were dismissed while the Tribunal stated that:

"[…] *as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."*[19]

Unlike in the *Santa Elena v. Costa Rica* case, the ban was therefore perceived as lawful regulation, not expropriation, and the state was under no obligation to pay compensation to the investor.[20]

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16 Ibid.

17 See Award of 16 May 2012, ICSID Case no. ARB/08/1, *Marion Unglaube v. Republic of Costa Rica*, para. 121. In: *italaw* [online] [cit. 5. 11. 2018].

18 See Award of 29 May 2003, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, para. 217. In: *italaw* [online]. [cit. 5. 11. 2018].

19 Award of 3 July 2005, UNCITRAL, *Methanex Corporation v. United States of America*, Part IV, para. 7.

20 Award of 3 July 2005, UNCITRAL, *Methanex Corporation v. United States of America*, Part IV para. 59.

3.3 Legal Basis for the Reference to Environmental Considerations in Case of Their Absence in the IIA

On the one hand, it seems easy to reprobate the approach of the Santa Elena Tribunal and similar decisions which utterly disregarded any environmental considerations; on the other hand, it might be difficult for the tribunal to find any legal justification for doing so because it can only apply a limited number of legal sources. Typically, the tribunal will consider the text of the treaty itself, other international treaties applicable between the parties and principles of general international law.

Hence, if the treaty is silent on the matter, the tribunal has no power to import or evolve any environmental easements of states' obligations. However, a new approach was suggested in the *Iron Rhine case*[21] that deserves to be mentioned here, although it was not an investment arbitration case, but a state-state arbitration case decided by the PCA in the dispute between Belgium and the Netherlands with regards to relocation of costs associated with the operation of a railway connecting those states. The Tribunal attached a growing importance to environmental issues in the context of international law, deciding that:

"Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992, which reflects this trend, provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm […]. *This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties."*[22]

21 Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands of 24 May 2005. *Reports of International Arbitral Awards* [online]. United Nations [cit. 5. 11. 2018].

22 Award in the Arbitration regarding the Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of the Netherlands of 24 May 2005, para. 28.

The tribunal therefore suggests that, in accordance with evolutive interpretation, environmental protection should be read into international treaties and, what is more, it should be considered as one of the principles of general international law.

If such approach was accepted by international tribunals, it would provide them with the searched space for considering environmental questions even if the treaty itself does not specifically treat environmental questions.

It can now only be anticipated how the tribunals will interpret newly incorporated provisions introduced in the second part of this paper. However, to my knowledge no such disputes have been decided yet as most of them are based on older generations of BITs.

3.4 The Possibility of Counter-claims

The notion of counter-claims has long been a Pandora's box in investment arbitration. It is true that the ICSID Convention allows for counter-claims in its article 47 but for long this possibility remained intact.

There are at least two other ways to make counter-claims possible – based on a later consent of the parties, i.e. the state and the investor, after the dispute has arisen (which might seem unlikely but was however the case in *Burlington Resources v. Ecuador*) or based on the jurisdictional provisions of the respective BIT.

In order to be able to file a counter-claim, there must be an obligation on the part of the investor, a question already shortly discussed in the first part. Again, this obligation would most likely find its basis in the "obligation" "to make investment in accordance with the host state law".

In *Burlington Resources v. Ecuador*, the counter-claim was based on and consequently found in breaches of the local environmental law and contractual obligations. Ecuador was awarded a compensation amounting to USD 40 million (however, Burlington was awarded compensation of USD 380 million).[23] Nevertheless, the case shows yet another path of how it might be possible to react to the current reality even though the respective BIT

23 LEVINE, Matthew. Ecuador Awarded USD 41 Million in Counterclaim Against U.S. Oil and Gas Company Burlington Resources. *International Institute for Sustainable Development* [online]. 2017 [cit. 5. 11. 2018].

was concluded at the time when environmental protection was not in the limelight. Counter-claims could become a smart tool by which the tribunal might mitigate the amount of damages in the cases where it is not straightforward to decide whether the measure was a legitimate measure or a measure amounting to expropriation (as it often is).

It appears crucial to resolve the question of finding jurisdiction if the proceedings are not held under the ICSID. However, maybe too creatively, the tribunal in *Urbaser v. Argentina* based jurisdiction for bringing counter-claims solely on a standard BIT jurisdiction clause allowing to hear disputes *"arising between the parties and being submitted to arbitration at request of either party to the dispute"*.[24]

4 Conclusion

Especially in the practice of drafting BITs, a clear shift towards expressly including environmental consideration is apparent. So far, several types of clauses of reflection have developed, while the most effective seems to be an inclusion of a general exception preferably together with preambular references to environmental protection.

However, effectiveness of such changes is yet to be tested in the arbitration practice. In several instances the past tribunals were ready to dismiss any environmental protection considerations, even if they stemmed from an international obligation of the sued state.

Nonetheless, the changes tracked in the paper suggest that we can anticipate a widening of the manoeuvring field of the tribunals when considering impacts of environmental measures and based on that perhaps an increased willingness to admit states' defences of environmental protection.

24 LAVAUD, Floriane, Blair ALBOM and Rhianna HOOVER. Corporate Responsibility for Human Rights Violations after Urbaser. *Oil and Gas Law Committee* [online]. 2017 [cit. 5. 11. 2018].

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COFOLA INTERNATIONAL 2018
Conference Proceedings

JUDr. Klára Drličková, Ph.D. (ed.)

Published by Masaryk University, Žerotínovo nám. 617/9, 601 77 Brno
Publications of the Masaryk University No. 633
(theoretical series, edition Scientia)

Print: Point CZ, s.r.o., Milady Horákové 890/20, 602 00 Brno
1st edition, 2018

ISBN 978-80-210-9064-4
ISBN 978-80-210-9065-1 (online : pdf)
ISSN 2464-8485
www.law.muni.cz

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ISBN 978-80-210-9065-1