

Addressing corruption allegations in arbitration disputes

Cross-country insights

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Because the fight against corruption now takes place at all stages of business, claims related to allegations of corruption are increasingly raised in commercial disputes and, naturally, in arbitration proceedings, whether they are raised as a strategic maneuver, as an excuse for not fulfilling contractual obligations or complying with awards, or genuinely, to avoid irregularities and misconduct. Corruption allegations can notably taint the credibility of arbitral awards, potentially rendering them unenforceable in domestic or international courts. Courts may refuse to enforce awards that are perceived to have been influenced by corrupt practices, thereby nullifying the parties' efforts to resolve their dispute through arbitration. As such, handling such allegations is key in ensuring the integrity of the arbitration process. Through a series of interviews and comparative analysis, this project seeks to shed light on the diverse approaches taken by arbitrators and state courts in addressing corruption allegations.

By exploring different legal frameworks and practices across various jurisdictions, we hope to offer valuable insights into best practices for maintaining integrity and accountability in arbitration proceedings worldwide.



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Addressing corruption allegations in arbitration disputes: Colombia

Pamela Alarcón and Natalia Moreno

I. Can allegations of corruption serve as a bar to jurisdiction of arbitral tribunals or admissibility of claims?

Under Colombian law, arbitration agreements are also considered autonomous from the contract into which they are incorporated. This means that the absence, inefficacy, or invalidity of the contract executed by the parties shall not affect the arbitration agreement.

Based on the autonomy principle that applies to arbitration agreements, regardless of any antecedent criminal offense or corrupt activity between the parties, arbitrators shall adjudicate matters related to economic and private concerns that impact the parties.

Lastly, it is essential to highlight that Colombian criminal law provides alternative mechanisms for dispute resolution, specifically restorative justice processes. These mechanisms allow victims and defendants to reach agreements regarding victim restitution, with the aim of suspending or terminating criminal proceedings. To date, arbitration has not been employed as a restorative justice mechanism. However, within the framework of criminal proceedings, there exists a normative option for arbitrators to decide on reparations sought by the victim in cases involving corruption. It is important to note that the arbitrator's authority would be limited solely to reaching an agreement on restitution, without opining on guilt or the existence of a criminal offense.

II. Can allegations of corruption affect the validity of an arbitral award?

Awards can be refused to be enforced if they are found to be contrary to Colombia's international public order. The concept of Colombia's international public order has a substantive element, which includes the basic rules and principles of the Colombian rule of law that cannot be overruled by international arbitration. The argument that an award in which the underlying dispute is affected by corruption is contrary to Colombia's public international order may be raised, and it could be successful. Colombia recognizes the universal fight against corruption and can see this in different treaties against corruption entered by Colombia.

III. In annulment or enforcement proceedings, can the court review the award and the merits to determine whether corruption or related offences affect the underlying dispute?

Under Colombian law, the annulment of awards and the recognition proceeding are, in principle, limited to assessing the procedural issues of the arbitration.

The Colombian Arbitration Act does not have grounds for the annulment of domestic awards based on corruption or related offenses. All grounds for annulment aim to review procedural issues, such as the arbitrators' jurisdiction, the constitution of the arbitral tribunal, improper

notifications, erroneous evidentiary rulings, and exceeding the scope of the dispute, among other procedural errors.

Therefore, the competent judicial authority overseeing annulment proceedings will refrain from addressing the merits of the underlying dispute. It will neither assess nor modify the criteria, motivations, probative assessments, or interpretations the arbitral tribunal presents when rendering its award.

In addition, awards can be refused to be enforced if they are found to be contrary to Colombia's international public order, which could include the fight against corruption.

IV. Can courts review corruption allegations which have not been raised in the arbitration?

Whether corruption was raised in the arbitration is irrelevant for the argument to succeed. The Colombian Arbitration Act does not require the party opposing the recognition to have raised this argument before the arbitration tribunal. Refusal on the grounds of international public order is analyzed *ex officio* by the court. This means that parties do not have to raise this objection to find and declare it.

V. Do courts defer to the arbitral tribunal's finding that no corruption acts were committed?

In Colombia, the judicial authority reviewing the annulment petition of the arbitral award may correct or supplement the information in the award, set aside the award, and continue the proceedings based on the order of evidence. These actions allow for a reconsideration of the conclusions reached in the initial award.

VI. Is there a standard of proof used by arbitrators and reviewing courts to assess the existence of corruption?

Nevertheless, considering the possibility that an arbitration tribunal could be conformed as an alternative mechanism for dispute resolution in a criminal process, the tribunal must establish whether the evidence available, documents, testimonies, considering the applicable regulations, are sufficient, relevant, pertinent, useful, among other specific local requirements to support the position of each party.

In this regard, in Colombia, the evidence must comply with the conductivity, pertinence, and usefulness requirements, each of which must be argued. Conductivity refers to the suitability of the evidence to determine a fact, i.e., it is a means allowed by law to prove that fact. Relevance has to do with the evidence directly relating to what is being questioned or discussed. And finally, the usefulness lies in the fact that the evidence contributes concretely to the object of the investigation, as opposed to the unimportant.

VII. Which method do arbitrators and reviewing courts employ to establish evidence of corruption?

There are not many arbitration awards that deal with corruption or related offenses. However, a very notorious case was the Ruta del Sol award, which addressed a contract performed by an Odebrecht subsidiary. The tribunal went beyond the application of a balance of probabilities test and closer to a piece of clear and convincing evidence. In doing so, the tribunal adopted an active approach and used its legal powers to carry out its own investigation to collect evidence beyond the party-produced evidence.

VIII. Are arbitrators seated in your jurisdiction bound by criminal proceedings on issues that could impact the underlying arbitration dispute?

Under the Colombian law, a criminal judgment may constitute *res judicata* on civil matters. Therefore, certain civil issues, especially regarding fact-finding, may be binding on the arbitral tribunal. However, the arbitral tribunal is not required to stay the proceeding if a criminal investigation is pending.

Under Colombian law, criminal offenses are non-arbitrable, and arbitrators lack jurisdiction to adjudicate criminal offenses. Nevertheless, arbitrators retain the authority to adjudicate the civil ramifications stemming from such offenses or conduct an alternative dispute resolution mechanism.

IX. To what extent do they rely on or defer to findings from parallel criminal investigations?

Given the autonomous nature of arbitration proceedings, Colombian arbitral tribunals are not obligated to suspend their proceedings pending a criminal court decision – whether domestic or foreign – concerning an offense relevant to the arbitration case.

Arbitral tribunals possess the discretion to suspend their proceedings, and it is advisable for them to exercise this discretion to prevent inconsistency between the arbitral award and the criminal judgment.

X. Are remedies available when an arbitral tribunal rules that there is no evidence of corruption but subsequently a criminal ruling decides otherwise?

Under Colombian law, parties can seek to file a request to review the award if a criminal judgment is rendered after the award.

According to Article 45 of Law 1563 of 2012, the revision remedy may be filed within 2 years following the issuance of the award. The valid ground for such revision would be the discovery, subsequent to the judgment, of documents that would have altered the decision contained therein and which the petitioner could not have submitted during the proceedings due to force majeure or the actions of the opposing party.

Addressing corruption allegations in arbitration disputes: France

Stéphane de Navacelle and Grégory Arnoult

I. Can allegations of corruption serve as a bar to jurisdiction of arbitral tribunals or admissibility of claims?

Under French law, by application of the principle of autonomy of the arbitration agreement – meaning that the validity of the agreement is assessed by reference to the common intent of the parties, by application of a material rule and without reference to legal provisions – and the principle of *compétence-compétence* – which means that arbitrators have the power to rule in priority on their own jurisdiction –, arbitral tribunals can rule on allegations of corruption.

In international arbitration cases, arbitrators have jurisdiction even when the dispute involves public policy rules. Parties may attempt to argue that alleged corruption affects the validity of contracts subject to the dispute and accordingly, the arbitration agreement. However, because of the autonomy of the arbitration agreement, whereby the nullity of the contract does not affect the validity of the arbitration agreement, such an argument is unlikely to prevail. The situation may be different if parties alleged that corruption relates to the arbitration agreement itself, although such an argument has not been raised to our knowledge.

Findings related to corruption, which fall under the purview of arbitrators, will in principle not affect the admissibility of the claims although this will depend on the law applicable to the merits of the dispute and not the arbitration law. Under French law, objections related to the inadmissibility of claims tend to have claims ruled inadmissible without a ruling on the merits. It is unlikely that allegations of corruption would lead to the inadmissibility of claims, without an examination of the merits.

II. Can allegations of corruption affect the validity of an arbitral award?

In annulment and enforcement proceedings in France, the court reviews the validity of award on the basis of limited grounds related to jurisdiction, the constitution of the arbitral tribunal, the compliance with its mission by the arbitral tribunal, the respect of due process rights and the compliance of the award with international public policy rules.

The fight against corruption and money-laundering has been confirmed by case law to form part of international public policy. Accordingly, reviewing courts may be required to determine whether recognition or enforcement of arbitral awards may contravene this objective, notably if it gives effect to a corruption pact.

III. In annulment or enforcement proceedings, can the court review the award and the merits to determine whether corruption or related offences affect the underlying dispute?

Annulment and enforcement proceedings are not appeals and the court does not review the award on the merits and rule again on the dispute. The court only reviews the award to determine whether it can become part of French public order, although in relation to jurisdiction and compliance with public policy, courts have greater powers of review.

In relation to the jurisdiction – which exclude issues related to the admissibility of claims –of the arbitral tribunal, courts perform a complete review of the issue, in law and in fact, and is not bound by the findings of the arbitrators.

In relation to compliance with international public policy, the review of the court focuses not on the merits of the dispute but on the recognition and enforcement of the award, which must not violate French international public policy rules, including the fight against corruption and money-laundering. However, in performing this review, the court can review, in fact and in law, all the elements necessary to assess whether the recognition and enforcement of the award complies with public policy.

IV. Can courts review corruption allegations which have not been raised in the arbitration?

Courts examining the compliance of arbitral awards with international public policy rules are not limited to the elements contained in the award or discussed in the arbitration proceedings, and the court can reopen the debate and is not bound by the findings of the arbitrators. Accordingly, claims related to allegations of corruption can be brought forward before the reviewing court for the first time, in spite of the estoppel rule of Article 1466 of the Code of Civil Procedure, even if this argument was not raised before the arbitrators.

V. Do courts defer to the arbitral tribunal's finding that no corruption acts were committed?

No, in France, when reviewing an award, especially on grounds related to the arbitral tribunal's lack of jurisdiction and compliance with public policy rules, the court is not bound by the arbitrator's findings and will perform a complete review of the issue, in law and in fact

VI. Is there a standard of proof used by arbitrators and reviewing courts to assess the existence of corruption?

In arbitration proceedings, including when ruling on claims related to allegations of corruption, French arbitration law does not impose specific standards of proof or rules of evidence. However, in relation to compliance with public policy, French courts apply a standard of “*serious, precise and consistent*” or “*characterized*” evidence to determine whether there has been a material violation thereof.

VII. Which method do arbitrators and reviewing courts employ to establish evidence of corruption?

In seeking to establish evidence of corruption, arbitral tribunals have used the “red flags” method. French courts, when reviewing awards, have also used red flags; Examples of evidence taken into account include lack of proof of services performed, irregularities and deficiencies in accounting and compliance, disproportion between the services and payments received, the wider context of corruption in a country, etc.

VIII. Are arbitrators seated in your jurisdiction bound by criminal proceedings on issues that could impact the underlying arbitration dispute?

Criminal law is inarbitrable per se, and arbitrators, naturally, cannot rule on criminal offenses. However, arbitrators can rule on the civil consequences of an offense, for instance, when it affects the validity of a contract.

Because arbitration proceedings are autonomous, French arbitral tribunals seated in France are not required to stay their proceedings until a criminal court – whether French or foreign – rules on an offence that is relevant for the arbitration case. Likewise, French courts ruling on enforcement or annulment of awards are not required to stay their proceedings when there is a criminal proceeding that can influence the commercial dispute.

IX. To what extent do they rely on or defer to findings from parallel criminal investigations?

Arbitral tribunals and French courts have the ability to stay their proceedings and it may be good practice for them to do so, in order to avoid contradiction between the award and the criminal ruling. In addition, recognition or enforcement of an award giving effect to a contract or claims which have been ruled illegal by a criminal judge, e.g. because of corruption, will likely violate French international public policy.

X. Are remedies available when an arbitral tribunal rules that there is no evidence of corruption but subsequently a criminal ruling decides otherwise?

Except the annulment or the appeal of the recognition and enforcement of award, there are no effective remedies in case of contradiction between an arbitral award and a ruling in French arbitration law. Applications for review, before the arbitral tribunal, can be made under specific conditions, which are unlikely to cover this situation. This application can be made by the parties to the original proceedings, within two months of the date when they have gained knowledge of the cause of the application, which are limited to the decision having been obtained by fraud, or on the basis of evidence found to be false or key evidence has been retrieved since the award.

