NAVIGATION

CROSS-COUNTRY INSIGHTS

Addressing corruption allegations in arbitration disputes

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

Under Austrian law, allegations of corruption do not automatically invalidate arbitration agreements. However, if corruption directly affects the arbitration agreement itself — e.g. if the agreement is used for criminal purposes such as money laundering — the agreement may be declared void for illegality or immorality under Para 879 Austrian Code of Civil Procedure (*ABGB* or ACCP).

Under the competence-competence principle (Para 592(1) Austrian Code of Civil Procedure), the arbitral tribunal determines the existence of jurisdiction on its own. Consequently, a declaratory judgment on the existence or validity of an arbitration agreement is inadmissible both before and during arbitral proceedings. This also follows from Para 578 ACCP, according to which state courts may only take action to the extent expressly assigned to them (scholars voiced opinions that prior to constitution of the arbitral tribunal state courts should have the competence to declare arbitration agreements null and void in extraordinary matters). Furthermore, Para 578 also prohibits actions for a declaratory judgment regarding the (lack of) jurisdiction of an arbitral tribunal.

An allegation that an arbitration agreement would be null and void due to corruption does not change the objective arbitrability of the subject matter. In this context, preliminary criminal issues can also be assessed incidentally by the arbitral tribunal.

Austrian law recognizes the doctrine of separability (Para 581(1) ACCP). Thus, an arbitration agreement remains valid even if the main contract is nullified due to existence of corruption. Thus, the arbitral tribunal would retain jurisdiction to hear the dispute.

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

Such an arbitral award, by which a contract obtained through corruption is deemed to be valid, may be annulled on the grounds of a violation of substantive *ordre public* (Para 611(2)(8) ACCP).

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?

The prohibition of *révision au fond* limits annulment proceedings under Para 611 (2)(8) ACCP to reviewing awards only for violations of substantive public policy. The court may, however, not examine whether the arbitral tribunal correctly resolved the factual and legal issues raised in the arbitration proceedings. The Austrian Supreme Court has, however, considered the possibility of a review in the event of arbitrary application of the law by the arbitral tribunal. For example, a completely unacceptable interpretation that affected the arbitral tribunal's decision could be challenged as a violation of substantive *ordre public*.

State courts are, in any event, not bound by the arbitral tribunal's factual findings.

Similarly, in enforcement proceedings, again following the prohibition of *révision au fond*, the examination of the grounds for refusal must not result in a review of the arbitral award. It is only to be examined whether the assumptions of the arbitral tribunal in its award constitute a violation of the public policy.

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

Courts are not bound by the arbitral tribunal's findings or the arguments presented in arbitration proceedings. In addition, the right to invoke a violation of substantive *ordre public* cannot be waived neither in advance nor retrospectively.

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

Austrian courts adhere to the principle of limited judicial review in line with the prohibition of *révision au fond*. This means that they do not typically conduct a full factual review of arbitral awards. However, as stated above, when a violation of substantive *ordre public* is alleged, courts are not bound by the arbitral tribunal's findings. Thus, Austrian courts do not automatically defer to the arbitral tribunal rejecting allegations of corruption.

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

The question of whether the standard of proof in international arbitration is governed by substantive or procedural law remains debated. There is much to suggest that in Austria the standard of proof is also the subject of the applicable arbitration law. According to this view, the arbitral tribunal is consequently not bound by provisions on the judicial

standard of proof that may arise from the applicable substantive law based on the parties' agreement. This would contradict the mandatory free consideration of evidence. In practice, the standard phrase whether the realization of the facts is more likely than that of the alternative facts is often used.

While no explicit unique evidentiary standard tailored to corruption cases exists under Austrian arbitration law and subsequent state proceedings, it is being pointed out by scholars that in cases involving criminal conduct, such as fraud or bribery, arbitral tribunals occasionally require "clear and convincing evidence" or an increased level of conviction, i.e. "beyond reasonable doubt".

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

Austrian arbitration law does not, strictly speaking, provide for an obligation to investigate the facts by the arbitral tribunal (however, a gross violation can constitute grounds for setting aside the arbitral award due to a violation of procedural *ordre public*). It is within the discretion of the arbitral tribunal to decide on the admissibility of any type of evidence.

Pursuant to Para 602 ACCP, the arbitral tribunal or a party with the tribunal's consent may apply to the competent state court for the performance of judicial acts that the arbitral tribunal (which has no coercive power) is not authorized to perform.

Given that the facts surrounding corruption are often deeply concealed, arbitrators (and reviewing courts) generally use circumstantial evidence to establish whether corruption has occurred. Evidence may include mismatches between fees and services, opaque structures, the use of aliases, inexplicable payments, or missing documentation. In addition, not providing explanations for such circumstantial evidence might lead arbitrators to infer the existence of corruption.

However, it is noteworthy to state that arbitrators do not lightly assume the existence of corruption and are mindful of the overriding importance of party autonomy in arbitration proceedings.

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

A final and binding criminal conviction has a binding effect in civil proceedings. A person who has been convicted in a criminal court cannot subsequently claim in a civil proceeding that she / he had not committed the offense. This binding effect is recognized in arbitration by both case law and scholars. Disregarding this binding effect could justify the annulment of an arbitral award for violating procedural public policy (Para 611 (2)(5) ACCP).

However, there is no such binding effect with regard to acquittal or other sorts of termination of criminal proceedings.

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

In light of the above, arbitration tribunals will have to assess carefully, unless otherwise agreed by the parties, whether to temporarily stay the arbitral proceedings. A stay may facilitate fact-finding, as criminal investigations often prove more effective in uncovering corruption than arbitral proceedings. However, white-collar crime proceedings in Austria can take many years and might unreasonably prolong the arbitration proceedings.

The arbitral tribunal can, in any event, freely assess evidence submitted from the criminal file. It does, however, not have any right to inspect the file. The Austrian Supreme Court has rejected the allegation of a violation of *ordre public*, alleging a lack of evidence for rendering the arbitral award, because the arbitral tribunal has relied on the final criminal conviction of the claimant.

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

Para 611 (2)(6) ACCP provides for the possibility to have an arbitral award annulled in case of existence of certain criminal conduct: falsification of a decision-relevant document; false testimony by a witness, expert or opposing party, insofar as it was relevant to the decision; the decision having been obtained by means of one of the crimes explicitly listed (deception, embezzlement, fraud, forgery of documents, forgery of specially protected documents or public certification marks, document suppression). In such cases, the deadline for initiating annulment proceedings is four weeks from the judgment's delivery or, if later, from the conviction having become final and binding (usually, the deadline for initiating annulment proceedings is three months from receipt of the arbitral award).

Apart therefrom, an arbitral award may be set aside or declared unenforceable if corruption proven in criminal proceedings resulted in the recognition or enforcement of such arbitral award contradicting *ordre public*.

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Cameroon

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

Under Cameroonian arbitration law, the arbitration agreement is independent of the main contract, which means that its validity is not affected by the nullity of the main contract. Thus, an allegation of corruption relating to the subject matter of the main contract is no obstacle to the appointment or jurisdiction of the arbitrator, who is appointed based on an autonomous agreement – the arbitration agreement.

Based on the principle of competence-competence, the arbitral tribunal has the sole jurisdiction to assess its own jurisdiction, once the parties have decided to submit their dispute to arbitration by means of an arbitration agreement. Thus, should the dispute arise, the arbitral tribunal becomes the sole authority competent to rule on all matters relating to the dispute, including questions related to its jurisdiction.

Allegations of corruption therefore do not constitute an obstacle to the jurisdiction of arbitral tribunals or to the admissibility of claims, as these are examined by the arbitral tribunal.

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

Under Cameroonian law, an arbitral award can be annulled in instances where (i) the arbitral tribunal has ruled without an arbitration agreement or on the basis of a void or expired agreement; (ii) the arbitral tribunal was improperly constituted or the sole arbitrator was irregularly appointed; (iii) the arbitral tribunal failed to comply with its assigned mission; (iv) the principle of adversary proceeding has not been respected; (v) the arbitral tribunal has violated a rule of international public policy; and (vi) the award does not state the reasons on which it is based.

In case where there is an allegation of corruption, this may constitute, in accordance with Cameroonian arbitration law and practice, a violation to international public policy, which is a ground for setting aside an arbitral award.

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?

In the event of recognition of an arbitral award, national courts do not examine the merits of the dispute. Their role is limited to verifying that the award complies with international public policy. In this regard, the court cannot verify whether corruption or related offences affect the underlying dispute.

An arbitral award may also be set aside or recognized before the national courts. In the event of the setting aside of an arbitral award, courts are not required to re-examine the merits of the dispute. However, if the award is set aside, a party may refer the case to arbitration before a new arbitral tribunal.

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

During a setting aside proceeding, the judge may raise an irregularity of his or her own motion if the facts of the case point to the existence of such an irregularity. However, the judge is under no obligation to seek out the applicable opening cases, except where the irregularity in question is a breach of international public policy.

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

In Cameroon, the event of the setting aside of an arbitral award, and except where the said setting aside is because the arbitral tribunal ruled without an arbitration agreement or on a null and void or expired agreement, it is up to the most diligent party to initiate, if it so wishes, new arbitration proceedings.

The judge who sets aside the arbitral award does not replace it with a new decision. So, he or she only rules on the grounds to set aside the arbitral award and other irregularities but does not replace the arbitral award. It is left for the most diligent party to initiate another proceeding on the merits following the setting aside judgment.

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

In Cameroon, the standard of proof imposed by the law governing arbitration is *"legally admissible means"* evidence necessary to resolve the dispute.

Regarding the existence of corruption which can be a ground for setting aside an arbitral award, a criminal action can be initiated. In such a case, the said criminal suit will have

to obey criminal procedure rules of evidence. Should the action which will result in the setting aside of the arbitral award be initiated under the purview of criminal law, the standard of proof will be *"beyond all doubts"* to determine whether there is sufficient ground to apply a sanction.

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

Under Cameroonian law, corruption falls under the exclusive jurisdiction of courts; therefore, arbitral tribunals are not entitled to rule on corruption and related offences.

The evidence of corruption is established in accordance with criminal procedure rules. The methods employed by courts to establish evidence of corruption generally include the following approaches: the examination of documentary evidence, testimonial evidence, technical expertise, internal or external investigations/inquiry.

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

Criminal offenses are non-arbitrable thus, arbitral tribunals as well as arbitrators lack jurisdiction to rule over them.

The Cameroonian arbitration law does not specifically provide for the stay of arbitral proceedings until any ongoing criminal rules over the issue at stake. However, taking into consideration that arbitration is autonomous in nature and falls outside the ambit of the traditional judicial structure, we may conclude that the arbitral tribunal is not bound by any criminal proceeding or ruling, therefore it may not have to stay proceedings in the event of an ongoing criminal proceeding.

The parties to an arbitration agreement may decide that criminal proceedings related to the arbitral dispute will stay the ongoing arbitral proceedings.

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

In arbitration proceedings, the extent to which arbitrators rely on or defer to findings from parallel criminal investigations can vary based on several factors, including the jurisdiction, the nature of the case, and the specific rules governing the arbitration, etc.

Furthermore, while arbitrators may consider findings from criminal investigations, they typically do so within the context of their own procedural rules and evidentiary standards. The influence of criminal findings on arbitration decisions is not automatic but is assessed based on their relevance, credibility, and impact on the arbitration issues at stake.

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

The available remedies on an arbitral award under Cameroonian arbitration law are setting aside, third party opposition, and review before the arbitral tribunal. No remedy is provided in case of contradiction between the arbitral award and a court ruling. Since the setting aside remedy is based on specific grounds, the adequate remedy in case of contradiction of an award and a court ruling would be a review.

Revision proceedings are initiated before the arbitral tribunal based on the discovery of a fact of such a nature as to have a decisive influence on the settlement of the dispute and which, prior to the making of the award, was unknown to the arbitral tribunal and to the party requesting revision. When the arbitral tribunal can no longer be convened, the application for revision shall be brought before the competent court in the State Party which would have had jurisdiction in the absence of arbitration.

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Cyprus

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

Cyprus legislation governing international commercial arbitration i.e., International Commercial Arbitration Law of 1987, L. 101/1987 (the "International Arbitration Law"), which has been drafted on the basis of the UNCITRAL Model Law on International Commercial Arbitration, expressly recognizes the autonomy of an arbitration agreement from the contractual agreement in which it is enshrined. As per the provisions of the International Arbitration Law, the nullity of the contractual agreement does not automatically result in the nullity of the arbitration agreement itself. As such, any corruption or illegality that may affect the parties' contract will not necessarily affect the arbitration agreement and the jurisdiction of the arbitral tribunal to rule on the parties' dispute.

Further, the International Arbitration Law expressly acknowledges the principle of *compétence-compétence* and the arbitration tribunal's jurisdiction to rule on its own jurisdiction and matters concerning the validity or existence of the arbitration agreement. Hence, any allegation that corruption or illegality affects the parties' agreement to submit their disputes to arbitration may be ruled upon the arbitral tribunal itself.

While the Cyprus legislation governing local arbitrations, Arbitration Law, Cap.4, does not include corresponding provisions, it is known that there have been local arbitrations where the arbitral tribunal has ruled on the parties' disputes, including allegations of corruption.

Having said that, to our knowledge, the matter has not been explicitly raised and ruled upon by the Cyprus courts to date.

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

Under Cyprus law, the annulment and recognition and enforcement of both international and domestic arbitral awards is subject to public policy considerations. The term public policy has been interpreted by Cyprus courts to include the fundamental principles that a society, at any given time, recognises as governing the transactions and aspects of life of its members, and provide the basis of the established legal order.

While there is no known precedent where the annulment or recognition and enforcement of an arbitral award has been refused on the grounds of corruption, courts in Cyprus are expected to annul or refuse the recognition and enforcement of an arbitral award should

it be proved that it is affected by corruption. Cyprus is a party to a number of anti-corruption international treaties while in recent years it has faced serious cases of corruption domestically, which have shaped public policy and are expected to influence Cyprus courts' approach on the matter. Having said that, according to common law precedent, which is normally adopted by Cyprus courts, contracts which have been procured by bribes are not unenforceable but voidable. This in turn may result in the Cyprus courts upholding an arbitral award which was issued on the basis of a contract that was procured by bribes.

It should be noted that in every case where an arbitration award is challenged on the grounds of public policy, courts in Cyprus, which is a pro-arbitration jurisdiction, should balance between the public interest of finality of arbitral awards and the public interest of combating illegality. Hence, it has been stated by the Supreme Court of Cyprus that challenging an arbitral award on the grounds of public policy is only appropriate in "exceptional" and "clear" cases.

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?

The general rule is that in annulment or recognition and enforcement proceedings, the Cyprus courts will not review the merits of the arbitral tribunal's decision. The courts in Cyprus, which is a pro-arbitration jurisdiction, have consistently refused to examine the substance of arbitral awards and have limited their role to that of supervisory nature in annulment or recognition and enforcement proceedings.

However, as a deviation to this rule, public policy grounds, on the basis of which corruption or related offences may be invoked, may nevertheless provide the basis for annulling or refusing the recognition and enforcement of an arbitral award. Even in such a case though, the Cyprus courts will not review the decision of the arbitral tribunal on the merits and will limit their determination on the public policy matter raised.

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

An allegation of corruption can be reviewed by the Cyprus courts on the grounds of public policy which serve as one of the limited grounds of annulment and refusal of recognition and enforcement of an arbitral award. Cyprus courts review issues of public policy that have not been previously raised in the arbitration proceedings but, at the same time, will examine and take into account the reasons why the matter was not previously raised in the course of the arbitration proceedings. Hence, Cyprus courts are expected to review corruption allegations which have not been raised in the arbitration, provided satisfactory reasons are given for failing to raise the matter in the course of the arbitration.

A recent high-profile judgment on point is *The Federal Republic of Nigeria v. Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) issued by the English High Court, where no corruption allegations were raised before the arbitral tribunal, but the award was challenged for being obtained by fraud and being procured contrary to public policy, among others, on the basis of allegations of corruption. It should be noted that, in the absence of local legislation and case law on a specific matter, Cyprus courts look for guidance in English case law which the Cyprus court have acknowledged as being of great persuasive authority as illustrating common law, which is expressly introduced in Cyprus law by virtue of section 29(1)(c) of the Cyprus Courts of Justice Law L.14/1960, as amended.

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

Where the arbitral tribunal has already ruled on allegations of corruption raised, the Cyprus courts are expected to defer to conclusion of the arbitral tribunal provided there is no fresh evidence on the matter and there is nothing suggesting that the arbitral award was secured as a result of collusion, improper process, bad faith or incompetence on the part of the arbitral tribunal.

It has been expressly acknowledged by courts in Cyprus that arbitration is not and does not constitute a pre-action stage but is a separate and independent procedure with its own procedural and evidentiary rules, similar to those of judicial proceedings, in which the arbitrator exercises quasi-judicial power. As such, Cyprus courts take the view that the findings of the arbitral tribunal should be generally respected and seldom be departed from.

Having said that, there is no known case law where the Cyprus courts have been asked to defer to an arbitral tribunal's finding that no corruption acts were to date.

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

There is no fixed standard of proof under Cyprus law for arbitrators and reviewing courts in assessing the existence of corruption. However, it has been stated by the Supreme Court of Cyprus that challenging an arbitral award on grounds of public policy is only appropriate in "exceptional" and "clear" cases of violation of a given public interest.

Having said that, it is clarified that proving corruption under Cyprus criminal law, which requires proof "beyond reasonable doubt", should not be required for these purposes.

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

Although there are no specific standards or rules under Cyprus law to establish evidence of corruption, arbitrators and reviewing courts may employ the normal range of evidentiary rules seen in judicial proceedings. These include the use of circumstantial evidence, witness and expert testimonies, inferences from conduct etc.

At the same time, rules of evidence apply in a more relaxed manner in the context of arbitration, which may permit the use of other methods by arbitral tribunals to establish evidence of corruption. Having said that, it is unlikely in practice for arbitrators in Cyprus to undertake independent investigations or active steps to inquire into whether there has been any corruption where there no "signs" of corruption and the parties do not raise and present evidence to substantiate allegations of corruption.

In that regard, the "Toolkit for Arbitrators on Corruption and Money Laundering in International Arbitration" published by the Basel Institute on Governance and the Competence Centre Arbitration and Crime is known for providing useful guidance to arbitrators when dealing with corruption and other such illegal acts.

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

It is a settled rule under Cyprus law, founded on common law, that a judgment in criminal or civil proceedings does not constitute admissible evidence of findings of fact or of the legal consequences of such findings of fact as against third parties or in proceedings between one of the parties and a third party. This rule is based on the notion of natural justice which requires a person to only be bound by a ruling where s/he was a party to the proceedings where the ruling was issued. As such, arbitrators in Cyprus would not generally be bound by the findings of criminal proceedings insofar as they are applying Cyprus law.

Having said that, there is no known case law on the matter to date.

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

Arbitrators in Cyprus will not generally rely on or defer to findings from parallel criminal investigations insofar as they are applying Cyprus law, given the autonomous nature of arbitration proceedings. Having said that, there is no known case law on the matter to date.

It should be noted however that evidence gathered from parallel criminal investigations may be adduced in arbitration proceedings where they will be independently evaluated by the arbitral tribunal for the purposes of the matters in dispute therein. It is clarified that criminal law is not arbitrable, and arbitrators cannot rule on the commission of criminal

offenses or not; hence, the scope of any criminal investigation will necessarily differ from the scope of any arbitration proceedings.

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

Under Cyprus law, arbitral awards may be annulled or judgments for the recognition and enforcement of arbitral awards may be appealed to the Cyprus courts where fresh evidence, which was not previously available, have become available and such evidence is credible and would probably have an important influence on the result of the case. Hence, what is decisive is whether the criminal ruling constitutes fresh evidence that could impact the arbitration proceedings in a material respect.

In that regard, it is noted that, according to common law precedent, which is normally adopted by Cyprus courts, contracts which have been procured by bribes are not unenforceable but voidable. This means that the Cyprus courts may uphold an arbitral award which was issued on the basis of a contract that was procured by bribes.

Having said that, the matter has not been raised and ruled upon by the Cyprus courts to date.

It is noted that an application for the annulment of an arbitral award under the International Arbitration Law may be filed within 3 months from the issuance of the arbitral award while an appeal of a judgment for the recognition and enforcement of an arbitral award may be filed within 42 days from the issuance of the judgment for recognition and enforcement under Cyprus Civil Procedure Rules.

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Czech Republic

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

Under Czech Law, the principles of autonomy, separability of arbitration agreement from the main contract, and *compétence-compétence* allow the arbitrators to rule on their jurisdiction, as well as on the allegation of corruption raised by the parties. Therefore, allegations of corruption do not, by themselves, serve as a bar to the jurisdiction of the arbitral tribunal or the admissibility of claims, unless the arbitrators themselves conclude otherwise while assessing the validity of the arbitration clause.

If a party raises the issue of corruption regarding the conduct of any party during the arbitration proceedings, this does not automatically lead to the termination of the arbitration process. Some have argued that, in certain cases, Czech arbitrators may have a duty to report bribery to Czech authorities if they learn of it from a credible source. However, this potential duty to report has not yet been tested by Czech courts, and therefore, there is no established legal precedent to support the conclusion that arbitrators have a duty to report bribery to authorities, despite their confidentiality obligations.

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

An allegation of corruption could affect the validity of an arbitral award only if it concerns the conduct of the arbitrators, the validity of the arbitration clause, and in the exceptional case where the corruption constitutes a breach of public order. In these cases, the award could be set aside. The case law on this issue is sparse. However, to claim a breach of public order as a ground for setting aside an arbitral award, the arbitral award must be manifestly contrary to the fundamental rules and principles of the rule of law of the Czech Republic. The alleged violation of fundamental rules and principles must be exceptional and sufficiently serious.

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?

In accordance with the prevailing case-law, the annulment and enforcement proceedings are not appellate proceedings and the merits of the case shall not be reviewed by the court unless for reasons listed in the Czech Arbitration Act. The grounds to annul an

arbitration award are listed as following: a) the award was delivered in a matter on which a valid arbitration agreement cannot be concluded; b) the arbitration agreement is otherwise invalid, or has been annulled, or does not apply to the agreed matter; c) an arbitrator who was not called to arbitrate under the arbitration agreement or was not qualified to arbitrate has participated in the matter; d) the award was not delivered by a majority of the arbitrators; e) the party has not been given an opportunity to try the case before the arbitrators; f) the arbitral award condemns the party to a performance which was not requested by the beneficiary or to a performance impossible or illegal under Czech law; g) it is established that there are grounds for seeking a retrial in civil proceedings (i.e. if there are facts, decisions or evidence which, through no fault of its own, the party could not have used in the arbitration or when evidence may be adduced which could not be adduced in the arbitration proceeding).

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

Courts can review corruption allegations that were not raised in the arbitration in an annulment proceeding under the condition that this qualifies as one of the reasons for a mistrial under Czech law (i.e. there are facts, decisions or evidence which, through no fault of its own, the party could not have used in the arbitration or when evidence may be adduced which could not be adduced in the arbitration proceeding).

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

In the Czech Republic, the courts conduct an independent review only under the available grounds for annulment. Unless the act of corruption qualifies as a reason for an annulment, the court will not assess relevant issues which were reviewed in the arbitration proceedings.

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

In the arbitration and civil proceedings in the Czech Republic, in respect of the evaluation of evidence, reference should be made to the wording of Section 132 of the Civil Procedure Code, according to which the court shall evaluate the evidence at its discretion, each piece of evidence individually and all the evidence in its mutual context; in doing so, it shall carefully take into account everything that has come to light during the proceedings, including what the parties have stated. The principle of the free evaluation of the evidence shall apply. It is not required to establish the truth in any absolute sense, but rather a high probability of the relevant facts approaching the limit of practical certainty.

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

As of now, there are not many arbitral awards dealing with corruption or similar offences. There are also no court decisions reviewing awards on this issue. However, in these cases, the arbitrators and courts would also establish evidence of corruption on the basis of the "high level of probability corresponding to a virtual certainty" appreciation of evidence.

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

Under the Czech Law, the arbitrators and courts are bound by criminal judgment rulings that a criminal offence has been committed. However, they are not required to stay the proceedings until a criminal court rule on the offence that is relevant for the resolution of the arbitration dispute or the court decision on arbitral award review. They may do so if they deem it pertinent to their decision-making process.

Under Czech Law, criminal offences are non-arbitrable and the arbitral tribunals do not have jurisdiction to adjudicate them. The arbitral tribunals can rule on the civil consequences of the criminal offence conducted usually in relation to a commercial matter involving a contract with an arbitration clause.

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

Arbitral tribunals and Czech courts can stay their proceedings until a parallel criminal investigation is concluded to avoid possible contradictions between their decision and the criminal ruling. Moreover, the arbitral tribunals and Czech courts are bound by criminal court rulings that a criminal offence has been committed and shall reflect them in their decision.

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

Under Czech Law, subsequent evidence of corruption may be a ground for the annulment of the arbitration award. However, even in this case, there is no possibility to request the annulment of the arbitral award in case the criminal ruling is adopted after the time limit for requesting the annulment has passed (i.e. the request for annulment is not filed within 3 months after the arbitral award was delivered to the party).

In the context of the enforcement proceedings of a domestic arbitral award, it is possible to request the stay of enforcement proceedings, and thereafter initiate the annulment proceedings at court.

Notwithstanding the above, a party may request compensation as a damaged party in the context of criminal proceedings.

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France

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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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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Germany

Daniel Weiss and Daniel Engel – Hengeler Mueller

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

Under German law, arbitration agreements are not per se rendered null and void in cases of allegations of corruption. If alleged corruption directly affects the arbitration agreement as such, e.g., if the parties attempt to use fictitious arbitration proceedings as a means of money laundering, the arbitration agreement would be void due to illegality or unconscionability. In this event, parties can argue that the alleged corruption bars jurisdiction of the arbitral tribunal. Before the arbitral tribunal is constituted, the invalidity of the arbitration agreement can be asserted before national courts. In these exceptional cases, allegations of corruption can therefore bar jurisdiction of arbitral tribunals. If the arbitral tribunal is constituted, it is generally up to the tribunal to issue an interim decision on its jurisdiction. Ultimately, the decision on the arbitral tribunal's jurisdiction then rests with the domestic courts in potential annulment procedures.

This is, however, not the typical case. Like other jurisdictions, German law accepts the doctrine of separability which ensures that an arbitration clause survives any invalidity of the main contract. The doctrine of separability holds true even if the main contract is invalidated due to alleged corruption. Typically, allegations of corruption will relate to the main contract and not to the arbitration agreement. Such allegations of corruption cannot bar jurisdiction of arbitral tribunals.

Allegations of corruption also do not render a claim inadmissible. Any claim involving an economic interest or on which parties could legally reach a settlement is arbitrable. This includes claims based on tortious acts as well as claims arising out of contracts which are void due to illegality or unconscionability.

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

Yes, allegations of corruption can affect the validity of an arbitral award, especially if they amount to a violation of *ordre public*.

In annulment or enforcement proceedings, German courts review whether the recognition or enforcement of the arbitral award would contradict *ordre public*, i.e., whether the award and its enforcement would lead to a result which is manifestly incompatible with the essential principles of German law. An arbitral award ordering, e.g., the respondent to make what amounts to bribe payments to the plaintiff would be in violation of the *ordre public*. Such arbitral award would be set aside in annulment proceedings and declared unenforceable in enforcement proceedings.

Parties may also raise the objection that alleged corruption renders the arbitration agreement invalid due to illegality or unconscionability. If the court agrees with this assessment, the arbitral award will also be set aside or declared unenforceable.

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?

When assessing whether the recognition or enforcement of the award would lead to a result which is manifestly incompatible with the essential principles of German law, German courts are not bound by the findings of the arbitral tribunal. Domestic courts can therefore review the award and the merits to determine whether corruption or related offences affect the underlying dispute to such an extent that acknowledging and/or enforcing the award would be a manifest violation of *ordre public*. The argument of an *ordre public* violation due to corruption can be brought forward in annulment and enforcement proceedings in Germany.

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

German state courts have broad jurisdiction to review potential violations of *ordre public* and are not bound by the findings of the arbitral tribunal or the arguments presented during the arbitration proceedings. Therefore, courts can examine corruption allegations that were not raised in arbitration, provided these allegations are invoked to substantiate a violation of *ordre public*. The right to argue a violation of *ordre public* cannot be forfeited.

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

German courts are arbitration-friendly and hesitate to conduct a full factual review of cases decided by an arbitral tribunal. However, most recently, the Federal Court of Justice mandated a comprehensive legal and factual review of an arbitral award in a case involving alleged under-enforcement of antitrust law. Whether this decision signals a shift in how courts review cases in other legal domains remains uncertain, but so far continued adherence to the prohibition of *révision au fonds* appears to prevail.

However, to the extent a violation of *ordre public* is alleged in annulment or enforcement proceedings, German courts are not bound by the findings of the arbitral tribunal. If there is an objective violation of *ordre public*, the state court may even supplement any insufficient investigation and determination of the facts. Therefore, in the case of corruption allegations, German courts do not necessarily defer to the arbitral tribunal's finding that no corruption acts were committed.

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

There are no general guidelines specifying which evidence is necessary or sufficient to prove corruption in German arbitral, annulment or enforcement proceedings. The applicable standard of proof in German arbitration proceedings depends on the *lex arbitri*. Under German *lex arbitri*, evidence of the relevant facts must be provided to the satisfaction of the arbitral tribunal, i.e., doubts must be silenced, but not completely excluded. This same standard of proof applies in annulment and enforcement proceedings.

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

Given that the facts surrounding corruption are often deeply concealed, circumstantial evidence plays a crucial role in establishing its presence. Such evidence may include discrepancies between fees received and services provided, opaque structures, or the use of aliases. Arbitrators would also be in a position to order broad document production so that the opposing party can demonstrate corruption and allow for detailed (cross-)examination of witnesses.

In addition, the principles of the secondary burden of proof can lead to the party alleging corruption needing only to present sufficiently concrete suspicious circumstances, shifting the onus on the opposing party to refute this suspicion with their own evidence. This requires that the party with the primary burden of proof makes every reasonable effort to clarify the facts, e.g., by naming the recipients of bribes if known to them. Failure by the party with the secondary burden of proof to rebut the suspicion results in establishing sufficient evidence of corruption.

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

No, arbitral proceedings are independent proceedings and not bound by criminal proceedings regarding the underlying issues, in particular if no final criminal court decision has been rendered (*in dubio pro reo*). Instead, the principle of free assessment of evidence applies in arbitral proceedings. However, in practice, arbitrators will feel a high hurdle to rule differently from final criminal court decisions.

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

Arbitral tribunals decide autonomously how to respond to parallel criminal investigations.

Unless otherwise agreed by the parties, arbitral tribunals are not bound by the parties' submissions of evidence and may therefore conduct investigations *ex officio*. This allows arbitral tribunals to consider findings from parallel criminal investigations even if these facts are not introduced into the proceedings by the parties. Arbitral tribunals can gain access to the case files from law enforcement authorities by requesting access directly or seeking judicial assistance from a competent state court.

Moreover, unless otherwise agreed by the parties, arbitral tribunals have the discretion to temporarily stay the arbitral proceedings until one party requests their continuation and/or until the conclusion of related criminal proceedings. Such a stay of proceedings can be beneficial for fact-finding purposes, as criminal investigations are generally more effective in investigating allegations of corruption compared to arbitral proceedings.

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

Apart from annulment and enforcement proceedings, German law does not offer remedies against arbitral awards. An arbitral award may be set aside or declared unenforceable if corruption proven in criminal proceedings resulted in the recognition or enforcement of such arbitral award contradicting *ordre public*. However, annulment proceedings cannot be initiated after the arbitral award has been declared enforceable.

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Guinea

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

Guinean arbitration law is governed by the Organization for the Harmonization of Business Law in Africa's (OHADA) Uniform Act on Arbitration Law (the "Uniform Act"). Article 11 of the Uniform Act provides that arbitrators rule on their own jurisdiction. Accordingly, the arbitral tribunal has the sole power to rule on its own jurisdiction. There is no exception to this rule based on allegations of corruption. Allegations of corruption are, therefore, no obstacle to the ability for the arbitral tribunal to be seized.

In addition, the Uniform Act provides for the principle of the independence of the arbitration agreement from the main contract. Thus, even if the validity of the contract is questioned on the basis of allegations of corruption, the dispute will remain subject to arbitration. Indeed, the validity of the arbitration agreement is only assessed based on the common intent of the parties, without reference to State law.

In the case of allegations of corruption relating to the arbitration agreement itself, the arbitral tribunal has the power to assess the validity of the arbitration agreement in light of the elements submitted to it. This may constitute a valid argument for lack of jurisdiction or inadmissibility of the claims on the merits for annulment of the award, since the nullity of the arbitration agreement is a cause of annulment of the arbitral award.

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

Under OHADA law, under Article 31 of the Uniform Act, recognition of an arbitral award will be admissible only if the award is not in manifest violation of Guinean rules of international public policy. In addition, in set-aside proceedings, the reviewing court can verify the compliance of the award with international public policy.

The other grounds for annulment are, restrictively, the existence of a valid arbitration agreement, the regularity of the composition of the arbitral tribunal, compliance with its mission by the arbitral tribunal, respect for the adversarial principle and the absence of motivation of the arbitral award.

Thus, an arbitral award against which there is an allegation of corruption is liable to annulment, as corruption violates international public policy. In addition, as explained above, corruption can also affect the validity of the arbitration agreement.

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 OHADA law, in annulment or enforcement proceedings, the court cannot rule again on the merits of the dispute. It only assesses the validity of the award on the basis of limited grounds, which are:

- if the arbitral tribunal ruled without an arbitration agreement, or on the basis of a void or expired agreement;
- if the arbitral tribunal was improperly constituted or the sole arbitrator was irregularly appointed;
- if the arbitral tribunal failed to comply with its assigned mission;
- if the principle of adversary proceedings has not been respected;
- if the arbitral award is contrary to international public policy;
- if the arbitral award does not state the reasons on which it is based.

In the case of recognition of an arbitral award, the *prima facie* review is limited to manifest compliance with Guinean international public policy.

However, to determine whether the arbitral award is compatible with international public policy, the reviewing court may examine the merits of the award to assess whether corruption or related offences affect the underlying dispute.

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

Courts before which is brought an annulment or enforcement proceeding of an arbitral award on the grounds of violation of Guinean international public policy can examine all related elements independently of the elements referred to in the arbitral award. Thus, the fact that allegations of corruption were not raised during the arbitration is irrelevant.

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

In Guinea, courts are not bound by the arbitral tribunal's findings in matters of public policy issues. The competent courts are not required to only examine the arbitral award's conclusions. They may review all the elements submitted for their consideration.

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

In Guinea, the freedom of evidence applies to arbitration proceedings and annulment, recognition or enforcement proceedings of arbitral awards, without any specific standard. There is no case law imposing specific criteria for assessing evidence in terms of respect for international public policy.

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

Corruption being by nature diffuse and hidden, it is very rare to be able to gather material evidence of corruption. One notable exception is the *BSGR v. Republic of Guinea* case (ICSID Case No. ARB/14/22) in which corruption contracts were filed on record.

Consequently, arbitral and judicial tribunals rely on a set of corroborating evidence. In this respect, the following elements or their combination may constitute a set of corroborating evidence to establish corruption: payment for services that were not rendered or whose value is largely disproportionate to the amounts paid, the use of intermediaries with unclear services and questionable skills to justify large disbursements, etc.

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

In Guinea, criminal matters cannot be arbitrated. However, civil compensation issues arising from offences may be decided by arbitrators.

Under the autonomy of arbitration proceedings principle, arbitrators are not required to suspend proceedings pending before them if a criminal investigation is ongoing

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

As stated above, arbitrators are not required to suspend proceedings when they rule on the civil compensation issues related to criminal offences. However, for arbitral tribunals to suspend proceedings until the criminal investigation has been completed may contribute to the proper administration of justice.

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

Guinean law provides that the parties may bring an action either before the arbitral tribunal itself, or before the reviewing courts having jurisdiction. At the judicial court level, this will involve proceedings for annulment or challenge to the enforcement of the arbitral award. At the arbitral tribunal level, the more diligent party may request a review due to the discovery of a fact of such a nature as to exert a decisive influence and which, prior to the making of the award, was unknown to the tribunal and the party requesting the review.

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Italy

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

Allegations of corruption made in arbitral proceedings seated in Italy, per se, do not impinge on the tribunal's jurisdiction, nor do they lead to the inadmissibility of the claims put forward in the arbitration.

Under Italian law, the parties can refer to arbitration any disputes relating to rights that they can freely decide to exercise or not (diritti disponibili). Moreover, the Italian arbitration law expressly recognizes the principles of competence-competence (Art. 817(1) Code of Civil Procedure, "CCP") and of separability of the arbitration agreement (Art. 808(2) CCP). Accordingly, arbitrators are empowered to decide challenges to the validity of the arbitration agreement (for instance, challenges based on allegations of corruption) and they must assess the validity of the arbitration agreement separately from the validity of the contract that contains the arbitration clause.

This means that, even if the arbitral tribunal were to conclude that the contract is invalid (or, more specifically, null and void) because it was concluded as a result of acts of corruptions, the arbitration agreement would remain valid and the arbitrators would be empowered to decide on the merits of the dispute, except when the arbitration clause itself was part of the corruptive scheme.

These principles were recently reaffirmed by the Italian Supreme Court in a case deriving from a lease agreement in which a usury interest rate was applied by the lessor, this being a criminal offence in Italy (Cass. n. 16364 of 8th June 2023). However, it is worth noting that a 1997 decision of the Milan Court of First Instance – often criticized by scholars – held that the corruption affecting a contract also invalidates its arbitration agreement.

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

Allegations of corruption can be the basis of an application either to set aside an arbitral award or to seek its revocation.

The grounds to set aside awards rendered by tribunals seated in Italy are only those listed in Art. 829 CCP. A party seeking the annulment of an award can rely on corruption allegations mainly in the following circumstances. First, it can argue that the corruption rendered the arbitration agreement invalid, provided however that the inclusion of the arbitration clause in the contract was part of the illegal scheme and that this argument was already raised in its first submission during the arbitration (Art. 829(1) n. 1 CCP).

Second, the party seeking annulment may argue that its allegations of corruption put forward in the arbitration were not dealt with in the award (Art. 829(1) n. 12 CCP). Finally, it can invoke the violation of public policy in two hypotheses: when the award confirmed the validity of the contract without considering evidence offered by the parties which showed that the contract was in fact tainted by corruption, or when the allegation of corruption was not raised during the arbitration (Art. 829(3) CCP).

It is worth pointing out that, once the award has been challenged, a public policy issue – including an issue of corruption – may be raised ex officio by the court. This is so irrespective of whether the application to set aside was based on a different public policy issue or the applicant invoked a ground for annulment other than public policy.

Also the grounds to obtain the revocation of an Italian award are limited by law. Corruption allegations can be the basis of an application for revocation in three scenarios. First, the arbitrator was found to be corrupt by a final decision having res judicata effects (Arts. 831 and 395 n. 6 CCP). Second, the award upholds or rejects allegations of corruption, but, after the award is rendered, the evidence relied upon by the arbitrators to reach such a conclusion is found to be forged by a final decision having res judicata effects or the other party recognizes that the evidence is false (Art. 395 n. 2 CCP). Finally, revocation can be sought when, after the conclusion of the arbitration, the moving party finds decisive documents relating to the allegations of corruption and it proves that it could not exhibit that evidence in the arbitral proceedings due to force majeure or because of the opposing party's conduct (Art. 395 n. 3 CCP).

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?

In annulment proceedings, Italian courts cannot review the merits of the award, unless the parties agreed otherwise, or the law explicitly so provides (Art. 829(3) CCP). As for exequatur proceedings, the Italian arbitration law mirrors the 1958 New York Convention, thus, no review of the merits of the award is possible. This holds true even when public policy – which is the standard that generally comes into place when acts of corruption are alleged – is the ground underpinning the application to set aside or invoked to resist the exequatur.

Italian case law repeatedly confirmed this principle, holding that, while the court may analyse the award reasoning in carrying out its task, it cannot reassess the evidence on record before the arbitral tribunal and much less take into consideration new evidence. Moreover, at the annulment and exequatur stage, Italian courts cannot investigate if the arbitrators violated (i.e. misapplied) legal provisions relating to the merits of the dispute (Cass. n. 23160 of 25th July 2022). As a result, an Italian judge cannot perform a reassessment of the evidence allegedly demonstrating acts of corruption, nor can it determine if the arbitrators erred in applying a legal provision in respect to the claim (or defence) relating to corruption.

According to some scholars, this minimalist standard of review could be derogated in extreme circumstances, such as when it is prima facie clear that the arbitrators' reasoning is manifestly and seriously mistaken and it would lead to an outcome that seriously undermines fundamental principles of public policy.

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

Under Italian law, a challenge to set aside an arbitral award for alleged violation of public policy can be filed "in any case" (Art. 829(3) CCP). Therefore, allegations of corruption can be considered by the Italian court seized to decide on the validity of the award even if they had not been raised before the arbitrators. It is worth stressing, as indicated in answer II above, that an issue of corruption (insofar as it amounts to a public policy issue) can also be raised ex officio by the court.

The same conclusion applies to exequatur proceedings. When the award creditor seeks an ex parte order to obtain recognition in Italy of a foreign award, the Italian court can grant the recognition only if it determines that the award is not contrary to public policy (Art. 839(4) CCP). If the award debtor challenges the decision granting recognition of the foreign award, enforcement can be denied by the Italian court if it determines, either ex officio or upon request by the award debtor, that the award violates public policy principles (Art. 840(5) CCP). This means that corruption can be the basis to deny exequatur to a foreign award – at either of the two stages – even if no allegation had been raised in that respect during the arbitral proceedings.

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

Yes, as explained in answer III above, in principle Italian courts dealing with both annulment and exequatur applications will defer to the arbitrators' conclusions, except when it is prima facie clear that their reasoning is manifestly and seriously wrong.

However, in revocation proceedings, an Italian court can revoke an award finding that there was no corruption, but only in very limited circumstances. These can occur when: the tribunal's finding on the absence of corruption was reached as the result of the fraudulent conduct of a party against the other (Art. 395 n. 1 CCP); an arbitrator is found to be corrupt (Art. 395 n. 6 CCP); the evidence relied upon by the arbitrators to conclude that no corruption existed is found to be forged by a final decision having res judicata effects or other party recognizes that it is false (Art. 395 n. 2 CCP); or decisive documents relating to the allegations of corruption are found after the conclusion of the arbitration and the party seeking the revocation proves that it could not exhibit that evidence in the arbitral proceedings due to force majeure or as a result of the opposing party's conduct (Art. 395 n. 3 CCP).

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

The Italian arbitration law does not set a specific standard of proof, neither for the arbitral proceedings, nor for the annulment and exequatur proceedings. In general, in Italian civil proceedings the court must be satisfied that an event is more likely than not to have occurred. This standard is likely to be applied by Italian-seated tribunals, especially if a dispute is purely domestic or almost entirely connected with the Italian legal system. However, if the arbitration is international, the arbitrators may prefer to apply the internationally accepted standard of "clear and convincing evidence" when it comes to establishing corruption. This standard imposes a higher threshold compared to the "more likely than not" standard employed in civil proceedings, but it is not as high as the "beyond any reasonable doubt" standard, which is adopted in Italian criminal proceedings.

As for Italian reviewing courts, as said in answer V above, they will usually stick to the tribunal's findings. However, should they have to make findings on their own, they will apply the general standard for civil proceedings ("more likely than not").

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

Under the Italian arbitration law, the parties are empowered to set the rules applicable to the arbitral proceedings, including rules on evidence, provided this is done in the arbitration agreement or in an additional written deed executed before the beginning of the proceedings (Art. 816bis CCP). It is also generally accepted that the parties can agree on rules of evidence in the terms of reference, or similar instruments provided for in institutional sets of arbitration rules. When the parties are silent, the arbitrators have broad discretion to regulate the proceedings as they see fit.

As a result, in an arbitration seated in Italy, the parties can agree on the application, and the arbitrators can decide to apply, all sort of evidence rules, even if they are not available to an Italian court in civil proceedings (such as the cross-examination of witnesses or the document production phase as it is typically devised in the international arbitration context). The only limit is that the arbitrators must comply with the principle of contradictoire, by granting each party a reasonable and equivalent opportunity to present its case.

Thus, to establish whether acts of corruption have occurred, an Italian-seated arbitral tribunal could resort to different means of evidence, ranging from documentary evidence (either spontaneously exhibited by the party invoking corruption or produced by the other party upon an order by the tribunal), to witness and expert evidence (including tribunal-appointed experts), and also inspections.

Unless the parties agree otherwise, a tribunal seated in Italy would typically adopt the adversarial principle, whereby each party has the burden of proving the facts it alleges, as this is the standard approach adopted in Italian civil proceedings. If this is the case, the arbitrators are under no obligations to seek evidence on their own. However, when it comes to allegations of corruption, given their sensitive nature, arbitrators could take a more proactive stance. Moreover, considering the hurdles in demonstrating the existence of corruption, arbitral tribunals may also resort to presumptive indicators, provided they are serious, precise and concordant.

As for Italian reviewing courts in annulment or exequatur proceedings, if they have to make findings on their own – and, as said above, this will occur in rare circumstances – they will apply the means of evidence that are available to them in civil proceedings.

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

In principle, final convictions and acquittals issued by Italian criminal courts have res judicata effects in a civil case dealing with an overlapping subject matter, provided the criminal decisions have been issued and become final before the tribunal closed the proceedings.

On the one hand, a final conviction has res judicata effects in a civil proceeding relating to a claim for restitution or for damages brought against the convicted person with respect to the following findings: a fact occurred, the fact is criminally unlawful, and the defendant committed that fact (Art. 651 Code of Criminal Procedure).

On the other hand, a final acquittal has res judicata effects in a civil proceeding relating to a claim for restitution or for damages brought by the injured party against the prosecuted person with respect to the following findings: a fact did not exist or the defendant did not commit it, and the fact was committed in the performance of a duty or in the exercise of a legitimate power. It is worth noting, that in case of acquittal (as opposed to the conviction), the res judicata effects only apply if the injured party participated, or was in the position to participate, in the criminal case (Art. 652 Code of Criminal Procedure).

These res judicata effects also apply to arbitral proceedings seated in Italy. In fact, were the arbitrators to disregard a criminal decision in the above circumstances, it could pose a ground to challenge the award (Art. 829(1) n. 8 CCP).

However, the res judicata effects do not apply in at least two circumstances.

First, when no claim for restitution or for damages is put forward in the arbitration, but, for instance, merely a claim to declare the contract null and void because it was affected by acts of corruption. In this scenario, the arbitrators would have discretion to assess and evaluate the findings of the criminal court and decide whether, and to what extent, reliance on those findings should be made.

Second, even if a claim for restitution or for damages is being debated in the arbitration, there would be no res judicata effect if the conviction or acquittal were not final yet, or if it became final after the closure of the arbitral proceedings.

Moreover, if Italian criminal proceedings and arbitral proceedings seated in Italy are pending in parallel, the arbitration can sometimes be stayed. An arbitral tribunal is indeed compelled to suspend the proceedings when the claim for restitution or for damages (arising out of the commission of a crime) is put forward in the arbitration after the claiming party joined the criminal proceedings (to claim damages deriving from the crime) or after a decision of first instance is rendered by the criminal court. The suspension can be lifted only when the criminal judgment becomes final (Art. 819bis(1) CCP). In all other circumstances, arbitral tribunals are entitled to proceed in parallel and decide incidentally issues of criminal law that are relevant to decide the claims submitted before them. However, if a decision is rendered in the criminal proceedings and becomes final before the end of the arbitration, it will have the res judicata effects illustrated above.

Finally, foreign judgments can also have certain effects in arbitration seated in Italy, particularly with regard to civil effects of foreign criminal rulings.

Even though, as a general principle, Italian legislation does not provide for the recognition of foreign criminal judgments, there are some exceptions. First, the Minister of Justice (or the General Public Prosecutor under certain circumstances) has the power to request recognition of a foreign criminal judgement. Furthermore, within the framework of international cooperation, foreign judgments are automatically recognized when there is an extradition treaty between Italy and the State where the criminal ruling is issued. This automatism is even stronger in the context of the European Union, in light of the strides made in judicial cooperation in criminal matters on the basis of the principle of mutual recognition, offering a more solid grounding for the development of a criminal justice space.

According to the Italian regulation, recognition applies only when the judgments produce legal consequences under Italian law for the convicted person. These consequences, set out in Art. 12 of the Italian Criminal Code, are: (1) establishing recidivism or other criminal effects of the conviction or declaring habitual or professional criminal behaviour or criminal tendencies, (2) applying accessory sanctions under Italian law, (3) applying personal security measures under Italian law, (4) enforcing restitution, compensation for damages, or other civil obligations within the Italian territory. In this last case, a significant exemption is provided: in fact, Art. 12 states that the Minister of Justice's request is not required, even in the absence of an extradition agreement.

Moreover, according to Art. 733 of the Italian Code of Criminal Procedure, certain requirements must be met for a foreign judgment to be recognized: it must be final and res judicata; the fact must be considered a crime under Italian law; and the decision must comply with the rule of law. This last principle requires that (i) the sentence be issued by a foreign judicial authority, (ii) it be compatible with the fundamental principles of the Italian legal system, and (iii) it respects the convicted person's human rights.

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

Arbitrators are not bound by findings of ongoing criminal investigations. Nevertheless, they have broad discretion to consider those findings and give them the weight (if any) they deem appropriate, provided the relevant evidence is submitted by the parties in the arbitration.

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

In these circumstances there are limited remedies available.

The party whose corruptions allegation were dismissed in the arbitral proceedings may move to seek the annulment of the award, but this application can only be upheld if the supervening criminal ruling contributes to demonstrate that the arbitrators' reasoning on the issue of corruption was prima facie manifestly and seriously wrong (otherwise, the Italian judge will not review the merits of the arbitrators' findings). Besides, this remedy will only be available if the time limit to challenge the award is still running, i.e. within 90 days from the date of service of the award or, absent the service, within one year from the date on which the last arbitrator signed the award.

No specific ground for revocation exists for a supervening criminal ruling that contradicts the finding of an earlier arbitral award. However, revocation could be sought if, during the criminal proceedings (but after the issuance of the award), a new decisive document relating to the allegations of corruption appears, and the party seeking revocation shows that it could not exhibit that document in the arbitration due to force majeure or because of the opposing party's conduct (Art. 395 n. 3 CCP).

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Kenya

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

Any claim that is marred by corruption is inadmissible in Kenya and arbitral tribunals have the power to rule on their jurisdiction in such a case.

Under Section 17 of the Arbitration Act 1996 (the Arbitration Act), arbitral tribunals in Kenya have the authority to determine their own jurisdiction, including issues regarding the existence or validity of the arbitration agreement (principle of *compétence-compétence*).

The Arbitration Act upholds the principle of separability, ensuring that the arbitration agreement remains valid even if the main contract is invalidated due to corruption. Thus, arbitrators can address disputes, including those involving economic and private concerns, irrespective of prior corrupt activities.

Notably, in *World Duty Free Company Limited v Republic of Kenya* (ICSID Case No. ARB/00/7), para. 188, an ICSID tribunal dismissed the claim against Kenya, ruling that a contract obtained through corruption is unenforceable as it contravenes international public policy. Despite this, World Duty Free later received a favorable ruling from an *ad hoc* tribunal, which was subsequently set aside by the Kenyan High Court for being against public policy, as it was tied to the corruptly obtained contract (*Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex* (High Court of Kenya, Nairobi, misc. application no. 67 of 2013)).

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

Yes, under Kenyan law, allegations of corruption can significantly impact the validity of an arbitral award. According to Section 35 of the Arbitration Act, awards may be set aside if they are found to be influenced by fraud, undue influence, or corruption. Additionally, Section 37 of the Arbitration Act allows arbitral awards to be challenged at the enforcement stage in the High Court if they conflict with the public policy of Kenya. This includes corruption and bribery offences, which are prohibited by the Anti-Corruption and Economic Crimes Act and the Bribery Act, 2016. Public policy considerations in Kenya include adherence to the Constitution of Kenya, 2010, and other laws strictly prohibiting corrupt practices. Consequently, awards influenced by corruption are likely to be viewed as contrary to public policy and subject to annulment (as demonstrated in *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & Another* [2006] eKLR).

A pivotal example is the *World Duty Free Company Limited v Republic of Kenya* (ICSID Case No. ARB/00/7) mentioned above. As explained, an ICSID tribunal initially dismissed World Duty Free Company Limited's claim against Kenya, stating that a contract obtained through bribery violated international public policy. Although an *ad hoc* tribunal later awarded damages to World Duty Free Company Limited, this decision was overturned by the Kenyan High Court, which found the award to be inimical to public policy due to the corrupt origins of the contract (*Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex* (High Court of Kenya, Nairobi, misc. application no. 67 of 2013)).

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?

In annulment or enforcement proceedings, the High Court of Kenya has the authority to review an arbitral award to determine whether corruption or related offences affect the underlying dispute. Under Section 37 of the Arbitration Act, the court may refuse to recognize or enforce an award if it is shown that a party to the arbitration agreement was incapacitated, the agreement is invalid, proper notice was not given, the party was unable to present their case, the award deals with matters beyond the arbitration agreement's scope, the composition or procedure of the tribunal was improper, the award is not binding or has been annulled, or if the award was procured by fraud or corruption. Additionally, an award can be set aside if its enforcement would be contrary to the public policy of Kenya, which includes instances of fraud and corruption.

The Supreme Court of Kenya, in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another*, held that an appeal against a High Court decision under Section 35 of the Arbitration Act lies as of right to the Court of Appeal only in cases where the High Court has made a decision so manifestly wrong that it closes the door to justice for either party. This decision underscores the finality of arbitration awards and limits the grounds for appeal. Similarly, in *Kampala International University vs. Housing Finance Company Limited* (Petition No. 34 (E035) of 2022), the Supreme Court upheld the Court of Appeal's decision to deny leave to appeal against a High Court decision, reinforcing the limited circumstances under which appeals against arbitral awards are permissible.

A landmark case demonstrating the Kenyan judiciary's stance on corruption in arbitral awards is *World Duty Free Company Limited v Republic of Kenya discussed above*. An ICSID tribunal initially dismissed World Duty-Free's claim against Kenya due to the corrupt origins of the contract. Despite an *ad hoc* tribunal later awarding damages to World Duty Free, the Kenyan High Court set aside this award, citing it as contrary to public policy because of the corrupt foundation of the contract.

Furthermore, under Section 39 of the Arbitration Act, the High Court can vary an arbitral award if the parties have expressly agreed that any question of law arising from the award may be referred to the High Court. The court, in determining such a question of law, may confirm, vary, or set aside the award.

In conclusion, while the High Court of Kenya is generally cautious about intervening in arbitral awards, it retains the authority to review and set aside awards involving corruption or other public policy violations. This approach, supported by statutory provisions and case law, balances the finality of arbitration with the necessity to uphold public policy.

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

In Kenya, there is no requirement in the Arbitration Act that allegations of fraud or corruption must have been raised during the arbitral proceedings. A party challenging the enforcement and recognition of an award can bring these allegations before the High Court, offering proof that the award was obtained through corruption or fraud. The High Court may refuse enforcement if it finds that recognition and enforcement would be contrary to Kenya's public policy, which includes considerations of fraud and corruption. This means that even if the parties do not raise such allegations, the court has the authority to examine the record and, if satisfied that the proceedings were tainted by fraud and corruption, refuse recognition and enforcement.

The *World Duty Free* case serves as an example of how the Kenyan judiciary handles corruption in arbitral awards. The Kenyan High Court set aside the award, deeming it contrary to public policy because of the corrupt foundation of the underlying contract. Notably, the bribery allegation was not raised by either party in the arbitration, yet the High Court still addressed it, emphasizing the judiciary's active role in ensuring that arbitral awards comply with public policy and are free from corruption.

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

Under Kenyan law, Sections 107 and 108 of the Evidence Act stipulate that the burden of proof lies with the party alleging corruption. The courts may not necessarily defer to an arbitral tribunal's finding that no acts of corruption were committed, depending on when these allegations were raised. The High Court has a duty to independently evaluate the evidence presented before the arbitral tribunal and make its own determination regarding the existence of corrupt acts. The burden of proof rests with the party alleging corruption, as seen in the case of *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKLR.

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

In Kenya, there is no specific burden of proof for allegations of corruption in arbitration proceedings. However, since these proceedings are civil in nature, arbitrators and the High Court generally apply the balance of probabilities standard to determine the existence of corruption. This means that the party alleging corruption must demonstrate

that it is more likely than not that the corruption occurred, in accordance with Sections 107 and 108 of the Evidence Act. The courts will scrutinize the evidence presented to assess if it adequately supports the claim that corruption influenced the arbitration process.

Furthermore, Kenyan courts emphasize the necessity of a high threshold of evidence to substantiate allegations of corruption, ensuring that claims are not based on mere speculation but are backed by solid evidence, as highlighted in *Telkom Kenya Ltd vs Kam Consult Ltd* [2001] 2 EA 574.

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

Arbitrators and reviewing courts in Kenya employ a comprehensive approach to establish evidence of corruption. This includes the use of documentary evidence, witness testimony, forensic analysis, circumstantial evidence, affidavits, cross-examination, audit reports, and legal presumptions. The aim is to ensure that any allegations of corruption are substantiated by credible and substantial evidence, maintaining the integrity of the arbitration and judicial processes, as seen in *Gerick Kenya Limited v Honda Motorcycle Kenya Limited* [2019] eKLR and *Kenneth Maweu Kasinga v Cytonn High Yield Solution LLP & Another* [2020] eKLR.

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

In Kenya, arbitrators are not strictly bound by criminal proceedings but must consider the implications and relevant evidence arising from such proceedings. They operate independently under the Arbitration Act but must be mindful of public policy considerations, the potential impact of criminal findings, and the need to ensure a fair and just resolution of the arbitration dispute. Courts may also intervene to stay arbitration in certain circumstances to ensure coherent and consistent legal outcomes, as illustrated in *Telkom Kenya Ltd vs Kam Consult Ltd* [2001] 2 EA 574 and *Laiser Communications Limited v Safaricom Limited*.

Criminal and civil proceedings can run concurrently in Kenya, as stipulated by Section 193A of the Criminal Procedure Code. Consequently, arbitration proceedings, being civil in nature, can proceed alongside any criminal proceedings related to corruption charges.

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

In Kenya, Section 193A of the Criminal Procedure Code allows both civil and criminal proceedings to run concurrently. If a conviction for corruption occurs before the conclusion of arbitration proceedings, the tribunal may, upon application or *sua sponte*,

take these findings into account, particularly if they affect the validity of contracts or the fairness of the arbitration. However, if the arbitration has concluded, the arbitral award may be set aside under Section 35 of the Arbitration Act if it is deemed contrary to Kenyan public policy, which includes considerations of criminal conduct such as fraud or corruption.

If criminal proceedings are ongoing without definitive findings, arbitrators may proceed cautiously, evaluating the evidence available without fully deferring to the criminal process. This approach maintains the integrity of the arbitration while acknowledging the potential impact of criminal findings.

In *Telkom Kenya Ltd vs Kam Consult Ltd* [2001] 2 EA 574, it was noted that an arbitrator does not lose jurisdiction simply due to an allegation of fraud. The arbitrator is entitled to examine evidence and determine whether fraud has been established. While it would be against public policy to enforce a contract with an arbitration clause if fraud is proven, dismissing an arbitrator's jurisdiction based solely on unproven allegations would undermine the legislative intent.

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

In Kenya, when an arbitral tribunal concludes that there is no evidence of corruption, but a subsequent criminal ruling finds otherwise, several remedies are available. These include setting aside the arbitral award, appealing, or seeking annulment of the award. These remedies ensure that public policy is upheld and that awards tainted by corruption are not enforced. Courts play a crucial role in reviewing such cases to ensure justice and adherence to legal standards.

In the case of *Laiser Communications Limited v Safaricom Limited*, the Court of Appeal emphasized that, given the initiation of criminal investigations, the fraud allegations were serious and should be adjudicated by the courts. This case underscores the importance of distinguishing between the roles of arbitration and criminal proceedings, affirming that serious allegations of corruption may warrant judicial intervention beyond the scope of arbitration.

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Morocco

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

Under Moroccan law, arbitration agreements and arbitration clauses in the agreements are 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. In addition, the arbitrators must rule on their own jurisdiction, such that arguments related to lack of jurisdiction of the arbitral tribunal will be decided by said tribunal.

In general, arbitrators are not involved in the corruption allegations since this is a matter that remain out of the scope of the commercial/civil arbitration matter. Any corruption allegation must be submitted to the Prosecutor Department for investigation and examination.

Thus, allegations of corruption do not serve as a bar to jurisdiction of arbitral tribunals or admissibility of claims in the arbitration matters.

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

An arbitration court decision must be enforced by the State Court. When ruling on the recognition of the award for enforcement, the State Court makes the necessary investigation and checks if the arbitration decision is compliant with the Moroccan rules and the Moroccan public order. If the allegation of corruption is not evidenced by the alleging party, such allegation may be rejected by the court.

On the contrary, if the award is contested for non-compliance with the public order and notably for corruption actions, parties can seek to set-aside the award and the State Court may challenge the validity of the award and rule on its annulment and cancellation.

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?

In Morocco, the judge does not review the award on the merits and cannot rule again on the dispute in case of annulment or in case of enforcement of the arbitration decision. This is also the case when the reviewing judge ensures that the award is compliant with the Moroccan public order and it cannot take into consideration new elements related to this alleged violation.

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

Courts ruling on motions to set aside arbitral awards can rule on their own motion when the award is deemed contrary to public policy.

In addition, when corruption allegations are raised, the alleging party has the right to introduce a criminal claim with the Prosecutor Department. If the allegation is true and evidenced, the Court has the right to open a court case of corruption against the party suspected of corruption and the Criminal Court may review awards concerned by corruption acts.

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

In Morocco, in case of corruption allegation, the State courts and the Prosecutor Department bypass the arbitration decision and have the right to investigate the corruption act and open the case based on the corruption allegation.

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

In arbitration proceedings, there are no standards of proof principle. However, since corruption is a criminal act/behavior, the evidence of the corruption must comply with the rules of evidences as practiced in the criminal matters.

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

As far as we know, there has been no arbitration litigations in relation with corruption. However, since the corruption is a criminal act/behavior, the evidence of the corruption must comply with the rules of evidences as practiced in the criminal matters.

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

It is not legally authorized in Morocco for arbitrators to examinate Criminal law matter. As per Article 44 of the Arbitration and Mediation Act of the Kingdom of Morocco, arbitrators can pursue the case even if there are issues outside of their jurisdiction if it is deemed that this issue would not affect the decision on the merits.

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

As stated above, arbitral tribunals possess the discretion to suspend their proceedings until that the State Court decides on the criminal behavior in relation with the corruption allegation.

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

Except for 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 the corruption matter by the State Court.

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Poland

Janusz Tomczak – Raczkowski

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

There is no clear answer to this question but, in general - rather not.

Polish procedural law requires that the arbitration clause specify the legal relationship/claim to be arbitrated. It does not indicate any restrictions on the legal relationships that cannot be the subject of arbitration. It can be assumed that, in accordance with the freedom of contract principle, the content or purpose of the arbitration clause does not contradict the nature of the legal relationship, the law or the principles of social coexistence.

From the perspective of the entire legal system, the concept of corruption/bribery is closely related to criminal law and that criminal liability for corruption is decided by a criminal court.

However, this does not mean that factual circumstances that prove the illegality of an action and are relevant to the assessment of civil claims, e.g. regarding the performance of any commercial contract, its validity, etc., cannot be proven before an arbitration court. It is conceivable that an arbitration tribunal may find that a certain behavior constitutes an offence under criminal law (human culpability is a different matter)..

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

In Poland, a party may request that an arbitral award be set aside if it was issued as a result of a criminal offence. Proceedings take place before a common court and is initiated by a complaint of an interested party. However, this does not mean that the civil court hearing the complaint, has the right to decide or assess criminal liability. Criminal liability can only be decided by the criminal court. The civil court may suspend the proceedings initiated as a result of the complaint, pending the outcome of the criminal proceedings.

Additionally, the legislator indicates the contradiction of the judgment with the basic principles of the legal order of the Republic of Poland (the public order clause) as a ground which should cause mandatory setting aside of the judgment,. It may be cautiously assumed that the demonstration of unlawfulness of conduct which may bear the hallmarks of a criminal offence will, in certain situations, fall within the definition of contradiction with fundamental principles of the legal order.

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?

Proceedings to set aside an arbitral award are not appellate proceedings in which the merits of the case would be re-examined. The Civil Procedure Code contains a closed list of circumstances that may form the basis for a complaint. They are of a formal nature, concerning the manner of appointment of the arbitration court, service of correspondence, the scope of the award versus arbitration clause, the authenticity of the documents on which the award is based. Also the issue of the offence which was to affect the judgment is treated in terms of a specific, qualified legal defect of the arbitration decision. In order to establish it, it would be necessary to establish the commission of an offence before a separate, relevant authority.

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

Yes, the argument concerning the commission of a corruption offence should even be raised before a common court. In the context of allegations of corruption, there is no preclusion of any kind. At the same time, it is important to emphasize that in order for such an allegation to be taken seriously, there must be a criminal prosecution for corruption pending or at least notification of the law enforcement authorities submitted. Merely claiming that a crime has occurred, without verification of this claim by the authorities appointed to do so, will not be credible and sufficient. However, it is impossible to exclude or prohibit a situation in which a party before an arbitration tribunal will prove the facts of unlawful actions of the opponent and these unlawful actions bear the hallmarks of corruption.

In practice it is likely that if the court examining a complaint against an award of an arbitral tribunal considers that the outcome of the case depends on the outcome of the criminal proceedings, it will then suspend the civil case until the criminal case is decided.

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

There is no specific standard of proof related to corruption allegations set by the arbitration rules or Civil Procedure Code. Assuming that corruption will be treated as a tort – unlawful behavior causing damage –, one can look for analogies in the way of proving such claims.

In legal language, corruption has the meaning of a criminal offence, prosecuted by the public authorities. In procedural practice, raising the corruption argument requires reference to particular criminal proceedings/investigation aimed to determine whether a corruption offence has been committed. This means either initiating criminal investigation by a party to arbitration proceedings, or referring to criminal proceedings already underway, when raising corruption allegations as explained in section IV.

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

As explained above, there are no specific standards of proof in that matter (general, civil procedure standards apply) and establishing evidence of corruption in practice will likely refer to criminal investigations or proceedings.

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

According to the basic principles of civil procedure, a civil court is only bound by a criminal conviction that prejudges the guilt of the offender. It is inconceivable that an arbitral tribunal would apply different rules and disregard such judgments, challenging the findings of a criminal court.

However, this means that there are other decisions issued by the criminal authorities which are not binding in terms of factual findings, e.g.: decision on discontinuing the investigation because the perpetrator of the offence has not been identified.

Criminal courts have exclusive jurisdiction over criminal liability regime.

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

As explained above, deference will be given to pending criminal investigations or proceedings. In this context, access to information from criminal proceedings, which is limited especially during the investigation stage, will be an important issue.

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

In specific, listed circumstances, it is possible to lodge an application for the reopening of proceedings (court proceedings initiated against arbitration award), when - to simplify - new circumstances of the case arise. Criminal court decisions on someone's criminal liability may be considered as such. An action for reopening is a specific, exceptional remedy, limited by time limits: the time to file an application is no later than 3 months since the party learned about the cause to reopen the case and no later than 10 years after the case to be reopened had been completed.

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Romania

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

First, corruption allegations would not prevent an arbitral tribunal from hearing the dispute at all, since the doctrine of *Kompetenz-Kompetenz* is enshrined in Romanian law. Thus, arbitral tribunals can/would analyse the arbitrability of such a claim.

Romanian legislation encapsulates the principle of separability of the arbitral convention, by providing at art. 550 (2) Code of Civil Procedure that the validity of the arbitral convention is separate from the validity of the contract. This leads to two scenarios.

In the first scenario, if the validity of the contract itself were called into question, a claim based on such a contract would still be arbitrable. In this scenario, the arbitral tribunal will in theory be able to analyse the corruption allegations and rule on whether the claim is founded, or the contract is valid or, on the contrary, null and void due to it being concluded on illicit *cause*.

In the second scenario, corruption allegations concern the arbitration clause itself. In this case, it must be noted that under the rules of the Code of Civil Procedure courts will retain their competence and, conversely, arbitral tribunals have no jurisdiction, over claims where the arbitration clause is null and void.

Thus, if an arbitration clause was concluded in consideration of corruption activities or money-laundering, which constitute illicit *cause*), the clause could be rendered null and void, which would in turn render the dispute on the merits inarbitrable. In this case, an arbitral tribunal would rule, based on *Kompetenz-Kompetenz*, on the arbitrability of the dispute.

In another scenario, during criminal investigations the arbitral clause as *instrumentum* is invalidated, a procedure provided for by Romanian criminal law in the case of documents that are the result of criminal activity. For example, the arbitral clause which was forged as a result of acts of corruption may be disregarded in this way. The result is that an interested party could invoke before the arbitral tribunal that no evidence of an arbitral clause may be made (since the *instrumentum* was invalidated), which in turn would render the arbitral tribunal non-competent to solve the dispute.

However, we note that cases where parties will sign an arbitration clause in order to launder money via pro-causa constituted arbitration institutions is no longer a viable option, given that after the Supreme Court Decision no. 10/2024 only non-profit organisations specifically authorised by law to organise institutional arbitration may

organise/set up arbitration courts. Said Decision eliminated the quasi-totality of national arbitration courts.

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

The validity of an arbitral award may be challenged in Romania via annulment proceedings; *inter alia*, a reason for annulling an arbitral award, as prescribed by art. V New York Convention and art. 608 Code of Civil Procedure, is the breach of public policy or *ordre public*.

Similar to its meaning under the New York Convention, it is generally recognized in Romania that corruption is included in the sphere of public policy breaches. Thus, an award obtained through illicit means, either by bribe or by trafficking in influence, is invalid and may be annulled.

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?

There are three scenarios in which courts may review aspects concerning the award (but not the merits of the case): (i) annulment proceedings, (ii) exequatur proceedings (if the arbitral award is rendered in a seat outside Romania) and (iii) opposition to enforcement proceedings. In all cases, courts may analyse the incidence of public policy concerns which may lead to the invalidity of arbitral awards. At the enforcement phase, only arguments which could not be brought in previous stages (arbitration itself and exequatur proceedings if any) may be invoked.

In practice, in order to obtain the annulment of an arbitral award obtained through corruption, a criminal case would be opened as well and annulment proceedings would be stayed until a final decision is rendered in the criminal case. In order to prevent the arbitral award from being enforced, it can be suspended in the annulment proceedings pending the court decision, if security is posted.

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

If corruption allegations concern the arbitration clause itself, the answer is no; according to art. 608 (2) in conjunction with art. with 592 (1) and (3) Code of Civil Procedure, reasons concerning the existence and validity of the arbitration clause, the constitution of the arbitral tribunal, the powers of the arbitrators and the irregularity of procedural aspects and acts throughout the arbitration may not be invoked in annulment proceedings, unless they were previously invoked during the arbitration itself.

However, if corruption allegations concern the arbitral tribunal itself, e.g. bribery, in order to obtain a certain decision from the tribunal, then such allegations may be invoked in annulment proceedings.

On top of the above-mentioned limitation, an additional limitation exists during annulment proceedings. As such, if the corruption allegations were not raised before the first court in annulment proceedings, they may not be raised directly in the challenge against the first court decision.

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

The Supreme Court (Decision no. 1453/2020 of 23 July 2020) recently underlined that in annulment proceedings courts review the legality of the arbitral award without re-evaluating and interpreting the evidence submitted.

However, issues of public policy are reviewed separately from the findings of the arbitral tribunal and courts have a broad scope of appreciation of what constitutes a breach of public policy. Also, when analysing if the arbitral award was rendered in breach of imperative provisions, courts have discretion in analysing whether such provisions were breached. *A fortiori*, courts have discretion in analysing corruption acts that may influence the validity of the arbitral award.

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

During both arbitral proceedings and annulment proceedings, the general rule of *actor incumbit probatio* will apply, meaning that the party invoking alleged corruption acts is bound to prove them. No special rules exist as to the standard applied by arbitrators/courts in determining whether such corruption acts occurred. Thus, arbitration tribunals and courts will apply the common standard, i.e. of useful, pertinent and conclusive proof, which may lead the judge/arbitrator to a solution in the case.

In practice, the "clear and convincing" standard of proof has been invoked in the landmark *EDF v. Romania* case (ICSID Case no. ARB/05/13, *EDF Services Limited v. Romania*, settled through Award of 8 October 2009), though it must be pointed that in this case corruption allegations were very severe (even involving the Romanian Prime-Minister).

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

Arbitral tribunals may use their legal empowerment under art. 586 (2) Code of Civil Procedure to request written explanations from the parties and to decide on the use of

any evidence provided for by the law. Such evidence may consist of witness statements (including oral statements), using the opinion of expert witnesses, interrogations, or addresses to relevant authorities (such as the investigation authorities handling the corruption case). Fundamental procedural principles such as the duty to find the truth apply to arbitrators as well as judges.

Proactively seeking to gather evidence on alleged corruption acts, even when parties may be against such an investigation, may later be used as a reason to annul the award – one of the reasons for annulment is the case where the tribunal renders a decision *plus petita*. However, not investigating a possible corruption act affecting the arbitration itself may render the award invalid under public policy rules. Arbitrators will have to weigh the two potential invalidity reasons and decide whether administering evidence even against the wishes of the parties is warranted in the case – such is the case where there is an objective concern of corruption acts.

Similarly, annulment courts may employ the same general procedural law instruments in order to gather evidence.

There is no unitary practice regarding specialised methods of establishing evidence of corruption. However, a very important guide for arbitrators and annulment courts is given by the Basel Institute on Governance's Toolkit for Arbitration, which establishes a "red-flag" system of inferences which can be made from certain factual situations.

Courts typically take into consideration hard evidence pointing towards corruption acts and not simple suspicions. However, as discussed above, the standard of proof applicable will still be the more lenient private-law standard employed by the Code of Civil Procedure.

Nevertheless, standards for admissibility of evidence are to be kept high, due to the sensitive and criminal nature of corruption allegations. In the *EDF v. Romania* case, the arbitral tribunal struck down a request to produce an audio recording because the Claimant failed to provide the full recording in its original form, thus leaving room for an allegation of evidence tampering.

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

Until a (final) criminal court decision is rendered and *res judicata* may be invoked, arbitral tribunals will not be held by criminal proceedings on issues which can impact the underlying dispute. However, an arbitral tribunal has the option to suspend proceedings pending a final decision in the criminal case, if the matter deferred to the criminal court has a decisive influence on the arbitration. We note that in such cases the parties in the arbitration may file a separate annulment request against the decision of the tribunal to suspend proceedings.

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

Arbitral tribunals and courts in annulment proceedings have a limited capability of producing evidence of corruption activities by themselves. However, they may defer questions and request evidence from the criminal court (if the arbitral/annulment proceedings have not been stayed pending the criminal case) in order to obtain necessary evidence.

Thus, the Romanian legal framework gives arbitral tribunals and civil courts the possibility of relying on the criminal investigations; there are no other viable alternatives to obtain separate evidence, given that criminal investigations take precedence over any civil law proceedings.

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

In such a scenario, the award generally may not be overturned, because annulment proceedings are time-barred past a 30-day term after the communication of the arbitral award. Other means of recourse, including extraordinary means of appeal, are not compatible with arbitration proceedings. However, an exception to the rule exists which may allow claimants to file successful annulment proceedings in these cases.

More exactly, the result of the criminal ruling would be that the arbitral award appears as invalid due to breach of public policy. However, because the 30-day period for filing an annulment claim begins as of the moment the arbitral award is communicated to the party, the invalidity of the award may no longer be challenged after that point, when the criminal court decision would be rendered.

However, the party challenging the award may be granted the benefit of the 30-day period, according to the provisions of art. 186 Code of Civil Procedure, if it can prove that the delay in challenging the award is due to justified reasons – in this case, the absence up to that point of a decision rendered by criminal courts. Courts in annulment proceedings may therefore avoid time-barring legitimate annulment claims simply because criminal courts were slower than the arbitral tribunal in rendering a decision.

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Slovakia

Katarína Čechová and Marek Varga – Čechová & Partners

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

Allegations of corruption do not by themselves serve as a bar to jurisdiction of arbitral tribunals. Under Slovak law, the arbitrators have the power to decide on their jurisdiction and also on the allegation of corruption raised by the parties in the arbitration proceedings. Thus, allegations of corruption may serve as a bar to the jurisdiction of the arbitral tribunal or the admissibility of claims if the arbitrators conclude so in the proceedings while assessing the validity of the arbitration clause.

This means that raising the issue of corruption regarding the conduct of any party during the arbitration proceedings does not automatically lead to the termination of the arbitration process.

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

An allegation of corruption can affect the validity of an arbitral award in the following cases: i) if it concerns the conduct of the arbitrators or the validity of the arbitration clause or ii) in the exceptional case where the corruption constitutes a breach of public order. In such cases, the award could be set aside. Under the relevant case law in the Slovak Republic, the term breach of public order should be interpreted restrictively and the degree of interference of the arbitral award with the public order should be incompatible with the principles of the social and state structure of the Slovak Republic and its legal order, which must be insisted on without reservation. In principle, situations when the arbitration award was influenced by a criminal act of an arbitrator, expert or witness in an arbitration proceeding or the arbitral award was issued by a manifestly biased arbitrator should constitute a breach of public order.

In case of a consumer arbitration, the court review of arbitral awards is more extensive. In such case, an allegation of corruption could affect the validity of an arbitral award also on the grounds that i) the corruption caused the facts in the arbitration proceeding to not be correctly established, ii) an arbitrator in the proceeding was biased, and iii) the arbitration award is based on an incorrect legal assessment of the case.

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 Slovak law, the annulment and enforcement proceedings are not constructed as appellate proceedings and the merits of the case shall not be reviewed by the court unless for the qualified grounds stated in the Slovak Arbitration Act.

The grounds to annul an arbitration award are stated in the Slovak Arbitration Act as follows: i) a party in the proceeding did not have the capacity to conclude an arbitration agreement or the arbitration agreement was not concluded in accordance with the law; ii) a party in the proceeding was not duly notified of the appointment of the arbitrator or of the arbitration proceeding, or it was not allowed to participate in the arbitration proceeding; iii) the arbitration award has resolved a dispute for which no arbitration agreement has been concluded, or which is not within the scope of the arbitration clause, or that the award exceeds the scope of the arbitrator agreement or the scope of the arbitration clause; iv) the arbitration court was not established or the arbitration proceeding were not conducted in the manner agreed upon by the parties to the arbitration proceeding, or that this agreement was not concluded, if these facts could have influenced the decision on the merits; or v) under Slovak law, the subject of the dispute cannot be resolved in arbitration proceedings or its recognition and enforcement would be contrary to public order.

In case of consumer arbitration, the ground to annul an arbitration award are more extensive and include also the following: i) the facts were not correctly established in the proceeding because the arbitration court incorrectly assessed the evidence presented, did not conduct the proposed evidence or did not allow the consumer party to present evidence, and this error could have influenced the outcome of the dispute; ii) the case was decided by a biased arbitrator; iii) the arbitration court ruled in violation of the provisions of generally binding consumer protection legislation and this violation could have influenced the outcome of the dispute; or iv) the arbitration award is based on an incorrect legal assessment of the case.

In case of consumer arbitration, there are also additional requirements for review of the arbitration award in enforcement proceedings. In such case, an application for enforcement on basis of a consumer arbitration award shall be rejected by the court if i) the consumer arbitration agreement does not meet the legal conditions, ii) the arbitration award in the consumer dispute was not issued by an arbitrator who was registered in the list of authorized arbitrators, iii) the arbitration award in the consumer dispute was not issued by an authorized permanent arbitration court, iv) the arbitration award does not meet the legal requirements or is not enforceable.

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

Courts can review corruption allegations which have not been raised in the arbitration in an annulment proceeding if the ground for annulment is that the recognition and enforcement of an arbitration award would be contrary to public order. Such ground has to be reviewed by the court even if the party of the proceeding did not raise it in the arbitration proceeding and also if the party did not even raise it in the petition for annulment of the arbitration award. Other grounds for annulment maybe reviewed by the court only if they were raised by the party in the arbitration proceeding.

In case of an arbitration award issued in a consumer arbitration proceeding, corruption allegations which have not been raised in the arbitration may be reviewed by the court in an annulment proceeding based on any grounds for annulment.

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

In the Slovak Republic, the courts review arbitration awards only under the available grounds for annulment. Unless the act of corruption qualifies as a reason for an annulment, the court will not assess relevant matters which were reviewed in the arbitration proceeding.

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

In arbitration proceedings in the Slovak Republic, evidence is evaluated under the principle of free evaluation, with the arbitrators evaluating the result of evidence impartially according to their own considerations. In civil proceedings in the Slovak Republic, evidence is similarly evaluated under the principle of free evaluation of evidence under the Slovak Civil Litigation Code. Pursuant to the Slovak Civil Litigation Code, the court shall evaluate the evidence at its discretion, each piece of evidence individually and all the evidence in its mutual context; in doing so, it shall carefully take into account everything that has come to light during the proceeding.

The standard of proof in arbitration and courts proceedings in the Slovak Republic is in general based on preponderance of the evidence principle, i.e., demonstrating that the proposition is more likely true than not. In arbitration proceedings with consumers, the arbitral tribunals may, in the interest of consumer protection, require information, documents and other evidence that is relevant to the proceedings and decision in their own initiative and on top of the documents provided by the parties of the proceedings.

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

There are currently not many arbitral awards dealing with corruption or similar offences in Slovakia. There are also no court decisions reviewing awards on this issue. The evidence of corruption should be established on the basis of the high level of probability of the fact.

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

Under Slovak law, courts are expressly bound by criminal judgment rulings that a criminal offence has been committed. The courts are also required to stay the proceedings until the criminal court decides on the criminal offence that is relevant for the resolution of the court decision on arbitral award review. Arbitrators are not strictly bound by criminal judgment rulings that a criminal offence has been committed; however, they should decide in accordance with them, otherwise they risk that their arbitration award would be against public order. The arbitrators are also not required by the law to stay the proceedings until the criminal court decides on the criminal offence that is relevant for the resolution of the court decision on arbitral award. However, they may stay the arbitral proceedings in such case to avoid possible contradictions between their decision and the criminal ruling.

Under Slovak Law, criminal offences are non-arbitrable and the arbitral tribunals do not have jurisdiction to decide on them. The arbitral tribunals can rule on the civil consequences of the criminal offence falling into the scope of arbitrable matters, such as compensation of damages related to a commercial relationship.

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

Arbitral tribunals can and Slovak courts have to stay their proceedings until a parallel criminal investigation is concluded to avoid possible contradictions between their decision and the criminal ruling. Further, the courts are bound by criminal court rulings that a criminal offence has been committed and shall reflect them in their decision and the arbitral tribunals should also decide in accordance with them.

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

Under Slovak Law, subsequent evidence of corruption may be a ground for annulment of the arbitration award. However, there is no possibility to request the annulment of the arbitral award in case the criminal ruling is issued after the time limit for requesting the

annulment has passed (i.e. the request for annulment is not filed within 60 days after the arbitral award was delivered to the party and in case of consumer arbitral proceedings within 3 months after the arbitral award was delivered to the party).

In case of consumer arbitral proceedings, there is also a possibility to object to enforcement if corruption constitutes a ground for rejection of the application on enforcement of the arbitral award.

Notwithstanding the above, a party may request compensation as a damaged party in the context of criminal proceedings.

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Spain

Eliseo M. Martinez, Tomás Villatoro and Javier Robles Moreno – Ius + Aequitas Abogados

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

Under Spanish law – Article 22 of the Arbitration Act 60/2003 (AA) – the principle (unanimous and uncontested in its application) of *Kompetenz-Kompetenz* – which constitutes the separability of the arbitration agreement from the main contract, in the sense that the validity of the arbitration agreement does not depend on the validity of the main contract and that the arbitrators have jurisdiction to judge even the validity of the agreement itself – is established.

The generic term 'jurisdiction' must be understood to include not only the issues that strictly speaking are such, but also any issues that may prevent a decision on the merits of the dispute (except those relating to the persons of the arbitrators, which have their own treatment).

Arbitral tribunals should thus conduct the arbitration in the most expedient manner possible, including full discretion to decide whether or not to proceed with the arbitral proceedings if corruption is invoked.

As in France, findings relating to corruption, which fall within the competence of the arbitrators, will in principle not affect the admissibility of claims, although this will depend on the law applicable to the merits of the dispute and not on the AA. In Spain, allegations of corruption are unlikely to lead to the inadmissibility of claims, at least without an examination of the merits.

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

For the resolution of this question we must differentiate between two moments, (i) if the award has not yet been issued or is in the production phase; or (ii) if the arbitral award has already been issued.

In Spain, if the arbitral award has not yet been issued and during the proceedings allegations of corruption are made and the arbitral tribunal shares this consideration, by virtue of the provisions of the New York Convention and Article 41, numeral 1, letter f) of the Spanish AA – which establishes that awards that are 'contrary to public order' shall be annullable -, taking into account that corruption is a substantial violation of international public policy, the arbitral tribunal should not make the award until it confirms whether the alleged corruption effectively affects the underlying contract or agreement in order to avoid a possible subsequent judicial declaration affecting the validity of the award.

If the arbitral award has already been rendered, the High Court of Justice of the respective Autonomous Community can invalidate those awards that affect public order (including corruption, money laundering and the fight against terrorism). In this way, the reviewing judicial body can analyze the existence or not of corruption in order to determine the validity or nullity of the award.

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?

In award annulment proceedings in Spain, the High Court of Justice of the respective Autonomous Community does not 'review' the award and the merits, but it can invalidate awards that affect domestic or international public order if it is proven that corruption or related offences affect the underlying dispute.

As in France, in proceedings for recognition and enforcement of the award, the court can review whether they are in conformity with domestic or international public policy.

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

In Spain, the object of the annulment action is not the dispute between the parties but a review, on specified grounds, of the validity of the award.

As these grounds include breach of public policy, the High Courts of Justice may review allegations of corruption, even if they were not raised in the arbitration.

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

In Spain, courts are not obliged to defer to the findings of the arbitral tribunal as to whether or not acts of corruption were committed. Courts may examine the question of corruption if it is alleged that the award violates public policy rules.

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

In Spain, there is no specific standard of proof regulated by the law applicable to arbitration proceedings in corruption cases. However, arbitrators may adopt various approaches depending on the context of the particular case, including the 'preponderance of the evidence' or 'balance of probabilities' standard, which implies that corruption must be more likely than not to be considered proven. This standard is

common in civil and arbitration proceedings where the party alleging corruption must prove its existence with evidence suggesting that it is more likely than not to have occurred, in light of the available evidence.

In addition, Spanish arbitrators, like their international counterparts, may use 'circumstantial evidence' or 'indirect evidence' when direct evidence of corruption is not available. This approach allows considering a set of indications or 'red flags' (e.g. disproportionate payments, lack of evidence of services rendered, accounting irregularities, etc.) that, when evaluated as a whole, can form a sufficient basis for concluding that corruption existed. In this way, it seeks to 'connect the dots' to obtain a complete factual picture to prove the existence of corruption, applying an approach similar to that used in international arbitrations such as the ICSID-arbitrated case of Metal-Tech v. Uzbekistan, in which:

«Pakistan discovered new evidence of alleged corruption which it submitted after the hearing on jurisdiction and merits and which the arbitral body examined and ruled on in a separate decision on the admissibility of the investor's claims,52 demonstrating that the relevance and gravity of such allegations are taken into account by arbitral bodies and, despite being submitted very late in the proceedings (when the Tribunal was already drafting its Decision on jurisdiction and liability) justify their examination.».

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

In Spain, arbitrators can use methods similar to those used by international arbitration tribunals to establish evidence of corruption, such as the use of 'red flags'. These 'red flags' are indicators or warning signs that may suggest the existence of corruption, such as lack of evidence of services rendered, accounting irregularities, deficiencies in compliance with rules, or a clear disproportion between services and payments received. In addition, arbitrators may consider the context of widespread corruption in a country or sector as a relevant element in assessing the evidence.

Spanish courts reviewing arbitral awards may also take into account these indications or 'red flags' when assessing whether an award may be annulled or not recognized on public policy grounds. However, it is important to note that, in Spain, national courts do not usually substitute their judgement for that of the arbitral tribunal, unless a serious procedural violation has been committed or public policy has been violated.

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

In Spain, criminal offences are not arbitrable, and arbitrators have no jurisdiction to hear criminal offences. However, arbitrators retain the authority to resolve the civil consequences of such offences.

Regardless of the above, doctrine and case law have ruled in favour of the application to arbitration of 'pre-judicial criminal proceedings'; in an 'unquestionable' manner according to the Judgment of the High Court of Justice (STSJ) Madrid, 10/2019, of 22 March. The STSJ Andalucía (Granada), Sala de lo Civil y Penal, 12/2021, of 17 June, bases this on the fact that 'the identity of reason (art. 4.2 CC) must prevail over the differences in nature existing between the arbitration award and the judgement': not applying the rule of pre-judicial by analogy 'could lead (at least hypothetically) to the parties freely disposing a priori, and with the effects of both res judicata and enforceability, of the civil consequences of a crime'. There is no obstacle to the arbitrator, in order to decide whether to suspend the arbitration proceedings, being able to examine the facts that are the subject of the criminal proceedings, which cannot be the subject of the arbitration, because his ruling on them is for the 'sole purpose of prejudicial effects'.

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

If the criminal or corruption proceedings are in their early stages and the outcome is uncertain, an arbitral tribunal may be reluctant to stay the proceedings, as it may result in undue delay and prejudice the parties. On the other hand, if the criminal or corruption proceedings have advanced significantly and the outcome is imminent, an arbitral tribunal may be more inclined to stay the proceedings to await the outcome of the criminal or corruption proceedings, as it may provide relevant evidence or affect the credibility of the parties.

In addition to the stage of the corruption proceedings, the nature and gravity of the criminal charges may also be a relevant consideration for an arbitral tribunal. If the criminal allegations are of a serious nature and pose a significant risk of undermining the integrity of the proceedings, a court or arbitral tribunal may consider suspending the proceedings to ensure that justice is not compromised.

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

In Spain, when a criminal judgment subsequent to the award declares the existence of corruption, the interested parties can challenge the arbitral award by requesting its annulment or revision or oppose the recognition and enforcement of the award in national courts, arguing that the award is contrary to public policy – Article 41.1, letter e) of the AA enables them to do so.

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Sweden

James Hope, Nils Ivars and Gulestan Ali – Vinge

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

Allegations of corruption do not, as such, serve as a bar to jurisdiction of arbitral tribunals or prevent them from hearing the case.

The potential exception would be if the existence of corruption affects the validity of the arbitration agreement. The Swedish Arbitration Act lays down the general principle that an arbitration agreement incorporated into another agreement is considered a separate agreement when determining the arbitrators' jurisdiction (the separability doctrine). This means that issues regarding the validity, existence, or termination of the main contract generally do not affect the arbitration agreement itself – also for reasons of corruption. But if the corruption in question would be deemed to render the agreement in its entirety (i.e. including the arbitration agreement) null and void, the tribunal's jurisdiction will consequently fall as well.

Arbitrators have the authority to determine their own jurisdiction, including addressing any challenges to the validity of the arbitration agreement. If arbitrators decide they have jurisdiction, any party disagreeing with this decision can request the Court of Appeal to review it. Such a request must be made within thirty days from when the party was notified of the decision. During this period, the arbitrators may continue the arbitral proceedings pending the court's determination.

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

In Sweden, an arbitration award is final and binding as of the day it is rendered, with no possibility to appeal on the merits. Like many jurisdictions, an award may, under certain circumstances, be set aside by Swedish courts, for example if the tribunal has exceeded its mandate or committed a procedural error. In addition, an award may also be annulled by a Swedish court on grounds of invalidity, without limitation in time after the issuance of the award, see further below.

One ground on which an award can be invalidated is that the arbitral tribunal has ruled on questions which are not arbitrable under Swedish law. While criminal proceedings are reserved for the courts, civil law implications of crimes, including allegations of corruption, are generally arbitrable under Swedish law.

A second ground for annulment is that the award violates Swedish public policy (*ordre public*). Such public policy violations may include situations where the claims in the underlying arbitrations have been based on criminal acts, for example an obligation to

pay an agreed bribe. An award may also contravene public policy if it enforces a right based on an agreement involving immoral or illegal considerations (*pactum turpe*), which could be the case in a situation where the award or the underlying claims are tainted by corruption.

Importantly, allegations of corruption alone are typically not sufficient to invalidate an award. However, if corruption is proven, the arbitral award or parts thereof may indeed be invalid under the abovementioned circumstances. However, the mere existence of circumstances related to corruption in an arbitral award is not *per se* a violation of public policy.

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?

In annulment or enforcement proceedings, the court generally does not review the merits of the arbitration award, as arbitration awards are typically considered final and binding on the merits.

However, if the award is challenged on the ground that it violates Swedish public policy, the court is free to draw conclusions *ex officio* from whatever material and evidence that the court has access to. In such cases, however, the court's mandate is not a re-evaluation of the merits of the case but simply a review of whether the award violates fundamental principles of public policy.

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

Yes, when assessing if an award violates public policy, Swedish courts may review most types of corruption allegations *ex officio*, even if these allegations were not raised during the arbitration process. Under this scrutiny, the court is not bound by the arbitrators' conclusions. This means that claims of corruption can be brought before the court for the first time, regardless of whether they were raised during the arbitration.

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

No, in Sweden, the judicial review of an arbitral award for the purposes of a potential annulment (e.g. due to public policy concerns) is independent. Thus, the court is not bound by the findings of the arbitrators. Nevertheless, in practice, the court may give considerable weight to the arbitrators' findings.

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

Swedish arbitration law does not set out specific standards of proof or rules of evidence in arbitration proceedings nor in annulment proceedings, including when ruling on claims related to allegations of corruption. However, the general rule with respect to standard of proof in civil proceedings is that a factual assertion must be "proven" or "shown" (Sw. *styrkt* or *visat*), which is a lower requirement than what applies in criminal proceedings.

Notably, with few exceptions, no evidence is inadmissible on the basis of its type or nature under Swedish law. Consequently, hearsay evidence, evidence wrongfully obtained and uncertified copies are generally admissible, both in court and in arbitral proceedings (unless the parties have agreed on other rules regulating the evidence in the arbitration). This flexibility allows arbitrators to consider a wide range of evidence, including when assessing allegations of corruption.

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

In Sweden it is up to the parties to present and produce the evidence in arbitration proceedings. The arbitrators do not have a subsidiary statutory responsibility to carry out any investigation. Arbitrators in Sweden may appoint experts, but this is subject to the condition that neither party objects to such appointment.

Moreover, in civil proceedings in Swedish courts, the parties generally bear the full responsibility of presenting factual evidence to the court. The court thus has no mandate to seek evidence on its own.

Although Swedish courts have the authority to review most types of corruption allegations *ex officio*, they do not independently conduct extensive investigative measures to assess these allegations. The burden of proof typically rests with the party alleging corruption. Consequently, the party making the allegation must provide sufficient evidence to support its claim.

Under the principle of the free evaluation of evidence, both judges and arbitrators are allowed to assess the evidence presented independently, without being bound to any method or particular standard. That being said, there is case law from the Swedish Supreme Court that provides general guidance on how to examine evidence.

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

Under Swedish law, arbitrators do not have jurisdiction to rule on criminal charges, as these matters fall outside the scope of arbitration. However, arbitrators can address and rule upon the civil law consequences that arise from criminal offenses.

In Sweden, a criminal proceeding only constitutes *res judicata* with respect to criminal liability. As such, it does not formally bind an arbitral tribunal in a subsequent arbitration. For example, in a case where a claimant seeks damages on the basis that the respondent allegedly committed a crime, the arbitrators may award damages on such grounds even if the respondent was acquitted in the prior criminal proceeding. Likewise, in theory, the arbitral tribunal may find that no criminal offence was proven, even if the respondent was previously convicted in a criminal proceeding.

Nevertheless, a prior criminal proceeding may serve as evidence in the subsequent civil proceeding. In practice, a prior judgment in a criminal proceeding typically carries high evidentiary value and it can be assumed that most arbitrators will be reluctant to create an inconsistency between the criminal proceeding and the arbitral proceeding.

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

As stated above, an arbitral tribunal is not bound by a criminal proceeding as such. Arbitrators are, however, allowed to review findings from parallel criminal proceedings if these facts are submitted by the parties to the arbitration and the tribunal can use such information as evidence in its own, independent, assessment of the facts.

Swedish arbitral tribunals are not obliged to suspend their proceedings pending the outcome of a criminal court decision, regardless of whether the decision is from a domestic or foreign court.

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

In Sweden, the sole remedy available in the case of a contradiction between an arbitral award and a subsequent criminal ruling is to seek an annulment of the award, for example on the basis that the award is a violation of Swedish public policy.

To successfully annul an arbitral award, it must be proven that the specific circumstances relied upon justify the invalidity of the award. This means that the party challenging the award must demonstrate that the criminal ruling establishing corruption directly impacts upon the integrity and fairness of the arbitral award.

Unlike other jurisdictions, Swedish arbitration law does not impose a specific time-limit for an annulment of an arbitral award on grounds of invalidity. This provides an opportunity for parties to challenge the award also when new evidence, such as a subsequent criminal ruling, comes to light.

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Switzerland

Saverio Lembo, Cinzia Catelli, Abdul Carrupt and Anastasiia Dulska – Bär & Karrer

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

Under Swiss law, according to the principle of *compétence-compétence*, the arbitral tribunal has the authority to rule on its own jurisdiction, including addressing any claims of corruption raised by the parties that may challenge its jurisdiction. Even if there are ongoing proceedings concerning the same subject matter between the same parties before a state court or another arbitral tribunal, the arbitral tribunal will still be competent to determine its jurisdiction unless there are significant reasons to stay the proceedings.

Allegations of corruption will in principle not bar the admissibility of claims, as any claim with an economic interest may be submitted to arbitration if the arbitration clause is valid. A dispute is non-arbitrable only if considerations of *ordre public* requires that the dispute be settled solely by the Swiss courts. Allegations of corruption therefore do not automatically disqualify the parties from arbitration but may be taken into account in the award on the merits, potentially by rejecting the claims made.

In addition, by virtue of the principle of autonomy of the arbitration clause and the doctrine of severability, the arbitration clause remains valid even if the main contract is unenforceable or null and void due to corruption.

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

Corruption allegations may be a ground for set-aside of an arbitral award or, when the time limit for its setting aside had lapsed, for its reconsideration – "revision". Such applications must be filed directly with the Swiss Supreme Court.

The award can be challenged before the Swiss Supreme Court (for set-aside) on the following limited grounds (which mirror those listed in the 1958 New York Convention): irregularity in the appointment or constitution of the arbitral tribunal; incorrect decision on jurisdiction; where the arbitral tribunal has ruled *ultra petita* or has failed to rule on one of the claims; disregard of the parties' due process rights; or incompatibility with Swiss public policy or *ordre public*. The latter ground might be invoked to challenge the validity of an arbitral award as acts of corruption are contrary to Swiss public policy. However, for the corresponding ground for setting aside to be upheld, corruption must have been established in the arbitral proceedings whereas the arbitral tribunal has refused to consider it in its award.

The grounds for revision of an arbitral award are limited. They include circumstances in which an arbitral award was obtained criminally, particularly through bribery or

corruption, or when new material facts or evidence unavailable at the time the award was rendered was discovered despite the party's due diligence. Such circumstances, although unknown to an affected party at the time the arbitral award was rendered, should have occurred before the issuance of the award. If, *inter alia*, criminal proceedings establish that the award was influenced to the detriment of a party to the arbitral proceedings by a crime or misdemeanour, it can be subject to revision, even if such proceedings did not result in a conviction.

For this ground for revision to be upheld, there must be a causal link between the offence of corruption committed and the outcome of the arbitration. In other words, the offence must have had an actual influence on the award in question to the detriment of the party who has thus suffered an unfavourable result. When such causal link is determined, the Swiss Supreme Court may annul the award and remand the matter to an arbitral tribunal to be newly constituted.

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?

In set-aside proceedings, the Swiss Supreme Court has a limited role in reviewing arbitral awards, including in cases involving corruption. Indeed, the Swiss Supreme Court only reviews the facts of the case if they have been established arbitrarily, meaning if they have been established in a manifestly inaccurate manner. The threshold is therefore very high. While parties may claim that anti-corruption laws were disregarded by the tribunal, the court typically does not reassess the facts or merits of the case. Instead, the Swiss Supreme Court examines whether the award breaches fundamental legal principles of public policy, with a very high threshold for intervention. For the award to be set aside, the misapplication of anti-corruption laws must result in an outcome that is deemed absolutely intolerable.

In the ambit of enforcement of an award, the Swiss Supreme Court does not reassess the merits of the dispute or the factual findings of the arbitral tribunal. Minor legal or factual errors are insufficient grounds for denying enforcement.

Ultimately, while corruption allegations are taken seriously, courts in set aside and enforcement proceedings aim to preserve the finality of arbitral awards. They intervene only when the violation of public policy is severe and unmistakable. This approach ensures that arbitral awards are upheld unless the misconduct, such as corruption, directly undermines the fairness or legitimacy of the arbitral process, leading to an outcome that fundamentally contradicts the legal order of Switzerland.

In revision proceedings, the Swiss Supreme Court may review the award and its merits if allegations of corruption affecting the merits of the dispute were raised during arbitration but were rejected by the arbitral tribunal due to insufficient evidence. If new, conclusive evidence that existed at the time the arbitral award was rendered is discovered after the award, this may lead to a revision to be granted. However, the threshold for the Swiss

Supreme Court to revise arbitral awards, including those involving corruption claims, is high. The Swiss Supreme Court carries out a full review of the fact if the applicant provides proof of the ground for revision.

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

Courts in set-aside proceedings generally cannot review allegations of corruption that were not raised during the arbitration itself. Under Swiss law, the Federal Supreme Court is bound by the facts established by the arbitral tribunal and does not reassess the merits of the case unless there has been a significant procedural violation, such as fraud or corruption affecting the tribunal's decision-making process. If corruption was not argued or addressed in the arbitration, it is unlikely that the court will allow it to be introduced for the first time during set-aside proceedings, as the court's review is limited to assessing whether the arbitral award violates fundamental public policy principles based on the existing record.

Similarly, in enforcement proceedings under the New York Convention, courts are hesitant to entertain new allegations of corruption that were not raised before the arbitral tribunal, unless there is a violation of public policy.

According to the Swiss Supreme Court, a party cannot rely on circumstances that postdate the disputed award to request a revision of an arbitral award rendered in a Swiss-seated arbitration, even if these new circumstances relate to corruption-related allegations. A party may seek revision only if it is able to demonstrate that these facts could not have been discovered earlier, despite exercising the required diligence, and thus could not have been presented during the arbitration proceedings.

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

If the arbitral tribunal has examined the allegations of corruption and found no wrongdoing, the Swiss Supreme Court is unlikely to question or overturn these findings during set-aside process.

The deference to the tribunal's findings also extends to enforcement proceedings, where Swiss courts generally respect the tribunal's factual determinations, including rulings on corruption. As long as the arbitral process was fair and the tribunal's decision does not grossly violate Swiss public policy, the courts will not intervene.

In revision cases, the Swiss Supreme Court may reach a different conclusion from the arbitral tribunal on corruption-related findings. If a party seeking a revision of an arbitral award presents newly discovered evidence that strengthens the corruption allegations previously raised during the arbitral proceedings – allegations that were dismissed by the

tribunal due to insufficient evidence – the Swiss Supreme Court may grant the party's request for revision.

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

In arbitration seated in Switzerland, corruption allegations are subject to the standard rules of evidence and burden of proof. Arbitrators generally require the party raising corruption claims to substantiate them to a degree that leaves no serious doubt about their occurrence. This standard is often referred to as "clear and convincing evidence," which, while not as high as the criminal law standard of proof beyond a reasonable doubt, is higher than the balance of probabilities typical in civil cases.

Proving corruption is particularly challenging because those involved in such acts usually take steps to conceal their wrongdoing, such as using intermediaries or manipulating records. Arbitrators can consider indirect evidence or suspicious circumstances, such as unusually high consultancy fees without justification, as potential indicators of corruption. However, arbitrators cannot act independently of the parties' arguments and must respect the procedural rights of both sides, including the right to be heard.

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

Arbitrators seated in Switzerland generally use a combination of burden of proof, circumstantial evidence, and inferences to establish whether corruption has occurred. This means that arbitrators must be firmly convinced of the corrupt acts, which is a higher threshold than the balance of probabilities used in typical civil cases. Given the secretive nature of corruption, direct evidence is often unavailable, making this standard difficult to meet.

To overcome the lack of direct evidence, arbitrators frequently rely on circumstantial evidence and indirect indicators. Such evidence might include unusually large payments for vague consultancy services, discrepancies in financial records, or a lack of clear documentation explaining large transactions. Suspicious behavior, such as refusing to provide an explanation for substantial financial transfers or having contracts that appear fabricated, can also lead arbitrators to infer corruption. In these situations, the party suspected of corruption may be required to offer convincing explanations to avoid adverse inferences.

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

Arbitrators seated in Switzerland are not bound by the decisions of criminal authorities abroad on matters that could influence the arbitration. Similarly, arbitrators seated in Switzerland are not formally bound by the outcome of criminal proceedings related to issues that could impact the underlying arbitration dispute. The principle of autonomy of the arbitral process allows arbitrators to make independent assessments of the facts and legal issues, even if they overlap with criminal matters. While arbitrators may consider evidence from criminal proceedings or take notice of findings from those cases, they are not obliged to follow the decisions or conclusions reached by criminal courts.

As clarified by the Swiss Supreme Court, arbitral tribunals are independent and may reach their own conclusions regarding allegations of corruption or other criminal issues, irrespective of the findings in criminal proceedings. Furthermore, the Swiss Supreme Court emphasized that a finding of corruption by national courts do not automatically represent an absolute "material truth" that must be followed by other judicial or arbitral authorities when determining whether the relevant contracts were obtained through bribery.

However, in certain circumstances, if criminal proceedings establish facts that are critical to the arbitration, arbitrators may find those findings persuasive or relevant. For example, if a criminal court definitively establishes corruption or fraud, arbitrators may consider that in deciding whether a contract is void or unenforceable. Nonetheless, they retain the discretion to independently evaluate the relevance and impact of the criminal findings on the arbitration dispute.

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

Arbitral tribunals generally do not automatically defer to findings from parallel criminal investigations, but they may consider them as part of the overall evidence presented in the arbitration. The degree of reliance on or deference to criminal findings depends on several factors, including the relevance of the criminal proceedings to the arbitration, the overlap of facts, the type of findings made by the criminal court, and the standards of proof applied.

However, if the findings from the criminal investigation are directly relevant and reliable, arbitrators may give them considerable weight. In particular, undisputed facts established in criminal cases, such as the occurrence of illegal activities like bribery or fraud, can be influential in the tribunal's decision-making. Nevertheless, arbitrators retain the freedom to assess how much weight to give these findings, especially if the parties present additional evidence or arguments that might lead to a different conclusion in the arbitration.

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

After the arbitral award is rendered, it is possible to file a request for revision before the Swiss Supreme Court. The Swiss Supreme Court can review an international arbitration award when criminal proceedings have established that the award was influenced by a criminal act to the detriment of the party requesting revision. The right to file for revision will expires within an absolute time-limit of ten years starting when the award becomes legally binding.

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Tanzania

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

Jurisdiction of an arbitral tribunal is a creature of an arbitration clause in a contract, which is an independent and separate agreement. It does not get canceled on a future event due to the principle of separability of arbitration agreement as per Section 12 of the Arbitration Act, Cap 15 R.E. 2020 (the **Arbitration Act**). The validity, enforceability and applicability of the arbitration clause / agreement does not depend on other factors. The only vitiating factor to the jurisdiction of an arbitration tribunal is an invalid agreement to arbitration. When the agreement to arbitration is not valid then this will invalidate the jurisdiction granted to the arbitral tribunal as per Section 14 of the Arbitration Act.

There are no provisions in the Arbitration Act restricting a party's ability to exclude the jurisdiction of the Tanzanian courts, in this regard the parties enjoy the freedom of contract to agree where the arbitration shall be held and what procedural laws to follow. Where the seat of arbitration is Tanzania, the courts will maintain supervisory jurisdiction.

The existence of corruption allegations does not render an arbitration clause / agreement inapplicable to the extent of acting as a bar to the jurisdiction because of the autonomous nature of arbitration. The autonomous nature of arbitration agreements ensures that arbitration proceedings are independent of courts as well as holding the agreement parties accountable.

Under Section 34 of the Arbitration Act, the Tribunal can rule on its own substantive jurisdiction, this is mainly on the validity of arbitration agreement, constitution of the Arbitral Tribunal and what matters to be submitted for arbitration as agreed by the parties.

Corruption allegation that can vitiate the jurisdiction of a Tribunal and the validity of arbitral award are those that have been proved before the competent corruption court. Mere corruption allegations that have not been proved yet cannot stand as bar to the jurisdiction of a tribunal.

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

In Tanzania the enforcement of an arbitral award can be refused if the same has been endorsed, affected or influenced by corruption. The Arbitration Act provides bribery, corruption and fraud as one among the factors for challenging the enforcement and validity of an arbitral award in terms of sections 75(2)(g) and 83(2)(a) of the Arbitration Act. However, the allegation must have been proved by a competent corruption court in line

with the presumption of innocence, mere allegations which have not been proved cannot have effect of invalidating the arbitral award.

Tanzania enforces and recognizes principles of international standards in arbitration, which recognizes that corruption can undermine the intention of conducting arbitral proceedings. Once there is sufficient proof of corruption / fraud in procuring the award then the court can set aside the award in whole or in part or declare the award to be of no effect, in whole or in part in terms of Section 75 (3) of the Arbitration Act.

Whilst there is no appropriate procedure to be followed in occasions where proof of corruption has to be obtained in another court, it has been the court's practice to stay the enforcement proceeding to allow any subsequent proceeding that may affect recognition and enforcement of an arbitral award. In the of case of *North Mara Gold Mine Limited v Diamond Motors Limited*, Civil Appeal No. 29 of 2017, Court of Appeal of Tanzania, at Dar es Salaam (Unreported), the Court of Appeal determined that the High Court had committed an error in dismissing a petition to stay winding-up proceedings which aimed at facilitating the resolution of the underlying dispute through arbitration.

However, the court might take a different direction if it is of the opinion that the criminal proceeding is not materially related to the enforcement proceeding. This includes instances where the issues are materially not related and parties to the suits are different.

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?

In Tanzania the Court has jurisdiction to enforce an arbitral award and hear an application challenging the award when it is affected by a serious irregularity. Here the court has the power to remit the matter back to the arbitral tribunal, set aside or declare the award to be of no effect. The court cannot determine the merit of the award and arbitral proceedings on other underlying offences.

In practice the court's power to review an award and merit is subject to an application to challenge its validity and enforcement. Whereas upon application for enforcement of the arbitral award the Court has power to refuse enforcing the arbitral award if it finds that the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence as per section 83(2) of the Arbitration Act. However, in determining corruption related issues, it will depend whether the corruption court which has convicted a person. If so, the annulment can have effect. Mere allegations cannot be a ground for reviewing the arbitral award as allegations are not true until the same is proved against the person under allegation.

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

Yes, technically Tanzanian court can review corruption allegations which were not raised in the arbitration. A party can challenge the enforcement of the arbitral award on the ground of serious irregularity which includes fraud and corruption. As such, pursuant to section 75 and 83 of the Arbitration Act, the Tanzanian courts can review the corruption allegation during the enforcement proceedings.

However, the review is subject to final determination of the corruption allegation by the corruption court and having convicted a person other than which review will not be possible for lack of actual evidence of corruption based on the presumption of innocence.

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

When there is an allegation of corruption concerning the issuance of the arbitral award, the court can review corruption allegations including those that are not raised in the arbitration, the court has the power to review allegations not raised in arbitration provided the same is essential towards reaching the substantive justice between the parties. In doing so the court can evaluate the evidence provided and make its determination on the allegations.

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

In Tanzania, corruption is a criminal offence and therefore the standard of proof before the national courts for such criminal offences is that of beyond any reasonable doubt as per section 3(2)(a) of the Evidence Act.

On the other hand, for arbitration matters, the standard of proof for corruption allegations is not merely on a balance of probabilities. Although, the standard of proof required will not be that of beyond reasonable doubt; instead, the tribunal will require such matters to be reasonably proven on a standard higher than a balance of probabilities. This has been the position of the court in instances where claims are brought against an arbitrator, the complainant needs to show that, his position on that issue was "reasonably arguable" in proving his claims against the arbitrator. This was the decision in *Cereals and other Produce of Board of Tanzania vs Monaban Trading Farming Company Limited* (Misc Commercial Cause 9 of 2022) High Court (Commercial Division) TZHCComD 266 [2 September 2022].

Therefore, the standard of proof applicable by courts and Arbitral Tribunals is that of beyond reasonable doubt. This is in line with the fact that mere allegations should not hold one liable for corruption since everyone is presumed innocent until proved guilty.

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

In establishing evidence of corruption there has to be proof to the effect that a person "*(a) solicits, accepts or obtains, or attempts to obtain, from any person for himself or any other person, any advantage as an inducement to, or reward for, or otherwise on account of, any agent, whether or not such agent is the same person as such first mentioned person and whether the agent has or has no authority to do, or for bearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business, or (b) gives, promises or offers any advantage to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of, any agent whether or not such agent is the person to whom such advantage is given, promised or offered and whether the agent has or has no authority to do, doing, or forbearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business*" as outlined under section 15(1) of the Prevention and Combating of Corruption Act.

There is no specific method to establish evidence of corruption in Tanzania, but rather there should be proof beyond reasonable doubt that there is corruption.

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

Yes, the arbitrators are rarely bound by the criminal proceedings that could impact the underlying of, or connected to, the arbitration provided that the proceeding are undertaken by the competent corruption court to conviction and in case the award is not issued already the arbitral processes can be deferred pending determination of the criminal proceedings which impede the decision of the Arbitrator.

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

Corruption offences are undertaken by special corruption courts, arbitral tribunals reliance on the findings of the corruption court is great as it is a serious factor in determination of validity of an award issued.

This goes to the extent that when there are proceedings going on the corruption allegations initiated can defer the proceedings of the arbitral tribunal leading to the change of position depending on the outcome of the alleged corruption.

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

Yes, parties to the award can challenge the award if there is a criminal ruling stating otherwise, and that is the reason for an arbitral tribunal to hold proceedings pending the finalization of a criminal case or investigation.

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The Netherlands

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

Under Dutch law, the validity of an arbitration agreement is separable from the underlying contract pursuant to article 1053 of the Dutch Code of Civil Procedure ("DCCP"). That means that even if the contract is at risk of being invalidated in the arbitral proceedings due to an argument with its basis in corruption, the arbitration agreement is not automatically affected.

Article 1052 DCCP contains the internationally recognised principle of competence-competence, which allows arbitral tribunals to determine their own jurisdiction. This principle applies also when the dispute involves allegations of corruption.

Based on these principles of separability and competence-competence, allegations of corruption do not necessarily serve as a bar to jurisdiction of arbitral tribunals or the admissibility of claims. Certain claims or counterclaims could however fall outside the scope of the arbitration agreement, if allegations of corruption are explicitly excluded by the arbitration clause. In that event, the tribunal will conclude that there is no valid arbitration agreement that covers (that part of) the dispute and that the tribunal therefore lacks jurisdiction to decide on the corruption allegations. Article 16(2) of the 2019 Netherlands Model BIT, for example, prescribes that: "*The Tribunal shall decline jurisdiction if the investment has been made through misinterpretation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.*"

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

Under Dutch law, allegations of corruption can affect the validity of an arbitral award. Article 1065(1)(e) DCCP states that an arbitral award can be annulled if the award, or the manner in which it came about, violates public policy. An arbitral award would violate public policy when the content or the enforcement of the award would result in violation of mandatory law of such a fundamental nature that adherence to it may not be made impossible by rules of procedure (Supreme Court 21 March 1997, ECLI:NL:HR:1997:AA4945 (*Eco Swiss/Benetton*); Supreme Court 12 April 2019, ECLI:NL:HR:2019:565 (*Republiek Ecuador/Chevron*)). In principle, Dutch setting-aside courts interpret public policy grounds narrowly, reserving intervention for exceptional cases where corruption fundamentally affects the award or its enforcement.

For example, an award violates public policy if it enforces a contract that came into existence under the influence of corruption and which would not have come into existence (or not on the same terms) without it (The Hague Court of Appeal 22 October

2019, ECLI:NL:GHDHA:2019:2677 (*Bariven/Wells*)). An award would also amount to a violation of public policy when corruption has significantly influenced the arbitral proceedings. On the other hand, in setting-aside proceedings stemming from a treaty-based arbitration, the courts held that there was no impact on the validity of the arbitral award where the claimants had lawfully obtained the investment subsequent to the purported acts of corruption, which were connected to the prior acquisition of the investment (The Hague Court of Appeal 18 February 2020, ECLI:NL:GHDHA:2020:234).

Similarly, article 1076(1)(B) of the DCCP permits courts to refuse recognition or enforcement of an arbitral award if it contravenes public policy. Dutch courts must assess whether the recognition or enforcement of an arbitral award would be contrary to public policy on an *ex officio* Therefore corruption can serve as a basis for refusal of enforcement, even if the award was issued in a foreign jurisdiction.

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?

According to established case law, setting-aside courts should in principle review arbitral awards with deference to the findings of the arbitral tribunal, even when public policy is alleged to have been violated. Setting-aside proceedings cannot be used as a disguised appeal. There are only two specific exceptions in which a full *de novo* review is warranted: (a) where a violation of the right to be heard is asserted, or (b) where it is asserted that no valid arbitration agreement exists. However, the Supreme Court's case law on deferential review in the context of article 1065(1)(e) DCCP provides that the court is to conduct (some) 'investigation', without explaining what such investigation in this context entails or imposing any specified restrictions.

The Hague Court of Appeal held in its judgment in the *Bariven* case (22 October 2019, ECLI:NL:GHDHA:2019:2677), that the court could review whether corruption influenced the arbitral proceedings or the underlying contract, not only on the basis of the facts established by the arbitral tribunal, but also on the basis of facts that occurred after the arbitral tribunal's decision. While the Advocate General to the Supreme Court confirmed that the approach of The Hague Court of Appeal fell within the scope of a deferential review (11 December 2020, ECLI:NL:PHR:2020:1176), the debate regarding the extent to which courts can reassess evidence or investigate new evidence is not yet settled. The Supreme Court in the *Bariven* case did not address this matter (16 July 2021, ECLI:NL:HR:2021:1171) and scholars are divided on the question of whether a deferential review can entail a reassessment of the evidence or extend beyond the evidence submitted to the arbitral tribunal.

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

Dutch courts respect the finality of arbitral awards and are generally reluctant to intervene in matters that were or could have been addressed during the arbitral proceedings. However, courts can examine corruption allegations that have not been raised during the arbitral proceedings if these issues relate directly to public policy violations. Dutch courts take this approach sparingly, reserving intervention for exceptional cases where corruption fundamentally affects the award or its enforcement. So while Dutch courts are hesitant to reassess arbitral findings, they retain discretion to examine overlooked corruption allegations.

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

While Dutch courts respect the autonomy of arbitral tribunals, they retain the authority to review awards when allegations of corruption arise, particularly if such allegations could violate public policy. There has been case law in which the original arbitral tribunal found no clear evidence of corruption, but where The Hague Court of Appeal later set aside the award based on broader evidence (22 October 2019, ECLI:NL:GHDHA:2019:2677 (*Bariven/Wells*), see question n° 3 above, for more context to this judgment).

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

There is no established standard of proof for assessing the existence of corruption. Article 1039(1) DCCP states that unless parties have explicitly agreed otherwise, tribunals are free to determine the rules of evidence, the admissibility of evidence, the division of the burden of proof and the assessment of evidence. This article is applicable in cases where the tribunal is asked to assess the existence of corruption.

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

In Dutch arbitration practice, establishing corruption often relies on a multi-layered approach. Arbitrators and courts may start with circumstantial indicators or red flags of corruption, such as unusual payment patterns or close personal ties, which may lead to deeper scrutiny. However, these indicators are insufficient on their own to substantiate a claim of corruption. Once red flags are identified, arbitrators may adopt a higher evidentiary standard to meet the serious implications of proving corruption.

Where significant indicators of corruption are present but direct evidence is hard to obtain, Dutch and international tribunals have considered shifting the burden of proof. This shift requires the accused party to demonstrate that their conduct adhered to legal

and ethical standards, addressing the inherent challenge of gathering conclusive evidence in cases involving concealed acts of corruption.

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

Article 1039(1) DCCP states that unless parties have explicitly agreed otherwise, arbitrators seated in The Netherlands are free to determine the rules of evidence, the admissibility of evidence, the division of the burden of proof and the assessment of evidence. This entails that arbitrators in principle are not bound by the outcome of criminal proceedings that resulted in a guilty verdict for acts that are connected to the alleged corruption, or even the corruption itself. However, because corruption is a grave violation of public policy, which would provide a ground for setting aside the arbitral award, it is expected they will take it into account in the event that the verdict is brought into evidence by one of the parties.

In the event that Dutch rules of evidence are applicable to the arbitral proceedings, article 161 DCCP provides that a criminal verdict for involvement in corruption is regarded as conclusive evidence of that fact in a civil proceeding. This entails, according to article 151 DCCP, that the tribunal would be under an obligation to accept the content of the evidence as true or to at least acknowledge its strength and weight. The other party is still allowed to present contrary evidence.

Since arbitral proceedings are autonomous, Dutch arbitral tribunals with their seat in The Netherlands are not obliged to stay the proceedings until the court in the criminal proceedings has reached its verdict. It may however be good practice for them to do so and it is likely that one of the parties will request it.

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

This will depend on the specific facts, circumstances and evidence of each individual case. The fact that, once proven, corruption can constitute a violation of public policy and therefore influence annulment or enforcement of the award, will most likely mean that the tribunal does take the findings into account in the event that the verdict is brought into evidence by one of the parties.

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

In The Netherlands, if an arbitral tribunal initially rules that there is no evidence of corruption but a later decision finds otherwise, there are limited remedies available for parties to challenge or revise the award. Typically, this would involve seeking annulment of the award under article 1065(1)(e) DCCP, which allows for setting aside an award if it

violates public policy. The criminal ruling can be used to argue the allegations of corruption, which would constitute this violation of public policy and provide the ground for setting aside.

Another possible remedy is to request revocation under article 1068 DCCP, if substantial new evidence of corruption surfaces after the award is issued. This process is generally available if the new evidence would have materially impacted the tribunal's decision and was unobtainable during the arbitration for reasons beyond the party's control.

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AMERICAS

Argentina

Gonzalo García Delatour, Fernando Kreser and Andrea Aguirre – Beccar Varela

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

Section 1649 of the National Civil and Commercial Code (NCCC) provides that disputes in which public order is compromised are not arbitrable. However, legal scholars have widely criticized the ambiguity of this provision, and court rulings have consistently held that concerns about public order, or the applicability of public order rules to issue a decision, do not prevent a dispute from being arbitrated. Therefore, allegations of corruption made by the parties cannot serve as a bar to the jurisdiction of arbitral tribunals or admissibility of claims, as arbitral tribunal, in principle, have jurisdiction even when public policy rules are involved.

Due to the principle of autonomy of the arbitration agreement, under which arbitration agreements are a separate and autonomous agreement from the underlying contract and, hence, that the former's validity is independent from the latter's validity (Section 35, International Commercial Arbitration Law (ICAL) for international arbitrations, and Section 1653, NCCC for domestic arbitrations), parties allegations that the underlying contract is invalid due to corruption would not, in principle, invalidate the arbitration agreement. Moreover, due to the positive effect of the *kompetenz-kompetenz* principle, which grants arbitrators the power to decide on their own jurisdiction (Section 35, ICAL for international arbitrations, and Section 1654, NCCC for domestic arbitrations), if parties claim that alleged corruption invalidates the arbitration agreement, the arbitral tribunal has jurisdiction to decide on its own jurisdiction, and due to its negative effect, judicial courts must compel the parties to arbitrate disputes that are subject of an arbitration agreement, unless, (i) in domestic arbitrations, the arbitration has not yet started and the arbitration agreement appears to be clearly null or inapplicable (Section 1656, NCCC), or, (ii) in international arbitrations, it finds that the agreement is null and void, inoperative or incapable of being performed, at the request of one of the parties (Section 19, ICAL).

It must be noted that, under Argentine law, criminal offenses are not arbitrable, meaning that the arbitral tribunal's jurisdiction is limited to deciding on, *gr.*, the civil and commercial aspects of the claim involving corruption allegations. If a claim is totally or partially inextricably linked to an allegation of corruption, and civil and commercial aspects cannot be reasonably separated to issue a decision, the arbitral tribunal may find the arbitration agreement to be totally or partially invalid.

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

Awards issued in domestic arbitrations in law are subject to the same remedies as judicial judgments according to Section 758 of the National Civil and Commercial Procedural Code (NCCPC). Thus, unless the right to appeal is waived, awards can be appealed and reviewed on their merits by judicial courts, including allegations of corruption.

Even if the right to appeal is waived, awards can be challenged on the grounds of nullity and that challenge cannot be waived when the award is "contrary to law" (Section 1656, NCCC). This provision has been criticized by the legal community as it could be interpreted to provide for an excessively expansive approach to the reasons to challenge awards. Case law has interpreted this provision restrictively, only allowing for domestic awards to be set aside exclusively on the grounds listed in Sections 760 and 761, NCCPC, which pertain only to procedural aspects, meaning that judicial courts are not allowed, in principle, to review the merits of the award when the appeal has been waived. Hence, when the appeal has been waived, the validity of the award, in principle, cannot be affected or challenged by allegations of corruption duly considered by the arbitral tribunal during the proceedings, unless the corruption allegations decided by the award are outside the scope of the arbitration agreement or are not arbitrable.

Awards issued in *international arbitrations* can be set aside (if seated in Argentina) or their enforcement denied (if seated abroad) if the award decides on criminal aspects of the corruption allegations and such decisions are found to (i) be outside the scope of the arbitration agreement, (ii) pertain to non-arbitrable matters; and/or (iii) be contrary to Argentine public policy (Sections 98 and 99, LACI for setting aside, and Sections 102 and 104 for enforcement).

For the purposes of public policy, case law has determined that the fight against corruption and money-laundering are part of public policy. Hence, if the award under scrutiny is deemed contrary to such objective, the award may be annulled, set aside or its enforcement denied; especially it is gives effect to a corruption pact. Judicial courts in such cases could review, in fact and in law, all aspects necessary to ascertain whether the award complies with public policy.

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?

As an act of corruption is deemed to contravene the public policy, judicial courts could review the award to determine whether corruption or related criminal offences affect the underlying dispute, and annul, set aside the award or deny enforcement if the award is contrary to public policy pertaining to corruption matters.

Judicial courts could also review jurisdictional aspects related to corruption allegations and decided in the award to determine if the arbitration agreement is valid or invalid.

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

Arbitral awards in international arbitration can be set aside or its enforcement refused if it is contrary to the public policy. Thus, judicial courts are not limited to the elements contained in the award, discussed in the arbitral proceedings, or by whether the issue was raised by the parties during the arbitral proceedings. Judicial courts can set aside or deny enforcement of awards *ex officio* if the award contravenes public policy, including in cases of corruption and money-laundering.

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

Under Argentine law, judicial courts can, in principle, review an award in full to analyse the arbitral tribunal's jurisdiction and/or compliance with public policy related to corruption.

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

As far as we know there are no relevant cases in Argentina concerning corruption allegations in commercial arbitration.

The LACI, NCCC, and NCCPC do not have a specific, regulated process for establishing evidence of corruption in arbitration or judicial proceedings. Therefore, the general principles of Argentine evidence law apply, meaning that the rules of sound rational judgment are used to determine corruption based on the evidence presented. Any form of evidence is admissible, including witness statements and expert reports.

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

Argentine law does not have specific regulations governing the relationship between arbitration proceedings and criminal proceedings. However, the laws regulating the relationship between civil judicial proceedings and criminal proceedings could potentially be applied to arbitration proceedings; specially in domestic arbitrations, as awards issued in *domestic arbitrations* in law are equated to judicial judgement as they are subject to the same procedural rules on enforcement and remedies as judicial judgments (Sections 499 and 758, NCCPC).

Under Argentine law, civil and criminal judicial proceedings can be initiated separately (Section 1774, NCCC). However, if a criminal action precedes or begins during a civil case, the civil proceedings must be suspended until the criminal case is resolved, except

for the following cases: (i) when the criminal case is terminated for any reason; (ii) if the delay in the criminal proceedings significantly hinders the plaintiff's right to compensation in the civil case; or (iii) if the civil claim is based on strict liability (Section 1775, NCCC). The outcome of the criminal case has *res judicata* effects on the civil case regarding the facts constituting the crime and the guilt of the defendant (Section 1776, NCCC), meaning that if the criminal court determines that the crime did not occur or that the defendant is not responsible, these findings cannot be challenged in the civil proceedings (Section 1777, NCCC).

If the civil proceedings are not suspended, and a civil judgment is issued before a criminal ruling, the criminal ruling generally does not affect the civil judgment. A review of the civil judgment is possible only at the request of an interested party and in very specific scenarios, such as that the civil judgment has res judicata effects over issues resolved in the criminal judgment and the criminal judgment is subsequently reviewed on those issues, unless the review is due to a change in the law (Section 1780, NCCC).

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

As explained above, a review of the civil judgment is possible at the request of an interested party and in very specific scenarios, such as that the civil judgment has *res judicata* effects over issues resolved in the criminal judgment and the criminal judgment is subsequently reviewed on those issues, unless the review is due to a change in the law (Section 1780, NCCC).

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Brazil

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

If we are dealing with patrimonial and disposable rights, there is no issue with the admissibility of the claim. If it impacts the validity of the contract, the arbitration clause will remain valid due to the principle of separability, provided for in art. 8 of the Brazilian Arbitration Act (Law No. 9,307/96) (the "Arbitration Act"), which reinforces the jurisdiction of the arbitration court to deal with the matter. If the civil aspects depend on the definition of some fact that is being discussed in the criminal sphere, the arbitration should be suspended until the matter is defined, in line with art. 200 of the Civil Code.

It must also be mentioned that criminal conducts shall only be investigated and prosecuted by public authorities, and not arbitral tribunals.

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

Allegations of corruption may affect the validity of an arbitral award. According to the Arbitration Act, in its art. 32, an arbitral award may be nullified if it is proven that the award was granted through corruption. It is important to mention that the mere allegation is not enough, as there should be evidence to attest and to seek remedies against the validity of the award due to the practice of corruption. This hypothesis is triggered when considering the allegation of corruption of the arbitral tribunal, not of the facts under dispute *per se*.

Thus, it is our understanding that the allegation of the delivery of an award in which the dispute was affected by corruption, may also be eventually used to question the validity of the award itself, considering that corruption is a matter of public order.

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?

The Judiciary may not review the merit of an arbitral award. The hypotheses for annulling an arbitration award are limited and involve a violation of public order, but even in this more serious case, in which corruption could be considered a matter of public order, the award would be annulled and a new award would have to be issued by the arbitration court (if possible, considering the limitation and statute of limitations periods). The

Judiciary cannot modify, amend or anyhow resolve the case in the manner it deems most appropriate.

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

It is our understanding that courts may review corruption allegations which have not been raised in the arbitration, based on the fact that corruption is a matter of public order. If evidence of corruption is brought to the attention of public authorities in Brazil, a criminal investigation will necessarily be launched into the respective facts, regardless of the allegations or not, in an arbitration proceeding.

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

Based on our understanding and experience, courts do not necessarily defer to arbitral tribunal's findings. The public authorities may analyze the respective elements, but the launch of an independent public investigation, through the so-called police inquiry, is the relevant proceeding to gather the evidence needed to determine whether corruption was effected, or not, and its respective authors.

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

Depending on the specific case, possible omissions will be analyzed, as well as the indications that parties intended to corrupt, or that there is no evidence of the service provided, etc. The mere suspicion of corruption, such as an allegation with no demonstration, will usually not be enough.

According to our understanding and experience, reasonable grounds or pieces of evidence demonstrating the practice of corruption may lead the public authorities to launch the respective criminal investigation into the matter, although equally dependent on a case-by-case analysis.

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

We do not have public cases in Brazil involving arbitration and corruption, However, according to our experience, evidence for demonstrating the practice of corruption may be, among others, through accounting/financial records, contracts, lack of proof of services being provided, and notes.

In arbitration, it is our understanding that the tribunal may launch investigative measures when faced with suspicions, although it is valid to mention that the arbitral tribunal does not investigate corruption to criminally punish the party, but to determine the civil consequences of finding or not the wrongdoing in the facts under dispute.

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

This is a controversial matter. It is possible to argue that according to art. 17 of the Arbitration Act, arbitrators, when exercising their functions or by reason thereof, are considered equivalent to public servants, for the purposes of criminal legislation. In addition, according to art. 40 of the Brazilian Criminal Procedure Code, when, in records or documents that they are aware of, judges or courts verify the existence of a crime, they will send to the Public Prosecutor's Office the copies and documents necessary for filing of a criminal complaint.

From a Brazilian point of view, criminal law is not subject to arbitration and arbitration cannot rule, convict or acquit, on matters relating to criminal conducts. Considering that arbitration and criminal proceedings are independent from each other, there is no need for suspension, however, it is possible to affirm that arbitration may be affected by findings and decisions of criminal cases, and parties may present, in the course of criminal proceedings, evidence produced in the arbitration, which will be subject to the analysis of the competent authorities alongside other relevant elements.

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

Depending on a case-by-case basis, we understand that arbitral tribunals may decide to stay their proceedings until the conclusion of an ongoing criminal process, and defer to its findings.

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

Although this intersection is a complex issue in Brazil, in theory the interested party may file an annulment, in an attempt to demonstrate that the ruling is not sustainable, which will be subject to further analysis depending on the existing evidence.

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Chile

Eduardo Villagra and Edian Arancibia – PPU Legal

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

There is a consensus in Chilean doctrine (legal opinion) and jurisprudence that the arbitration agreement, whether in the form of an arbitration clause or a settlement clause, is completely autonomous and independent. In that order, the possible allegations of corruption that seek to render the main contract null and void do not affect either the arbitration agreement or admissibility of claims.

Besides, under Chilean procedural civil law (that could be applicable if the parties agree), there is no basis to declare inadmissibility of claims or lawsuit based on corruption allegations.

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

Under Chilean legal framework, Law No. 19,971 on International Commercial Arbitration ("LACI") applies without prejudice to any multilateral or bilateral treaty in force. This law provides that one of the ways to request the nullity of an arbitral award is to prove to the court that the award is contrary to Chilean public policy.

In that order, while it is possible that allegations of corruption may support an appeal for annulment or prevent the enforcement of an arbitral award on the grounds that it affects Chilean public policy, there is a consensus in doctrine and case law that the public policy ground for annulment is interpreted restrictively (that is, only when the arbitral award affects the most fundamental and explicit principles of justice and equity of the State, or when eventually there is an act of corruption on the part of the arbitral tribunal).

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?

LACI provides that the challenge of an arbitral award, as well as the opposition to its recognition and enforcement, is only plausible on formal grounds, that means the procedure by which the award was rendered suffers from a procedural defect (for instance, the parties have not been notified of the appointment of the arbitrator, the award relates to a dispute not provided for in the arbitration agreement, the composition

of the arbitral tribunal is not in accordance with the agreement of the parties, among others).

For that reason, the court reviewing an arbitral award based on the foregoing factual assumptions will not be empowered to rule on the merits of the case. As mentioned above, an arbitral award can be annulled on the grounds of violation of public policy. In this scenario, corruption allegations might be eventually subsumed under this ground.

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

As above mentioned, the Court can only review the award that was rendered by an arbitral tribunal based on a procedural defect. For that reason, corruption allegations might be reviewed under the grounds of infringement of public policy, provided that the parties have alleged this argument.

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

In Chile, the Court having jurisdiction to hear an appeal for annulment of an arbitral award will generally respect the conclusion that no acts of corruption have been committed. Indeed, according to LACI, the appeal for annulment is extraordinary and based on formal grounds, which does not include the review of the evaluation of the evidence presented nor of the manner in which the law has been applied.

Accordingly, the Court when requested to annul an award, may suspend the annulment proceedings, when appropriate and when requested by one of the parties, for a period it determines in order to give the arbitral tribunal the opportunity to resume the arbitral proceedings or to take any other measure that, in the opinion of the arbitral tribunal, eliminates the grounds for the annulment request.

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

To determine the existence of corruption in a civil case, an arbitral tribunal or a Court reviewing an arbitral award does not need to meet a different standard of proof than the civil standard known as "preponderance of the evidence". This standard involves gathering the most substantial and convincing evidence (serious and consistent) to support one party's allegations over those of the opposing party ("more likely than not").

The standard of proof to justify an act of corruption is more stringent only when a criminal court is adjudicating the commission of crime against an individual (for instance, in a criminal case related to bribery).

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

Most cases in which corruption is the main fact, or the arbitrator is involved, are under the jurisdiction of criminal courts.

Notwithstanding, when parties want to allege corruption issues in a civil case (which, in turn, is being heard by the Public Prosecutor's Office or a criminal court), they usually add to the arbitration file part of the documents from the investigative file that gathers the official investigation of the Public Prosecutor's Office (in the investigative files, for instance, there are testimonial statements that serve as a basis to prove an act of corruption).

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

According to Chilean regulation, the crimes are not subject to arbitration. Therefore, only criminal courts have jurisdiction to hear facts that constitute crimes.

Notwithstanding, civil actions derived from a crime can be heard by civil court or an arbitral tribunal, as the case may be. In such an event, criminal judgments that acquit the accusation or order the definitive dismissal of the case may produce *res judicata* in civil matters, which may also be applicable to civil issues that may be under discussion in arbitration (e.g. a breach of contract that allegedly is false).

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

LACI has established a mechanism that recognizes that the parties are free to agree on the rules of the arbitral procedure and that, in the absence of such rules, the arbitrator may supplement them in accordance with the said law. In that order, there are no rules requiring an arbitral tribunal to stay proceedings because of an ongoing criminal investigation related to arbitration. Nevertheless, under Chilean procedural civil law (that could be applicable if the parties agree), when the existence of a crime forms the specific basis for a civil judgment or has a notable influence on it, the Court (or arbitral tribunal, as the case may be) may suspend the pronouncement of the civil judgment until the conclusion of the criminal proceedings, if an accusation has been filed.

Notwithstanding this, the parties may present evidence related to the crime being investigated in criminal proceedings to the arbitral trial (i.e., documents from the investigative file) to support their allegations. If the tribunal considers such evidence relevant, it may take it into account when rendering the award.

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

The grounds for annulling an arbitral award under LACI do not contemplate a case like the one described (except for those already mentioned above). Nevertheless, under Chilean civil procedural regulations (that might turn out applicable for domestic law arbitrations), when a final decision has been unfairly obtained by virtue of bribery, it is possible for the Supreme Court, for reasons of material justice, to review that judgment despite the existence of res judicata.

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Colombia

Pamela Alarcón and Natalia Moreno – PPU Legal

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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Peru

Daniel Ramos, Sebastián Basombrío, Daniel Reyna and Dayan Flores – PPU Legal

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

Under Peruvian law, allegations of corruption in the context of an arbitration do not constitute an obstacle to the jurisdiction of the arbitral tribunals or to the admissibility of claims made in arbitration, provided that such allegations or claims are linked to matters freely available and permitted by law or international treaties that have been submitted to the jurisdiction of the arbitral tribunals by the parties, in accordance with Article 2 of the Peruvian Arbitration Law (Legislative Decree No. 1071).

However, it is important to specify that the analysis, review and ruling of the arbitrators on the facts surrounding corruption can only be made in relation to the scope of the arbitrable matter in order to determine legal consequences (i.e. nullity of the contract, indemnification) regarding the subject matter of the dispute in view of jurisdiction granted by the parties through their allegations and evidence offered in the arbitration. This could not imply determining the criminal culpability of the parties involved, the existence of a crime or establishing a criminal sanction within the arbitration, since criminal justice is reserved solely to the jurisdiction of criminal judges.

Likewise, as in French and Colombian law, the arbitration agreement is autonomous from the substantive agreement in which it may be included, and is governed by the principle of arbitral separability, so that a possible nullity of the contract (for example, for corruption) does not determine the nullity or affect the validity of the arbitration agreement to which the parties will continue to be bound, and on the basis of which the arbitral tribunal will have jurisdiction to rule within the limits mentioned above.

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

Under Peruvian law, the validity of arbitration awards may only be affected if one of the parties to the arbitration files an appeal for annulment based on grounds for annulment provided for in Article 63 of the Peruvian Arbitration Law (i.e. non-existent arbitration agreement; infringement of rights in the process; improper composition of the arbitration tribunal or improper arbitration proceedings; ruling by the arbitration tribunal on matters not subject to its decision, or on matters not susceptible to arbitration; arbitration award contrary to international public order in the case of international arbitration). If the appealing party proves that any of the aforementioned grounds are verified, the Peruvian Commercial Courts may annul the arbitration award.

In this regard, in arbitration cases where acts of corruption have been alleged or evidence of corruption has been presented regarding a certain act being analyzed by the arbitral tribunal, the award issued may only be subject to annulment if any of these causes are present.

If it were the case that none of the parties to the arbitration alleged acts of corruption, nor did the evidence indicate this, nor had the arbitral tribunal warned the parties of the existence of an alleged act of corruption to promote the contradiction by the parties in the arbitration, then, if despite this, the arbitral tribunal were to rule on the matter in the award, the validity of said award could eventually be questioned, for example, because the tribunal is ruling on a matter not subject to its jurisdiction or that is not subject to its decision, as well as the violation of due process.

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 Peruvian law, in annulment proceedings, the courts cannot review the merits of the arbitration award, in accordance with Article 62 of the Peruvian Arbitration Law, which expressly prohibits judges who hear the annulment of an award from ruling on the merits of the case or on the content of the decision or from qualifying the criteria, motivations or interpretations set forth by the arbitral tribunal. Judges may only review the form of the arbitration award and review whether the award violates the essential principles of formal logic (i.e. non-contradiction, undue process).

In accordance with Article 40 of the Peruvian Arbitration Law, when the parties have agreed to submit to arbitration, the arbitration tribunal is the only authority with jurisdiction over the merits of the dispute. In this sense, judges may not review the merits of the acts of corruption that the arbitration tribunal may have eventually analyzed and considered for the issuance of its arbitration award.

In the proceedings for judicial enforcement of the arbitration award, the courts may not review the merits of the matter decided in the arbitration award, and in accordance with Article 68 of the Peruvian Arbitration Law, the judicial authority is prohibited, under its own responsibility, from admitting appeals that hinder the enforcement of the award.

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

Under Peruvian law, in line with the answer to the previous question, the courts do not review and cannot rule on the merits of arbitration so they could not review allegations of corruption that have been made in the arbitration. Likewise, if, for example, the appealing party in the appeal for annulment of the arbitration award made allegations of corruption linked to the facts of the dispute that were not raised in the arbitration, the judges could not undertake the analysis of said allegations because the arbitral tribunal is the only one

competent to hear the merits of the dispute and to decide on the related and accessory issues raised during the arbitration proceedings, not the judicial courts.

In cases where the party appealing to annulment of an arbitral award makes allegations of corruption as part of the basis of its appeal, for example, an allegations of corruption in the issuance of the arbitral award by the arbitral tribunal, the courts may review such allegations solely for the purpose of verifying whether due process was respected in the arbitration proceedings or whether or not there is a violation of international public order in order to determine the validity of the arbitral award.

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

Under Peruvian law, in the proceeding of annulment of an arbitral award, commercial courts do not review the merits of the matter resolved by the arbitral tribunal, so that these courts could not strictly be linked or not to the ruling of the arbitral tribunal on the acts of corruption alleged in the arbitration. Commercial courts only review the validity of the arbitral award in accordance with Article 63 of the Peruvian Arbitration Law.

If the acts of corruption alleged in the arbitration are also the subject of a criminal proceeding, criminal judges carry out an independent review of the case and are not bound by the analysis or decision made by an arbitral tribunal in the arbitration regarding the acts of corruption. Criminal courts and arbitration tribunals are independent of each other and operate under very different standards of proof, with criminal courts carrying out a more thorough review of the evidence (high standard of proof) to determine whether a crime has occurred and to establish the corresponding criminal consequences.

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

Under Peruvian law, the standard of proof used by arbitrators and courts regarding the existence of corruption is different In arbitration, in accordance with Article 43 of the Peruvian Arbitration Law, the arbitration tribunal reviews and determines the admission, relevance, validity and value of evidence in arbitration, and is governed by the standard of intimate conviction and/or the regime of preponderance of probabilities, that is, it will be enough to prove that the occurrence of the event (act of corruption) is more likely than its non-existence, although there is a tendency to apply a more rigorous standard to arbitrations involving acts of corruption, as occurs in civil proceedings.

On the other hand, the courts, in the case of a criminal proceeding on corruption, have a higher standard of proof of acts of corruption, since in this type of proceeding the principle of presumption of innocence governs, which requires that crimes be proven beyond all reasonable doubt.

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

Under Peruvian law, arbitration tribunals may use different methods to identify corruption acts, including any suspicious activity surrounding the corruption act. Thus, arbitrators usually determine the existence of acts of corruption based on indications, that is, using documents that allow proving a specific event, from which the existence of acts of corruption can be reasonably presumed.

Likewise, in the framework of arbitration, considering the evidentiary standard applied by arbitrators, there is usually no direct evidence that accounts for the act of corruption, but there could be a series of indications that allow the arbitrator to conclude the existence of acts of corruption. Along these lines, for example, in arbitrations where there is a stage of document exhibition, and the arbitration tribunal orders the exhibition of certain documents linked to the allegations of acts of corruption, if they are not exhibited, the negative inference rule is usually applied. In this way, the reluctant party could be prejudiced by a qualification of its conduct as an indication that such evidence is unfavorable to it, or that it confirms the hypotheses that were intended to be corroborated.

On the other hand, since commercial courts in the context of annulment proceedings cannot examine the merits of the arbitral award, no particular method applies to establish proof of corruption. In the event that allegations of corruption are the basis of the appellant to annul the arbitral award, commercial courts will review said allegation in order to verify whether or not there was a violation of due process, for which they can use different methods to identify acts than that applied in criminal proceedings (high standard of proof in accordance with the principle of presumption of innocence).

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

Under Peruvian law, in accordance with Articles 3.2 and 3.3 of the Peruvian Arbitration Law, the arbitral tribunal is fully independent and is not subject to any order, provision or authority that undermines its powers, and has full powers to process arbitration proceedings.

In this sense, there is independence between the arbitration and the criminal proceedings, so the arbitrators are not bound by the decisions of the Criminal Courts. In addition, criminal matters are not the subject of arbitration, although the arbitrators may rule on acts of corruption to determine non-criminal consequences.

This allows us to verify that there is no necessary dependence between what is decided in the criminal proceedings and what is decided in the arbitration, and vice versa. Thus, for example, there may not be a criminal conviction or even an acquittal judgment regarding the crime of corruption, and this will not oblige the arbitrator to exonerate the legal consequences of acts of corruption that have been submitted to his jurisdiction.

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

Under Peruvian law, as previously mentioned, there is no dependence between the decision of the arbitral tribunals and the criminal courts, so that existence of a criminal proceeding in parallel to an arbitration in which the same acts under analysis are discussed does not condition the decision of one or the other court, since the scope of the ruling is different.

In this sense, the existence of an investigation or criminal proceedings for the same facts or for events directly linked to the arbitration case does not generate a case of prejudiciality, so the arbitrators are not obliged to suspend the arbitration if criminal investigations are initiated, as the jurisdiction and effects of each ruling will be different. Thus, for example, a criminal acquittal judgment does not force the arbitrator to exempt the person who previously had the status of defendant in the criminal proceedings from civil liability.

Under these considerations, a suspension of arbitration due to the existence of parallel criminal investigations would be questionable, since it would generate an infringement of the right of access to arbitration justice, considering that a suspension would imply that a party is condemned to await the conclusion of criminal proceedings that will not determine the outcome of the future arbitration award.

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

Under Peruvian law, taking into account the independence of criminal and arbitration proceedings, if there were a subsequent criminal judgment that determined the opposite of what was decided in the arbitration award regarding the criminal acts (i.e. corruption) that were reviewed in the proceedings, it would not have an impact on the decision adopted by the arbitration tribunal, since its scope and consequences of its decision are different.

According to Article 62 of the Peruvian Arbitration Law, only the annulment appeal can be filed against the arbitration award, which must be filed within 20 business days following the issuance of the award or the decision that resolves the requests against the arbitration award. However, the commercial courts cannot analyze the merits of the case resolved by the arbitration tribunals; therefore, there is no direct remedy for the situation raised in the question.

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United States of America

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

Under U.S. law, including the Federal Arbitration Act (9. U.S.C. 1 *et seq.*) and the Uniform Arbitration Act of 1955 ("UAA") (adopted by 49 states within the United States), parties are free to contract and agree to arbitrate all disputes arising out of or related to their agreement. Whether a dispute falls within the scope of any written arbitration agreement is a question solely for the arbitrators to determine. Much like the international principle of *compétence-compétence*, U.S. law gives broad authority to arbitration tribunals to determine their own jurisdiction and the scope of any claims placed at issue. Courts will enforce agreements to arbitrate, and parties will routinely be forced to arbitrate rather than litigate claims in the court system.

Allegations of corruption, generally, will not bar a tribunal's jurisdiction or admissibility under U.S. law because of the liberal federal policy favoring arbitration and giving deference to the parties' contractual rights and intent. *See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Generally, civil claims or defenses such as claims of fraud, civil theft, conversion, unjust enrichment, civil conspiracy, and fraud in the inducement of procuring the underlying contract all fall within the purview of the arbitrators' review and determination of whether such claims or defenses are within the scope of the parties' arbitration agreement.

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

Generally, an allegation of corruption will not provide a sufficient basis to challenge or vacate an arbitration award. The Federal Arbitration Act provides only four narrow grounds for vacating an arbitration award: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, refusing to hear evidence pertinent and material to the controversy, or any other misbehavior which may prejudice the rights of a party; or (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award was not made. 9 U.S.C.10(a).

The fraud and corruption mentioned in the Federal Arbitration Act is fraud in the arbitration proceeding itself, or corruption or bias of an arbitrator. Other U.S. laws deal more specifically with anti-corruption enforcement and civil liability that may flow from actual corruption, such as the U.S. Foreign Corrupt Practices Act.

Recent federal courts have examined whether allegations of fraud in the underlying conduct of the parties that forms the basis of a claim subject to arbitration (such as alleged corruption in procuring a government contract that contains the agreement to arbitrate) can constitute a basis for vacating an arbitration award under the public policy prong or the New York Convention. Every U.S. federal court that has examined this issue has agreed: a court will not vacate or overturn an arbitration tribunal's award based on allegations of corruption intertwined with the merits fully litigated before a duly appointed, competent tribunal. *See,g.*, *Commodities & Mins. Enter. V. CVG Ferrominera Orinoco, C.A.*, 2024 U.S. App. LEXIS 19944 (11th Cir. Aug. 8, 2024); *Commodities & Mins. Enter. V. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802 (2d Cir. 2022); *Metro Mun. v. Rutas de Lima S.A.C.*, 2024 U.S. Dist. LEXIS 42891 (D.C. Dist. Ct. March 12, 2024).

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?

In the United States, judicial review is limited to the four statutory bases for vacating an award in the Federal Arbitration Act above. The Supreme Court of the United States and all lower courts strictly adhere to the strong statutory and common law principle that courts do not review the merits or the factual determinations made by an arbitration tribunal unless one of the four statutory bases for vacating an award is properly raised. *See,g.*, *Hall St. Assocs, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

The New York Convention does provide one other avenue for judicial review, but that avenue is limited to legal and public policy review – not to the merits of the underlying dispute. For example, a court in the United States will not re-examine or review whether a contracting party breached a contract or whether the contract was procured by fraud. Those decisions are considered part of the merits and substantive claims or defenses to be raised and asserted before the arbitration tribunal.

Courts will review awards for a manifest disregard of law, or failure to apply clear legal principles to the facts determined by the arbitrators.

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

Generally, U.S. courts will not review allegations of corruption related to the underlying merits where those allegations were not raised in the arbitration. S. law treats judicial review of arbitration awards with extreme deference to the tribunal and courts will not consider new arguments or allegations that a party failed to put before the arbitration tribunal.

The exceptions to this rule relate to corruption or a fraud committed in the arbitration itself, or the discovery of new evidence that clearly and convincingly establishes an underlying fraud or corruption, which was not available to the party or the tribunal during

the arbitration, and which could not have been raised or discovered before or during the arbitration. *Compare Metro Mun. v. Rutas de Lima S.A.C.*, 2024 U.S. Dist. LEXIS 42891 (D.C. Dist. Ct. March 12, 2024) *with France v. Bernstein*, 43 F.3d 367 (3rd Cir. 2022).

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

In the United States, courts are extremely deferential to an arbitration tribunal's findings of fact and to mixed questions of fact and law. A tribunal's finding that no corrupt acts occurred is generally considered a finding of fact and accorded the highest level of deference by reviewing courts. Such a finding can only be overturned if a party demonstrates clear error or corruption or bias on the part of the tribunal.

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

In arbitration proceedings, U.S. law does not require arbitrators to follow the standard rules for admitting evidence but does require arbitrators to apply the law and other legal standards. In civil arbitration proceedings, the petitioner or claimant has the burden of proving all elements of its claims by a preponderance of the evidence, meaning a fact is more likely true than not. Claims for fraud are subject to a higher burden of proof – clear and convincing evidence.

Reviewing courts generally do not assess allegations of corruption that a party failed to raise in the underlying arbitration. If a party raised corruption allegations, the reviewing court will be extremely deferential to the tribunal's findings and award.

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

Arbitrations within the United States generally are private, and the awards and underlying proceedings cannot be analyzed or examined by the public. Where parties challenge an arbitration award and assert claims of corruption, reviewing courts are required to give deference to all facts found by the tribunal. Arbitrators and courts will generally apply a higher standard proof by clear and convincing evidence to allegations or claims related to corruption because they are most closely related to civil fraud.

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

Similar to the other countries, criminal offenses are not arbitrable in the United States and arbitrators cannot rule on criminal offenses. If a party has been convicted of a

criminal offense or pleaded guilty to a criminal offense, that fact is considered res judicata and must be accepted by the tribunal.

Arbitrators can only determine the civil claims and remedies that may flow from criminal conduct. For example, a party convicted of criminal fraud, bribery, or theft may have additional civil liability. Any facts supporting the elements of a crime and found by the fact-finder in the criminal trial or admitted in a plea agreement by the criminal defendant will be res judicata and considered admissions of a party opponent when raised in a related civil arbitration.

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

Arbitrators in the United States also have discretion to stay a civil arbitration while a criminal investigation or trial is pending. Most arbitrators will defer to the criminal investigation or grant a request to stay the arbitration pending resolution of the criminal case. If the U.S. federal government is investigating a crime related to corruption, particularly corruption involving foreign entities, the U.S. Attorney's Office may request civil parties to stay their arbitration and may seek a court order to stay an arbitration so as not to interfere with the government's investigation and to avoid any inconsistent findings. Generally, civil litigants and arbitrators will voluntarily stay private civil arbitrations and allow the government to proceed with criminal cases.

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

This factual scenario is unlikely to occur in the United States because the U.S. government, enforcing U.S. anti-corruption laws in a criminal context, will have priority. Any criminal case will be decided before any private civil arbitration. If, however, the criminal investigation and prosecution are conducted by a foreign sovereign, it is possible such a ruling post-dates a civil arbitration. In that context, U.S. law recognizes two remedies for amending, vacating or modifying an arbitration award – one under the Federal Arbitration Act and the other under the New York Convention. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 443 (2020). Under either rubric, a party seeking to vacate an arbitration award would need to demonstrate that evidence establishing the criminal conduct or offense was not available and could not have been available to the party or the tribunal during the arbitration. It is irrelevant that a criminal conviction post-dates an arbitration. The ability to vacate or amend an arbitration award is based on whether a party had access to facts and information that would have put the party on notice of the alleged criminal activity at the time of the arbitration hearing.

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APAC

India

Anuj Berry and Varuna Bhanrale – Trilegal

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

For an arbitral tribunal to have jurisdiction to adjudicate upon a dispute or a claim, the subject matter of the dispute must be arbitrable. The Indian Arbitration and Conciliation Act, 1996 (**Indian Arbitration Act**) does not provide a list or description of disputes that are not arbitrable. However, generally the courts consider disputes concerning rights *in personam* (i.e., rights against only specific individuals) as arbitrable. On the other hand, disputes regarding rights *in rem* (i.e., rights against the world at large) are required to be adjudicated by the courts and public tribunals. Though there are no cases that specifically deal with the issue of arbitrability of corruption (i.e., bribery of a public servant), corruption is often considered a non-arbitrable issue since it is a criminal offence under Indian law.

Based on cases concerning arbitrability of fraud, it is unlikely that mere allegations of corruption would bar the jurisdiction of arbitral tribunals or admissibility of claims. Simple allegations of corruption that touch upon the internal affairs of the party *inter se* or have no implication in the public domain may still be arbitrable. An arbitral tribunal's jurisdiction may be barred only in cases where very serious allegations of corruption are raised such that (i) the arbitration clause/agreement itself cannot be said to exist and it is held that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all, or (ii) allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or *mala fide* conduct, thus necessitating the hearing of the case by a court.

In any event, Indian arbitration laws are modelled on the principles of severability and *compétence-compétence*. Consequently, the arbitral tribunal is competent and authorized by law to rule on its jurisdiction where issues of arbitrability of corruption-related issues are raised – though courts may reconsider such issues at the post-award stage. Further, if courts are faced with these issues at the time of reference of a dispute to arbitration, the courts can examine the non-arbitrability of a claim on an extremely limited basis, and refuse arbitration when the matter is manifestly and *ex facie* "non-arbitrable". Other than in exceptional cases, Indian courts are expected to refer the matter to arbitration wherein the arbitral tribunal would decide on any challenges to its jurisdiction.

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

Under Indian law, setting aside or enforcement of an arbitral award is determined based on a host of grounds such as validity of the arbitration agreement, arbitrability of the dispute, the scope of arbitration, procedure followed by the arbitral tribunal, and consonance of the arbitral award with the public policy of India. Amongst others, allegations of corruption can also affect the validity and enforcement of an arbitral award.

If the allegations of corruption are of such a serious nature that make the dispute non-arbitrable, the validity of the arbitral award would also get affected on this count and Indian courts could set aside or refuse enforcement of such awards. Further, under the Indian Arbitration Act, if the "*making of an award was induced or affected by*" corruption, the award is considered to be conflicting with the public policy of India and will be set aside/refused enforcement.

In the case of *Devas Multimedia Private Limited v. Antrix Corporation Limited & Anr. (2023) 1 SCC 216* (**Antrix Case**), where issues of grave corruption were discovered only at the stage of challenge to the arbitral award (and not during the adjudication by the arbitral tribunal), the courts held that the award is induced or affected by corruption and was set aside. There are presently no cases where validity or enforceability of an arbitral award has been tested based on allegations of corruption raised before the arbitral tribunal.

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?

In proceedings for setting aside and enforcement of awards, it is a settled legal position that courts do not sit in appeal over the arbitral award. Therefore, typically courts cannot delve into the merits of the case, save in exceptional cases such as while dealing with issues of non-arbitrability, patent illegality of an award, infringement of public policy or violation of fundamental principles of justice. In the absence of any such exceptional case, the award must be considered only from limited perspectives as discussed in the response under Question 2.

In cases where courts are considering the effect of corruption or related offences on the dispute under arbitration, it is likely that they would be able to review the award and merits of the case – since in such cases issues such as non-arbitrability and infringement of public policy would usually be under consideration.

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

The courts can consider allegations of corruption not raised in the arbitration, where grave issues of non-arbitrability and conflict with public policy of India are concerned.

Consequently, allegations of corruption, if not raised in the arbitration, can be raised at the time of review of arbitral award in setting aside or enforcement proceedings, especially when they could not be discovered or were not discoverable at the time of arbitration proceedings. In the Antrix Case, the courts set aside the award on the basis of existence of corruption and fraud, even though such corruption and fraud were discovered after making of the award.

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

Indian courts usually defer to the arbitral tribunal's findings on substantive issues unless examination of such issues is necessary to assess if grounds exist for setting aside or refusing enforcement of an arbitral award. Thus, if existence of corruption would affect the validity or enforceability of the arbitral award, Indian courts may independently assess this issue instead of deferring to the arbitral tribunal's finding on it.

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

Arbitral proceedings essentially concern disputes which are civil in nature. The standard of proof required in civil and criminal cases is different under Indian law. In criminal cases a case must be proven beyond reasonable doubt. However, civil cases are decided on the basis of preponderance of probabilities, that is, a fact is said to be proved when it is believed to exist, or its existence is considered so probable that a prudent man would act upon the supposition that it exists. Hence, the arbitrators and reviewing civil courts decide issues of corruption on the basis of preponderance of probabilities.

We have not come across cases in public domain where issues of corruption have been considered/adjudicated in an arbitration in India. However, even in those cases, the arbitrators and the reviewing courts would have to adjudicate on issues relating to corruption (including the arbitrability of such issues) based on the test of preponderance of probabilities. Inference of probabilities is drawn from the materials produced by the parties as well as by reference to the circumstances upon which the concerned parties rely.

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

An arbitral tribunal in an India-seated arbitration is not required to conform to the statutory provisions of evidence and procedure. The arbitral tribunals are, with the consent of parties or in the absence of any agreement between the parties, at liberty to decide upon the procedure for adjudication of dispute and have the power to determine the admissibility, relevance, materiality and weight of any evidence albeit preserving the principles of natural justice.

Thus, even in arbitrations involving issues of corruption, the arbitrators have the power to decide the preferred procedure for evidence, albeit within the contours of the terms of the arbitration agreement and any applicable institutional rules. Further, any evidentiary procedure should honour the principles of natural justice.

Typically, in arbitrations, evidentiary tools such as documentary records and oral testimonies are employed to establish that there is a strong probability of existence of a fact. Further, where facts are not directly proved, arbitrators may also infer facts from circumstantial evidence such that the circumstances exclude any other reasonable possibility.

In so far as the reviewing courts are concerned, they ascertain whether an award is to be set aside or enforced by assessing evidence gathered through the methods as mentioned above. Typically, the reviewing courts do not entertain fresh evidence, new evidence could be considered in exceptional circumstances such as where certain crucial facts relating to the subject matter of arbitration arise subsequent to the arbitral award being issued.

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

Under Indian laws, findings of fact recorded by a criminal court do not have any bearing on civil cases and vice versa, especially since the standard of proof for civil and criminal cases are different. The same set of facts may lead to civil and criminal proceedings which can proceed parallelly and the pendency or disposal of one does not automatically affect the other.

Thus, arbitrators would not be bound by criminal proceedings (or their outcome) on issues that could impact the dispute under arbitration. However, if such proceedings before or findings by a criminal court are likely to affect the arbitrability of the dispute, it is likely that the arbitrator may have to consider such developments/outcome of a criminal proceeding.

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

As stated before, since civil cases have different standards of proof, the findings in parallel criminal cases do not automatically apply to arbitrations. However, where findings from a parallel criminal investigation or litigation may affect the arbitrability of a dispute or enforceability of an arbitral award (for example, if the finding would make the outcome of arbitration in conflict with public policy of India), in practicality, arbitrators are likely to consider or may even defer to the findings in such criminal case.

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

If existence of corruption is established in a criminal ruling subsequent to issuance of an arbitral award, it would strengthen the case for setting aside / non-enforcement of the arbitral award if existence of corruption renders the dispute under arbitration non-arbitrable. Further, a finding on existence of corruption in a criminal proceeding may also suggest that the arbitral award is in conflict with the public policy of India, which is also a ground to set aside the award or refuse its enforcement.

In the Antrix case, the arbitration proceedings did not consider any issues of corruption. However, subsequently, fraud and corruption were discovered through parallel criminal investigations, and on this basis the arbitral award was set aside as being against the public policy of India.

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Japan

Yuki Daisuke and Michael Mroczek – Nozomi Sogo

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

Under Japanese law, corruption is generally defined under the Penal Code, which includes offenses such as bribery. Key aspects of corruption include (i) the bribery of public officials and (ii) offering bribes. Both the giver and receiver of the bribe can face severe penalties, including imprisonment and fines. The Japan Arbitration Act also addresses corruption involving arbitrators under Chapter X Penal Provisions. For example, Article 53 stipulates that arbitrators who accept, solicit, or promise to accept a bribe in connection with their duties can face imprisonment for up to seven years. Pursuant to Art. 23(1) of the Japan Arbitration Act, an "*Arbitral Tribunal may rule on its own jurisdiction (…), including a ruling on any allegations on the existence or validity of an Arbitration Agreement.*"

Furthermore, pursuant to Article 13(1) of the Japan Arbitration Act, "*Except as otherwise provided for in laws and regulations, an arbitration agreement is effective only when its subject is a civil dispute (excluding disputes of divorce or dissolution of adoptive relation) which can be settled between the parties*." Accordingly, under Japanese jurisdiction, an arbitral tribunal does not have the authority to rule on questions of criminal law. However, if a criminal court establishes bribery or corruption, this may render the arbitration agreement invalid.

Additionally, Art. 13(7) of the Japan Arbitration Act provides that *"[i]n regard to a contract containing an arbitration agreement, even if the clauses of the contract other than that of the arbitration agreement are not valid due to nullity or rescission or for any other reasons, the validity of the arbitration agreement is not automatically impaired*." As such, depending on the circumstances of the case, the separability doctrine may apply and may render the arbitration clause valid.

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

Japan's Arbitration Act is based on the UNCITRAL Model Law 2006. Articles 44(1)(viii) and 45(2)(ix) of the Japan Arbitration Act provide that an arbitral award can be set aside or its recognition and enforcement can be refused if the content of the award is against public policy. Since contracts and transactions involving corruption are considered to violate public policy, Japanese courts may set aside or refuse recognition and enforcement of arbitral awards affected by corruption.

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

In Japan, while courts generally show a high level of deference to the findings of arbitral tribunals, they retain the authority to review arbitral awards to ensure they do not violate public policy, including instances involving allegations of corruption.

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

In Japan, the courts apply the principle of free evaluation of evidence when reviewing alleged violations of public policy. This means that the courts have the discretion to independently assess and weigh all relevant evidence presented to them, without being bound by the findings of the arbitral tribunal. This allows the courts to ensure that arbitral awards do not contravene public policy, including in cases involving allegations of corruption.

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

In Japan, criminal law matters are inherently not arbitrable, meaning arbitrators cannot rule on criminal offenses. However, findings of criminal courts regarding criminal allegations may be binding on arbitral tribunals seated in Japan.

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

If an arbitral tribunal rules that there is no evidence of corruption, but a subsequent criminal ruling establishes otherwise, the affected party has several potential remedies under Japanese law. Primarily, Article 44(1)(viii) of the Japanese Arbitration Act allows for an arbitral award to be set aside if it is found to be contrary to public policy. Corruption, being a serious violation of public policy, can provide grounds for such an action. However, a significant challenge is the three-month time limit for filing a petition to set aside the award. If the criminal ruling occurs after this period, it complicates the ability to set aside the award directly. Despite this, courts retain the authority to refuse the enforcement of an arbitral award if it violates public policy, which means that even if the award cannot be set aside, its enforcement can still be contested based on the criminal court's findings.

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Russia

Evgeny Gurchenko, Diana Kevorkova and Yulia Sevostyanova – EPAM

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

In Russia, the principle of the autonomy of the arbitration clause applies, meaning that the invalidity of the contract containing the arbitration clause, or allegations of corruption in the conclusion or performance of such a contract, as a general rule, do not affect the validity of the arbitration clause.

In such cases, the arbitral tribunal is competent to consider disputes insofar as they arise from the civil law relations of the parties.

However, it is possible that a court may conclude that the arbitral tribunal lacks jurisdiction to consider the dispute if it determines that the conclusion of the arbitration clause itself contravenes public policy, including anti-corruption laws. This could occur if the arbitration clause was concluded in violation of the law and aimed at circumventing it.

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

According to Russian procedural law, when considering cases on the recognition and enforcement of arbitral awards, courts review the award based on limited grounds, including the requirement that the arbitral award must comply with the public policy of the Russian Federation.

Therefore, a court may refuse to recognize or enforce an award if it contradicts the public policy of the Russian Federation, which includes measures to combat corruption, as well as countering money laundering.

For instance, in Russian judicial practice, there are examples where courts have found the enforcement of a foreign arbitral award, which provides for the recovery of penalties under a contract concluded as a result of commercial bribery, to be contrary to the public policy of the Russian Federation (paragraph 2 of the Review of Practice approved by Information Letter No. 156 of the Presidium of the Supreme Arbitration Court of the Russian Federation dated February 26, 2013).

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?

As a general rule, according to Russian procedural law, when considering cases on the recognition and enforcement of arbitral awards, the court reviews the award based on limited grounds but does not review the merits of the case (part 4 of Article 243 of the Arbitration Procedure Code of the Russian Federation).

However, in practice, when assessing the compliance of an arbitral award with public policy, courts may examine issues concerning the substance of the dispute and the actions of the parties (for example, reviewing arguments regarding the affiliation of the parties or whether the contract terms meet market standards), including reviewing the factual basis of corruption allegations.

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

The issue of verifying an arbitral award for compliance with the public policy of the Russian Federation is determined independently by the court, *ex officio*, meaning regardless of whether allegations of corruption were raised by the parties or considered in the arbitration.

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

According to Russian procedural codes, the findings and decisions of arbitral tribunals generally do not have binding effect for the state court.

In any case, when considering issues such as the lack of jurisdiction of an arbitral tribunal to consider a dispute or the compliance of an arbitral award with the public policy of the Russian Federation (which includes the fight against corruption), the court is not bound by the arbitrators' conclusions.

Arbitral tribunals and courts generally proceed on the basis that the establishment of facts constituting a crime is possible only through criminal proceedings and does not fall within the scope of the arbitration tribunal's consideration. An arbitral tribunal can establish factual circumstances, but it is not authorized to give these circumstances a criminal law qualification.

Moreover, if a criminal court verdict establishes the fact of corruption, this verdict will be binding for the court considering the enforcement of the arbitral award, regardless of what was established by the arbitrators in their decision.

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

The legislation on both international commercial arbitration and arbitration tribunals in Russia does not establish specific criteria or standards of proof.

However, establishing facts of a crime and providing a criminal-law assessment of the circumstances are only possible within the framework of criminal proceedings and cannot be part of the consideration of arbitration or arbitration tribunals.

For courts, there are also no specific standards of proof established for assessing the presence of corruption. In particular, courts, when considering the compliance of an arbitral award with public policy, may accept any evidence they deem relevant and admissible to establish specific facts, including facts of corruption.

However, in such cases, when determining whether an arbitral award contradicts public policy due to corruption, courts also tend to rely on criminal court verdicts or information from authorized state bodies (such as Rosfinmonitoring) regarding suspicious transactions under anti-money laundering legislation.

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

There are not many cases where courts have considered issues of corruption when reviewing arbitral awards.

For example, in paragraph 2 of the Review of Practice approved by Information Letter No. 156 of the Presidium of the Supreme Arbitration Court of the Russian Federation dated February 26, 2013, the court, while reviewing an arbitral award, was guided by a criminal court verdict that established that a person performing managerial functions at the enterprise, which was a party to the contract, was held criminally liable for commercial bribery.

At the same time, when verifying an arbitral award's compliance with public policy, courts can assess factual circumstances of the case for signs of money laundering. Courts consider whether the contract could actually be performed (including considering the financial condition of the parties), what the economic purpose of the contract was, whether it pursued a lawful goal, and other relevant factors.

It should be noted that if the court has doubts about compliance with public policy, it may involve an authorized state body to present the court with a position and evidence of public interest violations in the case.

If there are signs indicating the possible use of the arbitration for money laundering purposes, the court may refuse to enforce the arbitral award on the grounds of public policy violation, even if the court does not establish the fact of corruption.

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

Arbitral tribunals located in Russia are autonomous and, therefore, are not required to stay their proceedings until a criminal court issues a verdict that is relevant for the arbitration case. However, if the arbitration tribunal renders an award that contradicts the findings of a criminal court verdict, it is highly likely that the arbitral award will be deemed contrary to public policy.

The Russian state court, when considering the recognition and enforcement of an arbitral award, is required to stay its proceedings if the case cannot be resolved before another case being considered by another court (Article 143 of the Arbitration Procedure Code of the Russian Federation), which may include the consideration of a criminal case. However, in any case, the necessity to suspend the proceedings is determined at the court's discretion.

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

A final criminal court verdict establishing the fact of corruption is binding on all state authorities, courts, and other individuals and legal entities and must be strictly enforced throughout the territory of the Russian Federation (Article 392 of the Criminal Procedure Code of the Russian Federation).

Specifically, when considering the issue of recognition and enforcement of an arbitration award, the issues resolved in the verdict — such as whether certain actions took place and whether they were committed by a specific person — will be binding on the courts (Article 69 of the Arbitration Procedure Code of the Russian Federation).

If an arbitration tribunal renders an award contrary to the findings of a criminal court verdict, it is highly likely that the award will be deemed contrary to public policy, which may include the binding force of a criminal court verdict.

The findings of the investigations or investigative authorities are not binding, but certain documents from the criminal case (for example, interrogation protocols, investigator's rulings) can be used by the parties as evidence of their positions in court or arbitration, and these documents will be evaluated alongside other evidence.

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

If there is a contradiction between an arbitral award and a criminal court verdict, the award may be deemed contrary to the public policy of the Russian Federation.

If a criminal court verdict is issued after the arbitral award has been recognized or enforced by a court, the decision to recognize or enforce the award may be reconsidered based on newly discovered circumstances (Article 311 of the Arbitration Procedure Code

of the Russian Federation). These circumstances include a criminal court verdict related to a party involved in the case. As a general rule, such a request must be filed within three months from the date when the party became aware of the newly discovered circumstances.

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