

THE ROLE OF AN ARBITRATOR IN INVESTIGATING CORRUPTION CASES IN INTERNATIONAL COMMERCIAL ARBITRATION^{*}

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International Commercial Arbitration is a private dispute settlement used in a cross-border setting that is based and founded on an agreement to arbitrate. International Commercial Arbitration is known as a faster method of resolving disputes that gives the parties a great deal of discretion in the way the procedures are conducted. However, on the contrary, corruption undermines not only trade – deeply harming society as a whole – but also the arbitral process since it runs against the fundamental and universal norms known as public policy. Corruption also causes tribunals and arbitrators to face evidentiary issues and challenges when faced with corruption cases. This highlights the main problem related to the role of the arbitrator in investigating corruption cases and to what extent the arbitrator has the authority to investigate corruption and implement anti-corruption efforts even if parties did not trigger corruption allegations. This study will use a normative-empirical method to examine the role of the arbitrator in investigating corruption and how far the arbitrator is permitted to go into investigating corruption in the absence of party allegation. It is found that arbitrators are becoming the servants of truth, examining all aspects of the case including corruption.

Keywords

Arbitrator, Arbitral Tribunal, Corruption, Investigation, International Commercial Arbitration

Introduction

In a time when the use of international commercial arbitration to resolve disputes is on the rise, arbitral tribunals must play a significant part in achieving an international anti-corruption effort. Since tribunals and arbitrators face evidentiary issues and challenges when faced with corruption cases, the role of the arbitrator in investigating corruption cases and how far the arbitrator is permitted to go into investigating corruption in the absence of party allegation must be addressed and highlighted.

Due to the rise of corruption as a subject of international instruments and the concentration of criteria around its avoidance, detection, and remediation in commercial sectors, corruption is regarded as a significant and important problem in international commercial arbitration. This highlights a persistent issue about what defines the arbitrator's function when accusations of corruption are raised, or allegations of

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corruption develop, because it has been acknowledged as a subject of global and transnational public policy.

According to some legal scholars, this alarming question in International Commercial Arbitration had resulted in the appearance of different points of view and theories. The connection between the arbitrators and the parties is at the center of the concepts around the role of the arbitrator. The contractual principle states that arbitrators are considered to be “the servants of the parties” and originate their rights and duties from their contracts. As a result, this approach suggests that instead of looking at criminal law, arbitrators should focus on the parties' commercial responsibilities and rights. The status approach, on the other hand, gives arbitrators judicial authority. According to this theory, the arbitrator's rights and obligations are not resulting from the agreement that the arbitrating parties made. Instead, their function is defined by applicable jurisdictional law. Therefore, arbitrators must ensure that their actions do not conflict with the principles of the national laws (Born 2009, 1598).

Because of their limited power, some courts subscribe to the first theory and show a hesitancy to combat corruption, while other judges who follow the second view take hold of both stated and presumed corruption cases. We might infer that there is no generally accepted understanding of the arbitrator's position in the context of corruption, making it even more crucial to address the arbitrator's role in investigating corruption cases, particularly when there is no party allegation.

This study endeavors to address the above-mentioned issue and debate that leave arbitral tribunals and arbitrators in a difficult situation every time they are faced with corruption cases from a normative-empirical approach. The author will analyze the role of the arbitrator in investigating corruption and how far is the arbitrator permitted to go into investigating corruption in the absence of party allegation. The analysis will be supported by international cases, conventions, surveys, and other sources studying corruption, arbitration, and the arbitrator's role in investigating corruption cases.

1. Theoretical background

The urge to find a proper answer for the role of the arbitrator in investigating corruption cases and to what extent the arbitrator has the authority to investigate corruption and implement anti-corruption efforts even if parties did not trigger corruption allegations is not new in the arbitration field. However, the reason behind not having a generally accepted understanding of the arbitrator's position in the context of corruption has resulted in the appearance of several studies, theories, and scenarios. Several studies have followed the contractual theory, declaring that the arbitrator acquires his rights and obligations from the party's contractual agreement (Fan 2017, 5). In other words, the arbitrator is appointed by the parties and therefore the arbitrator performs his authority according to the party's agreement. This theory believes that the arbitrator's exclusive task is to serve the parties and address the conflicts raised by the parties without referring to a corruption investigation in the absence of the parties' allegations. This theory considers the arbitrator as “the servant of the parties”. While on the other hand, other studies did not accept the contractual theory and have applied a completely different approach known as the status theory (Fan 2017, 4). Members that support this theory believe that the arbitrators' rights and duties are not derived from the party's

agreement but rather from the applicable jurisdictional/national law. In other words, they believe that the role of an arbitrator is not limited to party contracts. The arbitrator's role is broad, and the arbitrator's responsibility is to serve not only the parties but also the international rule of law. According to this theory, the arbitrator is considered the "servant of truth" and not a "servant to parties" as mentioned in the contractual theory (Uluc 2016, 245).

The author's main goal is to tackle and address the main question related to the role of the arbitrator in investigating corruption cases and to what extent the arbitrator has the authority to investigate corruption and implement anti-corruption efforts even if the parties did not trigger corruption allegations. The author will focus on and tackle the available data, analysis, and theories from a normative-empirical approach to provide a clear and updated explanation that the new movement in arbitration is to confront corruption issues even if they are not raised by parties. In other words, how arbitrators are becoming the servants of truth, examining all aspects of the case including corruption.

2. The legal context

The arbitrators are given reciprocal authority and responsibility under the parties' agreement. The arbitrating parties, the legislation controlling the arbitration contract, the norms provided by arbitral institutions, and the legislation where implementation and acknowledgment are sought all contribute to the creation of these powers and obligations.

Regarding the obligations owed to the parties, the arbitrators must settle the dispute, abide by the arbitration agreement, act fairly and accurately, adopt suitable procedures to prevent delays, render a strictly enforceable award, and make good faith attempts to look into any possible criminal law violations in the relevant jurisdictions. In other words, arbitrators must follow the protocol established by the parties for the arbitration process. However, to avoid unjust or improper proceedings or to ensure efficient case management, they could instead choose not to enforce the parties' choice.

Two of the fundamental obligations of arbitrators are to operate fairly and impartially and to stay at the peak of the pyramid. These obligations are fundamental components of the adjudicatory role that arbitrators play and are inherent to the arbitration process. National laws, international treaties, and institutional guidelines all specifically impose these obligations on arbitrators. For example, Article 18 of the UNCITRAL Model Law Act states that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." (UNCITRAL Model Law 2006, 14).

Some of the typical vested powers used by arbitrators include the following: Determining the language of the arbitration, the relevant legislation and venue, the number of expert witnesses, the number of fact witnesses who must be present in person, and the number of documents that must be submitted. However, one power and authority to which different points of view and approaches are applied to is the power and the role of the arbitrator to investigate. The ability of an arbitrator to independently research the facts is governed differently by national arbitration laws. There are, however, laws governing arbitration that provide arbitrators this authority by enabling

them to collect proof that hasn't been offered by the parties. In other words, there are regulations that allow arbitrators to investigate and collect proof for cases and situations that are not raised by parties such as corruption.

An example of these regulations and laws is Article 184 of the Swiss Federal Statute on Private International Law, which states that “the arbitral tribunal shall itself conduct the taking of evidence.” (Swiss Federal Statute on Private International Law 1987, 62).

Arbitrators are also given investigative authority by norms. Arbitral tribunals have the authority to make essential inquiries, classify pertinent issues, evaluate pertinent facts, and direct any party to provide more evidence, as stated in Article 22 of the LCIA Arbitration Rules (LCIA Arbitration Rules 2020, Article 22). In addition to that, Articles 3 (10) & 4 (10) of the IBA Rules on Evidence enable tribunals to require documents or witnesses, including those whose testimony has not yet been given as evidence (International Bar Association 2020, 12-15).

Based on what is stated above, we will analyze and study the role of the arbitrator in investigating corruption and how far the arbitrator is permitted to go into investigating corruption in the absence of an allegation by a party according to several arbitral tribunal rules, laws, and case studies.

3. The social context

Corruption is a serious problem for modern societies since it affects and harms the economy, society, and even justice systems. Corruption is considered to be a dangerous disease that has deep roots in social structures. Numerous countries around the world suffer from corruption and the Member States of the EU are not unaffected by this reality (European Commission 2014, I).

According to the results of the face-to-face survey coordinated by the European Commission, Directorate-General for Communication in March-April 2022 titled Special Eurobarometer 523, the majority of Europeans find corruption to be unacceptable. Although this is the belief of more than six in ten Europeans, the percentage has decreased since December 2019. The belief that it is appropriate to give a present or do a favor in exchange for anything from a public administration or a public service has also grown in popularity during the same time, although less than three in ten people currently hold this opinion (Special Eurobarometer 523 2022, 30).

According to several legal scholars, this ongoing debate about corruption finds its social origin in how attitudes towards corruption vary considerably and specifically across countries including those within the European Union.

Based on the results of a recent survey published by the European Commission on 13 July 2022, federal authorities should encourage people to put their trust in authorities and inform them about corruption cases that they have knowledge of. As shown by the study, about 6% of Europeans say they experienced or even witnessed a case of corruption in the last 12 months, but only 15% of those witnessing corruption reported the issue. In general, almost half of the people believe that corruption cases are difficult to prove and for authorities to investigate (European Commission 2022, 3rd paragraph).

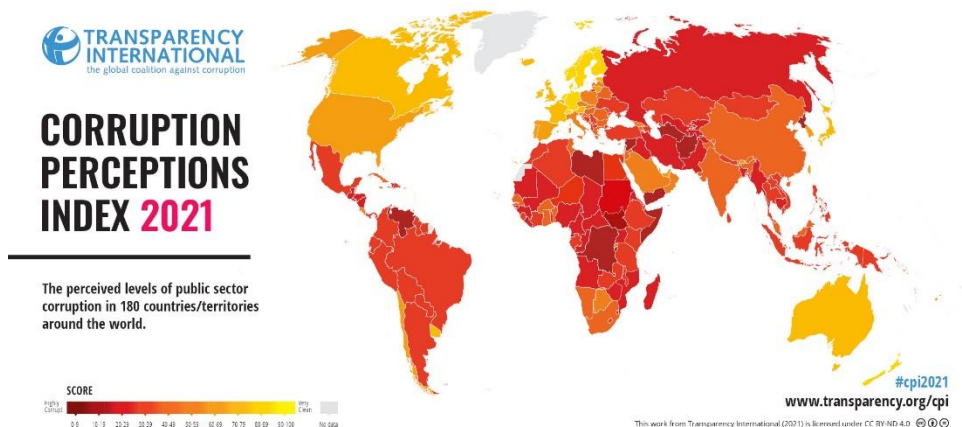
The main question related to the role of the arbitrator in investigating corruption cases and to what extent the arbitrator has the authority to investigate corruption and

implement anti-corruption efforts even if parties did not trigger corruption allegations will be further developed and examined in the coming sections.

4. Data and information

According to a recent statistical study made by Transparency International (Corruption Perception Index 2021), the frequency of corruption is increasing, affecting the operation of fundamental social justice and numerous institutions including arbitration institutions and the arbitral process, regardless of the country's level of development. According to this study and on a scale from 0 (meaning extremely corrupt) to 100 (meaning no perception of corruption) none of the countries have achieved a suitable rating and more than 68% percent of the countries recorded less than 50 out of 100. Moreover, this study also showed that 66% percent of Eastern Europe and the European Union scored less than 50 out of 100 (Transparency International 2022, 6).

Figure 1: Corruption Perception Index 2021



Source: Transparency International 2022

In a time when corruption cases are increasing, the impact of these cases on the role of the arbitrator in investigating corruption and to what extent the arbitrator has the authority to investigate corruption even if parties did not trigger corruption allegations must be addressed and highlighted. Especially since studies have shown that most citizens believe that corruption cases are difficult to prove and for authorities to investigate as shown in the below study (European Commission 2022).

Figure 2: Corruption is hard to prove and to investigate

Source: Transparency International 2022

It is found that arbitrators, when encountering corruption cases, face several challenges, especially when these cases are not raised by parties.² These challenges put arbitrators in a position where they can either apply an “eye wide shut” or “eye wide open” method. It is noted by several legal scholars that the methods applied by arbitrators will determine their rights and obligations when dealing with corruption cases whether these cases are raised by parties’ allegations or are suspected cases.

In arbitration history, several tribunals applied different approaches when faced with corruption cases. In the well-known *World Duty-Free v. Kenya* case (Investor-State LawGuide 2006), arbitrators and tribunals have tackled corruption using the “eye wide open” method. In other words, the tribunal has tackled corruption and did not prefer to apply any passive method that disregards corruption. On the other hand, several other tribunals, when faced with corruption cases, preferred to apply the second method and to disregard any case of corruption, as can be deduced from the *Azurix Corp. v. The Argentine Republic* case (Uluc 2016, 245). Moreover, also in the *SPP v. Egypt* case, the tribunal did not accept the Respondent's claim that the information submitted by the Claimant responding to the procedural order had any evidence of corruption (Uluc 2016, 245).

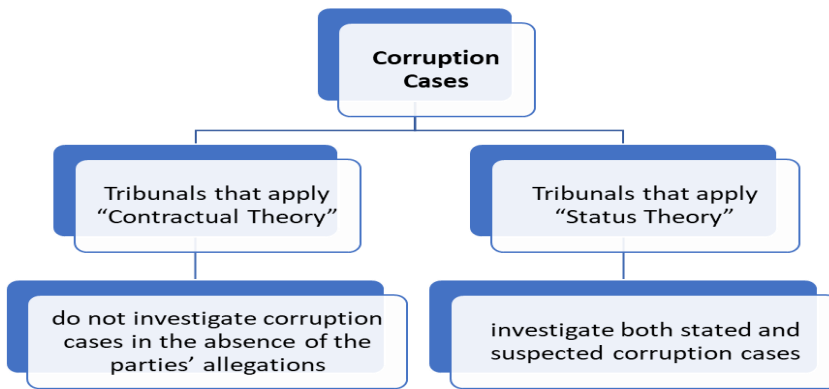
Studies that analyzed legal cases and tribunal decisions have come to the conclusion that most tribunals would ignore corruption cases if parties decided not to raise any grounds relating to corruption (de Navacelle & Musso 2022 paragraph 15). The

²Arbitrators may face several challenges when dealing with corruption cases. These challenges include procedural problems and obstacles that hinder the successful resolution of corruption in arbitral processes. Additionally, obstacles and challenges arise from the application of due diligence and the norm of good faith. Furthermore, arbitral tribunals encounter issues stemming from the extraterritoriality of domestic legislation and the level of proof required to carry out corruption proceedings.

explanation behind their position is based on the method they apply: either the contractual method or the status method.

According to tribunals that apply the first method, they believe that arbitrators are appointed by the parties' agreement, and they perform the rights and duties detailed in the parties' agreement. Therefore, according to this theory, arbitrators would disregard investigating corruption since their main task is to accomplish their duties under the parties' agreement. On the other hand, the tribunals that apply the second method believe that arbitrators have broad duties, and they should serve not only the parties but also the truth. Therefore, and based on the above information and data, we can establish the following diagram (Figure 3) that helps us understand how several tribunals deal and have dealt with corruption cases.

Figure 3: Corruption cases diagram



Source: author's compilation

Accordingly, the author will study and examine these theories along with several interpretations by legal scholars that mostly tackle this debate.

5. Systematic explanation

During the arbitral process, when a party claims corruption to ask for the nullity of the agreement, the arbitrator shall investigate this allegation in order to conclude whether corruption is present without being able to disregard this claim.

However, what if the arbitrator encounters evidence that helps him deduce that the parties are engaged in a corruption case or that the parties have used the arbitral process for criminal reasons without the presence of any allegation raised by the parties? From here the main issue raised for debate is the following: what is the role of the arbitrator in investigating corruption cases and how far is the arbitrator permitted to go into investigating corruption in the absence of allegations by a party?

It should be stated that arbitrators face several challenges when they run across corruption cases that are not raised by parties' allegations; especially when arbitrators

perform their authority according to the parties' agreement. However, the current movement that tends towards tackling and fighting corruption plays a significant role in encouraging arbitrators not to disregard evidence that highlights the presence of corruption. According to several legal scholars, the number of arbitral tribunals that believe they have the duty to investigate suspected corruption cases to protect global interest is increasing. There are several reasonings for this increase (de Navacelle & Musso 2022, I B).

Firstly, according to several arbitral institutions' laws like Article 42 of the ICC Arbitration Rules, arbitrators have the task to declare an enforceable award (ICC Arbitration Rules 2017). It should be stated that when rendering an arbitral award that gives effect to a corruption case in this situation, this award is against all laws and public policies worldwide that fight the deep diseases of corruption. For example, in France, arbitral tribunals are urged to deal with corruption cases on their proposal. In other words, they should investigate corruption cases even if they are not raised by parties' allegations in order to prevent rendering an arbitral award that includes corruption.

Secondly, legal experts consider that arbitrators are not private-decision makers, as the legal influence of their decisions has considerable effects on the public (de Navacelle & Musso 2022, paragraph 19). Therefore, if arbitrators disregard corruption cases whether suspected or raised by parties' cases they are considered to be refusing their engagement in the global movement against corruption which will affect the public interest.

Moreover, it should be highlighted that arbitrators are well-equipped with powers and authorities to investigate corruption cases, even those that are not raised by parties' allegations according to numerous laws on arbitral institutions that give arbitrators general authority to investigate the facts of the cases they run into. For example, Article 25 (1) of the ICC Arbitration Rules states clearly that the arbitrator should establish the facts of the case by all applicable means (ICC Arbitration Rules 2017). Article 22.1 (iii) of the LCIA's Arbitration Rules also provides the arbitrator with the power to investigate the facts of the case to determine to what degree the arbitrator should take the initiative to classify the relevant issues, facts, and applicable law (LCIA Arbitration Rules 2020).

In addition to what is stated above, the more detailed powers given to arbitrators that help with investigating corruption cases could be the following. First, the arbitrator should request the testimony of a person that was not involved in the case as a witness to be provided with more details about the facts of the case. Second, the arbitrator can also request additional documents that are relevant to the case from the parties (de Navacelle & Musso 2022, II B). In case the parties refuse to provide the requested information and documents, the arbitrator can consider this refusal to constitute a lack of production of documents.

Therefore, we can deduce that arbitrators are given the power to investigate corruption cases; even those that are not raised by parties' allegations. Arbitrators shall participate in the global and public fight against corruption. Even if parties try to claim that the tribunal is not competent to deal with corruption cases, tribunals and arbitrators should preserve their jurisdiction.

6. Discussion

According to the statistical studies and data listed in Chapter 2, we can deduce that the prevalence of corruption is increasing, affecting the operation of fundamental social justice and numerous institutions including arbitration institutions and the arbitral process regardless of the country's level of development. The implications of these cases on the function of the arbitrator in investigating corruption and the extent to which the arbitrator has the ability to investigate corruption even if parties did not initiate the allegations must be addressed and highlighted in a time when corruption cases are on the rise. In particular, the research has shown that the majority of people think it's hard for authorities to prove incidences of corruption and look into them.

As mentioned earlier, arbitrators are appointed by parties to solve contractual disputes. In other words, different from a judge in national courts, arbitrators are appointed by parties having a contractual dispute. As a result, the role of an arbitrator in investigating corruption cases will be viewed and questioned differently than a judge in national courts. The growth of corruption in arbitration urges the arbitrator not only to perform their usual role outlined in the parties' agreement but to perform a role dedicated to serving international public policy. This performance converts the arbitrator to become a servant of truth examining all aspects of the dispute including corruption.

However, the tribunals that follow the contractual theory declare their unwillingness to investigate corruption cases that are not raised by the allegation of a party on the grounds of their limited authority and powers provided in the parties' agreements. In other words, they believe that the arbitrator's role is to address the particular needs and interests of the parties in the arbitral process and not to address any international policy issues. Therefore, advocates and legal experts that support this theory believe that it's not the arbitrator's duty to investigate corruption when it's not alleged by parties. For example, Alexis Mourre states that: "Arbitrators should act with great caution when introducing in the arbitral debate elements which were not included in the parties' submissions. Although there is no doubt that arbitrators should be sensitive to states' legitimate interests, they should not turn themselves into investigators, policemen, or prosecutors. As opposed to the state judges, the primary role of an arbitrator is to enforce the contract, and not to defend the public policy. It is submitted, as a consequence, that an arbitrator has no duty to investigate possible breaches of the criminal law of which there is no evidence at all, and which were not raised by the parties in their submissions." (Uluc 2016, 278). Moreover, according to the *Westacre Investments* case, the arbitral tribunal took a passive role in investigating corruption and dismissed the defendant's argument that the agreement was made through bribes on the grounds that the arbitrators have an adjudicator role and not a prosecutor role. In other words, if the defendant does not include evidence of corruption in his facts, then an arbitrator doesn't need to investigate (Martin 2003, 5).

However, this point of view can no longer be the case in corruption cases. The new movement and battle against corruption and the ratification of anti-corruption treaties encourage arbitrators to investigate corruption even if the issue is not raised by parties' allegations or in their representation of facts because if the investigation of corruption is only limited to parties' allegations, then parties will use the arbitral process for illegal purposes.

This causes the arbitrator to be placed in a difficult situation when dealing with a corruption case, especially if the arbitrator detects the evidence indicating that corruption is present in the parties' behavior and agreement. However, other tribunals have adopted the status theory allowing them to investigate corruption allegations and suspected corruption cases. Especially, according to this theory, arbitrators are considered the servants of truth and not only a servant to parties. These tribunals took into consideration the evidence and indicators that determine the presence of corruption in the cases raised before them and declared the parties' agreement as null and void, as seen in the ICC Case No. 8891 where the tribunal took an active approach taking into consideration all evidence and signs of corruption into consideration (Martin 2003, 5). Various legal scholars have supported the status theory applied by several tribunals. For example, several legal experts such as Catherine A. Rogers have stated that: "The modern international arbitrator is not simply an instrumentality of the parties' collective will be expressed through the arbitration agreement, but instead an integral part of a larger system that depends, in part, on them performing their role as responsible custodians of that system." (Rogers 2005, 963).

From this, given a clear view that corruption is considered to be illegal by international law, arbitration should highlight the indicators, evidence, and signs that invalidate the parties' agreement. Arbitrators shall participate in the global and public fight against corruption and take an active role in investigating corruption cases whether they are raised by parties' allegations or are suspected cases.

We can deduce that arbitrators are moving towards investigating corruption even if the issue is not raised by parties' allegations in order to be fair and protect international public policy, especially since they are given the power to investigate corruption cases even those that are not raised by parties' allegations. In other words, arbitrators are becoming the servants of truth investigating every aspect of the dispute including corruption.

Conclusion

When claims or suspected evidence of corruption appear, arbitral tribunals, arbitrators, and the institutions charged with managing them encounter challenging situations. The situations and cases examined in this study do not all follow the same technique, approach, or outcomes. We have seen that some legal scholars and tribunals believe that investigating corruption by arbitrators must only be triggered by parties' allegations. However, on the contrary, other tribunals believe that arbitrators should not disregard any suspicious evidence of corruption in order to be impartial and defend global public policy, particularly considering that they have been granted the authority to look into cases of corruption. These variations illustrate the tremendous difficulties that several tribunals and arbitrators encounter when trying to solve corruption issues.

However, the new standard and goal that has been established by the different international treaties against corruption and the national laws that implement them provides arbitrators with the chance to appropriately apply it to their rulings. As seen by the arbitral decisions previously mentioned in this article, the arbitrators' strategy greatly influences the outcomes. We are able to deduce that arbitrators are becoming the servants of truth in investigating corruption cases even if they are not raised by parties'

allegations or even if parties try to claim that the tribunal is not competent to deal with corruption cases in order to have a fair decision and protect international public policy. In other words, in order to protect the public interest that the arbitrator's decision/award significantly affects, the arbitrators' new approach is to investigate corruption cases taking into consideration that it is more likely that signs of corruption will be found, the more proactive the arbitrators and tribunals are.

Overall, the success of the fight against corruption will depend on how arbitrators tackle this issue. Arbitrators that are tackling and investigating corruption cases are demonstrating their adherence to international law and public policy rules while also demonstrating the power of international commercial arbitration in enforcing the global legal framework of fighting corruption and their ability to balance their commitment to upholding international law with their allegiance to the parties. This balancing of devotion and dedication, coupled with the proactive involvement of arbitrators in investigating corruption, will significantly contribute to international commercial arbitration's survival as an effective dispute resolution system.

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