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What Is at Stake?

Allegations of criminal conduct arising in disputes that are settled in international arbitration proceedings are not a new issue. In commercial arbitration, the landmark *Lagergren* case dates back to 1963,[1] and in investment arbitration, the well-known *World Duty Free* v. *Kenya* case was decided in 2006.[2] Arbitrators regularly have to deal with alleged transnational corruption and bribery, and allegations of fraud and money laundering equally come up. In a globalised economy, licit as well as illicit financial flows across borders are on the rise.

Over the past decades, international arbitration has become the number-one mechanism to settle international commercial and investment disputes[3] where large-scale economic interests may be at stake.[4] Independently of the rise of arbitration, another development took place: the international legal framework that criminalises public and private bribery, fraud and money laundering has become much stronger over the past twenty years. Transnational public policy plays an important role in arbitration nowadays, and allegations of criminal behaviour can have a decisive impact on the outcome of the proceedings.[5] Such allegations have the potential to serve as 'killer argument' in a case, giving one party a defence against all claims of the opposite party – if they are proven successfully. Therefore, the question how allegations of criminal conduct in international arbitration can be proven is highly relevant in practice.

[1] See discussion in Chapter 6. [2] See discussion in Chapter 5.
[3] For commercial arbitration: Born 2014, 93 et seq.; for ICSID arbitration: ICSID Annual Report 2014, 5.
[4] E.g. in *World Duty Free* v. *Kenya*, the former Kenyan Attorney-General pointed out that the claim in this case amounted to more than Kenya's budget at that time, emphasising that if the Claimant had succeeded, this might have halted the country's development and turned it into a failed state (Llamzon 2014, 117, 251).
[5] Cf. Pieth 2011, 1375 et seq.

May arbitral tribunals decide disputes involving alleged criminal conduct at all, or must state courts deal with such issues?[6] It is undisputed that the sanctioning of criminal behaviour is exclusively reserved to domestic state courts (or international criminal courts and tribunals).[7] However, this does not preclude arbitrators from applying criminal laws: '[I]nternational arbitral tribunals have no power to or interest in providing sentencing for criminal offences, while they may well have the power to assess the impact of criminal or other illegal activity on commercial transactions.'[8]

While domestic legislators could limit the possibilities of arbitration to assess the impact of criminal conduct on commercial transactions, this is not usually done.[9] With regard to Switzerland, the Federal Supreme Court held in 1992 that disputes involving matters of foreign mandatory law or public policy are not, in principle, exclusively reserved to state courts.[10] Today, it is established that any dispute of financial interest is arbitrable under chapter 12 of the Swiss Private International Law Act (SPILA), including disputes that in some way involve criminal conduct.[11] While opinions are not uniform in this regard,[12] the practice of arbitral

[6] Cf. Art. V 2. (a) New York Convention 1958. The question of arbitrability is not to be confused with the issue of separability of the arbitral clause (see discussion in Chapter 2 and in Chapter 10).

[7] Kurkela 2008, 282 (fn. 7); Mistelis 2009, 574 et seq.; on punitive damages: Mourre 2009, 220 et seq.

[8] Mistelis 2009, 575; see also Mourre 2009, 209 et seq.; Raeschke-Kessler 2004, 493; Srinivasan et al. 2014, 135 et seq.; and Voser 1996, 330 et seq. Different: Smit, who argues that arbitrators should be precluded from ruling on mandatory law issues (Smit 2011, 226).

[9] Cf. e.g. the US Supreme Court decision in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985), where the Court argued that a Japanese arbitral tribunal was competent to rule on alleged violations of the US Sherman Antitrust Act (Donovan and Greenawalt 2006, 14 et seq.; Mayer 1986, 279 et seq.); and the Paris Court of Appeals decision of 1993 that the arbitrability of a dispute was not precluded only because a rule of public policy was at stake (*Société Labinal* v. *Sociétés Mors et Westland Aerospace*; Mourre 2009, 216); cf. also Blackaby et al. 2015, 112 et seq., 586.

[10] BGE 118 II 353, 356 et seq.; Blessing 1997, 29 et seq.; Schnyder 1995, 297.

[11] Regarding corruption: Berger and Kellerhals 2015, 82; Kaufmann-Kohler and Rigozzi 2015, 102; Arfazadeh 2001, 681; in detail: Sayed 2001, 658 et seq.; on public procurement-related matters: Sayed 2004, 27 et seq.; cf. also BGE 119 II 380, 385.

[12] Smit argues that in order to ensure that arbitral tribunals apply mandatory law properly and consistently, such issues should be referred to a single judicial institution of the state whose mandatory law is applied: '[M]aterial issues of mandatory law are ruled non-arbitrable and are referred to a single domestic court.' (Smit 2011, 210). It remains open how practical such a solution would be, in particular with regard to the capacity of state courts in jurisdictions worldwide.

tribunals shows that those frequently decide on mandatory law issues, including matters of criminal law.

From a criminal law viewpoint, allegations of criminal conduct in international arbitration are not a mere morality issue. Bribery, fraud and money laundering are economic crimes. Committed on a large scale involving the abuse of public funds, they have a detrimental impact on national economies and the people's trust in public institutions. A state's assets are channelled away from the legitimate recipients – the people – into the pockets of a few powerful. This causes massive problems, as public funds (including aid money) disappear that would be needed for health, education and infrastructure projects. Reducing poverty and crime cannot succeed if the state's wealth is shovelled to offshore bank accounts or real estate, to the benefit of a few.[13]

The effects of corruption can also be perceived more directly: in public procurement, if a project is awarded – due to bribe payments or fraud during the bidding process – to a bidder whose performance is substandard, the work product will quite certainly not be 'state of the art' and, for instance, not fulfil essential safety standards.[14] The negative impact of bribery on fair competition is quite universally acknowledged.[15] For all these reasons, the international efforts to combat illicit financial flows[16] have been stepped up dramatically in the past decades, and most states nowadays criminalise bribery, fraud and money laundering in their domestic law. In short: if criminal conduct is alleged in international arbitration, it cannot be taken lightly anymore, or even disregarded, by arbitrators.[17]

In practice, when arbitral tribunals decide criminal law issues, difficult questions regarding the applicable law and evidence arise. Criminal law is mandatory and part of public law – it is not at the disposition of the parties – while in particular international commercial arbitration is private and autonomous from states, consensual and based on party autonomy.[18] The proceedings are in general confidential and closed to the public, which is disturbing if public interest issues such as corruption in relation to public procurement or to concessions to exploit natural

[13] E.g. Cockcroft 2014, 57 et seq.; Makinwa 2013, 301 et seq.; on the impact of corruption on sustainable development: Aidt 2011, 3 et seq.
[14] Cf. e.g. Wells 2014. [15] See, e.g., Cremades and Cairns 2003a, 77.
[16] While no universally agreed definition of *illicit financial flows* (IFFs) exists yet, according to the World Bank, they are most commonly described as 'money illegally earned, transferred, or used that crosses borders'.
[17] Pieth 2011, 1380. [18] Mourre 2009, 207.

resources are at stake.[19] In domestic legal systems, prosecutors must collect the evidence in criminal cases; in international arbitration, there is no public prosecutor. In principle, the parties produce the evidence. The merger of proceedings that are essentially based on party autonomy with substantive criminal law that falls into the domain of the authority of states raises touchy issues.

At some point, parties may agree to settle if circumstantial evidence indicates that criminal conduct is involved (and the arbitral proceedings become time-consuming and expensive)[20] – but what if they do not? How can parties successfully prove criminal conduct, and how can arbitrators distinguish real cases from unsubstantiated allegations?[21] How can arbitrators recognise that criminal conduct is involved, even if none of the parties alleges it (including sham arbitration)? Arbitrators are facing a genuine dilemma in such cases.

This book looks into the process of proving bribery, fraud and money laundering in international investment and commercial arbitration. The focus is, on the one hand, on the applicable criminal law: which substantive law applies if criminal conduct is alleged, and which law applies to procedure and evidence? On the other hand, selected issues of evidence are discussed: burden and standard of proof, adverse inferences, admissibility of evidence and the privilege against self-incrimination. The core of the text is an analysis of current practice of arbitral tribunals – in particular ICSID and ICC cases – when facing allegations of, or suspecting, criminal conduct. Through an inductive[22] approach, pertinent

[19] Rose 2014, 224 et seq. who points out that ICSID arbitration is more transparent than UNCITRAL or ICC arbitration. The new UNCITRAL Transparency Rules (UNCITRAL 2013b) should bring about a higher level of transparency.

[20] Cf. e.g. the *Azpetrol* v. *Azerbaijan* case (Llamzon 2014, 125 et seq., 200 et seq.; Rose 2014, 192 et seq.).

[21] Cf. the Separate Opinion of Professor Thomas Wälde in *International Thunderbird Gaming Corporation* v. *The United Mexican States* of December 2005 (at para. 20), where he argued that '[corruption] insinuations are now frequently employed by both claimant investors and respondent governments. They should be disregarded – explicitly and implicitly, except if properly and explicitly submitted to the tribunal, substantiated with a specific allegation of corruption and subject to proper legal and factual debate for the tribunal.'

[22] Not *deductive*: the starting point is not the content of the law, but the cases. See Hassemer 1990, 9 et seq. (on criminal law textbooks): '"Induktiv" *meint: Die Darstellung lässt sich nicht* ("deduktiv") *vom Inhalt des Gesetzes und der Auslegung leiten, die das Gesetz konkretisiert, um danach das Wissen für die Entscheidung von Fällen präsent zu haben; die Darstellung geht vielmehr vom (noch ungelösten) Fall aus und entwickelt an ihm Gesetzesinhalt und Gesetzesauslegung, die auf diesen Fall "passen".*'

questions on applicable criminal law and evidence are identified, followed by a critical assessment. The aim is to develop a decision tree for arbitrators on how they should proceed in such situations. Some passages of the text draw from Swiss and English law as examples for a continental and a common law system with modern arbitration legislation. Both are popular arbitration locations, and parties also like to choose the law of those two countries to apply.[23]

Numerous commentators have addressed alleged criminal conduct in international arbitration. In 2003 and 2014, Crivellaro collected the arbitration case law that deals with bribery and corruption.[24] The Collection of ICC Arbitral Awards of the International Chamber of Commerce (ICC) contains a number of cases that involve bribery and fraud.[25] In 2013, the ICC issued a Special Supplement with extracts of ICC cases involving bribery and corruption.[26] In 2004, Sayed published a comprehensive study on corruption in international trade and commercial arbitration;[27] and in 2014, Llamzon addressed corruption in international investment arbitration in a thorough study.[28] Many articles specifically deal with the topic of proving alleged bribery, fraud and money laundering, and their legal consequences, in international arbitration proceedings.[29] In general, those writings have a background in arbitration. The approach here is from a criminal law perspective.

The text is organised in five parts. After the Introduction, Part II presents the basic legal framework for international investment and

[23] Born 2014, 144 et seq.
[24] Crivellaro 2003, 119 et seq.; Crivellaro 2014; for a collection and summary of ICC case law: Martin 2003, 12 et seq.
[25] The following cases discussed in this text are published in the Collection of ICC Arbitral Awards 1974–2011 (6 Volumes): ICC Cases No. 1110, 3916, 4145, 5622, 6248, 7047, 8891, 9333, 11307, 12290 and 14470.
[26] 24 *ICC International Court of Arbitration Bulletin* (2013), Special Supplement, 'Tackling Corruption in Arbitration', 39 et seq.
[27] Sayed 2004. [28] Llamzon 2014.
[29] See Bibliography; to name a few recent texts: Abdel Raouf 2009; Coşar 2015; Cremades 2005; Cremades and Cairns 2003; González García 2013; Hahn 2010; Haugeneder and Liebscher 2009; Hwang and Lim 2012; Karsten 2003; Kendra and Bonini 2014; Khvalei 2014; Kreindler 2010a; Kulick and Wendler 2010; Lamm, Greenwald and Young 2014; Lamm, Hellbeck and Khan 2015; Lamm, Pham and Moloo 2010; Lim 2013; Litwin 2013; Llamzon and Sinclair 2015; Martin 2003; McDougall 2005; Menaker 2010; Meshel 2013; Mills 2002; Mourre 2009; Nadeau-Séguin 2013; Nasarre 2013; Newcombe 2011; Partasides 2010; Philip 2003; Pieth 2011; Raeschke-Kessler 2004; Rose 2014; Sacerdoti 2009; Scherer 2002; Schill 2012; Schlabrendorff 2005; Srinivasan et al. 2014; Stacher 2011; Vincke 2014; Wilske and Fox 2011; Wilske and Obel 2013; Yackee 2012.

commercial arbitration, including the applicable substantive and procedural law. In addition, the forms and manifestations of criminal conduct that are the subject of this text are defined and discussed; and selected issues of evidence in common (English) law, in continental (Swiss) law and in arbitration are introduced. Part III analyses the current practice of international arbitral tribunals when they are confronted with alleged criminal behaviour, with a focus on ICSID and ICC cases. Part IV critically discusses issues of applicable criminal law and evidence that emerge from the case analysis. To round off the text, a brief look at the legal consequences of criminal conduct in investment and commercial arbitration is taken. Part V eventually summarises the results of the study, and draws a conclusion. The Annex is an attempt to draw up a decision tree for arbitrators on how they should proceed when they are confronted with allegations of, or suspect, criminal conduct.