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Red flags and the power and duty of arbitral tribunals to investigate suspicions of economic crime in international arbitration

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Framing the issue

- Corruption is a grave international harm
  - widely recognized as a violation of international public policy
  - International arbitration cannot ignore it
  - Worldwide trend towards increased transparency
- Yet posing significant challenges for arbitrators
  - Sensitive allegations (criminal wrongdoing by one or more parties)
  - Difficult evidentiary issues (often hidden, lacking direct evidence)
  - Far-reaching consequences (outcome determinative)

Difficult questions

- Can/should arbitrators raise legal defence of corruption *sua sponte* where neither party has (properly) pleaded or raised it?
- What are the arbitrators' duties and powers?
- When and how can arbitrators pursue factual investigations of corruption *sua sponte*?
- In practice very few known instances of corruption addressed by tribunals *sua sponte* – general hesitation: Why?

Why investigate: arbitrators' duty

- Why arbitrators **should be** prepared to raise and investigate economic crime on their initiative:
  - Public responsibility to the administration of justice
  - Support the international fight against corruption
  - Ensure that the international arbitration system does not perpetuate corruption

  ICC Case No. 1110 (Lagergren case): upon finding corruption, the sole arbitrator declined jurisdiction – "a case such as this, involving such gross violation of good morals and international public policy cannot be heard by any arbitral tribunal"

Why investigate: arbitrators' duty

- Risk of **complicity** in the parties' wrongdoing
  - *Metal-Tech v Republic of Uzbekistan*: addressing issues of corruption is aimed at "the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act"
- Duty to **render an enforceable award** – i.e. one that does not violate public policy
  - *Inceysa Vallisoletana SL v Republic of El Salvador*: giving effect to fraudulent acts would violate transnational public policy

Why investigate: arbitrators' power

- Arbitrators' **power to raise issues of law** *sua sponte*
  - Arbitration laws and rules (e.g. LCIA Arbitration Rules, Art. 22.1(iii))
  - Principle of *jura novit curia*
  - Contracts against public policy void *ab initio*
  - Broad grants of procedural authority: arbitral tribunals can and should address the application of international public policy on their own account

Why investigate: arbitrators' power

- Arbitrators' **power to investigate the facts** *sua sponte*
  - Arbitration laws
  - Arbitration rules (e.g. Art. 25 ICC Rules, Art. 25; Art. 24(3) Swiss Rules; Art. 43 ICSID Convention)
  - 2010 IBA Rules on the Taking of Evidence
  - Impact of legal background and culture

Limits to arbitrators' duty and power

- (Perceived) Risk of rendering an ***ultra petita*** award
  - Investigating economic crime to determine validity of claims, not punish it as a wrongful conduct
  - Concern can be alleviated by pointing to (i) public responsibility to raise and investigate corruption and (ii) direct relevance to dispute
- **Lack of police powers** and proper investigative tools
  - Costly (in terms of time and money)
  - But: investigative powers in fact available and broad discretion

Limits to arbitrators' duty and power

- **Due process**: equal treatment / impartiality, right to be heard
- However, finding of economic crime *favourable* to one party is different from the tribunal's *favouring* that party

> *Metal-Tech v Republic of Uzbekistan*: "It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law ..."

Limits to arbitrators' duty and power

- Arbitral tribunals must **ensure compliance**
  - Need for sufficient suspicion
  - Act on a sufficient basis of red flags or other (circumstantial) evidence
  - Communicate with the parties
  - Give parties an equal and reasonable opportunity to express their views and present evidence on the issue

When to investigate: “red flags”

- Quasi-impossibility of having access to direct evidence of economic crime
- What facts should turn arbitrators into investigators?
- Arbitral tribunals may rely on:
  - circumstantial evidence triggering strong suspicions of corruption
  - put in context with supplementary evidence (“*faisceaux d’indices*”)
  - case / fact-specific assessment
- Seek further evidence and assess (“connect the dots”)

When to investigate: “red flags”

- *Metal-Tech v Republic of Uzbekistan*
  - Tribunal initiated *ex officio* investigation into corruption based on a number of red flags raised during a witness testimony regarding payments under consulting contracts, including:
    - amount of payment
    - fact that payments made irrespective of services provided
    - insufficient professional qualifications of consultant
    - lack of transparency surrounding the payments
- First time in ICSID history that tribunal took proactive attitude, seeking explanations and further evidence

Conclusions

- Difficult terrain: potential challenges on *ultra petita* grounds, lack of direct evidence, due process concerns
- Arbitrators should act with care but not systematically assume they cannot address and must therefore avoid the issue
- The economic crime should be directly relevant to decision on legal claims before the tribunal
- Inquiries must be justified on basis of evidence available / red flags
- Tribunal must be careful about giving parties an opportunity to address the issue and produce evidence

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Thank you!