

**ARBITRATORS' INVESTIGATIVE RIGHTS AND DUTIES
(AND HOW THEY RELATE TO CORRUPTION IN ARBITRATION)**

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INTRODUCTION TO THE ARBITRATION ACT 1996

The Arbitration Act 1996 (the Act) consolidates and updates English arbitration law and procedure in statute form. It was designed to codify legal rules and principles established by case law and brought English law into line with international Arbitral principles. Arbitration proceedings under the Act are not tied to English court procedure. The Act enables Arbitrators to use wide-ranging procedural powers, similar to the case management techniques in European procedural systems, to ensure that the arbitration progresses fairly and efficiently.

The Act was broadly based on United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985)¹ but applies equally to domestic and international arbitration. It seeks to increase the scope of party autonomy and strengthens the powers of the Arbitral Tribunal, whilst limiting judicial intervention in the arbitration process.

The Act applies to all institutional or ad hoc arbitrations, the legal “seat” of which is in England, Wales or Northern Ireland. The general principles of the Act are set out in section 1 of Part I:

1. The provisions of this Part are founded on the following principles, and shall be construed accordingly -

(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial Tribunal without unnecessary delay or expense;

(b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(c) In matters governed by this Part the court should not intervene except as provided by this Part.²

It is possible to contract out of the parts of the Act. The Act lays down procedures which apply if the parties do not agree different provisions. The Act classifies each section as mandatory or non-mandatory. The parties cannot contract out of the mandatory sections under any circumstances, but can contract out of non-mandatory sections if they agree to apply Arbitral rules such as The London Court of International Arbitration Rules 2014.

Section 4 of Part I deals with this aspect of the Act:

(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary. These appear in Appendix 1 to this note.

(2) The other provisions of this Part (the “non-mandatory provisions”) allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement.

(3) The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means by which a matter may be decided.

(4) It is immaterial whether or not the law applicable to the parties’ agreement is the law of England and Wales or, as the case may be, Northern Ireland.

(5) The choice of a law other than the law of England and Wales or Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of this Part is equivalent to an agreement making provision about that matter.

¹ Model law is a set of model legislative provisions that States can adopt by enacting it into national law

² Section 1, The Arbitration Act 1996

For this purpose an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, shall be treated as chosen by the parties.³

With respect to the law applicable to the substance of the dispute, the non-mandatory sections 46 (1) and (3) of the Act provide that:

“The Arbitral Tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the Tribunal.”⁴

By applying these “other considerations” the Arbitrator can decide matters on an equitable basis, without necessarily applying strict legal principles.

Section 46 also dictates that “if or to the extent that there is no such choice or agreement, the Tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”⁵

³ Section 4, The Arbitration Act 1996

⁴ Section 46 (1) (b), The Arbitration Act 1996

⁵ Section 46 (3), The Arbitration Act 1996

LEGISLATION AND INSTITUTIONAL RULES – ARBITRATORS’ INVESTIGATIVE RIGHTS (all non-mandatory)

The Act gives Arbitrators wide-ranging powers to determine “all procedural and evidential matters, subject to the right of the parties to agree any matter.”⁶ The parties’ agreement may be contained in institutional or other rules which apply to the arbitration, or it may take the form of agreed directions or some other free-standing procedural agreement.

Section 34 (2) is a non-mandatory part of the Act and sets out a non-exhaustive list of the procedural issues to be determined by the Arbitral Tribunal.

- (a) When and where any part of the proceedings is to be held;
- (b) The language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;
- (c) Whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;
- (d) Whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;
- (e) Whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;
- (f) Whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;
- (g) Whether and to what extent the Tribunal should itself take the initiative in ascertaining the facts and the law;
- (h) Whether and to what extent there should be oral or written evidence or submissions.⁷

Section 37 of the Act sets out the Arbitral power to appoint experts, legal advisers or assessors. It is a non-mandatory section of the Act and states that:

- (1) Unless otherwise agreed by the parties -
 - (a) The Tribunal may -
 - (i) Appoint experts or legal advisers to report to it and the parties, or
 - (ii) Appoint assessors to assist it on technical matters,and may allow any such expert, legal adviser or assessor to attend the proceedings; and
 - (b) The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.⁸

⁶ Section 34 (1), The Arbitration Act 1996

⁷ Section 34 (2), The Arbitration Act 1996

The general powers exercisable by the Tribunal are outlined at section 38 of the Act. This is also a non-mandatory part of the legislation and states that:

- (1) The parties are free to agree on the powers exercisable by the Arbitral Tribunal for the purposes of and in relation to the proceedings.
- (2) Unless otherwise agreed by the parties the Tribunal has the following powers.
- (3) The Tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is—

- (a) An individual ordinarily resident outside the United Kingdom, or
- (b) A corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(4) The Tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—

- (a) For the inspection, photographing, preservation, custody or detention of the property by the Tribunal, an expert or a party, or
- (b) Ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.

(5) The Tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

(6) The Tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.⁹

The Arbitrators' wide power to determine procedural and evidential matters is also found in the rules of major Arbitral institutions:

The London Court of International Arbitration Rules 2014 (LCIA Rules 2014)

The LCIA Rules 2014 became effective on 1 October. They are substantively the same as the 1998 Rules.

Article 14 of the 2014 Rules outlines the Arbitral Tribunal's general duties to conduct proceedings and to "adopt procedures suitable to the circumstances of the arbitration."¹⁰ Article 14 continues to state that:

"The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable."¹¹

⁸ Section 37 (1), The Arbitration Act 1996

⁹ Section 38, The Arbitration Act 1996

¹⁰ Article 14.4, The London Court of International Arbitration Rules 2014

¹¹ Article 14.5, The London Court of International Arbitration Rules 2014

Article 16 grants that the Arbitral Tribunal “may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice”¹² and Article 17 outlines the Tribunal’s power to “decide upon the language(s) of the arbitration.”¹³

Article 19 states that before an oral hearing the Arbitral Tribunal may “require the parties to address a list of specific questions or issues arising from the parties’ dispute”¹⁴.

Articles 20 and 21 confer Arbitral powers regarding witnesses and experts, reflecting those in section 37 of the Act.

Article 22 grants additional rights to the Arbitrator “to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient.”¹⁵ Including “whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties’ dispute.”¹⁶

Article 22 also allows the Arbitral Tribunal to “apply to the merits of the dispute principles deriving from “*ex aequo et bono*”¹⁷, “amiable composition” or “honourable engagement” where the parties have so agreed in writing.”¹⁸ This Article reflects section 46 (1) (b) of the Act, which allows Arbitrators to dispense with the consideration of law and consider solely what would be a fair and equitable resolution to the dispute.

The International Chamber of Commerce Rules 2012 (ICC Rules 2012)

Article 18 gives the Tribunal the right to “conduct hearings and meetings at any location it considers appropriate.”¹⁹

Article 20 states that “in the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.”²⁰

Article 21 allows the parties freedom “to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.”²¹ The Article goes on to state that “the Arbitral Tribunal shall assume the powers of an amiable compositeur or decide *ex aequo et bono* only if the parties have agreed to give it such powers.”²²

Under Article 22 the Arbitral Tribunal, “after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.”²³

¹² Article 16.3, The London Court of International Arbitration Rules 2014

¹³ Article 17.4, The London Court of International Arbitration Rules 2014

¹⁴ Article 19.2, The London Court of International Arbitration Rules 2014

¹⁵ Article 22.1 (iii), The London Court of International Arbitration Rules 2014

¹⁶ Article 22.1 (iii) The London Court of International Arbitration Rules 2014

¹⁷ What is fair and just, according to equitable principles

¹⁸ Article 22.4, The London Court of International Arbitration Rules 2014

¹⁹ Article 18.2, The International Chamber of Commerce Rules 2012

²⁰ Article 20, The International Chamber of Commerce Rules 2012

²¹ Article 21 (1), The International Chamber of Commerce Rules 2012

²² Article 21 (3), The International Chamber of Commerce Rules 2012

²³ Article 22 (2), The International Chamber of Commerce Rules 2012

Article 22 also states that “upon the request of any party, the Arbitral Tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.”²⁴ This provision is in contrast to the Act, which does not address the principles of confidentiality and privacy. Since the Act came into effect, confidentiality has become an implied term of every arbitration agreement.²⁵

Articles 23-24 relate to the Arbitral Tribunal’s various powers to draw up Terms of Reference, call Case Management Conferences and set out procedural timetables.

Article 25 states that “after studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.”²⁶

Articles 25 (3) and 25 (4) deal with the Arbitrator’s right to hear witnesses and appoint experts.

Article 25 (6) allows the Arbitral Tribunal to “decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.”²⁷

According to Article 26 “the Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present.”²⁸

The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010 (SCC Rules 2010)

Article 20 allows the Arbitrator to “conduct hearings at any place which it considers appropriate.”²⁹

Article 21 states that, unless agreed by the parties, the Arbitral Tribunal may “determine the language(s) of the Arbitration.”³⁰

Article 22 grants the Arbitrator the right to:

“Decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.”³¹

The same Article also allows that the Arbitral Tribunal “shall decide the dispute *ex aequo et bono* or *as amiable compositeur* only if the parties have expressly authorised it to do so.”³²

Article 26 deals with issues of evidence and provides that the “admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to decide.”³³

Article 27 dictates that in consultation with the parties, the Arbitrator shall “determine the date, time and location of any hearing.”³⁴

²⁴ Article 22 (3), The International Chamber of Commerce Rules 2012

²⁵ *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyd’s Rep 643

²⁶ Article 25 (2), The International Chamber of Commerce Rules 2012

²⁷ Article 25 (6), The International Chamber of Commerce Rules 2012

²⁸ Article 26 (3), The International Chamber of Commerce Rules 2012

²⁹ Article 20 (2), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

³⁰ Article 21 (1), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

³¹ Article 22 (1), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

³² Article 22 (3), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

³³ Article 26 (1), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

Article 29 allows the Arbitral Tribunal to “appoint one or more experts to report to it on specific issues.”³⁵

Article 46 refers to the confidential nature of Arbitral proceedings and states that:

“Unless otherwise agreed by the parties, the SCC and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”³⁶

³⁴ Article 27 (2), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

³⁵ Article 29 (1), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

³⁶ Article 46, The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

LEGISLATION AND INSTITUTIONAL RULES – ARBITRATORS’ INVESTIGATIVE DUTIES (all mandatory)

Fairness and efficiency

Whilst the Tribunal must determine how the arbitration is to proceed, it does not have unfettered discretion to make decisions which might operate unfairly, or which might cause unnecessary costs or delays. Section 33 of the Act protects the parties by imposing upon the Tribunal duties which must be observed when making any decision in the arbitration. It is a mandatory provision because a proceeding which departed from the stipulated duties could not properly be described as arbitration. As section 33 is mandatory it will apply regardless of the wording of the arbitration agreement or the institutional rules being applied, and parties cannot contract out of it.

The Tribunal must comply with section 33 “in conducting the Arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it”³⁷.

Section 33 (1) of the Act imposes a two-pronged duty on the Tribunal. It must:

- (a) Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
- (b) Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.³⁸

“Fairness” requires the Tribunal to act even-handedly between the parties. It does not require the Tribunal to give the parties exactly the same amount of time to make submissions. One party may reasonably require much longer than its opponent to put its case, especially if it bears the burden of proof on the issues in the arbitration.

The express duty to avoid unnecessary delay and expense was first introduced by the Act and is an important provision. It is designed to promote efficiency by encouraging Arbitrators to impose strict timetables to ensure that the Arbitral proceedings are progressed with all due expedition. In their substantial report on the Arbitration Bill dated February 1996, the Departmental Advisory Committee on Arbitration (DAC) stated that the Tribunal must not blindly follow court procedures, nor must it allow itself to be bullied by lawyers or blinded by legal “science.”³⁹ The Tribunal must tailor the procedures to the requirements of the particular case, unless the parties have agreed a procedure, for example, by adopting a set of procedural rules. This may mean dispensing with certain procedural features, such as full disclosure or oral hearings. The Tribunal’s freedom to tailor the procedure to avoid unnecessary cost and delay is reflected in the powers conferred by section 34 of the Act as detailed above, which includes the power to exclude or limit written submissions or disclosure, to exclude the application of the strict rules of evidence, and to adopt inquisitorial procedures.

It can be difficult balancing the two limbs of fairness and efficiency and there can be conflict in some instances. For example, directing an oral hearing would, in most cases, give the parties ample opportunity to put their cases. However, in a case which does not require any lengthy consideration of factual or expert evidence, it might involve a breach of section 33 (1) (b). In every case, the Tribunal must balance the mandatory requirements of the two limbs of section 33 in determining the appropriate procedure for that particular case.

³⁷ Section 33 (2), The Arbitration Act 1996

³⁸ Section 33 (1), The Arbitration Act 1996

³⁹ Paragraph 153, DAC Report on the Arbitration Bill dated February 1996

Many major institutional rules contain provisions which, to some extent, reflect the Arbitral duties of section 33, for example:

LCIA Rules 2014

Article 14.4 repeats the Tribunal's duties under section 33 of the Act:

Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:

- (i) A duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and
- (ii) A duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.⁴⁰

Article 14.5 states:

“At all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties.”⁴¹

ICC Rules 2012

The Tribunal and parties are expressly required to “make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.”⁴² At the same time, the Tribunal is obliged to act fairly and impartially, ensuring that each party has a reasonable opportunity to present its case.⁴³

“The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”⁴⁴

SCC Rules 2010

The SCC Rules do not refer to fairness or efficiency. Instead they outline the Arbitral Tribunal's duty to:

“Conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.”⁴⁵

Independence and impartiality

A fundamental aspect of the arbitration process is that Arbitrators must be independent and impartial. This is particularly important given the limited possibilities for challenging awards. Section 67 of the Act dictates that awards can only be challenged “because the Tribunal did not have substantive

⁴⁰ Article 14.4, The London Court of International Arbitration Rules 2014

⁴¹ Article 14.5, The London Court of International Arbitration Rules 2014

⁴² Article 22 (1), The International Chamber of Commerce Rules 2012

⁴³ Article 22 (4), The International Chamber of Commerce Rules 2012

⁴⁴ Article 25 (1), The International Chamber of Commerce Rules 2012

⁴⁵ Article 19 (2), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

jurisdiction”⁴⁶ or because of “serious irregularities” which have caused, or will cause, substantial injustice, such as those outlined in section 68 of the Act:

- (a) Failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) The tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) Failure by the tribunal to deal with all the issues that were put to it;
- (e) Any Arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) Uncertainty or ambiguity as to the effect of the award;
- (g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) Failure to comply with the requirements as to the form of the award; or
- (i) Any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any Arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.⁴⁷

Section 1 of the Act states the general principle that there should always be an “impartial Tribunal”,⁴⁸ and the consequences for non-compliance are outlined in section 24. This is a mandatory section of the Act and dictates that:

(1) A party to Arbitral proceedings may (upon notice to the other parties, to the Arbitrator concerned and to any other Arbitrator) apply to the court⁴⁹ to remove an Arbitrator on any of the following grounds -

- (a) That circumstances exist that give rise to justifiable doubts as to his impartiality;
- (b) That he does not possess the qualifications required by the arbitration agreement;
- (c) That he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;
- (d) That he has refused or failed -
 - (i) Properly to conduct the proceedings, or
 - (ii) To use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.⁵⁰

⁴⁶ Section 67 (1), The Arbitration Act 1996

⁴⁷ Section 68 (2) , The Arbitration Act 1996

⁴⁸ Section 1 (a), The Arbitration Act 1996

⁴⁹ “The court” is defined as “the High Court or a county court” in section 105 (1), The Arbitration Act 1996

⁵⁰ Section 24 (1), The Arbitration Act 1996

Impartiality is such a fundamental tenet of Arbitral proceedings that section 33 reiterates that the Tribunal must act “impartially as between the parties.”⁵¹

Other international Arbitral rules impose requirements of independence and impartiality on Arbitrators. For example:

LCIA Rules 2014

Article 5.3 states that “all Arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties.”⁵²

The Article also obliges each Arbitral candidate to sign a written declaration stating:

“Whether there are any circumstances currently known to the candidate which are likely to give rise in the mind of any party to any justifiable doubts as to his or her impartiality or independence and, if so, specifying in full such circumstances in the declaration.”⁵³

This duty continues after an Arbitrator is appointed.⁵⁴

Under Article 10, an Arbitrator’s appointment may be revoked “if circumstances exist that give rise to justifiable doubts as to the Arbitrator’s impartiality or independence.”⁵⁵

ICC Rules 2012

Article 11 requires Arbitrators to be and remain “impartial and independent” of the parties.⁵⁶ The Article also requires prospective Arbitrators to:

“Sign a statement of acceptance, availability, impartiality and independence. The prospective Arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the Arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Arbitrator’s impartiality.”⁵⁷ This is a continuing obligation during the Arbitration.⁵⁸

SCC Rules 2010

Article 14 states that “every Arbitrator must be impartial and independent”⁵⁹ and imposes a duty upon them to “disclose any circumstances which may give rise to justifiable doubts as to his/her impartiality or independence.”⁶⁰ Once an Arbitrator has been appointed he must submit a signed statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts as to his impartiality or independence.⁶¹ An Arbitrator must immediately inform the parties where such circumstances arise in the course of arbitration.⁶²

⁵¹ Section 33 (1) (a), The Arbitration Act 1996

⁵² Article 5.3, The London Court of International Arbitration Rules 2014

⁵³ Article 5.4, The London Court of International Arbitration Rules 2014

⁵⁴ Article 5.5, The London Court of International Arbitration Rules 2014

⁵⁵ Article 10.1, The London Court of International Arbitration Rules 2014

⁵⁶ Article 11 (1), The International Chamber of Commerce Rules 2012

⁵⁷ Article 11 (2), The International Chamber of Commerce Rules 2012

⁵⁸ Article 11 (3), The International Chamber of Commerce Rules 2012

⁵⁹ Article 14 (1), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

⁶⁰ Article 14 (2), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

⁶¹ Article 14 (2), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

⁶² Article 14 (3), The Arbitration Institute of the Stockholm Chamber of Commerce Rules 2010

CORRUPTION IN ARBITRATION

The most common form of corruption in international arbitration is bribery. Corrupt individuals often prefer arbitration as it is a confidential process and is more attractive to them than the publicity of the courts. Arbitrators can only deal with the civil consequences of such behaviour but it can be difficult to know how to deal with some aspects of bribery which are only prohibited in certain jurisdictions. Legal communities are becoming increasingly sensitive to corrupt practices, and there is a growing anti-corruption industry of both governmental and non-governmental bodies.⁶³

An international consensus on a broad definition of both public and private sector corruption can be found in Articles 15, 16, and 21 of the United Nations Convention against Corruption 2003 (UNCAC). Article 15 applies to the bribery of both national and foreign public officials and is defined as:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.⁶⁴

Article 16 defines corruption in the public sector as the act of:

“Intentionally promising, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.”⁶⁵

Corruption in the private sector is defined in Article 21 as:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.⁶⁶

Public and private bribery are not the only forms of corruption in international trade that are outlawed. Article 18 UNCAC outlines the practice of “trading in influence”, an offence involving a person having “real or supposed influence” over public bodies or officials, trading the “abuse” of such influence (as opposed to the payment of bribes), in return for an “undue advantage” from a person seeking this influence.⁶⁷ Another illicit arrangement involves “facilitation payments”, otherwise known as “speed” or “grease” payments to foreign public officials. These are defined as:

⁶³ Including the Global Compact and the Group of States against Corruption within the Council of Europe, Transparency International, and the United Nations Convention against Corruption Coalition.

⁶⁴ Article 15, United Nations Convention against Corruption 2003

⁶⁵ Article 16 (1), United Nations Convention against Corruption 2003

⁶⁶ Article 21, United Nations Convention against Corruption 2003

⁶⁷ Article 18, United Nations Convention against Corruption 2003

“Payment[s] made with the purpose of expediting or facilitating the provision of services or routine government action which an official is normally obliged to perform.”⁶⁸

Such payments are prohibited under the UK Bribery Act 2010 and most other national laws.

Bribery in arbitration

As Vladimir Pavić states in his 2012 paper “Bribery and international commercial arbitration – the role of mandatory rules and public policy”⁶⁹ it is very unlikely that the Arbitrators themselves will be involved in demanding or accepting bribes during the Arbitral proceedings. It is less rare that fraudulent acts are committed during the course of proceedings, for instance false testimony and forged documents. Most commonly the corruption takes place prior to the arbitration and is invoked during the proceedings by one of the parties. Case law suggests that the most common circumstances surrounding this type of corruption is when an agent assists its principal in obtaining a certain contract or permission. Once the contract is secured, the principal refuses to pay the agent’s “commission”, and the agent brings the matter before arbitration. Respondent principals commonly argue that their arrangement with the agent was a conduit for bribery, and that to remunerate the agent would be tantamount to reimbursing them for the bribes paid to the officials.

Arbitrators’ rights and obligations to inquire into corruption *sua sponte*⁷⁰

A key issue for Arbitrators is whether they are able to investigate possible bribery of their own volition, or if they are limited to inquiring into allegations advanced by the parties. Arbitration serves as a private equivalent of a national court, and both types of decisions are equally as binding.⁷¹ Arbitrators could therefore be expected to approach matters of public policy in the same manner as their judicial counterparts. However, arbitration is borne of the parties’ contractual wishes and it could be argued that an Arbitrator imposing his own will onto proceedings would be acting outside his authority.

An Arbitral award could be at risk of being set aside or refused enforcement if an Arbitrator has acted outside their mandate by making enquiries *sua sponte*. However, as Michael Hwang and Kevin Lim stated in their paper “Corruption in Arbitration - Law and Reality”,⁷² failure to act *sua sponte* may lead to a decision that unintentionally endorses bribery, and a court reviewing a subsequent challenge to the award may be tempted to make their own enquiries to ascertain the existence of corruption, and uphold the challenge on public policy grounds if corruption is revealed. If an Arbitrator suspects corruption they should investigate *sua sponte*, provided it is relevant to the resolution of the dispute submitted to them. If either party to a contract is found to be corrupt it can decide the enforceability of the claim and is therefore relevant to the resolution of the dispute. The consideration of issues of corruption must, therefore, fall within the Tribunal’s mandate.

If a Tribunal makes a finding of corruption, it nevertheless retains jurisdiction over the parties’ dispute, and is entitled to adjudicate issues of corruption. If a contract is deemed to have been obtained by corruption it will generally be set aside by the victim in order to avoid his obligations. A victim may lose his right to avoid his obligations if he chooses to continue the contract with knowledge of such corruption. However, contracts providing for corruption are unenforceable or

⁶⁸ Appendix F, paragraph F.5, UK Law Commission Consultation Paper No. 185 dated 31 October 2007

⁶⁹ Pavić, Vladimir, Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy (17 November 2012). Victoria University Wellington Law Review (2012) Vol. 43 pp. 661-686. Available at: <http://ssrn.com/abstract=2252499>

⁷⁰ Of his own accord, not at the request of the parties

⁷¹ Article 35 (1) UNCITRAL Model Law on International Commercial Arbitration 1985

⁷² Hwang, Michael and Lim, Kevin, Corruption in Arbitration - Law and Reality. This article is an expanded version of a paper of the same title presented at the Herbert Smith-SMU Asian Arbitration Lecture on 4 August 2011 in Singapore. Available at http://www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration_paper_draft_248.pdf

inadmissible without being set aside. One party's intention to commit corruption under a contract does not preclude the other party from making claims arising out of the contract.

Disclosure of corruption to the authorities v preserving the confidentiality of Arbitral proceedings

The question of whether Arbitrators should report their suspicions to the authorities is a thorny one. Confidentiality is one of the main advantages of arbitration, whether it is express or implied. It is important to note, however, that the Arbitral process is private and therefore any confidentiality exists to protect private interests. In contrast, reporting corruptive crime protects public interests, and by doing so Arbitrators are helping to combat a growing international problem. In support of public policy, it must therefore follow that, although there is no general legal duty to report corruption to the authorities, the ethical duty to disclose overrides the duty to preserve the confidentiality of Arbitral proceedings.

The burden and standard of proof

The burden of proof in arbitration is borne by the party alleging the corruption.⁷³ They must discharge the balance of probabilities standard of proof. This evidentiary standard must be flexibly understood as it is innately difficult to prove corruption. In applying this standard of proof, Tribunals may consider circumstantial indicators of corruption, and/or draw adverse inferences from a party's failure to produce documents, when ordered.

The law governing the elements and legal consequences of corruption

In order for a Tribunal to find that a party has committed corruption, and to determine the legal consequences which ensue, they must ascertain whether the established facts make out all the elements of the offence of corruption under the applicable law. The Tribunal will first look to the law chosen by the parties to govern their contract. The parties are usually allowed to choose the applicable law, but this freedom is subject to the issues of public policy and mandatory norms.

Public policy prevents the application of any rules which would undermine the fundamental legal principles of the domestic law. In the context of private international law, mandatory norms are usually derived from the laws that lay down the foundations of an economic system. Arbitrators usually apply the rules chosen by the parties or, failing that, any rule they deem most closely connected to the dispute. The dilemma for Arbitrators is which public policy and which mandatory norms they should use.

Corrupt parties will naturally choose a law which upholds the validity of their contract and does not contain anti-corruption regulations or public policy considerations. However, contrary to the chosen law, mandatory laws or public policies of the place of performance or Arbitral seat may provide that one or both parties had committed corrupt acts. As Pavić has pointed out, Arbitrators are not part of any judiciary and are therefore not obliged to use the rules of any particular State, so may rely on transnational public policy. Such rules are based on legal principles upon which there is a broad consensus in the international community. There is no definition of "broad consensus" however, and it is not certain whether the breadth is measured by the number of States, or their relative economic and political importance. States have different definitions of corruption and prohibit different practices. Certain acts, such as bribery of public officials, are prohibited by over 160 countries and could therefore reasonably be considered as a transnational public policy. In contrast, facilitation payments and trading in influence are condemned in far fewer countries.⁷⁴

⁷³ Article 27.1, [United Nations Commission on International Trade Law](#) Arbitration Rules 2010

⁷⁴ Pavić, Vladimir, Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy (17 November 2012). Victoria University Wellington Law Review (2012) Vol. 43 pp. 661-686. Available at: <http://ssrn.com/abstract=2252499>

No matter whether the Arbitrator had applied national or transnational rules, if a contract is held to be a vehicle for bribery, it is declared null and void. This is illustrated in the two well-known examples of bribery allegations raised by respondents in arbitration:

1. In Award ICC Case No. 1110 from 1963, the claimant sought to enforce his contractual entitlement to 10% commission payments as an intermediary for all Argentinean energy contracts awarded to the respondent. The claimant's "major asset" was his influence over the officials who awarded public contracts. The Tribunal found that the object of the agreement was to facilitate bribery, which led Judge Lagergren to decline jurisdiction. He stated:

"It cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts of Arbitrators (cf *Oscanyan v Winchester Arm. Co.*, US Supreme Court 1880, 103 US 261). This principle is especially apt for use before international arbitration tribunals that lack a 'law of the forum' in the ordinary sense of the term."⁷⁵

"After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any Arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying Arbitrators to entertain disputes of this nature rather than from any national rules on arbitrality. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or Arbitral Tribunals) in settling their disputes."⁷⁶

2. In *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006, one of the claimant's allegations was that the Kenyan government had commandeered its two duty free complexes at Nairobi and Mombasa International Airports. Kenya counter-alleged that its contract with the claimant was unenforceable because it was the result of a "personal donation" of \$2 million to the President, which the claimant had admitted and described in detail in its submission. The Tribunal retained jurisdiction and made a finding of bribery on the facts. On the basis that bribery is against transnational public policy, the Tribunal found the contract was void and dismissed the claimant's claim. It was stated:

"The concept of public policy ('ordre public') is rooted in most, if not all, legal systems. Violation of the enforcing State's public policy is grounds for refusing recognition or enforcement of foreign judgments and awards. The principle is enshrined in Article V.2 of the New York Convention of 10 June 1958 and Article 36 of the UNCITRAL Model Law recommended by the General Assembly of the United Nations on 11 December 1985. In this respect, a number of legislatures and courts have decided that a narrow concept of public policy should apply to foreign awards. This narrow concept is often referred to as 'international public policy' ('ordre public international'). Although this name suggests that it is in some way a supra-national principle, it is in fact no more than domestic public policy applied to foreign awards and its content and application remains subjective to each State."⁷⁷

"The Tribunal notes that, in some of these cases, it was alleged that corruption is widespread either within the purchasing country or in the particular sector of activity. However, all

⁷⁵ Paragraph 16, Award ICC Case No. 1110 (1963)

⁷⁶ Paragraph 23, Award ICC Case No. 1110 (1963)

⁷⁷ Paragraph 138, *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7 (Award dated 4 October 2006)

Arbitral Tribunals concluded that such facts do not alter in any way the legal consequences dictated by the prohibition of corruption (see ICC case n° 1110 paras. 19-20; ICC case n° 3916, Yves Derains – *Collection of ICC awards 1974-1985* – Kluwer 1990 – p. 509; ICC case n° 8891 – *Journal du droit international* 2000 n° 4 p. 1083). They recognised that in some countries or sectors of activities, corruption is common practice without which the award of a contract is difficult – or even impossible – but they always refused to condone such practices. The present Tribunal agrees with such conclusion.”⁷⁸

“The answer, as regards public policy, is that the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world. Mr Ali’s complaint of unfairness was voiced centuries ago by earlier English litigants; and it was fully answered, as recorded in Chitty (*Chitty on Contracts*, Volume 1 at paragraph 17-007, 28th edition - cited by Kenya as the leading English treatise), by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp. 341, 343. It merits citing in full:

‘... the objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, but accidentally, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, *potior est conditio defendentis*.”

In other words, if Kenya were guilty of bribery and the claimant in this proceeding, it would likewise fall at the same procedural hurdle, to the benefit of the claimant as respondent.”⁷⁹

A void contract would normally give rise to obligations for parties to make restitution for what they have received pursuant to the contract. This is not the case with matters involving bribery, where no restitution is due. This can result in corrupt parties retaining a benefit from their illicit actions, i.e. an agent keeping the bribe he was advanced and did not use, or a principal who is granted the favour or contract he sought, without reimbursing the agent for his “services.” Such an inequitable ending can also act as a tool against corruption, as an agent in such circumstances would not benefit from their corrupt behaviour. Contracts procured by bribery are also usually voidable as the deceit or excess of authority used results in a lack of valid consent.

Article 34 of the UNCITRAL Model Law sets out various grounds on which an award can be set aside or enforcement refused. These grounds include Arbitral incapacity and circumstances where:

“The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.”⁸⁰

⁷⁸ Paragraph 156, *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7 (Award dated 4 October 2006)

⁷⁹ Paragraph 181, *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7 (Award dated 4 October 2006)

⁸⁰ Article 34 (2) (a) (iii) UNCITRAL Model Law on International Commercial Arbitration 1985

Article 34 also states that an award can be set aside if a court finds “the award is in conflict with the public policy of this State.”⁸¹ This provision is mirrored in section 103 of the Arbitration Act:

“Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.”⁸²

Once a Tribunal has made a finding of corruption and rejected a claim, a claimant will have virtually no chance of getting the decision reversed by a national court. This is the case even if the Tribunal has found bribery where there was none. An unsuccessful respondent in such a matter could refuse to recognise the award or could invoke public policy grounds to have the award set aside. The public policy argument is notoriously unpopular in Arbitral proceedings and is generally invoked when all other arguments have failed. Courts will examine whether the enforcement of such an award would run contrary to the public policy of the country of recognition. Their approach is not uniform and there are no specific guidelines or formulae to such a review.

⁸¹ Article 34 (2) (b) (ii) UNCITRAL Model Law on International Commercial Arbitration 1985

⁸² Section 103 (3), The Arbitration Act 1996

APPENDIX 1

Schedule 1 – Mandatory Provisions of Part I

- sections 9 to 11 (stay of legal proceedings);
- section 12 (power of court to extend agreed time limits);
- section 13 (application of Limitation Acts);
- section 24 (power of court to remove arbitrator);
- section 26 (1) (effect of death of arbitrator);
- section 28 (liability of parties for fees and expenses of arbitrators);
- section 29 (immunity of arbitrator);
- section 31 (objection to substantive jurisdiction of tribunal);
- section 32 (determination of preliminary point of jurisdiction);
- section 33 (general duty of tribunal);
- section 37 (2) (items to be treated as expenses of arbitrators);
- section 40 (general duty of parties);
- section 43 (securing the attendance of witnesses);
- section 56 (power to withhold award in case of non-payment);
- section 60 (effectiveness of agreement for payment of costs in any event);
- section 66 (enforcement of award);
- sections 67 and 68 (challenging the award: substantive jurisdiction and serious irregularity), and sections 70 and 71 (supplementary provisions; effect of order of court) so far as relating to those sections;
- section 72 (saving for rights of person who takes no part in proceedings);
- section 73 (loss of right to object);
- section 74 (immunity of arbitral institutions, &c.);
- section 75 (charge to secure payment of solicitors' costs).

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