

Keynote speech of Alexis Mourre, President of the ICC International Court of Arbitration, at the Workshop *Legal Consequences of Corruption and Money Laundering in International Arbitration* in Basel, Switzerland, 10 January 2020

I would like first of all to thank our colleagues Mark Pieth and Kathrin Betz for inviting me to deliver these short introductory remarks today, and in the same opportunity, I would also like to commend the *Competence Centre Arbitration and Crime* and the *Basel Institute on Governance* for the great work that they are doing to elaborate the rules that parties and arbitrators will use in dealing with matters of corruption and money laundering.

This work, in particular the toolkit, is of great importance to all of us, and it is part and parcel of a broader evolution that is indispensable to preserve the integrity of international arbitration as a global system of justice.

Corruption, according to the United Nations, is costing the global economy 3.6 trillion USD every year, which is about 15% of the United States GDP and almost 5% of the world's GDP.

There is now general awareness of the fact that corruption is a global threat to our societies and one of the main sources of poverty in emerging countries, contributing to instability and inequalities, and seriously undermining the public trust in governments and States.

In many parts of the world, such as Latin America, scandals such as Lava Jato and Odebrecht have contributed to provoking popular upheavals against our liberal economies, and have elsewhere fed the global wave of populism and opposition against globalization.

As we enter into a new decade, it is perhaps useful to have a look to the past.

Two decades ago, the view was still widespread that bribes, which were sometimes conveniently presented as facilitating payments, were a normal feature of international commerce.

Until the end of the last century, in many countries, tax deductions for these payments were commonly admitted.

Many businessmen held the view that paying bribes was a legitimate way of protecting their market share.

Many, in the arbitration community, believed that arbitrators should be confined in their role of private adjudicators and stay away from investigating bribes on their own motion.

And the approach by Courts was of course completely different from what we see today.

We all remember, here in Switzerland, the *Hilmarton* decision annulling an award having drawn the consequences from the corruption of a foreign public officer.

These times are long gone.

The turning point in this evolution has surely been the 1997 OECD Convention, as well as the UN anti-corruption Convention of 2003.

And arbitration has followed the tide.

In the past 20 years, a body of transnational rules has emerged, which are commonly applied by arbitral tribunals and by Courts.

There is consensus on the fact that bribes are an intolerable offense to transnational public policy.

It is widely admitted that arbitrators do have jurisdiction to deal with matters of corruption and fraud.

It is generally accepted that arbitrators have the duty to raise matters of fraud on their own motion, and to order the production of any evidence that may be relevant to these matters.

It is also widely admitted that arbitrators have the power to draw the civil consequences of such facts, by annulling the contract and awarding damages.

All this is now pretty much settled ground.

There is also less and less divergence as to the evidentiary standard that should be applied.

As shown by Emmanuel Gaillard in his recent article on the *Emergence of transnational responses to corruption in international arbitration*, the debate between the proponents of a heightened standard requiring 'clear and convincing evidence' and those advocating a more relaxed standard requiring balance of probabilities is becoming largely academic due to the emergence of a transnational method based on the use of red flags, both in commercial and investment arbitrations.

I have no doubts that, in the future, we will see this method being applied more and more consistently, hence the importance of the work of the Basel Institute and other bodies, such as the ICC Commission on International Arbitration, which are currently working of the transnational rules that should be applied in dealing with these matters.

Some questions are still evolving, such as whether, in case of a contract obtained by corruption, restitutions should be admitted to avoid situations of unjust enrichment.

I have no time to address this question in details, but I think that there will be an evolution towards more flexibility and more discretion on the part of tribunals, along the lines of article 3.3.2 of the Unidroit Principles 2010.

Finally, there is a growing consensus in the investment arbitration case law that when the investment has been made illegally, it is not protected by international law, and the tribunal lacks jurisdiction. *Metal Tech v. Uzbekistan* is an excellent illustration of that tendency.

All this goes in the right direction.

International arbitration is not only a private means of resolving commercial disputes.

It has become the normal way of resolving international disputes, not only between private parties, but also between investors and States and between States.

International arbitration has evolved to become a global system of justice, with its institutions, its soft law rules, its community of practitioners and academics sharing common values and a common understanding of arbitration as an international and autonomous justice.

International Arbitration affects in many ways the public interest, by subtracting to national courts most and, in certain industries, the entirety of disputes, by resolving matters that have a direct and significant impact on public funds and by touching upon questions, such precisely as corruption, that directly affect the public order and the organization of society.

Arbitration cannot tolerate corruption, or its legitimacy will be seriously undermined in the eyes of the public and States.

There needs, however, to be a measure of balance in the way in which we, arbitrators, counsel, and institutions, deal with these matters.

And in this regard, I would like to identify three areas where solutions are still uncertain and will need to evolve.

The first is whether arbitrators have a duty to report to the authorities facts of corruption or money laundering that may emerge in the arbitration.

This question has often been dealt with in terms of the confidentiality of the arbitration.

First of all, however, arbitration is not always confidential.

Second, it is doubtful that confidentiality can be a valid objection to the duty to report a criminal offense.

The question is in my view better posed in terms of the arbitrators' duty of impartiality.

Until when a final decision is made on the existence of corruption or money laundering, it is not conceivable for the arbitrators to report anything.

Once a decision has been made, however, the question becomes one of transparency: why should that award be concealed from the public authorities in charge of fighting corruption? If the award is published, as it should, then its content becomes public and the relevant authorities will be made aware of the tribunal's findings.

So the answer to the difficult question of the duty to report perhaps lies in the need to move towards greater transparency through the systematic publication of arbitral awards.

The second question I wanted to highlight is whether arbitrators should be bound to stay the arbitration in presence of a parallel criminal proceedings.

The answer to that question, I submit, should be no.

And that is the position that has traditionally been adopted by French Courts.

It is also the position that the ILC recommended in its 2009 report on *lis pendens* in arbitration.

However, the Spanish Supreme Court has, in March of 2019, annulled an award because it failed to suspend the arbitration in presence of a criminal investigation.

That, I submit, is a huge step backwards.

It is also the gate open to all sort of dilatory tactics.

Because the award is not binding on the criminal judge as far as its criminal findings are concerned, there is no reason to oblige an arbitral tribunal to defer to the criminal judge and to oblige it to suspend the arbitration.

Suspending should be a power of the tribunal, not an obligation.

It is therefore to be hoped that the courts' case law in the main arbitral jurisdiction will adopt a uniform position by endorsing, like French courts, the principle of arbitral autonomy.

The third point of concern is the status of arbitrators and their potential criminal liability.

One month ago, several arbitrators have been arrested in Peru on the suspicion that they had benefited of corrupt payments in the context of the Odebrecht investigations.

These arbitrators have been placed in a maximum security jail, a place normally reserved to highly dangerous criminals.

Amongst them was our ICC Court member for Peru, Fernando Cantuarias.

The least that can be said is that the accusation that is moved to Cantuarias is unsound.

Cantuarias had acted in an ad hoc arbitration in a commercial case involving issues of corruption, in which the parties had adopted the scale of fees of the Chamber of Commerce of Lima.

Because the fees of the tribunal were fixed slightly on top of the average, but below the maximum, the public attorney inferred that these fees included a bribe.

This, of course, showed a complete misunderstanding of how a schedule of fees works.

I have known Fernando for more than 15 years, and I am absolutely convinced of his complete innocence.

I immediately wrote to the minister of justice of Peru, and the ICC made a submission before the Court in favor of his release, which occurred 10 days after.

Now, I do not intend to suggest that an arbitrator who receives bribes should not be criminally pursued.

My concern, however, is that in the heated circumstances of a major corruption scandal, arbitrators can easily be taken hostage of sweeping accusations made with the aim of placating the public anger.

And this, perhaps, militates even more in favor of a rigorous approach against corruption, and in favor of an increased level of transparency in arbitration.

The last question which I would like to mention in these short remarks is that of the finality of arbitration and the deference that should be given to awards in the context of setting aside proceedings.

On 22 October 2019, in a case called *Bariven*, the Court of Appeal of The Hague annulled an ICC award on the basis that the arbitral tribunal had adopted an overly stringent criterion for the production of evidence in corruption.

The Court held that the prohibition of corruption is such a fundamental principle that its compliance may not be impeded by restrictions of a procedural nature, in particular the fact that the tribunal had decided to disregard evidence produced at a late stage.

The Court also held that, in dealing with a matter of corruption, it should not be bound by the tribunal's findings or by the standard of proof adopted by it, which in this case was that of clear and convincing evidence.

The Court therefore conducted its own inquiry, in large part based on evidence obtained after the award, and reached the conclusion that the contract in dispute had been obtained by way of corruption.

This decision will remind us of the debate that has opposed years ago the so-called minimalists and maximalists on the question of the level of deference that should be given to the award in setting aside proceedings.

That debate, as we all know, has unfolded in the context of competition law, but the questions posed are not fundamentally different for a cartel and for an allegation of corruption.

The question is still the same: when the arbitral tribunal has addressed the question and reached its conclusions, should the court annul the award only in case of a manifest or flagrant breach, or should it review the award *de novo*?

Because corruption is such an intolerable offense to a fundamental principle of transnational public policy, we should accept that – like cartels – it is an exception to the principle of minimal review, and the judge should therefore not be limited by the tribunal’s findings in setting aside proceedings.

The *Bariven* decision is a warning call to arbitrators and institutions. To arbitrators, it is an invitation to inquire into matters of corruption, if necessary on their own motion, and to apply the transnational red flags methodology instead of a heightened standard of proof. And to the ICC, it is a call to firmly raise these matters to the attention of the arbitrators in order to ensure that the award does not offend the transnational principle of prohibition of corruption and that the risk of an annulment is minimized.