International Arbitration and National Criminal Proceedings
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What I want to do in this lecture is to examine how arbitral proceedings and domestic criminal processes can interact; how parties to arbitrations have attempted to use domestic criminal proceedings to advance their interests; and how arbitral tribunals can and should respond to such attempts.

To begin with, some definitions.

First, during my talk I will give examples from both commercial and investment treaty arbitration. By commercial arbitration, I mean proceedings based on an arbitration clause in a contract between the disputing parties. By investment treaty arbitration, I refer to cases where there may not be any contract between the disputants. The arbitration proceeds on the basis a commitment made in a treaty by the respondent State to arbitrate disputes with a certain class of foreign investors of which the applicants claims to be a member. Although respondents in investment treaty arbitrations are (almost) always States, States and State-owned entities can also be parties to commercial arbitrations. This has some relevance to our subject today.

Second, when I talk about criminal processes, I refer to all procedures for the investigation and prosecution of suspected criminal behavior up until acquittal or conviction. My focus is not only on the outcome of such proceedings.

I will talk about three contexts where arbitration and criminal proceedings can interact, albeit there are others.

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- The first is where conduct which is the subject (or a subject) of arbitral proceedings is also the subject of criminal proceedings. The obvious example is in the context of bribery. In arbitration proceedings, it is alleged that a contract is void or voidable because corruptly procured, while at the same time the individuals said to have colluded in the corrupt transaction are pursued for the crime of bribery.

- The second context is where conduct undertaken in the context of the arbitral proceedings is alleged to be illegal and subject to criminal sanction. An example here would be when the way in which evidence presented by one party to the arbitration was allegedly obtained results in criminal proceedings being instituted against those responsible for its collection.

- And the third is when it is alleged that a State party to an arbitration uses its control over its investigatory, prosecutorial and judicial authorities to seek to prevent the other party from effectively pursing the arbitration, to take an extreme example, by imprisoning its key officers or witnesses. Such conduct has been alleged in a number of recent investor-State disputes, including some where the respondent State was a European, even an EU Member, State.

You will, of course, have already seen that there can be an overlap between these three contexts, in particular between 1 and 3, and 2 and 3. What a State party to an arbitration claims is an appropriate response by its law enforcement authorities to cogent allegations of criminality can be claimed by the other party to be persecution directed to preventing it from prosecuting its case before the arbitral tribunal.

1. <u>Allegations of corruption</u>

What should an arbitrator or arbitral tribunal do when faced with the situation that one (or both) of the parties to the arbitration is facing criminal proceedings in relation to conduct which is also at issue in the arbitration?

I use the term corruption fairly widely. I include bribery of both public and private employees. Facilitation payments (that is, payments made to public officials to do what they are anyway required to do) are also included, although some countries' authorities have not viewed payments illegal when paid by their nationals to do business abroad. And I also will discuss intermediary agreements because some countries ban or restrict the use of intermediaries in public procurement, and also because the exercise of personal influence on government officials, which is what some such agreements contemplate, is now generally considered corrupt

Here, of course, the transnational nature of arbitration can complicate matters. Take the example of a recent decision of the English High Court in a case where recognition of an award was resisted on the basis that it was contrary to public policy.[1] The defendant, companies registered in France and England, were wholly owned subsidiaries in the Alstom group. The claimant, ABL, was a Hong Kong company, which had entered into intermediary agreements with the Alstom companies to assist in their tenders for projects run by the Chinese Ministry of Railways. Each of the agreements was governed by Swiss law and contained an arbitration clause providing for disputes to be referred to ICC arbitration in Switzerland. Alstom failed to pay several of ABL's invoices and ABL brought arbitration proceedings. The backdrop to this refusal, according to Alstom, was criminal proceedings in the UK and the United States against the Alstom Group, which had led to a new focus on the group's compliance obligations. Nonetheless, having found that the indicia put forward by Alstom were insufficient to prove corruption by ABL, the tribunal awarded damages against Alstom. An attempt to Alstom to set the award aside in the Swiss courts was unsuccessful but Alstom was able to resist enforcement in France (although the matter is presently before the *Cour de cassation*). By contrast, the English High Court allowed enforcement.

[1] Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA & Anor [2020] EWHC 1584 (Comm).

So we have a situation where the parties are of different nationalities. The law chosen by them as governing their contractual relations differs from the law of the place of performance of the contract. Criminal proceedings were brought against one party to the dispute by two sets of national authorities, in the US case at least on a 'long arm' basis. Interestingly, in its Answer to the Request for Arbitration, Alstom requested a stay of proceedings pending completion of the criminal investigations, albeit it subsequently withdrew the request.

So should an arbitral tribunal stay proceedings until criminal proceedings are complete? Such a course might seem initially attractive, not least because national authorities, with their greater subpoena and enforcement powers to compel the production of evidence, might be thought better placed to get to the bottom of such allegations than the tribunal. On consideration, though, a stay rarely seems appropriate.

1) It would mean the tribunal would not act for an indefinite period. Indeed, quite when criminal proceedings ended might not be obviously apparent. National authorities do not always state that they have definitively concluded their investigations, reserving the right, in particular, to re-open them should new evidence emerge.

2) Paradoxically, it might assist the respondent party, as during that time it would avoid address having to address the alleged contractual consequences of its actions before the arbitral tribunal.

3) The obverse of the last point is that a stay might disadvantage the applicant, as developments might make it less likely that it could recover from the respondent: the latter's insolvency, to take one example.

The ABL/Alstom case also demonstrates other reasons. First, the applicable law can be different. In ABL/Alstom, the law of the contract was Swiss law, as was the law of

the seat of the arbitration. The law of the place of performance of the contract was Chinese law (although its potential applicability not appear to have been an issue in the arbitration). Criminal proceedings were brought by the UK Serious Fraud Office and the US Department of Justice and prosecuted under English and US federal law respectively. Had those proceedings determined that Alstom had acted corruptly in its activities in China (which neither did), the tribunal would still have had to determine the legal consequences under Swiss law of such determinations.

This issue has arisen in particular in relation to intermediary agreements. In the famous Hilmarton case, a first arbitral tribunal held an intermediary contract null and void under its Swiss governing law. Such contracts were illegal under Algerian law (the law of the place of performance) and contravention of this prohibition, which was aimed at fighting corruption, breached the Swiss conception of good morals. The Swiss Federal Tribunal, however, set aside the award on the ground that the Algerian prohibition was too broad and that Swiss law regarded intermediary agreements as lawful if entered into for non-corrupt purposes. A new tribunal held the agreement valid and ordered the OTV to pay the outstanding balance of Hilmarton's commission.

A further problem arises. In Hilmarton, Algerian law was the law of the place of performance and thus arguably applicable as 'overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed', to use the language of Article 9(3) of the Rome I Regulation. In ABL/Alstom, neither the parties' chosen law, nor the law of the forum, nor the law of the place of contractual performance governed the criminal proceedings against Alstom.

Secondly, perhaps more fundamentally, although the burden of proof remains with those alleging corruption, the standard of proof for allegations of corruption differs in civil and criminal proceedings. The standard of proof in criminal cases is beyond reasonable doubt. In civil cases, it is the balance of probabilities, albeit that some tribunals have taken the view that the more serious allegations are, the more cogent

the evidence needed to prove them. What this means, though, is that arbitral tribunals need not wait for the completion of criminal proceedings to act.

This is not to say that consequences of such proceedings cannot be of significance but, in general, they are significant as part of the factual matrix. Admissions made by a party in criminal proceedings, for example in a Deferred Prosecution Agreement, could be highly relevant, as too could convictions and decisions not to prosecute. To take one example, in EDF Services v Romania,[2] an ICSID arbitration brought under the Romania-UK BIT, the applicant argued that its refusal to comply with a demand for a bribe by senior government officials led to a concerted attack on its business in Romania resulting in the total loss of its operations in that country. Dismissing the claim on the basis that the applicant had failed to prove its case, the tribunal placed weight on the fact that the Romanian Anti-Corruption Authority (the DNA) had twice investigated and twice rejected the claim, which conclusions had been twice reviewed and affirmed by the Romanian criminal courts. National decisions can be of probative value but that is not to say that arbitral tribunals need wait until they are issued before making their own determinations.

2. Allegations of illegal conduct by parties during the arbitral process

How should arbitrators respond to allegations that a party to arbitral proceedings had acted illegally, even criminally, in prosecuting or defending the arbitration. An obvious example, already mentioned, would be when one party alleges another has illegally obtained evidence and, in addition to bringing the matter to the tribunal's notice, makes a criminal complaint to the relevant national authorities.

So it might be argued that one party obtained evidence through hacking the other party's computer network or its employees' mobile phones. It can generally be assumed that evidence obtained by hacking has been obtained illegally. Another way would simply be to bribe an employee of the other party to provide confidential

[2] ICSID Case No. ARB/05/13.

information, conduct which can be assumed to be criminal. A more 'old school' complaint would be that agents of one party trespassed on the property of the other party and went through its trash for discarded documents, which they then took away. This, famously was the *modus operand*i of Benji 'the Binman' Pell, who went through the rubbish of London law firms looking for titbits about their famous clients which he then sold to the press. Whether such conduct is criminal or even illegal can be a nice issue.[3] But if evidence is illegally obtained, the important question is what should be the consequences for the party seeking to rely on it?

International law does not say. National legal systems vary widely[4] and issues can again arise as to what national law the tribunal should apply (the seat of the arbitration might be in one country, the hacking take place against computers located in another by hackers in the territory of a third, etc.). Moreover, arbitration rules lack specificity.[5] They generally give arbitrators the power to determine the admissibility and weight of evidence presented by the parties but with the exception of the IBA Rules on the Taking of Evidence in International Arbitration (which, unless expressly adopted in an arbitration, are really only guidelines),[6] they do not say what principles they should apply when doing so.

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[3] In English law, relevant issues are where the bin was located (on private property or on a public highway) and whether the owner of the contents had abandoned them or not.

[4] An example given in discussion was when a covertly recorded conversation of a meeting as put as evidence before an arbitral tribunal. In Germany, it was said, such a recording, as illegally obtained evidence, could not be received. An English court might well rely on it: see Singh v Singh and Ors [2016] EWHC 1432(Ch).

[5] **Article 25(1) ICC Rules of Arbitration**: The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
Article 19(2) UNCITRAL Model Law: … The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.
Article 27(4) UNCITRAL Arbitration Rules: The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.
Rule 34(1) ICSID Arbitration Rules: The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

[6] **Article 9 IBA Rules**: The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
(a) lack of sufficient relevance to the case or materiality to its outcome;

Further questions arise. Was the party seeking to rely on the evidence complicit in the iniquity (or was it, for example, the act of some whistleblower within the other party's organisation)? On whom is the burden and what is the standard of proof when such allegations are made? Is the evidence inadmissible for some other reason: for example, is it confidential or protected by legal professional privilege so the party could not have been required to disclose it (with possible penalty of adverse inferences being drawn if failed to do so)?

In the NAFTA arbitration Methanex v USA, the applicant, through a law firm, obtained evidence that it put before the tribunal through trespassing on property of the head of a lobbying organization and searching through internal trashcans and dumpsters. The tribunal upheld the USA's challenge to the admissibility of the documents and ordered that they would form no part of the evidential record in the arbitration proceedings

> *In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of "equal treatment" and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules. As a general principle, therefore, just as it would be wrong for the USA ex hypothesi to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully.*[7]

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

[7] Methanex Corporation v USA, Final Award of the Tribunal on Jurisdiction and Merits, 5 August 2005, Part II; Chapter I, para. 54.

The tribunal saw three issues as relevant: legality, materiality and exercise of the Tribunal's discretion. As regards legality, the tribunal found that the evidence showed 'beyond any reasonable doubt that Methanex unlawfully committed multiple acts of trespass over many months in surreptitiously procuring the Vind Documents.'[8] Moreover, the tribunal considered that the documents had only 'marginal evidential significance'.[9] Finally, the tribunal placed considerable emphasis on the parties' obligation to arbitrate in good faith, concluding that:

> *[I]t would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and, indeed, incumbent on all who participate in international arbitration, without which it cannot operate.*[10]

It can be seen that the existence of any criminal proceedings against Methanex and/or its agents went only to the first issue.

The Methanex tribunal was also interesting on the burden and standard of proof to be applied to such allegations. Once the USA demonstrated *prima facie* that the evidence had been secured unlawfully, the burden of proof with respect to its admissibility shifted to Methanex. Methanex, however, did not call evidence on the matter.

In another investment treaty arbitration, Libananco Holdings v Turkey, the respondent – not the claimant – sought to rely on documents that had been obtained in a questionable manner. The respondent, Turkey, having intercepted more than 2000 privileged and/or confidential e-mails exchanged between the claimant and its counsel, sought to use them in evidence in the arbitration.

The tribunal weighed the importance of confidentiality and legal privilege and the obligation of all parties to arbitrate fairly and in good faith and ordered the destruction

[8] Ibid, para. 55.
[9] Ibid, para. 56.
[10] Ibid, para 58.

and exclusion from evidence of all privileged and confidential communication. Indeed, this case argues against too great a reliance on the existence of criminal proceedings. The documents had been obtained through court-ordered intercepts, with the respondent State claiming that the surveillance had been directed at the investigation of certain money laundering activities unrelated to the arbitration proceedings.

The Libananco case moves us to our final issue: because raises the question of how an arbitral tribunal can prevent its processes being subverted by a State party's manipulation of the criminal process.

3. Allegations that a State party to an arbitration is misusing its criminal processes to hinder the other party from pursuing the arbitration.

Such allegations have been made public in a number of investment treaty arbitrations conducted under the auspices of the International Centre for the Settlement of Investment Disputes. Claimants have stated that their officers and employees have called as witnesses in criminal investigations, made subject of such proceedings, been prosecuted, had extradition proceedings brought against, and even put in pre-trial detention. Under the guise of criminal proceedings, State authorities have seized claimants' documents. In all cases, what has been argued is that such activities were not good faith efforts to discover and combat criminality but aimed at hindering claimants effectively prosecuting their case in the arbitration, in particular by preventing them from putting their witnesses and evidence before the tribunal.

Such activities have formed the basis of requests for provisional measures. Under Article 47 of the ICSID Convention, tribunals may, if they consider that the circumstances so require, recommend any provisional measures that should be taken to preserve the rights of either party. Under Rule 39 of the ICSID Arbitration Rules, parties may request a tribunal to recommend provisional measures for the preservation of their rights.

On their face, such provisions argue for the non-bringing nature of provisional measures. Behind them, however, is the fact that ICSID is a body established by treaty administering a largely self-contained regime not subject to national court supervision. Contracting Parties' obligations under the ICSID Convention are obligations under international law, which they cannot plead their national law to avoid. So it is unsurprising that ICSID tribunals have been willing to be rather bolder than tribunals established under other sets of arbitral rules even though those rules may make similar provision for the indication of provisional measures.

Tribunals seem agreed that indicating provisional measures in such circumstances should be exceptional. As the tribunal in Churchill Mining v Indonesia stated: 'the right, even the duty, to conduct criminal investigations and prosecutions is a prerogative of any sovereign State'.[11] As the tribunal in Quiborax v Bolivia said: 'the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of them being investors.'[12] And as the tribunal in Teinver v Argentina repeated. '[I]t will usually require exceptional circumstances to justify the granting of provisional measures to suspend criminal proceedings by a State.'[13] Yet it does seem that ICSID tribunal have become readier to find such circumstances.

In Hydro and others v Albania,[14] an arbitration brought under the Albania-Italy BIT, the tribunal made an order for provisional measures recommended the suspension of criminal and extradition proceedings against two individuals, Mr Becchetti and Mr De Renzis. (As a side note, Mr Becchetti is president of London football club Leyton Orient.) Mr Becchetti and Mr De Renzis had ownership interested in the corporate

[11] Churchill Mining v Indonesia, (ICSID Case No. ARB/12/14 and 12/40), Procedural Order No. 14, 22 December 2014, para. 72.

[12] Quiborax SA and others v Bolivia, (ICSID Case No. ARB/06/2), Decision on Provisional Measures, 26 February 2010, para. 129.

[13] Teinver S.A. and others v The Argentine Republic (ICSID Case No. ARB/09/1), Decision on Provisional Measures, 8 April 2016, para. 190.

[14] ICSID Case No. ARB/15728.

claimants in the case, as well as being parties on their own behalf. The criminal proceedings brought against them by the Albanian authorities related directly to the subject matter of the arbitration. The claimants argued that respondent State had sought to undermine their investments in Albania, including by bringing tax audit proceedings and money laundering investigations against the claimants and Albanian entities owned by them, and by instituting criminal proceedings against Mr Becchetti and Mr De Renzis.

The tribunal considered that Mr Becchetti and Mr De Renzis's possible incarceration in Albania, if extradited from the UK, would prevent them from effectively managing their business and full participating in the arbitration, which threatened the procedural integrity of the proceedings. While the destruction of the claimants' investments in Albania might be repaired by an award of damages, that was not the case as regards the claimants' ability effectively to participate in the arbitration. The tribunal therefore recommended that the criminal proceedings against them be stayed until the conclusion of the arbitration, which, indeed, resulted in an award of damages to the claimants.

Interestingly, Messrs Becchetti and De Renzis were able to use the provisional measures order in the English courts to have their extradition proceedings stayed on the basis on abuse of process. It should be noted, however, that the decision was one of first instance and, moreover, that the Government of Albania accepted that it was bound by the tribunal's decision. The provisional measures order in Nova Group Investments v Romania[15] had a rather different reception in the English courts.

In Nova Group Investments, the tribunal recommended, subject to various conditions, that Romania withdraw its request for the extradition of Mr Alexander Adamescu from the UK but did not ask Romania to stay criminal proceedings against him. Alexander Adamescu is the son of Dan Adamescu, the founder and chairman of Nova

[15] ICSID Case No. ARB/16/19.

(who died in 2017 whilst in prison in Romania), and is Nova's sole director and main witness in the arbitration proceedings. He was crucial to Nova's presentation of its case in the arbitration and his incarceration would prevent him from being able to do so.

Despite the tribunal's order, however, Romania continued with its extradition request. Before the English courts, at first instance the judge refused to stay the extradition proceedings pending the conclusion of the arbitration on the ground that to proceed would be an abuse of process. Mr Adamescu sought permission to appeal against the District Judge's ruling but was unsuccessful on the basis that the provisional measures order prevented Romania from proceeding (although he was successful on other grounds). In the High Court, Whipple J stressed that the appellant was not a party to the arbitration (and neither was the UK), following the respondent's argument that '[t]he PMO at its highest could only bind the parties to the arbitration'. Nor could the order oust an extradition request 'pursued under a well-established machinery with origins in EU law, implemented by the [2003 Extradition] Act'.[16]

So what can be derived from these cases? First, tribunals have sought to intervene in domestic criminal proceedings when they consider they have served to prevent parties effectively participating in arbitral proceedings; to require that both parties arbitrate in good faith; and to ensure the integrity of their own proceedings. Second, that such orders can only be hortatory, not least because tribunals have no enforcement powers. At best, they serve a signalling function that the tribunal considers the targeted criminal proceedings improperly motivated (and it is notable that in the Adamescu extradition proceedings, the English courts were more receptive to arguments based on Mr Adamescu's human rights). Third, one might think it somewhat dispirited that tribunals have thought it necessary to make such orders against European, including EU Member States.

[16] Adamescu v Bucharest Appeal Court Criminal Division [2019] EWHC 525 (Admin), para. 30.

Which brings me to my final and general point. Arbitral tribunals must take account of concurrent national criminal proceedings but they cannot defer entirely to them. This is not only because they undertake a different role but also, unfortunately, because national authorities cannot entirely be trusted. But this, in turn, means tribunals can find themselves between Scylla and Charybdis, so that arbitrators must be skilful navigators to get safely to their destination: an enforceable award.