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Combating the Abuse of International and Domestic Arbitration and Alternative Dispute Resolution Mechanisms in Corruption Offenses

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Abstract

Past decades have seen more and more risks of corruption infiltrating private judiciary entities, including arbitration and alternative dispute resolution (ADR) mechanisms, which are integral to resolving disputes outside traditional courts. Ensuring the integrity of these institutions is essential to maintaining public trust and their credibility. The absence of robust safeguards exposes these mechanisms to exploitation by criminals and organized crime, threatening their operational reliability. It is therefore important to identify key vulnerabilities, including insufficient client due diligence programs, lack of integrity standards for arbitrators, mediators, and conciliators, and inadequate preventive frameworks in many jurisdictions. Advocating for legislative reforms and proactive measures, this study emphasizes the importance of securing these mechanisms to preserve their role as trusted and effective tools for justice.

Keywords: Corruption crimes, arbitration integrity, alternative dispute-resolution, judiciary service vulnerability, due diligence programs, legislation on arbitration.

Introduction

The past decades have witnessed a noticeable rise in interest in arbitration and alternative dispute-resolution methods, prompting many nations to explore the privatization of judicial services (Al-Khudair, 2020). The modern state has prohibited self-administered justice, or "nul ne peut se faire justice à soi-même", dedicating itself to protecting individual rights and ensuring their enforcement through structured legal systems. Justice is positioned as a public service, providing legal recourse through judiciary systems as an alternative to self-administered justice (Abdul-Fattah, 1986).

The effectiveness of ADR mechanisms in reducing judiciary caseloads has been well-documented (Amrani-Mekki, 2008). Additionally, such mechanisms alleviate financial burdens on state budgets by reducing the need for expanded judiciary staff and resources (Lemennicier, 1995). Consequently, judicial functions are no longer confined to public state facilities but extend to private judicial entities where arbitration and alternative dispute-resolution mechanisms play a vital role (D'Ambra, 1991).

Nonetheless, privatized judicial facilities can be manipulated to facilitate crimes like money laundering and corruption. These crimes often involve

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transnational networks, including international criminal groups and mafias, but may also involve individual citizens, posing significant risks to domestic and international legal systems (Melis-Maas, 2004).

Study Objectives

Criminals and organized groups often exploit the confidentiality of arbitration and ADR mechanisms to conceal corrupt activities and avoid detection by authorities (Gayer et al., 2017). The private nature of arbitration makes it particularly vulnerable to misuse, including laundering illicit funds and legitimizing questionable transactions. These actors may initiate sham arbitration proceedings domestically or internationally, fabricating disputes between related entities to mislead the tribunal. This manipulation can involve bribing arbitrators or orchestrating prearranged agreements to secure compensation or arbitration fees sourced from illicit funds (Gayer et al., 2017).

In some instances, arbitral tribunals may knowingly participate in these schemes, issuing awards based on fraudulent arrangements. Alternatively, tribunals might unknowingly adjudicate disputes that are fundamentally corrupt in nature. This dual possibility highlights the need for stricter oversight and preventive measures to safeguard the integrity of arbitration and ADR mechanisms against exploitation (Gayer et al., 2017).

Methodology

This research adopts a qualitative methodology to examine the vulnerabilities of arbitration and ADR mechanisms to corruption and to propose measures for mitigating these risks.

Literature Review

The issue of corruption infiltrating arbitration and ADR mechanisms has attracted significant attention in recent years, particularly given the growing reliance on privatized judicial systems globally. Multiple studies highlight that the confidentiality and flexibility inherent in arbitration and ADR make them susceptible to misuse. Scholars like Gayer et al. (2017) argue that criminals exploit these mechanisms to conceal illicit activities, including money laundering and bribery, often through sham disputes. The absence of stringent oversight and due diligence frameworks compounds this vulnerability, leaving these systems exposed to manipulation by organized crime groups and corrupt individuals.

Instruments like the United Nations Convention Against Corruption (UNCAC) (2003) and the Arab Anti-Corruption Convention provide foundational frameworks for combating corruption globally and regionally. However, the literature highlights gaps in enforcement, especially in jurisdictions like Kuwait, where legislative definitions of corruption and preventive measures in ADR remain underdeveloped (Kissling, 2015).

Studies identify a range of red flags in arbitration and ADR processes that signal potential corruption. These include unusual financial arrangements,

questionable qualifications or behavior of intermediaries, and excessive fees or commissions. Scholars like Betz (2017) emphasize the importance of equipping arbitrators and mediators with the tools to detect and address such red flags effectively.

Arbitration and Corruption Crimes

Despite concerted efforts to fight corruption, it remains the duty of a state to safeguard private justice facilities. Given a state's obligation to protect the public judicial system, it is equally vital to shield private justice facilities, particularly from corruption threats. This helps mitigate risks tied to the privatization of justice, safeguard the rights of litigants, and uphold the integrity and impartiality of arbitrators, mediators, and conciliators.

The international community has experienced the grave effects of corruption over the years. This damaging phenomenon erodes social, economic, and political stability, contributing to the rise of transnational organized crime. By triggering a fundamental decline in a country's economy, corruption can result in foreign investments fleeing due to unfavorable environments. It significantly impedes development and the achievement of future goals, as exemplified in initiatives like Saudi Arabia's Vision 2030 and Kuwait's New Kuwait Vision 2035.

The UNCAC has proven to be a significant international tool to help combat corruption. It was ratified by the State of Kuwait on December 4th, 2006. Further, during the St. Petersburg Summit in September 2013, G20 leaders emphasized the need for stronger anti-money laundering and terrorist financing measures. They acknowledged the need for greater collaboration between G20 anti-corruption experts and the Financial Action Task Force (FATF). The G20 also applauds the endeavors of the Anti-Corruption Working Group (ACWG) and encourages ongoing discussion on this topic. Moreover, the ACWG collaborates directly with the FATF on anti-corruption measures, signifying their mutual support and cooperation.

On a regional level, the Arab Anti-Corruption Convention was ratified by the State of Kuwait on 13 March 2013, after being signed in Cairo on 21 December 2010. Subsequently, the State of Kuwait promulgated Law No. 2 of (2016) to effectively deter and combat corruption in public and governmental sectors.

Kuwaiti lawmakers have not formally defined the term "corruption" in their legislation. Instead, they apply the provisions of the abovementioned law, including the categories outlined in Article 2, without specification. Furthermore, Article 22 of the same law specifies which offenses may be classified as "corruption" if committed by individuals falling under the categories outlined in Article 2.

Corruption in national and international arbitration

Bribery in Public Sector

Bribery, a significant form of corruption, is prominently addressed in the UNCAC. This study focuses on bribery due to its dual occurrence, in domestic and international contexts. Domestic bribery within the public sector is regulated by the internal laws of each state. Conversely, foreign public bribery involves promising

or providing undue benefits, directly or indirectly, to a foreign public official or an international public institution. These benefits may also be extended to a third party, with the intent to influence the official's functions, secure or maintain business, or gain an unfair advantage in international trade.

As a severe form of transnational corruption, foreign bribery primarily targets foreign public officials, highlighting its complexity and gravity. Its legal definition varies across domestic legal systems and international treaties, reflecting the challenges in combating this form of corruption.

Bribery in the Private Sector

Bribery in the private sector, which does not involve government officials, can seemingly have no role in public investment arbitration, such as the ICSID. However, litigants can potentially exploit arbitration and other alternative dispute-resolution mechanisms to approve questionable transactions related to bribery. Therefore, the UNCAC mandates that private-sector bribery should be intentional – explicitly carried out during economic, financial, or commercial activities.

Private-sector bribery does not have distinct definitions for domestic or foreign instances. The UNCAC tackles this by addressing private-sector bribery, whether it is domestic or cross-border (Kissling, 2015). Possible scenarios of private-sector bribery, without published judicial precedents, are given in Article 21 of the UNCAC, as follows: (a) the act of promising, offering, or delivering an unjust benefit, either directly or indirectly, to any individual employed in the private sector. This act is committed intentionally for personal gain or another person's benefit in order to illicitly influence their duties or actions, and (b) the direct or indirect solicitation or acceptance of inappropriate benefits by any individual employed or managing a private sector entity is unacceptable. This can happen when the person in question acts or abstains from acting against their responsibilities for personal gain or the benefit of another.

Although Kuwait has ratified the UNCAC, mandating in Article 21 that each participating state should adopt necessary legislative measures to classify private-sector bribery as a criminal offense, it has yet to pass a law criminalizing such acts. This raises the question of how bribery, in the context of arbitration and other alternative dispute-resolution mechanisms, would be addressed or penalized in light of this legislative gap. Furthermore, mediators and conciliators do not fall under the definition of public servants. According to Kuwaiti law - as stated in Article 43 of the Penal Code, amended by Law 31 of 1970 - only arbitrators are considered public servants, thus subjecting them to anti-bribery laws.

How to Learn About the Abuse of Arbitration and Other Alternative Dispute-Resolution Mechanisms Through Benefiting From Corruption Crimes

Domestic civil or criminal procedure rules, and rules of evidence, do not apply to arbitration unless agreed upon by the parties involved. When considering certain cases before international arbitration, fundamental issues concerning evidence may arise. All arbitral tribunals handling such cases must address these

issues (Betz, 2017). For instance, what law should be applied if an arbitral tribunal, conciliator, or mediator uncovers corruption offenses? Moreover, what are the warning signs that a litigant might be engaging in corrupt activities?

Law to be Applied if Corruption Arises in Arbitration

In private international law, courts are governed by attribution rules that grant them the authority to select the applicable law. Consequently, the provisions of such laws serve as the applicable civil and evidentiary rules. However, does this same principle extend to the arbitral tribunal's state? Specifically, can the arbitral tribunal implement the domestic civil procedure rules, penal procedure rules, and evidence rules, or do those of the arbitration seat state apply?

We maintain that arbitral tribunals lack jurisdiction over penal matters because they are inherently part of a state's sovereignty, hence outside the tribunal's authority. National law, which applies to the substance of the dispute, should instead dictate the repercussions of corruption crimes. This is due to corruption-related agreements being universally unenforceable, entirely void, and inapplicable from their inception. In terms of civil matters, the arbitration agreement's contents, agreed upon by both parties, determine jurisdiction. An arbitrator undertakes an administrative investigation in matters involving criminal evidence, basing this on the available evidence. Therefore, if an inquiry proves that the case under scrutiny involves possible corruption, the arbitrator is obliged to refer it to the appropriate authority (Betz, 2017).

Red flags Assisting an Arbitrator, Mediator and Conciliator Identify the Possibility of Corruption

Red flags are indicators of potential illegal activity during arbitration procedures (Gaillard, 2017). These can signify a range of offenses and violations. Both governmental and non-governmental international organizations maintain up-to-date lists of red flags associated with transnational crimes, including corruption.

The Intermediaries Red Flag Indicators

The following behaviors of intermediaries may raise red flags:

- An intermediary conducts business outside their home country, has questionable qualifications for their job role, or receives a commission that does not match their scope of work or claimed expenses. Doubts might also arise if there is no documentation to verify the intermediary's provision of services or if the details of their services do not support their claims of performance.
- An intermediary demanding payments be channeled through offshore accounts or third parties in unusual arrangements, potentially causing legal concerns. Often, the intermediary's intervention occurs just before contract finalization or after the company's failed negotiations. The intervention period might be extremely brief, with payment based on fixed percentages. The intermediary could also demand a significant portion or all of their commission before the contract's conclusion.

- Financial statements submitted to the arbitral tribunal may be incomplete or inaccurate.
- The structure of the intermediary, if a corporation or a financial organization, may not be clear, potentially leading to suspicions of corruption in the contract. Therefore, the arbitrator should remain vigilant and not overlook such suspicions.
- An intermediary fails to provide evidence of their good conduct, such as proof of a clear criminal record. Additionally, an intermediary may decline to supply documents needed by the arbitrators, including bank and payment records. Notably, an intermediary might claim exclusive ability to execute the contract, identify appropriate individuals, and exploit personal connections with foreign decision-makers.
- The absence of documents confirming a standard business relationship (e.g., technical studies, research, negotiations, contract drafts, letters, and emails) can arouse suspicion in an arbitrator.
- The selection of an intermediary for business transactions may be guided by specific individuals. However, certain indicators may suggest the intermediary's incompetence in the task at hand, without any justified reasons to choose them for the contract.
- For non-service-related contracts, there may be other signs of suspicion. These could include regional indicators, like the predominant corruption level in the intermediary's country. For example, if a state, or certain sectors thereof, are already notorious for corruption. In this regard, the Paris Court of Appeal, stated in part: "The fact that the country in question or certain sectors of its economy are notoriously corrupt, and that the consultant's client is implicated in habitual corrupt practices" (d'Avout and Bollée, 2018; Clay, 2018; Gaillard, 2018).

This information is often outlined by international organizations or NGOs, such as Transparency International's Corruption Perceptions Index. Further, the intermediary may be subjected to criminal investigations by local authorities prior to or during the arbitration procedures.

The company is inaccurate in its stance on updating regulations or policies related to compliance. Examples of this include the lack of policies concerning a code of conduct, whistleblowing, compliance with anti-money laundering/counter-terrorist financing (AML/CFT) and failure to adhere to anti-corruption public policies. When a company suspected or convicted of corruption crimes shows no initiative to address the issues, the absence of legal measures triggers administrative penalties.

In conclusion, significant red flags that can raise suspicion. If these indicators emerge before an arbitral tribunal, mediator, or conciliator, they suggest the presence of potential corruption. Therefore, upon identifying such signs, the arbitral tribunal, mediator or conciliator should subsequently scrutinize these indicators and report to the appropriate authorities.

The Litigant Parties Red Flag Indicators

The following behaviors of litigant parties may raise red flags:

- The parties are reportedly known for poor business ethics, including suspicious, illegal, or unethical behavior towards their subagents or employees, thus damaging their reputation.
- The parties have a history of inappropriate and suspicious behavior, including being investigated previously or currently, either formally or informally, by law enforcement. They have also previously been convicted for questionable payments.
- The parties have faced criminal or civil proceedings due to allegations of illegal, improper, or unethical behavior indicative of potential corruption. Such allegations may stem from the parties themselves or pertain to their tendency to make illicit or facilitative payments to corrupt officials. Integrity-related claims against the parties, including those tarnishing their reputation with suggestions of illegal or unethical conduct, have also been leveled.
- The parties neither possess compliance-related programs nor internal policies regarding conduct, anti-money laundering, or anti-corruption. Moreover, they decline to implement any such programs or policies.
- Dismissal of an individual from multiple companies due to inappropriate behavior.
- The arbitration tribunal, mediator, or conciliator's inability to verify the veracity of the information about the parties, their services, or the actual beneficiary's identity when such information is false.
- A party is evidently willing to violate local laws or policies, such as laws prohibiting commissions or currency and tax laws.
- Overly generous or unusual compensation, submission of suspicious invoices regarding fees or commissions, or an unusually high discount rate compared to the market rate (Bribery and Corruption Red Flags, 2018).

Should substantive corruption offenses be detected, arbitrators, mediators, and conciliators are required to report them in compliance with either the local law at the place of arbitration or any applicable legislation governing the members of these bodies (Cremades & Cairns, 2003; Nasarre, 2013).

Applications to a Real Dispute That Involves Funds Originating from Corruption Crimes

The French Court of Cassation ruled not to uphold an arbitral award if it results in a litigant party benefiting from acts of corruption. This ruling embodies French international public order since corruption contravenes it (Clay, 2017; Weiller, 2017; Seraglini 2017; Nourissat, 2018; Gaillard, 2017; Clay, 2018; d'Avout, 2017; Gaillard, 2018; Seraglini, 2018; Loquin, 2020; d'Avout and Bollée, 2017; Jourdan-Marques, 2018; Clavel et Jault-Seseke, 2018; Lemaire, 2018; Bollée, 2018).

In 2007, the ICSID Arbitration Tribunal demanded that the Argentine Republic reimburse Siemens with approximately US$218 million for breaching

provisions of the "Treaty between Germany and Argentina on the Reciprocal Protection of Investments" (Siemens v. Argentina, 2007). The tribunal concluded that Argentina had violated the treaty by expropriating Siemens' investments (Siemens v. Argentina, 2007, para. 403). However, Argentina rejected this decision and sought its annulment.

In July 2008, during annulment proceedings at ICSID, Argentina requested a review of the award based on new evidence suggesting bribery concerning the national identity card contract. Although corruption allegations had been raised earlier, they were not legally substantiated, leading Siemens to contest Argentina's request (Peterson, 2008). A turning point came in early 2008 when a former Siemens executive testified in a German court, admitting to bribery related to the contract's conclusion.

Argentina argued that the ICSID tribunal had dismissed critical bribery evidence vital for ongoing domestic investigations. During earlier proceedings, Argentina sought private hearings to present corruption claims, but the tribunal rejected these, noting that the allegations were introduced late (Peterson, 2008). Argentina attributed this delay to the slow pace of domestic investigations.

In December 2008, Siemens and the U.S. Department of Justice reached plea agreements. Siemens admitted to failing to maintain anti-corruption controls and violating the U.S. Foreign Corrupt Practices Act (FCPA) but did not plead guilty to bribery (US v. Siemens AG, 2008, paras. 131 et seq). Siemens' Argentine subsidiary admitted to breaching the FCPA (US v. Siemens SA, 2008, paras. 22 et seq). The Statement of Offenses revealed substantial payments to an Argentine official, disguised as legitimate consultancy fees, linked to the national identity card contract and recorded inaccurately in Siemens' accounts (US v. Siemens SA, paras. 30 et seq). These payments were also tied to secret arbitration proceedings in Zurich from 2005 to 2006.

The plea agreement resulted in Siemens Argentina settling the dispute by paying US$8.8 million to the consultancy group. Both parties agreed to keep claims and evidence confidential. Notably, ICSID lacks jurisdiction over contracts procured through corruption, and Siemens did not disclose corruption-related issues during arbitration (US v. Siemens SA, paras. 27 and 31 (aa.) et seq; Peterson, 2008).

In August 2009, Siemens relinquished its rights under the 2007 ICSID award, halting all annulment proceedings. Both parties agreed to cover their legal costs and forgo further litigation regarding the contract (Peterson, 2009).

This case underscores the interplay between domestic criminal investigations and ICSID processes. Despite Siemens' admissions and domestic findings, arbitration tribunals often struggle to address corruption claims comprehensively. Questions remain about whether evidence from Zurich proceedings could have altered the 2007 ICSID award, as indications suggest bribery payments disguised as consultancy fees (Betz, 2017).

Arbitration and ADR mechanisms are occasionally exploited in cases of corruption and money laundering due to their confidentiality and flexibility. Reports from the FATF highlight the potential misuse of these mechanisms in questionable

transactions, which underscores the necessity of implementing effective preventive measures to safeguard their integrity.

International frameworks, such as the UNCAC, establish global standards for transparency and due diligence, offering a foundation for reforms. Organizations like ICSID and UNCITRAL could enhance these efforts by introducing mandatory anti-corruption training programs for arbitrators and mediators. To mitigate resistance from stakeholders concerned about increased oversight, incentives such as compliance certifications and advanced technologies like AI-driven risk assessment tools can streamline monitoring without compromising efficiency. Additionally, creating independent oversight bodies at national and international levels would ensure accountability and proper enforcement. These entities could investigate red flags, mandate third-party audits, and enforce clear reporting protocols aligned with domestic and international laws, thereby strengthening the credibility and effectiveness of arbitration systems globally.

Conclusion

States must uphold the integrity of arbitration awards to mitigate allegations of corruption associated with such awards. Execution judges, whether enforcing foreign arbitration awards or issuing enforcement orders for domestic awards, bear the responsibility of scrutinizing these awards to prevent the misuse of private justice facilities for corruption offenses (Mehtiyeva, 2019). This scrutiny applies irrespective of whether the arbitration facility is domestic or foreign, as such offenses can damage the facility's reputation.

In assessing the compliance of an arbitral award with international public policy, it is acknowledged that the exequatur judge holds the authority to conduct investigations into possible corruption or money laundering within the disputed contract. Based on their findings, the judge may take necessary actions, potentially impacting trust in and engagement with the arbitration facility.

To safeguard arbitration facilities and arbitrators, mediators, and conciliators, precautionary measures and customer due diligence by arbitral tribunals are essential. National judiciary systems must ensure their procedural functions are not exploited by any party in arbitration. Consequently, courts may annul arbitral tribunal decisions, allowing aggrieved parties to file tort liability claims against arbitrators or opposing parties. This approach reinforces trust and accountability in both private and public judicial systems.

Recommendations

Based on the above findings, the following recommendations are proposed to enhance the transparency and accountability of dispute-resolution mechanisms:

A. Establish an independent center to oversee arbitration and alternative dispute-resolution mechanisms to ensure their integrity.
B. Implement safety protocols for arbitration facilities during dispute resolution.
C. Regulate customer due diligence procedures for arbitral tribunals, especially in cases requiring heightened scrutiny.

D. Set strict criteria for arbitrators and third parties, ensuring they are free of criminal records or corruption histories.
E. Develop legal procedures to report red flags to the Anti-Corruption Commission.
F. Establish clear criteria for arbitration fees and costs of third-party services.
G. Oblige arbitrators to report corruption cases in national criminal procedures, without using confidentiality as an excuse.
H. Broaden the definition of public servants in bribery offenses to include mediators and conciliators.
I. Enact a comprehensive law regulating alternative dispute-resolution methods to ensure impartiality and integrity among arbitrators, conciliators, and mediators.

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