

Criminal Offences Committed Through the Arbitration: Duty to Report & Investigate? Duty to Testify? Liability & Immunity?

Amir Ghaffari

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Introduction

- Arbitration & Criminal law: two distant planets?
- Arbitration, a champion of private law, party autonomy and private dispute resolution v. Criminal law, the State's mandatory laws restricting private autonomy
- But, convergence an inevitable and growing concern – ICC Task Force and Report



Introduction cont'd.

- Some examples:
 - Parties already engaged in criminal conduct, i.e., tax fraud, securities fraud or breach of foreign exchange control regulations etc.
 - Fictitious or 'sham' arbitrations to launder money
 - The 'consent award' – a rubber stamp to criminal conduct
 - Agency / Consultancy contracts and 'Influence Peddling'



The Issues

- What should arbitrators do when faced with criminal conduct?
- Specifically:
 - Duty to investigate & report v. Confidentiality?
 - Duty to testify v. Privilege?
 - Liability as an accomplice to crime v. Immunity?
- Direct v. Indirect criminal behaviour

Is there a Duty to Investigate and/or Report?

- An obligation to decide the parties' dispute in accordance with the "applicable law", including provisions of mandatory law
- An obligation transcending the provision of a contractual service or the fulfilment of a contractual duty?
- Arbitrators' personal legal and civic responsibility v. the original mandate – a need to proceed with caution
- 2001 EC Directive on Money Laundering, *Bowman v Fels* (2005) EWCA Civ 226 and other National responses

Is there a Duty to Investigate and/or Report? (2)

- Two commonly cited hurdles:
 - Role of the Arbitrator
 - Confidentiality

- The case against both:
 - An accomplice to crime
 - A duty to render an enforceable award
 - The uncertain scope of confidentiality
 - Ethics

Is there a Duty to Investigate and/or Report? (3)

- Some practical options:
 - Refusal to arbitrate, e.g. an illegal contract invalidates the arbitration clause
 - Declaration that a dispute does not exist
 - Dispute is non-arbitrable, e.g. *contra bonos mores*
 - The ‘consent award’, ICC Rules and AAA/ABA Code of Ethics

- But:
 - Risk of failing to complete the mandate?
 - Civil liability?

Is there a Duty to Testify?

- Privileges in International Arbitration: “international arbitral tribunals cannot expect much guidance ... from international sources” (von Schlabrendorff & Sheppard, *Conflict of Legal Privileges in International Arbitration*)
- Evidentiary privileges: recognised by virtually every developed jurisdiction, allowing parties to withhold documents and/or testimony in civil (and other) proceedings
- The international stage: the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters; ALI/UNIDROIT Principles on Transnational Civil Procedure; IBA Guidelines on the Taking of Evidence etc



Is there a Duty to Testify? (2)

- But, National arbitration laws and most institutional rules are silent regarding the existence and treatment of privileges (except ICDR Rules but only as a basis for objecting to requests for disclosure)
- As a result, there are significant differences in the nature and scope of privileges under different national laws (e.g., categories of privilege recognised, the treatment of waiver of privileges, persons entitled to invoke privileges and the scope of privileges)

Is there a Duty to Testify? (3)


- So what law (if any) applies to tribunals or counsel asked to testify in criminal proceedings against a party to arbitration?
 - Legal advisors: national ('Home Bar') rules v. international standards?
 - Tribunal: law of qualified jurisdiction?
 - Procedural law of the arbitration; the law governing the parties' arbitration agreement; and/or the law most closely connected to the allegedly privileged communication?

Liability & Immunity

- Two forms:
 - Civil liability, e.g. untimely or unfounded resignation of mandate
 - Criminal liability: a duty to apply the applicable law?

- Criminal liability:
 - Which law is to be applied?
 - Differing standards in international arbitrations?
 - The ‘place of execution’?

- The ‘better view’: the competent and responsible arbitrator



Conclusion

Q&A