ASIAN INTERNATIONAL ARBITRATION CENTRE
(MALAYSIA)

ALTERNATIVE DISPUTE RESOLUTION

JOURNAL

2022

VOLUME TWO

ALTERNATIVE DISPUTE RESOLUTION JOURNAL

2022

VOLUME TWO

ISSN 2948-3972
(bi-annually)

eISSN 2948-3972

Published by Asian International Arbitration Centre (Malaysia) (“AIAC”)
in Malaysia 2022

Volume 2

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Preface

Welcome to the second edition of the AIAC Alternative Dispute Resolution Journal 2022. This second edition features four articles, reflecting the second half of the year's interest in ADR.

The AIAC acknowledges the growing interest in article writing and knowledge-sharing which are inculcated in this journal. We are delighted to publish materials attributed to different perspectives of ADR practitioners, academicians, jurists, as well as young practitioners from around the globe.

As Malaysia recently opened its borders and COVID-19 restrictions were lifted, the AIAC took the opportunity to organize evening talks and workshops where a meeting of minds in the ADR industry was made possible. As a result, we witnessed an interesting panorama of discussions ranging from res judicata in arbitration, the journey embracing the historical milestones in the "Sulu Arbitration", to the perspective of arbitrators facing challenge applications, and investment arbitration in the winning article from the AIAC Young Practitioners' Group Essay Competition 2022.

Without a doubt, the quality of content paired with case law analysis in both domestic and international arbitration practice is inspired within these pages. The AIAC extends its utmost gratitude to the peer reviewers who undertook the arduous task of reviewing and assessing the second set of articles published in this second volume.

I sincerely hope the AIAC ADR Journal 2022 Volume 2 aid readers in expanding their compendium in ADR enchiridia.

TAN SRI DATUK SURIYADI BIN HALIM OMAR
Director of the AIAC

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Res Judicata in Arbitration

by Chan Leng Sun, SC • Duxton Hill Chambers

This is an update on a lecture delivered by Chan Leng Sun, SC on the revival of the AIAC Evening Talk Series in June 2022. The author expresses his sincere gratitude to AIAC for hosting the event.

To understand how *res judicata* operates in the field of international arbitration, we must start with the doctrine as it is developed by the courts. Most of you are already familiar with the doctrine. After discussing what *res judicata* means in court, I will discuss the special considerations arising from the operation of *res judicata* in international arbitration. I do not intend to spend time on the finer details on the elements of *res judicata*. However, it is important to understand the different aspects of this doctrine, to see how they can be transposed to an arbitration setting.

DOCTRINE OF *RES JUDICATA* AS DEVELOPED BY THE COURTS

Most, if not all, legal systems recognize finality in litigation, or the doctrine of *res judicata*. It is considered a "general principle of law recognized by civilized nations", within the meaning of Article 38 of the Statute of the International Court of Justice. Hence, it is a rule of public international law.

"*Res judicata*", in Latin, means "a thing adjudicated".

The doctrine is sometimes referred to as "*issue or claim preclusion*". Its general idea is that what has been decided in an earlier adjudication is binding and cannot be reopened in subsequent proceedings between the same parties.

The contents of the rule vary under national laws. Most common law countries have a broad rule which encompasses not only cause of action estoppel, but also issue estoppel. Moreover, many common law countries have an "extended doctrine" of *res judicata* to preclude the raising of arguments that could have been but were not raised in the earlier proceedings. This extended doctrine is grounded in the broad procedural concept of abuse of process.

Civil law countries such as France, Germany, Switzerland, China, Japan and Korea have a more limited scope of *res judicata*. This more limited doctrine covers claim preclusion (cause of action estoppel) but not issue preclusion. The extended doctrine of *res judicata* or abuse of process is not commonly recognized in civil law countries. But some countries like France and Spain have a "principle of concentration" which broadens claim preclusion to claims that could have been but were not brought in prior proceedings.

So that the topic does not get overly confusing, I will focus on *res judicata* as commonly understood in Malaysia, Singapore and England.

The pronouncements by Menon JC, as he then was, in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453, at [17]–[25] ("*Goh Nellie*") and subsequently by him as Chief Justice in *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 ("*TT International*"), at [103]–[104] are often the starting point for any discussion on *res judicata* in Singapore.

In Singapore, *res judicata* is a doctrine that encompasses 3 distinct principles:

(a) "Cause of action estoppel", which prevents a party from asserting or denying a cause of action which has been determined by a court of competent jurisdiction in previous litigation between the same parties. The bar is absolute unless there is fraud or collusion.

(b) "Issue estoppel" precludes re-litigation of an issue in subsequent proceedings if a court has already determined that issue as an essential step in its reasoning. To give rise to issue estoppel, that previous determination "must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination. The House of Lords' decision in *Arnold v National Westminster Bank* [1991] 2 AC 93 has given rise to arguments that the "*Arnold*" exception gives the Court a wide discretion to avoid injustice by declining to apply issue estoppel if there were reasons why the material or argument was not raised in the previous litigation. The Singapore Court of Appeal has rejected a wide exception and limited the *Arnold* exception to a situation where the previous decision is clearly wrong because of some point of fact or law relevant to the decision that was not argued and could not have been argued by reasonable diligence: *TT International*, at [188]–[190].

(c) "Abuse of process", or the extended doctrine of *res judicata*. This last principle is also referred to as the rule in *Henderson v Henderson* (1843) 3 Hare 99. The Court will not permit issues to be raised if they could have been but were not raised in an earlier action, either deliberately or due to negligence or inadvertence. Abuse of process is a broader, more flexible enquiry. One considers all the circumstances of the case", including whether there is fresh evidence that might warrant re-litigation or whether there are bona fide reasons why a matter was not raised in the earlier proceedings. In this regard, the court is not to "adopt an inflexible or unyielding attitude".

I will refer to cause of action estoppel and issue estoppel as "conventional *res judicata*" whereas the third will be described as the *Henderson* rule.

These are principles developed to deal primarily with *res judicata* arising from another court in the same jurisdiction. In other words, domestic *res judicata*. This is not to say that *res judicata* will not apply to foreign judgments. They do, but as we will see towards the end of this lecture, there are additional considerations when one is dealing with transnational *res judicata*.

What about Malaysia? A quick search on Lexis throws up 3000 Malaysian judgments that touch on *res judicata*. I am sure this audience of Malaysian law experts will forgive and correct me if I overlook any critical Malaysian judgment.

The doctrine of *res judicata* in Malaysia also encompasses cause of action estoppel, issue estoppel and the *Henderson* rule. On one reading, the leading Federal Court judgment in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 ("*Asia Commercial Finance*") seems to subsume the *Henderson* rule within cause of action estoppel and issue estoppel. Peh Swee Chin FCJ said:

At 199:

> *In order to prevent multiplicity of action …such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.*

Elsewhere, on p 200, Peh FCJ said he preferred "*the broader approach to the scope of issue estoppel, that issue estoppel applies to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence"*

My view is that the position in Malaysia is not substantively different from that in Singapore or England in that it recognizes cause of action estoppel, issue estoppel

and the *Henderson* rule/abuse of process. *Asia Commercial Finance* did not clearly articulate the distinction between the *Henderson* rule (or expanded *res judicata* doctrine) and the conventional *res judicata* doctrine of cause of action estoppel and issue estoppel because there was no need to do so in that case. Malaysian courts invariably cite English cases where the *Henderson* rule was discussed and explained.

In the Malaysian Court of Appeal judgment in *Mann Holdings Pte Ltd v Ung Yoke Hong* [2019] MLJU 101, Mary Lim JCA recognized the doctrine of abuse of process as a closely related but separate principle from the doctrine of res judicata, at [25], [33].

In *Muhammad Nur Hafiz bin Roslan v Mohamed Izani bin Mohamed Jakel* [2021] MLJU 2311, Mohd Arief Emran Arifin JC clearly dealt with the ingredients of the Henderson rule/abuse of process as a separate ground from conventional *res judicata* [24] – [31]. In doing so, he cited Lord Sumption in *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2014] AC 60, at [24]–[25]:

> *24. … The principle in Henderson v Henderson has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. … Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.*
>
> *25. … Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation.*

Why do we care how we describe the *Henderson* rule, whether as an abuse of process rooted in the court's procedural powers, or as a rule of substantive law? This distinction has not often mattered when *res judicata* comes up before a court, but it can become material in the arena of international arbitration. As we shall now discuss.

APPLICATION OF *RES JUDICATA* TO ARBITRATION

Gary Born, in *International Commercial Arbitration (3rd Edition), at p 4108,* acknowledges that, despite widespread acceptance of the *res judicata* effect of an award, there is limited agreement on the precise preclusion rules that apply

to international awards. He submits, however, at p 4112, that "it is inherent in the nature of an agreement to arbitrate, and the concept of an arbitral award [based on Article III of the New York Convention], that such an award will have binding, and thus preclusive, effects."

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") is about recognition and enforcement of arbitral awards by national courts. Therefore, the starting point is that Courts will recognize and enforce arbitral awards.

Courts recognize and enforce awards

Art III NYC provides as follows:

> *Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.*

The NYC speaks of not just enforcement, but also recognition. This includes not just enforcement of the award by the successful party seizing the initiative to take steps in the Enforcement State, but also reliance on the award to defend or set-off against any contrary claims by the counterparty. Recognition is particularly useful when an award contains declaratory pronouncements on the rights or obligations of parties.

Beyond the NYC, Courts apply *res judicata* to decisions of an arbitral tribunal. This includes the extended doctrine of *res judicata*/*Henderson* rule.

In *AKN and another v ALC and others* [2015] SGCA 63 ("*AKN*"), at [56] – [58] Menon CJ explained as follows:

> *Res judicata in arbitration*
>
> *57 Just as finality is of significance to the courts, so too is it of importance to arbitration. Thus, the courts will typically not rehear matters that have already been determined in arbitration*
>
> *58 Further, the court may disallow a party to raise certain points in court which it could and should have raised in arbitration*
>
> *56 The "extended" doctrine of res judicata, which derives from Henderson v Henderson (1843) 3 Hare 100; 67 ER 313 (see TT International at [101]), has been acknowledged in Singapore to be part of the doctrine of the abuse of process*

As an aside, it should be noted that an invalid award which has been set aside does not give rise to *res judicata*: *AKN*, at [63]. Where an award is set aside because the Tribunal overlooked the merits of one party's submissions and never dealt with the merits, there is neither conventional nor extended *res judicata*. The parties are free to commence fresh arbitration proceedings before a new tribunal.

The Malaysian Courts have also applied the *Henderson* rule to arbitration. A note of thanks to Kartinee Mageswaran and AIAC for bringing to my attention *Orin Energy Investments Ltd v The Owners of the Ship "Cavalier"* [2022] MLJU 673. In that case, Azlan Sulaiman JC held that the defendant shipowner in a Malaysian in-rem action was estopped from arguing that an arbitration clause in a fixture note was incorporated into the bill of lading contract upon which the plaintiff shipper had sued in Malaysia. The learned Judge held that this was a point that the defendant shipowner could and should have raised before a London arbitral tribunal when the shipowner brought an arbitration against the shipper and another party, unsuccessfully, based on another fixture note.

Singapore and Malaysia's position on the application of the Henderson rule to arbitral awards is favoured by Filip De Ly & Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (2009) 25(1) Arbitration International 83, at 85 ("*ILA Final Report*") who recommend that this extended doctrine be applied to arbitration*:*

> *An arbitral award has preclusive effects in the further arbitral proceedings as to a claim, cause of action or issue of fact or law, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse.*

Arbitral Tribunals applying *res judicata*/Conflict of laws rules in arbitration

Notwithstanding the ILA's recommendation, as we have seen, while there might be uniformity on the rules of *res judicata* in a few common law countries, there is no global uniformity on the contents of the doctrine.

Hence, the question of which law on *res judicata* applies can become rather acute in international arbitration.

Bernard Hanotiau, for instance, submits that the *lex arbitri* should determine *res judicata* rules because it is the juridical home of the arbitration and many authors and arbitrators consider *res judicata* to be a procedural question. He cites a number of ICC awards, reports and jurists in support of this view: Bernard

Hanotiau, Chapter 17: *Res Judicata and the "Could Have Been Claims"* in Neil Kaplan and Michael K. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (Kluwer Law International, 2018), at pp 291–292.

David Williams and Mark Tushingham, on the other hand, think that the English position supports characterising *res judicata*, including extended *res judicata*, as a substantive rule governed by the *lex causae*. David A R Williams QC and Mark Tushingham, *The Application of the Henderson v Henderson Rule in International Arbitration* (2014) 26 SAcLJ 1036, at [49].

I doubt that the English position is entirely clear on that. The better view, as we will see, is that conventional *res judicata* is a matter of substance, but the extended *res judicata*, is part of the procedural law of the *lex arbitri*.

Courts have seldom troubled themselves with this question, notwithstanding the occasional discussion on whether certain rules of *res judicata* are rules of substance or rules of procedure.

A recent judgment of the Singapore International Commercial Court ("SICC") highlights the finding of an arbitral tribunal which made this distinction between issue estoppel as a rule of substantive law and the *Henderson* rule as a procedural rule of the *lex arbitri*.

In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2022] SGHC(I) 9 (coram: Philip Jeyaretnam J, Vivian Ramsey IJ, Douglas Jones IJ) ("*Sanum*"), a previous SIAC tribunal in SIAC Arb 143 had rendered an award in favour of Lao government against the Investors (Sanum and Lao Holdings). Subsequently, the Investors brought SIAC Arb 414 against two corporations, SM and GASS. The Lao government applied to be joined as a co-respondent. The Arb 414 tribunal dismissed the Investors' claims against SM and GASS, partly based on a finding that the Investors were estopped from raising some claims due to the earlier SIAC Arb 143 award in favour of the Lao government against the Investors. The Arb 414 tribunal made this finding based on New York law on collateral estoppel, as a substantive rule of law.

Collateral estoppel under New York law is similar to issue estoppel under English law. The parties agreed that, under New York law, collateral estoppel is substantive in nature. They also agreed that it prevents "re-litigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties […] regardless of whether or not the two proceedings are based on the same claim" (at [34]). The Tribunal found that the New York doctrine of collateral estoppel applied to preclude the Investors from arguing the merits of the Estopped Claims. Even if SM and Gass were not parties to the prior SIAC arbitration, they were in privy with the Lao government for the purpose of the collateral estoppel doctrine.

There was also an argument on abuse of process or the *Henderson* rule before the arbitral tribunal. The arbitral tribunal had found that the *Henderson* rule was a procedural doctrine under Singapore law, which applied by virtue of the choice of Singapore as the seat of the arbitration. However, the Tribunal held that one of the conditions for its application, namely that the claim could have been brought in the prior proceeding, was not established.

The Investors applied to set aside the award and to resist enforcement, arguing that by finding they were estopped from pursuing their claims, the Tribunal had denied them an opportunity to present their case. It was also argued that the award was against the public policy of Singapore because the Investors had been denied access to justice due to the allegedly erroneous finding of collateral estoppel.

The SICC held that there was no breach of natural justice or lack of opportunity to the Investors to present their case due to a finding of *res judicata* by the Tribunal. This was because the arbitral tribunal was asked to decide on the claims, and this includes the very question whether the claims were barred by *res judicata*. There was no denial of acess to justice or breach of natural justice just because the tribunal made a finding that there was collateral estoppel.

A number of Singapore and English cases have supported the *Sanum* arbitral tribunal's treatment of issue estoppel as a question of the substantive law, i.e. the law of the contract, while the *Henderson* rule is governed by the *lex arbitri* as a matter of procedural law.

As seen in *TT International and AKN*, Menon CJ had emphasised that the *Henderson* rule is part of the abuse of process concept, which is procedural law, as distinct from conventional *res judicata*, which is a substantive doctrine.

A full coram of five in the Singapore Court of Appeal in *BWG v BWF* [2020] SGCA 36 also treated the *Henderson* rule as a category of the abuse of process doctrine. This coram of five further pointed out that "*the abuse of process doctrine coheres better with the whole law of civil procedure".*

A number of Singapore cases have applied the extended doctrine.

In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997, Quentin Loh J, as he then was, applied the *Henderson* rule to preclude the respondent from bringing a cross-claim that it could have but did not bring in a Danish arbitration. An award was made in Denmark applying Danish law, being the law governing the agreement, which the claimant used as a basis to bring winding up proceedings in Singapore.

Quentin Loh J followed the approach taken by the English Courts in *Dallal v Bank Mellat* [1986] QB 441, where Hobhouse J struck out a US citizen's action in England based on two cheques. This was because an Iran-US Claims tribunal in the Hague had already applied Iranian law as the law to dismiss the claim brought by a US citizen against an Iranian bank based on the same two cheques.

More recently, a recent decision of the English High Court in *Union of India v Reliance Industries Limited and BG Exploration and Production India Limited* [2022] EWHC 1407 (Comm) upheld the finding of an arbitral tribunal that applied English law to the question of the *Henderson* rule as the arbitration was seated in London, notwithstanding that the governing law of the contract in dispute was Indian law: at [58], [61].

These authorities seem to suggest as follows: In relation to an arbitration where the governing law of the contract is, say, Japanese law, but the seat of the arbitration is in say Kuala Lumpur, any question regarding cause of action estoppel or issue estoppel will be determined by Japanese law. But any question on the application of the *Henderson* rule will be determined by Malaysian law.

Effect of tribunal's ruling on *res judicata*

It has also been decided in Singapore that a tribunal's ruling on *res judicata* is a ruling on the admissibility of evidence or a ruling on a question of law. It does not go to the jurisdiction of the tribunal or a breach of natural justice, neither would it be contrary to public policy.

In *BTN v BTP* [2020] SGCA 105 ("*BTN*"), the Court of Appeal held that even an erroneous ruling of *res judicata* would not found a challenge to the award on the basis of public policy. Such errors are not to be treated any differently from other errors that a tribunal might make on the merits of the case before it. This endorses the view of Belinda Ang J at the High Court, [2021] 1 SLR 276, who held that *res judicata* went to the question of the admissibility of a claim before the tribunal and not one of jurisdiction of the tribunal. Therefore, the Plaintiff could not attempt to challenge the partial award as a jurisdictional decision of the tribunal that was susceptible to review by the court. This was upheld by the Court of Appeal in *BTN,* per Judith Prakash JA, at [72], [73].

BTN was cited with approval by the SICC in *Sanum*, who decided that an erroneous ruling of *res judicata* does not amount to a breach of natural justice. The SICC reasoned as follows:

> *38 It can be seen then that the Tribunal made determinations of law and fact in relation to a doctrine of substantive law under the governing law,*

> *namely New York law. It was these determinations that in turn led to the conclusion that the doctrine of collateral estoppel applied so as to preclude the Investors from arguing the merits of the Estopped Claims.*
>
> *39 This is very different from a tribunal mistaking its procedural powers or the scope of issues in play before it, and on the basis of such a mistake either proceeding to an award without hearing one party or excluding evidence. It is instead the Tribunal doing what it was tasked to do, namely, to determine the dispute referred to it, including determining the application of any preclusionary or exclusionary doctrines raised by a party before it. Whether the Tribunal made an error of law or fact in its decision that the doctrine of collateral estoppel applied goes only to the merits, and cannot found a challenge to the Award.*

At [47]–[48], the SICC also rejected the argument that such a ruling went against public policy.

Query: To what extent are arbitral tribunals restricted by the doctrine of *res judicata* when faced with previous national court judgments?

The *res judicata* principles developed by common law courts are relatively straightforward when applied in a domestic setting, i.e. when *res judicata* arises from a prior court decision in the same jurisdiction. They will apply and have been applied to foreign court decisions as well. But as a 2021 Singapore CA judgment demonstrates, there can be additional complexities arising from transnational issue estoppel.

In *Merck Sharp & Dohme v Merck KGaA* [2021] SGCA 14, the Singapore Court of Appeal explained that while the elements of issue estoppel apply to a prior foreign judgment just as they do to a prior domestic judgment, additional considerations come into play in transnational issue estoppel. For example, where there are multiple competing foreign judgments, the first in time should be recognised. But a local judgment will prevail over a foreign judgment: [36]. However, the Court is open to the possibility of taking into account any litigation commenced with undue haste to pre-empt recognition of a foreign judgment: [38]. The Court of Appeal also calls for the common law to be developed such that there is convergence between common law and statutes such as the Choice of Court Agreements Act 2016 and the Reciprocal Enforcement of Foreign Judgments Act 1959 on the defences against recognition of foreign judgments: at [37].

The bottom line is that the clearly articulated principles on the three types of *res judicata* that we see in judgments such as *Goh Nellie* and *TT International*, are not the final word on transnational *res judicata*. This is an area that is still developing.

In a similar but more challenging vein, how should an arbitral tribunal treat a prior national court decision on the subject matter raised in arbitration?

First, the Tribunal has to decide on the choice of law to apply on *res judicata*: (a) which may be the governing law of the contract/substantive law of dispute if it is considering the convention doctrine of *res judicata*; or (b) law of the seat, if it is considering abuse of process/*Henderson* rule or expanded *res judicata*.

Secondly, it should consider whether the same tests for *res judicata* developed by the courts should apply. Bear in mind that the Tribunal may have considerations other than the fraud or *Arnold* exceptions to *res judicata* in a purely judicial setting.

For example, what if the previous national court judgments had ignored an arbitration agreement? It frequently happens that one party may go forum shopping in violation of the agreement to arbitrate. It is also common that, notwithstanding a valid ongoing arbitration, one party may go to its home court to get a favourable judgment. What about multiple and conflicting judicial decisions?

This is not an easy conundrum to solve. The ILA Final Report acknowledged, at [11]:

> *However, international arbitrators may be faced with res judicata problems not only in relation to prior arbitral awards but also in relation to prior state court judgments, specifically regarding the existence of an arbitration agreement. Where a prior state judgment is invoked in arbitral proceedings, arbitrators may have to determine the res judicata effects of the prior judgment. Since the Recommendations do not deal with the relationship between state courts and arbitral tribunals, they will equally not apply to the question what the arbitral tribunal is to do when faced with a prior state judgment. Also in this respect, arbitrators may consider that they should not automatically apply the res judicata doctrine of the law governing the previous state judgment and/or of the arbitration seat, but take the Recommendations into consideration.*

The ILA Final Report does not offer any suggestions on how to treat state court judgments differently.

To conclude:

1. *Res judicata* applies to arbitral decisions.
2. It is relatively straightforward when a cause of action or an issue has been raised and determined in a prior arbitration. There is cause of action estoppel or issue estoppel.

3. There is support for the view that the *Henderson* rule should also apply in arbitration, so that any issue or material that should have been raised in a prior arbitration but was not, would also be precluded in a subsequent arbitration. But this is not a rule that has been developed in all jurisdictions. A question will arise which law will apply when one considers the *Henderson* rule. The better view is that it is the law of the seat, since that is a question equated with abuse of process which is a procedural question.

4. An arbitral tribunal's decision on *res judicata* is not a decision on jurisdiction. It is a decision of law or fact, or on admissibility of evidence or argument. Therefore, it is not a ground for setting aside under the Model Law or for refusing enforcement of the award under the NYC.

5. Whether there is *res judicata* arising from a prior national court decision is a much harder question. One can see that there may be circumstances other than fraud why it would be unjust to preclude a claim or issue from being raised in arbitration, for example, if one party had gone forum shopping in disregard of the arbitration agreement.

In conclusion, the doctrine of *res judicata* is well-ventilated in litigation before common law courts. It is still a developing doctrine when it comes to arbitral awards. There is widespread acceptance of the need for finality in arbitral awards. Nonetheless, the rules on the preclusive effect of arbitral awards have not been harmonised across all jurisdictions. It does help, however, within common law jurisdictions at least, if we bear in mind that there are differing philosophical underpinnings on the different facets of *res judicata*.

Challenges to Arbitrators: Recent Developments in English Law

by Joseph Dyke • McNair International

1 Introduction

Mechanisms for seeking the removal or disqualification of arbitrators for lack of independence or impartiality are "*fundamental control mechanisms*"[1] that are vital for encouraging procedurally fair arbitrations and promoting the legitimacy of arbitration for dispute resolution. Accordingly, such mechanisms exist in the rules of all the major arbitral institutions,[2] in the UNCITRAL Arbitration Rules,[3] and in national laws governing arbitration.[4] However, although removing an arbitrator "*is a most serious step … [which] should only be ordered where there are real reasons for loss of confidence in that arbitrator*",[5] data shows that challenges to

1 Giorgetti C, *Between Legitimacy and Control: Challenges and Recusals of Arbitrators and Judges in International Courts and Tribunals*, 49 Geo. Wash. Int'l L. Rev. 205 (2016)

2 E.g., Article 14, ICC Arbitration Rules 2021; Article 10, LCIA Arbitration Rules 2020; Rule 14, SIAC Arbitration Rules 2016; Article 19, SCC Arbitration Rules 2017; Rule 5, AIAC Arbitration Rules 2018; Article 11, HKIAC Administered Arbitration Rules 2018; R-18, AAA Commercial Arbitration Rules and Mediation Procedures 2013; Chapter V, ICSID Convention and Chapter III, ICSID Arbitration Rules

3 Article 12, UNCITRAL Arbitration Rules

4 E.g., Section 24 of England & Wales' Arbitration Act 1996, Section 1033 of the Netherlands Arbitration Act 1986, Article 180 of the Swiss Private International Law Act, Article 1456 of France's Code of Civil Procedure, Article 12 of the First Schedule to Singapore's International Arbitration Act, Article 14 of Malaysia's Arbitration Act 2005

5 *Groundshire v VHE Construction* [2001] EWHC 8 (TCC) per HHJ Bowsher QC at [23]. See also *Brake v Patley Wood Farm LLP* [2014] EWHC 1439 (Ch) per Tim Kerr QC (as deputy high court judge) at [166]: "*Removal of an arbitrator is an extreme step and is only likely to occur in the rarest of cases*".

arbitrators generally have a very low success rate.[6] For many years, practitioners have expressed concerns at an increasingly prevalent use of challenges as a tactical device. As the editors of *Redfern & Hunter* put it:

> *"Challenges of arbitrators were, at one time, a rare event. … However, modern commercial and investment arbitrations often involve vast sums of money and the parties have become more inclined to engage specialist lawyers, who are expert in manoeuvres designed to obtain a tactical advantage, or at least to minimise a potential disadvantage. Statistics on arbitrator challenges are available from most of the main institutions, and some commentators have concluded that the practice has increased to the extent that it is at risk of affecting the efficiency and legitimacy of the process".*[7]

This article examines the progression of the arbitrator challenge mechanism in the English jurisdiction, and its highly significant developments in recent years.

2 Development of Arbitrator Challenges Under English Law

A. *Section 24 of the Arbitration Act 1996*

Section 24(1) provides that:

> *"A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court 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*

6 See, e.g., Thompson J, '*Challenging Arbitrators in International Arbitration: How are Challenges Made and What is the Likely Outcome?*' (July 2019) (http://www.keatingchambers.com/wp-content/uploads/2020/04/Challenging-Arbitrators-in-International-Arbitration-James-Thompson-July-2019.pdf)

7 Redfern A, Hunter M, Blackaby N and Partasides C (eds), *Redfern & Hunter: Law and Practice of International Arbitration* (6th ed, 2015) (at 4.89)

(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".

In *Cofeley Ltd v Bingham* [2016] EWHC 240 (Comm), Mr. Justice Hamblen (as he then was) held (at [116]) that "*where there is actual or apparent bias there is also substantial injustice and there is no need for this to be additionally proved*".

In its report on the Arbitration Bill (that became the Arbitration Act 1996),[8] the Department Advisory Committee (chaired by Lord Saville) explained (at [106]) the pro-arbitration intention behind the power to remove arbitrators:

> *"We have every confidence that the courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the court to substitute its own view as to how the arbitral proceedings should be conducted.*[9] *Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by Clause 33, should on no view justify the removal of an arbitrator, even if the court would not itself have adopted that procedure. In short, this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration … he is in effect frustrating that object. Only if the court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process".*

B. *Laker Airways – Common Law Bias Test Established*

The first reported Section 24 case concerned an application to remove an arbitrator for "*justifiable doubts as to his impartiality*" because he was from the same barristers' chambers as the counterparty's counsel. In *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113 at 117F, Mr. Justice Rix (as he then was), dismissing the challenge, set out several of the key applicable principles,

8 Department Advisory Committee, Report on the Arbitration Bill (February 1996)

9 See also *Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Ltd* [2016] EWHC 1301 (QB) wherein HHJ Moulder (as she then was) held (at [94]) that: "*It is not for this court to substitute its view for the decisions made by the arbitrator in the course of the proceedings. The mere fact that Enterprise failed in its various applications … cannot … possibly lead to any inference that there was a real possibility that the tribunal was biased*".

including: (1) the test, having regard to *R v Gough* [1993] AC 646,[10] was objective: *"the court must find that circumstances exist, and are not merely believed to exist … [and] those circumstances must justify doubts as to impartiality*", and (2) it is unnecessary to prove actual bias.

The applicability of the *Gough* test was reconfirmed by Mr. Justice Moore-Bick (as he then was) in *Rustal Trading Ltd v Gill & Duffus SA* [2000] CLC 231, and then again by Mr. Justice Longmore (as he then was) in *AT&T Corp v Saudi Cable Co* [2000] 1 All ER (Comm) 201. In *AT&T* the challenge was based on the arbitrator's (non-disclosed) position as a non-executive director and shareholder of an unsuccessful bidder for a telecommunications project. The contention was that he could not therefore be impartial over a dispute between the successful bidder and a third party with whom bidders were required to contract. The challenge was unsuccessful. On appeal, the Court of Appeal confirmed the *Gough* test again and also held that, whilst recognising the applicant's concerns about disclosing confidential information to a rival company's director *qua* arbitrator, this particular arbitrator's level of experience was such that the risk of his leaking that confidential information "*was sufficiently remote to be ignored*" (*AT&T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625 per Lord Woolf MR at [54]).

C. *Failure to conduct arbitration properly – requires "serious risk"*

The *Kalmneft* case,[11] well known for establishing the so-called *Kalmneft* factors applicable to extensions of the time limit for bringing challenges to awards under Sections 67[12] and 68,[13] also featured an application under Section 24(1)(d). Mr. Justice Colman held (at [94]–[98]) that a failure "*properly to conduct the proceedings*" required "*at least some form of serious irregularity*" under Section 68 as well as a "*serious risk that [the arbitrator's] future conduct of the proceedings would not be in accordance with his [duty to act fairly and impartially]*". The evidence adduced by the applicant went "*nowhere near*" demonstrating that risk.

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10 Although the facts of *Gough* concerned juror bias, in reaching his conclusion that the appropriate test was "*whether, having regard to [the relevant] circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question*", Lord Goff held (at 669–670) that: "*I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted … has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him … Such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression "real likelihood" is understood in the sense I have described, i.e. as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias. … In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators.*"

11 *AOOT Kalmneft v Glencore International AG and another* [2002] 1 All ER 76

12 Under Section 67, parties challenge an award for "*lack of substantive jurisdiction*"

13 Under Section 68, parties challenge an award for "*serious irregularity*"

D. *Previous opinions expressed or formed in non-arbitrator capacity – bias?*

If an arbitrator has previously expressed opinions on issues in a different capacity (i.e. not *qua* arbitrator), might that affect his impartiality when he is an arbitrator for a dispute where those issues are relevant?

In *Argonaut Insurance Co v Republic Insurance Co* [2003] EWHC 547 (Comm), the removal of the non-lawyer arbitrator (an underwriter) was sought on the basis of statements he made in a previous arbitration (where he was a fact witness) concerning the meaning of a particular clause. Mr. Justice David Steel held that there was only a tentative link between that and the issues in the second arbitration, and that the opinion expressed *qua* fact witness did not implicate his impartiality as an arbitrator in the second arbitration.

By contrast, in *Sphere Drake Insurance v American Reliable Insurance Co* [2004] EWHC 796 (Comm), an arbitrator was removed on the basis that his prior involvement as a consultant advising parties who had been adverse to the applicants in related commercial litigation gave rise to apparent bias. As Mr. Justice Cooke held (at [41]), "*what he knows and what he thinks is unknown and must indeed remain so because it is privileged, but it is not possible for this court or a fair-minded and informed observer to conclude that it might not have a bearing on the issues he has to decide in the arbitration and that as a result he would regard the case of one or other party with favour or disfavour, however objectively he seeks to determine the matter*" (emphasis added).

E. *Unilateral communications between arbitrator and one party – "generally to be deprecated"*

Will unilateral communications between the arbitrator and one of the parties give rise to apparent bias?

In *Norbrook Laboratories Ltd v Tank* [2006] EWHC 1055 (Comm), where the arbitrator made telephone calls to one party to discuss administrative matters, Mr. Justice Colman held (at [132]) that such a practice "*is generally to be deprecated for it inevitably gives rise to the risk that evidence or submissions will be put before the Arbitrator in circumstances where no record is kept of what has been said and without the opposing party's awareness and therefore of an opportunity of challenging it*". The arbitrator was removed.

F. *Running the risk of losing the right to object*

ASM Shipping Ltd v TTMI Ltd [2005] EWHC 2238 (Comm) was a shipowner-charterer dispute, which concerned a serious irregularity challenge premised on

the argument that one of the three-person tribunal (a Queen's Counsel ("QC")) ought to have recused himself because he had been instructed as advocate by the charterers' solicitors in a previous arbitration in which allegations of impropriety in giving disclosure were mounted against the shipowners' principal witness (which was also an issue in this arbitration). Mr. Justice Morison held, applying the apparent bias test (which had since received further consideration from the House of Lords in *Porter v Magill* [2002] 2 AC 357[14]), that the QC ought to have recused himself when the objection was raised. However, the shipowners, having not made a Section 24 application, had now lost any right to object to his continued involvement. The shipowners' argument that that judgment was "*so clearly and obviously wrong that it … was an unlawful contravention of Article 6 of the European Convention of Human Rights which guaranteed a fair hearing before an impartial tribunal*" was rejected by the Court of Appeal in *ASM Shipping Ltd v TTMI Ltd* [2006] EWCA Civ 1341.

In the event, the QC resigned as chairman. The two wing arbitrators were also asked to stand down, but they refused, and the shipowners sought their removal on the grounds that they would have or had been infected by the QC's apparent bias and were no longer capable of acting fairly and impartially. The shipowners' attempt to debar the charterers from resisting the challenge was rejected by Mr. Justice Christopher Clarke (as he then was) in *ASM Shipping Ltd v TTMI Ltd* [2007] EWHC 927 (Comm). The challenge itself was dismissed by Mr. Justice Andrew Smith in *ASM Shipping Ltd v Harris* [2007] EWHC 1513 (Comm), finding that "*there was no invariable rule, nor was it necessarily the case, that where one member of a tribunal was tainted by apparent bias the whole tribunal was affected second-hand by apparent bias*".

G. *Arbitrator acting as counsel instructed by a party's solicitors in a different case – unconscious bias?*

Arbitrators are often appointed because they are known and because trust is placed in them (and their competence) by parties or, very often, by parties' legal representatives. However, where arbitrators are repeatedly instructed by the same lawyers, concerns begin to rise about their relationship, including whether it evidences apparent bias.

14 Which had since received further consideration from the House of Lords in *Porter v Magill* [2002] 2 AC 357, where Lord Hope approved the "*modest adjustment of the test in R v Gough*" to bring English law "*in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias*" that had been suggested by Lord Phillips MR in *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 at 726–727. Accordingly, test was confirmed as "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*".

In *A v B* [2011] EWHC 2345 (Comm), the arbitrator gave late disclosure (shortly before issuing his award) that he was instructed as counsel by the law firm (although not the same partner) acting for the respondent in an ongoing matter that had no connection to the arbitration. The applicant contended this justified removal because it gave rise to the prospect of "*unconscious bias*" due to a potential "*unconscious predisposition*" in favour of that law firm. Mr. Justice Flaux (as he then was) rejected that contention, holding (at [60]) that:

> *"I do not consider that the fair-minded and informed observer, who is presumed to know how the legal profession in this country works, would consider that, merely because the arbitrator acted as counsel for one of the firms of solicitors acting in the arbitration, whether in the past or simultaneously with the arbitration, there was a real possibility of apparent bias. Since the alleged predisposition to favour that firm is necessarily unconscious, any possibility that the arbitrator's judgment was, … "skewed", would be entirely theoretical".*

H. *The ever-increasing importance placed on an arbitrator's reaction to challenge*

What is an arbitrator to do when they are challenged? How should they react? A challenged arbitrator is entitled to appear and be heard by the court before any removal order is made[15], but how much of a detailed response is it advisable for them to give? What attitude should they adopt towards the challenging party?

In *Sierra Fishing Co v Farran* [2015] EWHC 140 (Comm), an arbitrator in a dispute arising out of a loan agreement was challenged on the bases of his legal and business connections to the defendants, his assistance with drafting and negotiating the parties' agreements, and his conducting himself in a manner justifying doubts as to his impartiality. In response, the arbitrator made representations to the court concerning his impartiality, the nature of the attack on his appointment and opining that the claimants had lost their right to challenge. Mr. Justice Popplewell (as he then was) held that, in addition to his legal/business connections to the defendants and his assistance drafting/negotiating the parties' agreements (which all gave rise to apparent bias), the tone and content of the arbitrator's correspondence with the parties and the court demonstrated he had "*become too personally involved in the issue of impartiality, and the issue of jurisdiction, to guarantee the necessary objectivity which is required to determine the merits of the dispute*" ([65]).

Similar concerns of an arbitrator "*descending into the arena*" featured in *Cofely v Bingham* (supra). In that case, the applicants had sought information from the arbitrator as to how many times in the previous 3 years he had acted as arbitrator in

15 Section 24(5)

disputes where the second defendant was the referring party, and what proportion of his professional income was derived from such referrals. The arbitrator was repeatedly dismissive and challenging of the relevance of those requests. It turned out that 25 of his 137 appointments in the previous three years had been by the second defendant. The arbitrator issued an unrequested ruling finding that there was no conflict of interest. Finding that the bias test was met, the court held (at [114]) that the arbitrator appeared "*to have considered Cofeley's inquiries to amount to an unwarranted attack on him and in turn to have seen attack as the best form of defence – this involved descending into the arena*".

A better approach by an arbitrator was that seen in *T v V and W* [2017] EWHC 565 (Comm) by Mr. Justice Popplewell who approved the "*measured way*" the arbitrator "*dealt with sometimes intemperate and critical correspondence*" (at [125]).

I. *Document disclosure in support of Section 24 applications*

Can the challenging party seek document disclosure to support its challenge?

In *P v Q* [2017] EWHC 148 (Comm), the applicant sought the arbitrators' removal on the basis of improperly delegation of their role to the tribunal secretary. This was based on the chairman's inadvertently sending the claimant's solicitors an email intended for the secretary asking their views on a letter from the claimant. The applicant sought disclosure by the arbitrators of several categories of documents including "*instructions, requests, queries or comments from the co-arbitrators…; and all responses from the Secretary…*", as well as "*all communications sent or received by the co-arbitrators which relate either: [i] to the role of the Secretary; and/or [ii] to the tasks delegated to the Secretary*". Refusing disclosure, Mr. Justice Popplewell held (at [71]) that "*What is sought would amount to disclosure of the confidential deliberations of the tribunal which is impermissible both under the Locabail principle*[16] *and under the parties' agreement contained within article 30.2 of the LCIA rules*".

J. *Extensive tribunal secretary involvement – grounds for removal?*

But is it possible for a tribunal secretary's involvement in arbitral decision-making to give rise to a challenge against the arbitrators?

In *P v Q* [2017] EWHC 194 (Comm), Mr. Justice Popplewell (having dismissed the aforementioned disclosure application) held (at [70(1)]) that:

16 In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 477, the Court of Appeal (Lord Bingham LCJ; Lord Woolf MR; Sir Richard Scott VC) held that "*There can, however, be no question of cross-examining or seeking disclosure from the judge*"

> *"The use of a tribunal secretary to analyse submissions and draft procedural orders is not an improper delegation of decision making functions, absent contrary agreement by the parties. Nor would it necessarily be such an improper delegation were the Chairman to solicit or take account of the views of this arbitral secretary on the merits of these procedural decisions".*

However, he also recognised (at [68]) the "*considerable and understandable anxiety in the international arbitration community*" about tribunal secretaries being used so extensively that they became "*fourth arbitrators*".

K. *Repeat/concurrent appointments*

Even today certain pools of arbitrators are small, particularly for disputes in niche economic sectors. This leads to some arbitrators being appointed repeatedly and/or concurrently by the same parties, creating fertile ground for conflicts of interest to arise. Can arbitral institutions lawfully impose limits on the number of repeat and concurrent appointments an arbitrator can accept?

In *Aldcroft v International Cotton Association Ltd* [2017] EWHC 642 (Comm), the International Cotton Association, on whose terms (including their arbitration clause) most of the world's cotton trades were done, attempted to do so by amending its arbitrators' code of conduct. The claimant (a full-time arbitrator on ICA disputes) claimed that constituted an unlawful restraint of trade. David Foxton QC (as he then was) rejected that claim, finding that, by virtue of the fundamental principle of party autonomy, the restraint of trade doctrine was inapplicable to rules defining arbitrators' rights to accept appointments on the institution's terms.

L. *Removal of arbitrator without a Section 24 application?*

When the court upholds a challenge to an arbitral award and remits matters for fresh determination, can it remove the tribunal without a separate Section 24 application?

In *RJ v HB* [2018] EWHC 2833 (Comm), Mr. Justice Andrew Baker recognised (at [15]) that "*whether there is power to remove under section 68, or only under section 24, is an important question of principle*", and declined to follow an earlier case (*Home Secretary v Raytheon Systems Ltd (No.2)* [2015] EWHC 311 (TCC)) in which it appeared to have been assumed the court could remove an arbitrator if it was remitting parts of an award for fresh determination. Since he did not need, on that case, to decide the issue, he held (at [21]) that:

> *"there would have been an interesting question to consider whether removal under section 24 was available in this claim (subject to re-re-amending and joining the Arbitrator), or would be a matter for a fresh*

> *claim, arising only upon the setting aside (in part) of the Award, with RJ and L Ltd then being required, by section 24(2), first to seek removal under articles 14–15 [of the ICC Rules of Arbitration] before making any such further claim".*

That result was consistent with the judgment in *Hussmann (Europe) Ltd v Pharaon* [2002] EWHC 689 (Comm), where a deputy judge held (at [30]) that:

> *"where a setting-aside order has been made in circumstances where it is undesirable to entrust the existing arbitrators with the further conduct of the reference, it may well be the intention of the court that the reference should not be resumed. But in such cases, the power to remove an arbitrator, now contained in s. 24 of the Act, will be available"*[17].

M. *Costs*

What might be the costs consequences of a failed arbitrator challenge? In *Koshigi Ltd v Donna Union Foundation* [2019] EWHC 122 (Comm), Sir William Blair found (at [59]) that the challenging party had advanced "*a very weak case of bias and non-disclosure. Advancing such a case under s 68 Arbitration Act 1996 may well in itself justify the court awarding indemnity costs*". The weakness of the challenge (and further factors such as the late discontinuance of Section 68 challenges) justified indemnity costs in that case.

Could a costs order be made against the arbitrator? In *C Ltd v D* [2020] EWHC 1283 (Comm), the arbitrator had been appointed by the LCIA on the basis of his significant experience in commercial disputes. However, the applicant sought his removal on the basis that his level of experience was deliberately misrepresented on his CV and this was, in fact, his first appointment. Although the arbitrator denied the allegation, he agreed to stand down on condition that no costs order was made in the Section 24 proceedings. The applicant rejected that, and referred the matter to the Solicitors Regulation Authority. The arbitrator then offered to resign on condition that he could retain his fees and the parties reach an agreement on costs. Mr. Justice Henshaw held that, although costs orders against an arbitrator were not precluded, they were rare and the starting point was that there should not be such an order unless it was tolerably clear that the Section 24 application would have been successful (which, on the facts, it was not).

17 Approved by the Court of Appeal in *Hussmann (Europe) Ltd v Pharaon* [2003] EWCA Civ 266, [2003] 1 CLC 1066 at 1088 per Lord Justice Rix

3 The UK Supreme Court's Decision in *Halliburton v Chubb*

Undoubtedly the most significant recent development in this area has been the decision of the UK Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (handed down on 27 November 2020).

The case arose out of the 2010 explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico, of which BP Exploration and Production Inc ("BP") was the lessee, Transocean Holdings LLC ("Transocean") was the owner and contractor for providing crew and drilling teams, and the appellants ("Halliburton") provided cementing and well-monitoring services.

The appellants and respondent ("Chubb") had entered into a Bermuda Form liability policy in 1992. Substantial legal claims were brought against BP, Transocean and Halliburton in respect of the disaster. Halliburton and Transocean settled claims and then claimed against Chubb under their Bermuda Form policies. Chubb refused to pay out to Halliburton on the basis, *inter alia*, that its settlement had been unreasonable.

The resulting dispute was referred to arbitration. The policy's arbitration clause required each party to appoint an arbitrator and, if the two party-appointed arbitrators could not agree a chairman, the chairman was to be appointed by the English High Court. On 12 June 2015, the court appointed Kenneth Rokison QC (one of the candidates proposed by Chubb).

In December 2015, Mr. Rokison accepted an arbitral appointment (nominated by Chubb) on an excess liability claim by Transocean arising out of Deepwater Horizon. Although Mr. Rokison disclosed to Transocean his appointment in *Halliburton v Chubb*, he omitted to disclose to Halliburton his proposed appointment in *Transocean v Chubb*. In August 2016, Mr. Rokison accepted appointment in another Deepwater Horizon arbitration in a claim by Transocean against a different insurer.

Halliburton discovered Mr. Rokison's appointments in the other two arbitrations in November 2016 and raised its concerns. Mr. Rokison agreed with the benefit of hindsight he ought to have disclosed the other two appointments but declined to recuse himself.

Halliburton filed a Section 24 application asserting justifiable doubts as to Mr. Rokison's impartiality in particular his acceptance (and non-disclosure) of the appointments in the other two arbitrations.

On 3 February 2017, Mr. Justice Popplewell dismissed Halliburton's application, holding, *inter alia*, that: (i) the arbitrator would not derive a secret benefit in the form of remuneration which he would receive from the arbitrations; (ii) there was no concern that the arbitrator would learn information in the Transocean references which was relevant to the issues in *Halliburton v Chubb* (which would be available to Chubb but not Halliburton); (iii) generally an arbitrator's involvement in multiple arbitrations with a single common party did not preclude them from sitting on both tribunals; (iv) there was no rule that a tribunal chairman had a greater duty than the wing arbitrator to maintain demonstrable impartiality; (v) in light of his explanations to the parties (even if he was under an honest mistaken belief as to his disclosure duty), Mr. Rokison's non-disclosure did not give rise to a real possibility of apparent bias. Importantly, however, Mr. Justice Popplewell granted permission to appeal[18].

The Court of Appeal disagreed with Mr. Justice Popplewell and found that Mr. Rokison ought, as a matter of law, to have disclosed to Halliburton his appointments in the other two arbitrations. However, the Court of Appeal upheld the overall conclusion that the bias test was not met in Mr. Rokison's case.

In the Supreme Court, the issues put to the court in the parties' agreed statement of facts and issues were whether and to what extent (i) an arbitrator might accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias, and (ii) he might do so without disclosure. Several arbitral institutions intervened and were given permission to make written and/or oral submissions.

The Supreme Court (Lord Hodge giving the main judgment) held as follows:

> The duty of impartiality applied equally to all arbitrators, regardless of how they were appointed. The test in Section 24(1)(a) was the same as the common law apparent bias test (whether the fair-minded and informed observer would conclude that there was a real possibility of bias). The fair-minded and informed observer needed to consider the realities, customs and practices of the relevant field of arbitration. There might be circumstances where acceptance of appointments in multiple arbitrations with the same or overlapping subject matter and only one common party would justify a conclusion of apparent bias;
>
> The duty to act impartially contained in Section 33 (which would be an implied term in a contract between the arbitrator and the parties) would not be complied with if the arbitrator, at and from the date of appointment, knew of undisclosed

18 Had he not done so, the case would have stopped there. The leave of the Commercial Court hearing the challenge at first instance is required for an appeal against a Section 24 decision. See Section 24(6) and *Athletic Union of Constantinople v National Basketball Association (No.2)* [2002] 1 WLR 2863 at 2867–2868 per Lord Phillips MR.

circumstances which would leave them liable to be removed under Section 24 (unless the parties agreed to waive the obligation[19]). In English law, arbitrators were under a legal duty to disclose facts and circumstances known to them which might meet the apparent bias test. In Bermuda Form arbitrations, the duty required the disclosure of appointments in multiple arbitrations concerning the same or overlapping subject matter but with only one common party (absent contrary agreement by the parties);

Where the information to be disclosed was covered by the arbitrator's obligations of privacy and confidentiality, those to whom the obligations were owed needed to give (express or inferred) consent before the arbitrator could give disclosure, otherwise the arbitrator would have to decline the second appointment. The common party's consent to multiple appointments of the same arbitrator could be inferred from its nomination of them;

Failure to make a required disclosure was a relevant factor for the apparent bias test.[20] Assessment of whether there was a failure of an arbitrator's disclosure duty required consideration of the facts and circumstances as at and from the date when the duty arose. The Supreme Court held that the relevant reference point was the date of the hearing, rather than the date of the application;[21]

On the particular facts of *Halliburton v Chubb*, Mr. Rokison had been under a legal duty to disclose his second appointment because, at that time, the existence of potentially overlapping arbitrations with only one common party might reasonably give rise to a real possibility of bias. However, the Supreme Court nevertheless concluded that the apparent bias test was not met. In circumstances where Mr. Rokison had explained his non-disclosure was an oversight (which explanation Halliburton accepted as truthful) and where the material overlap between the arbitrations had diminished (through extrinsic factors), the fair-minded and informed observer assessing the situation at the date of the hearing would not infer a real possibility of bias in respect of Mr. Rokison.

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19 By framing the disclosure obligation as a (waivable) component of the duty to act fairly and impartially under Section 33 (a non-waivable mandatory provision of English arbitration law: see Section 4 of and Schedule 1 to the Arbitration Act 1996), there is the potential for confusion.

20 Applying *dicta* of Mrs. Justice Cockerill in *PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch) at [57]. In that case, Ukraine unsuccessful applied to set aside permission to enforce a New York Convention award under Section 103(2)(e) for reasons which included that the presiding arbitrator's failure to disclose his subsequent appointment by Tatneft's solicitors in an unrelated ICSID arbitration gave rise to justifiable doubts as to impartiality and independence under Article 9 of the UNCITRAL Arbitration Rules

21 Identified as an issue that "*critics of the decision will undoubtedly focus on*" (see Rainey S and Sharma G, *Halliburton v Chubb: is timing everything?* https://www.quadrantchambers.com/sites/default/files/media/document/halliburton_v_chubb_is_timing_everything_-_simon_rainey_qc_and_gaurav_sharma.pdf), this proved to be a significant part of the *Halliburton v Chubb* result, as it enabled significant weight to be given to events which occurred post-challenge but pre-hearing: including the arbitrator's measured reaction to the challenge, and the significant reduction in the overlap between the two arbitrations following the early resolution of *Transocean v Chubb*.

4 Continued Development of the Law Related to Arbitrator Challenges

The English courts have given several other significant judgments in recent years relating to several different issues that can arise on arbitrator challenges, including the Commercial Court's first consideration of challenges post-*Halliburton v Chubb*.

N. *Unilateral communications between arbitrator and one party – have standards changed?*

Some of the most significant challenges were seen in two cases where football clubs had to play against the Premier League in 2021.

The first was *Newcastle United Football Company Ltd v The Football Association Premier League Ltd* [2021] EWHC 349 (Comm). In the context of the (then putative) acquisition of the claimant by a Saudi Arabian sovereign wealth fund (SWF), the defendant issued a decision finding that, because of the level of control exercisable by Saudi Arabia over the SWF, Saudi Arabia would be a "*Director*" (as that term was defined in Section A of the defendant's Rules). Section F of the defendant's Rules required the defendant to disqualify entities from acting as a "*Director*" of a club in certain circumstances – but the defendant had not made that decision yet. However, the claimant disputed the Section A decision and the matter was referred to arbitration pursuant to the defendant's Rules. An experienced QC was appointed as tribunal chair and he gave a statement of impartiality. The defendant's solicitors disclosed that (a) they had, in the previous 3 years, been involved in 12 arbitrations where the QC had been an arbitrator (in three he was their appointee; two were done after his appointment in this case), and (b) the QC had advised the defendant on four occasions (though all more than three years prior to this appointment) and on one occasion he had given legal advice on a potential amendment to Section F. The QC declined the claimant's invitation to recuse himself. Thereafter, the QC engaged in direct correspondence with the defendant's solicitors (without copying the claimant's solicitors) seeking consent to disclose his previous legal advice and clarification as to whether the defendant considered he should recuse himself.

HHJ Pelling QC dismissed a bias challenge, finding that none of (1) his having advised the defendant more than three years previously on a different issue than that which arose on this reference, (2) the (inadvertent) non-disclosure of the same, (3) the other arbitral appointments (given the limited number of experienced sports arbitrators), or (4) the unilateral communications with the defendant's solicitors (which were "*written in some haste and under some pressure of time*"), would give rise to apparent bias on the QC's part.

O. *The bias test applies to all arbitrators equally, but are experienced arbitrators more equal than the others?*

The second was *Manchester City Football Club Ltd v The Football Association Premier League Ltd* [2021] EWHC 628 (Comm). The defendant began a disciplinary investigation into the claimant and requested (under Rule W of the defendant's Rules) the claimant to provide information and documents. When that was not done, the defendant commenced arbitration. The parties both appointed arbitrators from a list of individuals from the defendant's panel of arbitrators. The claimant challenged the tribunal for lack of jurisdiction and lack of impartiality. (Meanwhile, the defendant's Rules on dispute resolution were amended). After the tribunal issued awards against them, the claimant sought to challenge those awards and to remove the arbitrators.

Mrs. Justice Moulder dismissed all the claimant's challenges. The manner in which arbitrators were appointed (and reappointed) to the defendant's panel (i.e. managed by the defendant without any open competition or written selection policy) did not suggest the arbitrators were "*beholden*" to the defendant. *Halliburton v Chubb* emphasised the need to view the broader context, and the judge considered several further factors: (i) the arbitrators' "*not insignificant*" remuneration did not lead to the conclusion that they derived their livelihood from acting as arbitrators (such as to render them susceptible to partiality through the need to secure appointments); (ii) sports arbitration was still a specialist field with a small pool of potential candidates; (iii) the undoubted professional reputation and experience of these arbitrators needed to be factored in; (iv) the fact that the defendant amended its Rules part-way through the dispute did not establish that the tribunal lacked independence prior to the changes. The judge also noted (at [140]) that *Halliburton v Chubb* did not directly deal with the issue of whether a lack of impartiality before the court was seised could be cured by a change of circumstances between that date and the hearing (but held in the circumstances of the instant case she need not make any further comment.[22]

22 Converse from the idea that a tribunal might cure a lack of impartiality between the date of challenge and date of hearing, there have been (unsuccessful) attempts to argue that the mere fact of challenges has deepened a lack of impartiality during that period. *Ovsyankin v Angophora Holdings Ltd* [2021] EWHC 3376 (Comm) included a post-award Section 24 challenge that contained, *inter alia*, an allegation that, because the applicant was claiming relief against each arbitrator by way of repayment of fees, and because the arbitrators had made representations to the authority designated to hear the challenge under the LCIA Rules, the reasonable observer would take note of that so-called "*confrontational dispute*" between the applicant and the tribunal in assessing apparent bias. Sir Andrew Smith held (at [109]) that: "*It would be strange if, because [the applicant] has launched an unsuccessful challenge under the LCIA Rules and he … had made otherwise unmeritorious applications in these proceedings, it should thereby come about that the applications under section 24 were granted. … Arbitrators are aware that the contentious nature of references means that their conduct and decisions might be challenged, and challenged vigorously, in the Courts and elsewhere. They do not generally allow it to influence their dispassionate assessment of disputes that come before them*".

P. *Arbitral Confidentiality vs Open Justice Court Proceedings*

As arbitrations are typically private and confidential, should a judgment given by the court on an arbitrator challenge be publicised or kept confidential? If publicised, should it be anonymised and/or redacted? Should any publication await the final award in the arbitration?

In *Newcastle United Football Company Ltd v The Football Association Premier League Ltd* [2021] EWHC 450 (Comm), one of the issues for HHJ Pelling QC was whether his Section 24 judgment (discussed above) should be publicised. Relying on principles set out by Lord Justice Mance (as he then was) in *Moscow v Bankers Trust Co* [2004] EWCA Civ 314, the judge held (i) the desirability of preserving arbitral confidentiality must in each case be balanced against the factors militating in favour of publication, (ii) there is a public interest in publicising Section 24 judgments because there is a public interest in maintaining standards of fairness in arbitrations, which is capable of outweighing the significance of arbitral privacy, (iii) the instant Section 24 judgment contained no significant confidential information other than the existence of and parties to the arbitration. The defendant had not established it would suffer a positive detriment in the event of unredacted and unanonymised publication. The defendant's expectation that the arbitration would be private and confidential had been diluted by the information already in the public domain (including the names of relevant participants).

In *Manchester City Football Club Ltd v The Football Association Premier League Ltd* [2021] EWHC 711 (Comm), both parties objected to publication of her judgment on the claims under Sections 24, 67 and 68 (discussed above), but Mrs. Justice Moulder held that the public interest in maintaining confidence in the courts outweighed the factors militating in favour of non-publication. The judgment did not contain significant confidential information – the only confidential information that would be disclosed was existence of the dispute and the arbitration, in circumstances where the defendant had already publicly stated it was investigating alleged breaches of its Rules. Even where both parties argued against publication, that was not determinative of (though it was relevant to) the court's assessment. That was upheld by the Court of Appeal, which held, *inter alia*, that "*the fact that [both parties] are opposed to publication is of some weight, but should lead to the court being careful not simply to accept the parties' wishes without scrutiny*"[23].

The tensions between arbitration confidentiality and open court proceedings were seen in a different context in *Chartered Institute of Arbitrators v B* [2019] EWHC 460 (Comm). Following a successful challenge under Section 24(1)(a), CIArb wished to bring disciplinary charges against the arbitrator and refer them to a

23 *Manchester City Football Club Ltd v The Football Association Premier League Ltd* [2021] EWCA Civ 1110 at [56] per Sir Julian Flaux C

disciplinary tribunal. The decision to bring charges was based upon the transcript of the arbitral hearing and on certain correspondence. But CIArb wished to obtain further material, including copies of the witness statements and exhibits filed in relation to the Section 24 application. CIArb applied to the court, *inter alia*, for an order to obtain copies of those materials.[24] Mrs. Justice Moulder, finding that the principle of open justice was engaged and that CIArb had a legitimate purpose in seeking the documents for disciplinary purposes (which was also in the public interest), granted CIArb access to the transcript of the arbitral hearing, the form and correspondence relating to the arbitrator's appointment and witness statements, but not to the skeleton arguments.

Q. *Refusal to admit substantial evidence pre-award (but post-closing of proceedings)*

A challenge seeking the removal of a three-person LCIA tribunal for apparent bias based on their refusal to allow evidence to be admitted was seen in *BSG Resources Ltd v Vale SA* [2019] EWHC 3347 (Comm). A dispute arising out of a JV to exploit Guinean iron ore deposits gave rise to both an LCIA arbitration (between the JV partners) and an ICSID arbitration (by one of the JV partners against Guinea). The LCIA tribunal ordered that the ongoing documentary record of the ICSID arbitration be disclosed in the LCIA arbitration. After the claimant failed to attend the final LCIA hearing, the proceedings were closed pending a final award. Several months later, but before an LCIA award had been given, the final ICSID hearing was held. The claimant applied for its 2000-page transcript to be admitted in the LCIA arbitration on the grounds that Guinean officials had given evidence contrary to what was in the LCIA arbitration. After the LCIA tribunal refused to admit the transcript (and gave an award in favour of the defendant), the claimant filed a bias challenge. Sir Michael Burton dismissed the challenge, finding that the arbitrators had been entitled not to admit substantial amounts of evidence (that would in any event not assist them in reaching their decision) in circumstances where the record-sharing agreement had ended. In those circumstances, there could be no suggestion of apparent bias.

R. *Unilateral communications between arbitrator and one party – have standards changed (again)? A question of fact and degree?*

As set out above in *Norbrook*, unilateral communications between arbitrator and one party on administrative matters for the arbitration were "*generally to be deprecated*". Yet, in *Dadoun v Biton* [2019] EWHC 3441 (Ch), the court reconfirmed (at [37]) that "*the fair-minded and informed observer is not unduly sensitive or*

24 Civil Procedure Rule 5.4(C) allows non-parties to obtain (with the court's permission) certain documents filed at court

suspicious but neither are they complacent". Accordingly, an allegation that a short discussion between the arbitrator and one of the parties' brothers regarding when a Beth Din award would be issued (in circumstances where 5 years had elapsed since the final hearing) gave rise to apparent bias was unsuccessful. As a result, non-disclosure of documents recording that short discussion also did not give rise to apparent bias: "*It is difficult to see how the non-disclosure of something that was not evidence of apparent bias could itself be evidence of apparent bias*" ([42]). *Norbrook* appeared only as a footnote in *Dadoun*.

S. *Potential Difficulties of Agreeing (in an Arbitration Clause) an Identified Individual as Arbitrator, then Seeking their Removal for Apparent Bias*

B v J [2020] EWHC 1373 (Ch) provided an illustration of difficulties that might arise where an arbitration agreement requires the appointment of a specific person with close professional involvement to the likely parties to a putative dispute. In that case, the contract (intended to regulate the affairs of several companies of which various members of the same family were shareholders) had an arbitration clause requiring disputes to be referred to a particular arbitrator who had previously worked as the family's accountant with involvement in their business for 20+ years. The applicants sought his removal on grounds that (i) the arbitrator had previously been employed by one of the defendant companies on opaque terms (he had resigned just shortly before the arbitration commenced), (ii) the arbitrator had allegedly refused to provide the claimants with financial information when requested, (iii) the arbitrator would be a fact witness if an account of profits was ordered, (iv) the arbitrator would be a witness in connection with alleged breaches by the first defendant of the relevant contract. The court held that the allegations of a sham resignation (based on the content of the resignation letter), the vague prospect of the arbitrator bringing a late claim for constructive dismissal in respect of his employment, and the purported refusal to provide financial information (where the arbitrator had been transparent as to the reason why) would not meet the bias test. Further, the fact that the arbitrator might be a possible witness did not give rise to apparent bias, in circumstances where it was his position in relation to the family that had led to his being designated as the arbitrator in the first place.

6 Concluding Observations

The law on arbitrator challenges continues to develop following *Halliburton v Chubb*. The courts recognise that removing an arbitrator is a serious step, and successful challenges are rare. As the *Halliburton*, *Newcastle United* and *Manchester City* decisions illustrate, the courts continue to exhibit deference to the reputations and experience of (senior) arbitrators.

The Sulu Arbitration: Above the Laws

by Prof. Dr. Lee C. G. John • Renmin University of China

The seizure of two Luxembourg subsidiaries of Malaysian state oil company Petronas by the descendants of a late sultan of Sulu, in July 2022 marked a dramatic escalation of a US$14.92 billion legal dispute linked to an agreement signed in 1878, some 144 years ago.

This seizure by the eight descendants is based on a final arbitral award (Final Award) dated 28th February 2022.[1]

This paper aims to analyse the pertinent issues of this dispute, its ramification on both Parties, the arbitrator, the Claimants' legal counsels and the third-party funder.

1.0 Historical Milestones

Chronologically, the narrative can be traced back to Spain relinquishing its territorial claims over North Borneo to the British:

1.1 The Madrid Protocol of 1885

Article III

> *"The Spanish Government renounces, as far as regards the British Government, all claims of sovereignty over the territories of the continent of Borneo, which belong, or which have belonged in the past to the*

1 Final Award, Sulu Arbitration, 28th February 2022

Sultan of Sulu (Jolo), and which comprise the neighbouring islands of Balambangan, Banguey, and Malawali, as well as all those comprised within a zone of three maritime leagues from the coast, and which form part of the territories administered by the Company styled the 'British North Borneo Company'."

1.2 Grant of 1878

On 22nd January 1878, the Sulu Sultan Jamalul Ahlam ceded the Sultanate's territories of North Borneo:

"We hereby grant and cede of our own free and sovereign will to Gustavus Baron de Overbeck of Hong Kong and Alfred Dent, Esquire, of London as representatives of a British Company co-jointly their heirs, associates, successors, and assign forever and in perpetuity all the rights and powers belonging to us over all the territories and land being tributary to us on the mainland of the island of Borneo commencing from the Pandassan River on the northwest coast and extending along the whole east coast as far as the Sibuco River in the south and comprising amongst others the States of Paitan, Sugut, Bangaya, Labuk, Sandakan, Kina Batangan, Nuniang, and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River with all the island within three marine leagues of the coast."

And

"In consideration of this grant the said Baron de Overbeck and Alfred Dent promise to pay as compensation to His Highness the Sultan Sri Paduka Maulana Al Sultan Mohamet Jamal Al Alam, his heirs or successors the sum of five thousand dollars per annum."

1.3 Confirmatory Deed of 1903 (Deed of 1903)

Subsequently, the Deed of 1903 marks the Sultan of Sulu's cession of certain outlying islands surrounding North Borneo:

"WE, the Sultan of Sulu, state with truth and clearness that we have ceded to the Government of British North Borneo of our own pleasure all the islands that are near the territory of North Borneo from Banguey Island as far as Sibuco Bay. These are the names of them: Muliangin, Muliangin Kechil, MalawaH, Tegabu, Bilian, Tegaypil, Lang Kayan, Boan, Lehiman. Bakungan, Bakungan Kechil, Libaran, Taganack, Beguan, Mantabtuan,

Gaya, Omadal, Si Amil, Mabol, Kepalai, Dinawan, and the other islands that are situated alongside, or around or between the islands that are above-mentioned.

This is done because the names of the islands were not mentioned in the Agreement made with Baron de Overbeck and Mr. Alfred Dent on the 19th Maharam, 1295, corresponding with the 22nd of January 1878. It was known and understood between the two parties that the islands were included in the cession of the districts and islands mentioned in the above-stated Agreement."

And it includes a consideration of:

(a) cession money of three hundred dollars a year and

(b) arrears for past occupation of 3,200 dollars.

This raises some interesting questions as to i) why the British continued to make the annual payment of $5,000 as per the Grant of 1878 and ii) later in 1903 concluded with the Sultan to pay an additional $300 per annum for a handful of outlying islands surrounding North Borneo, despite the Madrid Protocol of 1885.

1.4 Macaskie Judgment of 1939

Jamalul II's father, Sultan Jamalul Ahlam, ceded Sabah in 1878 to British North Borneo Co., for a consideration that the company would pay 5,300 dollars to the Sultanate of Sulu. It continued to do so until 1936, when Jamalul II died.

After Jamalul II's death, the British consul in Manila recommended the suspension of payments because President Manuel L. Quezon of the Philippines did not recognize Jamalul II's successor.

Sultan Punjungan Kiram, crown prince of the sultanate at the time of Jamalul II's death, went to the British consulate in Manila to demand the resumption of payments.

In 1939, a decision issued by the High Court of North Borneo named the nine principal heirs of the last sultan of Sulu and ordered resumption of annual payment.

1.5 North Borneo became a Crown Colony in 1946

The British Government became the successor-in-title to the British North Borneo Company in 1946 when North Borneo became a colony of the United Kingdom.

Thus between 1946 and 1963, the British Government paid annual compensation of 5,300 dollars to the nine heirs of the Sulu Sultanate.

1.6 Cession and transfer of the territory of North Borneo by Sultan of Sulu to the Republic of the Philippines, 1962[26]

"The Territory of North Borneo, and the title of sovereignty and dominion over the said Territory are hereby ceded and transferred by His Highness, Sultan Mohammad Esmail Kiram, Sultan of Sulu, acting with the consent and approval of the Ruma Bechara, to the Republic of the Philippines."

This cession and transfer were finalised in Manila, Philippines, on 24th day of April 1962. Following this, the Sultan and his heirs henceforth has no legal standing on the matter of North Borneo (Sabah) territorial sovereignty.

1.7 North Borneo (Sabah) became part of Malaysia in 1963

Malaysia honouring the Grant of 1878 and Deed of 1903 continued the annual payments to the Sulu heirs.

1.8 The Lahad Datu Incursion or Operasi Daulat, 2013[27]

The 2013 Lahad Datu incursion or Operation Daulat (Malay: "Operasi Daulat") was an armed conflict in Lahad Datu District, Sabah, Malaysia, which started on 11 February 2013, lasting until 24 March 2013.

The conflict began when 235 militants, some of whom were armed, arrived by boats to Lahad Datu from Simunul island, in southern Philippines, calling themselves the "Royal Security Forces of the Sultanate of Sulu and North Borneo", sent by Jamalul Kiram III, one of the claimants to the throne of the Sultanate of Sulu.

2 Cession and transfer of the territory of North Borneo by His Highness, Sultan Mohammad Esmail Kiram, Sultan of Sulu, acting with the consent and approval of the Ruma Bechara, in council assembled, to the Republic of the Philippines. April 24, 1962. Official Gazette. Government of the Philippines.

3 https://en.wikipedia.org/wiki/2013_Lahad_Datu_standoff

Kiram III stated that their objective was to assert the unresolved territorial claim of the Philippines to eastern Sabah (the former North Borneo).

This attack is perhaps one of the reasons why Malaysia ceased in making the annual payments of $5,300 in 2013.

2.0 *Locus Standi* (Legal standing) of the Claimants

The Claimants of the arbitration are: (i) Nurhima Kiram Fornan; (ii) Fuad A. Kiram; (iii) Sheramar T. Kiram; (iv) Permaisuli Kiram – Guerzon; (v) Taj – Mahal Kiram – Tarsum Nuqui; (vi) Ahmad Nazard Kiram Sampang; (vii) Jenny K.A. Sampang; and (viii) Widz – Raunda Kiram Sampang.

As per above point 1.1 The Madrid Protocol of 1885: Article III, the Spanish Government recognised the British Government's claims to Borneo which in the past belonged to the Sultan of Sulu and administered by the Company styled as the 'British North Borneo Company'.

The Sulu Sultanate on its own free will has ceded and transferred the territorial sovereignty of Sabah (North Borneo) under the Grant of 1878 and Deed of 1903.

More recently in 1962, with reference to the above point 1.6 *Cession and transfer of the territory of North Borneo by Sultan of Sulu to the Republic of the Philippines, 1962*, with effect from 24th April 1962, the Sulu Sultan, his heirs, and estate, no longer have legal standing on the territorial sovereignty of Sabah.

Thus, the Claimants (Sulu Sultan's heirs) have no legal standing to institute legal action against Malaysia with regards to Sabah's territorial sovereignty.

3.0 Sovereign Immunity

The principle of equality of sovereign states is enshrined in Art 1(2) of the Charter of the United Nations, and the notion of sovereign immunities including those afforded to its sovereigns operates on this principle, specifically *"par in parem non hebet imperium*" where since both states are equal, one cannot be subject to the jurisdiction and the courts of another.

Therefore, under established international law, Malaysia being a Sovereign nation, cannot be subject to the jurisdiction and courts of another. This includes any *ex-parte* legal suit filed by a private citizen or organisation in courts or tribunals outside of Malaysia.

The Spanish Court of the first instance has thus erred in law:

Paragraphs 29 and 30 of the Final Awards

> *"In its Order of May 8, 2018, the Superior Court of Justice of Madrid examined its competence and declared that its Civil and Criminal Chamber had jurisdiction over the Application."*
>
> *"On October 29, 2018, the Civil and Criminal Chamber of the Superior Court of Justice of Madrid decided to declare Malaysia to be in default in relation to the Application."*

The French Court of the first instance, similarly, erred in law:

Paragraph 129 of the Final Awards

> *"As on October 11, 2021, pursuant to instructions contained in Procedural Order 42, Claimants reported that the Tribunal de Grande Instance de Paris ordered the Exequatur of the Preliminary Award on September 17, 2021. Claimants appended the Exequatur of the Preliminary Award."*

The Luxembourg Court of the first instance, has similarly erred in law, in issuance of the enforcement order to seize the assets of Petronas subsidiaries.

4.0 Jurisdiction to Arbitrate

The Claimants alleged, and the sole arbitrator agreed that there was a written arbitration agreement and thus he had the jurisdiction to arbitrate.

Under paragraph 22 of the Final Award, the sole arbitrator relied on the following for jurisdiction to arbitrate the matter:

> *"The Deed contains a clause for the resolution of disputes (hereinafter, the Arbitration Agreement) which provides as follows: «…Should there be any dispute, or reviving of all grievances of any kind, between us, and our heirs and successors, with Mr. Gustavus Baron de Overbeck or his Company, then the matter will be brought for consideration or judgment of Their Majesties' Consul-General in Brunei…».*
>
> *"In case any dispute shall arise between His Highness the Sultan, his heirs or successors, and the said Gustavus Baron de Overbeck or his Company, it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo."*

This is an incorrect interpretation of the clause in question as it makes no mention that any disputes are to be resolved by arbitration, there is no mention of the *Lex Arbitri*, the language which the arbitration is to be conducted or the number of arbitrators.

Her Britannic Majesty's Consul-General for Borneo has ceased to exist since the formation of Malaysia and even if he or she still exists, reference to the Consul-General will logically result in the dispute being dealt with under the English Law, not Spanish or French Laws.

Drawing on the Macaskie Judgment of 1939, it is also of legal significance that the Sulu Sultan's heirs submitted their dispute to the High Court of North Borneo. It highlights the Sulu Sultan's heirs are mindful that there is no written arbitration agreement, and the correct forum is the High Court of North Borneo (now Sabah).

5.0 Was Sabah Ceded or Leased, and thus the Issue of Its Territorial Sovereignty?

The Sulu Sultan's heirs are claiming that Sabah (North Borneo) was leased rather than ceded and thus they retain the territorial sovereignty over the same. This confusion arises from the original documents of the Grant of 1878 and the Deed of 1903, which were in the Malay language, wherein the former contains the word, "pajakan" (meaning lease), but the latter contain the word "menyerahkan" (meaning relinquish or cedes).[4]

There is an apparent conflict between these two treaties, thus which treaty prevail?

As per Article 30 of the Vienna Convention on the Law of Treaties [5] and *lex posterior derogate priori,* the later or newer documents will be definitive or override, in this instance, the Deed of 1903 and thus the word: relinquish or cedes, prevail.

Remotely, if there was any territorial sovereignty for Sabah remaining with the Sulu Sultan's heirs, it was so ceded and transferred to the Republic of the Philippines in 1962. (Refer the above point 1.6 Cession and transfer of the territory of North Borneo by Sultan of Sulu to the Republic of the Philippines, 1962)

4 The futile pursuit of the Sulu Sultanate claims on Sabah. Jason Loh Seong Wei. March,14 2022. Emir Research

5 Article 30 of the Vienna Convention on the Law of Treaties, Application of successive treaties relating to the same subject matter.

The territorial sovereignty of Sabah remains with Malaysia, as Malaysia has been exercising actual sovereignty over Sabah since independence in 1963 and as successor-in-title of the British Government.[6]

6.0 Private Commercial Contract or a Treaty?

The Claimants alleged that both the Grant of 1878 and the Deed of 1903 are "commercial transaction for an undetermined period", in return for a series of annual rental payment.[7]

Similarly, the sole arbitrator, decided and declared that the Grant of 1878 is an international private lease agreement.[8]

As per above point ***5.0 Was Sabah ceded or leased, and thus the issue of its territorial sovereignty?*****,** it is established that Sabah it is not leased but its territorial sovereignty is ceded and transferred to Malaysia.

The signatories of the Deed of 1903, are on the one part:

The Sulu Sultan

and on the other part,

For Government, subject to His Excellency's approval. *A. COOK.*

And Approved *E. W. BIRCH, Governor.*

These signatories are signing in their official capacities as Sultan (sovereign) and, for and on behalf of H.E. (British) Government. It is submitted that this is clearly definitive and overrides the Grant of 1878.

Hence, both treaties are not private nor commercial in nature and thus foreign enforcement on the basis of the New York Convention is wrong.

7.0 Abuses

In the case of Government of Malaysia v. Nurhima Kiram Fornan,[9] Justice Mairin Idang determined four issues which are highly relevant:

6 Sultan of Sulu's Sabah Claim: A Case of 'Long-Lost' Sovereignty? By Mohd Hazmi bin Mohd Rusli & Muhamad Azim bin Mazlan. S.Rajaratnam School of International Studies, NTU. 13th March 2013

7 Paragraph 8 of Final Award, Sulu Arbitration, 28th February 2022

8 IX. The Decision, A1 On the Claims, Final Award, Sulu Arbitration, 28th February 2022

9 Originating Summons No. BKI-24NCvC-190/12-2019 (HC2)

(i) there is no valid or binding Arbitration Agreement;

(ii) there is no waiver of Malaysia's sovereign immunity to confer jurisdiction in proceedings before the courts of Spain which appointed the Spanish Arbitrator, Gonzalo Stampa;

(iii) the High Court of Sabah is the natural and proper forum to determine all disputes; and

(iv) there was forum shopping by the Claimants.

Despite this judgment (delivered in May 2020) and having this judgment communicated to both the Claimants and the sole arbitrator, Dr Stampa, the arbitration proceeded with a Final Award made on 28th February 2022, and the subsequent enforcement in Luxembourg against the two Petronas subsidiaries.

8.0 Fraud – Probable Cause?

The Malaysian Attorney-General (AG), in a letter dated 19th September 2019[10] addressed to the eight claimants made an offer to pay the arrears from 2013 to 2019 totalling RM37,100.00, together with 10% simple interest totalling RM11,130.00, or a total sum of RM48,230.00. This represented the loss they suffered in the 7 years period and an assurance given that Malaysia would pay the said annual sum for future years.

The claimants declined the AG's offers and instead opted for a much more luxurious claim. Both the Grant of 1878 and Deed of 1903 do not provide for claims for damages beyond the $5,300 annual payment. To be making claims for the value of the land due to later discovery of rich natural resources would be tantamount to unilaterally re-writing both treaties.

The Claimants had engaged experts i.e., Brattle Report, and the Meehan Report, to itemise and evaluate the rich natural resources now found in Sabah, especially oil and gas, and palm oil. Not surprisingly, they were handsomely rewarded by the sole arbitrator in the Final Award, details as follows:

In the Final Award, under IX. The Decision,

On the Claim:

> *4. The Arbitrator decides that Claimants are entitled to recover from Respondent the restitution value of the rights over the leased territory along North Borneo under the 1878 Agreement and the 1903 Confirmatory Deed, with pre-award interest of 3,96% per annum, as of January 1, 2013*

10 Statement from former Attorney General Tan Sri Tommy Thomas dated July 27, 2022

until 2044, and orders Respondent to pay to Claimants the amount of USD 14.92 billion.

On the costs:

1. *The Arbitrator decides that Respondent should bear all legal and expert costs incurred by Claimants in the merits phase of this arbitration. Claimants are entitled to be reimbursed by Respondent of these amounts. Therefore, Respondent is ordered to reimburse Claimants the amount of USD 3,502,394.24, corresponding to Claimants' Counsel and Experts' fees and costs.*
2. *The Arbitrator decides that arbitration costs of the merits phase of these proceedings are determined to be USD 2,351,592.64 and that Respondent should bear all the arbitration costs of this phase of these proceedings.*

As this is an ad hoc arbitration, the sole arbitrator will no doubt keep the bulk of the arbitration cost of US$2,351,592.64, the Claimants' counsels and experts are doing not too badly either. *Quid pro quo?*

9.0 Conclusion

Thus, the only reasonable conclusion is that this arbitration, its awards, and enforcement is a sham, to defraud Malaysia.

The obvious first task for Malaysia is to clear up this mess: annul the Final Award, set-aside the enforcement orders in Luxembourg, and other jurisdictions that may surface in the interim.

In view of the recent conduct of the Sulu heirs, Malaysia should consider a legal determination of the future in respect of the annual payment of $5,300 before the High Court of Sabah which is the correct and natural forum.

Given that there are abuses and probable fraud, appropriate legal actions are necessary: criminal and/or civil proceedings should be instituted against the claimants, arbitrator, and legal counsels. Also, let's not forget the third-party funder, Therium.

The judges of the first instance, in Madrid, Paris and Luxembourg that issued orders in violation of Malaysia's Sovereign immunity, amongst other things should be 'highlighted" albeit through diplomatic channels to the relevant Spanish, French and Luxembourger counterparts.

Corruption Allegations in International Investment Arbitration

It Takes Two to Tango, But the House Always Wins

by Raphael Ren • Senior Associate, Lim Chee Wee Partnership

1 Introduction

'*It takes two to tango.*'[1] No truer words have so richly encapsulate the scourge of corruption. After all, corruption is a bilateral transaction – a private person offers money or non-pecuniary gifts to a public official to discharge their official duties to the former's advantage.[2] Both actors are villains, not victims.[3]

Investment arbitral tribunals deserve credit for not turning a blind eye towards corruption, as epitomized by the ground-breaking award of *World Duty Free v Kenya* in 2006. Despite the US$2 million bribe being '*apparently solicited by the Kenyan President and not wholly initiated by the Claimant*', the tribunal refused jurisdiction because public policy '*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*'.[4]

Yet, there is growing concern that the corruption defense offers a '*get-out-of-jail-free*' card to host States to evade accountability for their own wrongdoings, or worse, perversely incentivize them to double-down on their mistreatment of

1 Sergey Alekhin & Leonid Shmatenko, 'Corruption in Investor-State Arbitration – It Takes Two to Tango' in A.V. Asoskov et all (eds) *4 New Horizons of International Arbitration 150* (2018), 176.
2 Aloysius Llamzon, 'Corruption in International Investment Arbitration' (OUP, 2014), §11.11.
3 Ibid §1.14.
4 *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006) paras 180–181.

investors.[5] Ironically, the frightening prospects of governments weaponizing corruption flows directly from the rigid approach taken by arbitral tribunals on the effect of corruption on jurisdiction (**Part II**), exclusivity of corruption distinct from other illegalities (**Part III**), and evidence required to prove corruption (**Part IV**).

This article critically analyses the reasonings and shortcomings of arbitral awards addressing preliminary objections grounded in corruption and illegality. More importantly, it posits an alternative paradigm in conceptualizing corruption that will mitigate the undue hardship faced by remorseful investors and combat corruption more effectively.

2 Effect of Corruption

A. *Jurisdiction and admissibility*

International courts draw a subtle but stark distinction between jurisdiction and admissibility. In *Congo v Rwanda*, the ICJ affirmed that '*jurisdiction is based on the consent of parties*' and that any non-fulfilment of preconditions to a compromissory clause relates to '*its jurisdiction and not the admissibility of the application*'.[6]

The distinction is even more acute in investor-State arbitrations constituted under bilateral investment treaties (BIT).[7] As succinctly put by the *Hochtief v Argentina* tribunal: '*Jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal*'.[8] The test of whether a specific preliminary objection is an issue of jurisdiction and admissibility can be subsumed into Professor Paulson's simple '*lodestar*' question: '*is the objecting party taking aim at the tribunal or at the claim?*'[9]

Does the distinction even matter? Whilst it is tempting to regard classifying an objection '*as either jurisdictional or relating to admissibility*' as '*immaterial*',[10]

5 R. Zachary Torres-Fowler, Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration (2012) 52(4) Virginia Journal of International Law 995, 1000.

6 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 88.

7 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania (I),* ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 64; *ICS Inspection and Control Services Limited (United Kingdom) v the Argentine Republic*, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012) paras 255–260.

8 *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) para 90.

9 Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and Robert Briner (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC, 2005) 616.

10 *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) para 346.

the answer is yes. First, consider the temporal factor. For illegality objections, jurisdiction is assessed at the *making of investment*.[11] Concomitantly, illegal acts occurring during the *performance of investment* will not deprive the tribunal of jurisdiction but may be relevant at the merits or damages phase.[12]

This is primarily due to the legality criterion contained in most BITs. For example, the Bolivia-Chile BIT defines an investment as '*any kind of assets or rights related to an investment as long as this has been **made** in accordance with the laws and regulations of the Contracting Party*'.[13] Closely analogous words have been given similar effect. In construing the operative terms '***accepted** in accordance*' and '***admit** such investments in accordance*' under the Germany-Philippines BIT, the *Fraport AG v Philippines* tribunal opined:[14]

> *'The language of both Articles 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction.'*

Likewise, most tribunals treat corruption allegations at the making of an investment as impacting its jurisdiction rather than the admissibility of claim.[15] This is rationalized on two legal bases: the express legality criterion enshrined in BITs,[16] and international public policy.[17] The latter is broad enough to encompass the fundamental principles of *nemo auditur pro priam turpitudinem allegans* (no party can benefit from their own wrong) and *pacta sunt servanda* (good faith) under

11 *Quiborax SA, Non Metallic Minerals SA v Plurinational State of Bolivia*, ICSID Case No ARB/06/2, Decision on Jurisdiction (27 September 2012) para 277; *Oxus Gold v The Republic of Uzbekistan*, UNCITRAL, Final Award (17 December 2015) para 707.

12 *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012.

13 Agreement between the Republic of Bolivia and the Republic of Chile on the Encouragement and Reciprocal Protection of Investments (entered into force 21 July 1999) art I(2).

14 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007) paras 281-282 and 345 (emphasis added).

15 Andrew Bulovsky, 'Promises Unfulfifilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development' (2019) 118(1) Michigan Law Review 117, 128-129.

16 *Metal-Tech Ltd. v the Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013) paras 372-373.

17 *World Duty Free* (n 4) para 157.

international law.[18] This, in turn, has steered most tribunals to find that the legality criterion is implicit in all BITs even in the absence of an express provision.[19] As observed by the second tribunal in *Fraport AG v Philippines*:[20]

> *"The Tribunal is also of the view that, even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.'*

Second, consider the remedial factor. Defects in admissibility can be waived or cured by acquiescence, but not defects in jurisdiction.[21] Accordingly, a tribunal is empowered to consider jurisdictional objections not raised by parties *proprio motu*.[22] Such residual power is expressly prescribed in Rule 41(2) of the ICSID Rules.[23] In *Infinito Gold v Costa Rica*, the tribunal proceeded to hear corruption allegations based on information submitted by an NGO *amici curiae* despite both parties denying such allegations at the jurisdiction phase[24] and Costa Rica withdrawing its initial objection at the merits phase.[25] Hence, even if both investor and host State admit to committing corruption and take remedial steps, the jurisdictional defect cannot be repaired.

The prevailing law produces anomalous outcomes. A tribunal lacks jurisdiction over a well-run, profitable, and publicly beneficial investment project tainted with small bribes during the initial tender stage. Yet, a tribunal retains jurisdiction over a failed investment project procured lawfully but subsequently saddled with skyrocketing costs due to kickbacks to licensing officers and overinflated payments to crony contractors. In the first scenario, the tribunal would still lack jurisdiction despite both parties coming clean by cooperating with enforcement authorities to

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18 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005) paras 140–145; *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) paras 230–244.

19 *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) para 101; *SAUR International S.A. v The Argentine Republic*, ICSID Case No ARB/04/4, Decision on Jurisdiction (6 June 2012) para 308.

20 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award (10 December 2014) para 332.

21 *Hochtief* (n 8) paras 94-95.

22 Ibid.

23 ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (adopted 10 April 2006) ('*The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence*').

24 *Infinito Gold Ltd. v Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017) paras 135–140.

25 *Infinito Gold Ltd. v Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) paras 179–182.

prosecute the individual offenders and facilitating the settlement of civil claims to affected third parties.

B. *Void and voidability*

This calls for a paradigm shift in determining when exactly corruption goes to the root of a tribunal's jurisdiction. An alternative normative model can be built upon the conception of void and voidable contracts as alluded in the *World Duty Free* award.[26] Contracts *procured by* corruption should merely be voidable by the innocent party, whilst only contracts *providing for* corruption are null and void *ab initio*.[27] Such distinction is well-entrenched in most national legal systems based on common law[28] and civil law.[29]

For instance, the Council of Europe distinguishes between '*a contract providing for corruption to be null and void*' and '*the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.*'[30] As lucidly put by Hwang and Lim (albeit in the context of commercial arbitration):[31]

> *'If a tribunal makes a finding of corruption, it nevertheless has jurisdiction over the parties' dispute, and is entitled to adjudicate issues of corruption as they are arbitrable. Contracts procured by corruption must generally be set aside by the victim of corruption in order for it to avoid its obligations thereunder (it may lose its right to do so if it elects to keep the contract alive with knowledge of such corruption), whereas claims arising out of contracts providing for corruption are deemed unenforceable or inadmissible without parties having to set it aside. However, generally speaking, one party's unilateral intention to commit corrupt acts in performing a contract will not preclude the other innocent party from making claims arising out of the contract.'*

Concomitantly, arbitral tribunals should treat allegations of corruption at the making of the investment as an issue of admissibility.[32] Only an investment designed with the primary purpose to facilitate corruption falls outside the protective sphere and

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26 *World Duty Free* (n 4) para 164 (referring to Lord Mustill's expert opinion).
27 Michael Hwang & Kevin Lim, 'Corruption in Arbitration — Law and Reality' (2012) 8(1) Asian International Arbitration Journal 1, para 95.
28 *Armagas v Mundogas* [1986] 1 AC 717, 742–743; *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256, 1260.
29 German Civil Code, s 134; Swiss Civil Code (Part Five: The Code of Obligations), art 20.
30 Civil Law Convention on Corruption (entered into force 1 November 2003) ETS No 174, art 8(1)–(2).
31 Hwang & Lim (n 27) para 195(d).
32 *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Award (6 December 2016) para 528; *Metal-Tech* (n 16) para 292.

jurisdictional ambit of a BIT – a prime example being the infamous 1MDB scandal implicating a former Malaysian public official and notorious international fugitive.

Moreover, unlike commercial arbitration between private parties, investor-State arbitration is asymmetrical in nature.[33] Generally, the dispute resolution frameworks of BITs are designed to adjudicate claims by private investors against States (and *not* vice versa).[34] The host State is almost always the respondent with no right to counterclaim against the investor for breaches of international law (exceptionally, such right may be explicitly provided under a BIT[35] or implied by a BIT's dispute resolution clause framed in broad symmetrical terms[36]). The substantive protections afforded to investors under BITs are imbued with principles of public law (*e.g.* expropriation, fair and equitable standard, non-discrimination) rather than contract. As rightly observed by the *Casinos Austria v Argentina* tribunal:[37]

> *'Investment treaty arbitration is very different from contract-based arbitration, even if both take place under the ICSID framework. It does not involve the assessment of whether breach of an agreement concluded between the disputing parties has occurred, but whether the respondent State abided by commitments made in an international treaty concluded with the claimant investor's home State … Investment treaty arbitration involves the review of legality under public international law of the host State's conduct initiated by an affected foreign investor. In terms of its function, it has therefore been likened to mechanisms of judicial review found domestically in administrative or constitutional courts or internationally in human rights courts.'*

33 *Casinos Austria International and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) para 272.

34 See for example: Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments (entered into force 11 June 1998) art 9(1)-(2) ('*If such disputes [between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement] cannot be settled … the investor concerned may submit the dispute ... to international arbitration*'); *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011) paras 868-869.

35 See for example: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (adopted 8 March 2018) art 9.19(2) ('*the respondent may make a counterclaim in connection with the factual and legal basis of the claim*'); Investment Agreement For the COMESA Common Investment Area (adopted 23 May 2007) art 28(9) ('*A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a … counterclaim … that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement*').

36 See for example: Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain (entered into force 28 September 1992) art X(1)-(3) ('*The dispute* [*arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement] may be submitted to an international arbitral tribunal … at the request of one of the parties to the dispute*'); *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 1143–1144.

37 *Casinos Austria* (n 33) para 273.

To be clear, this is not to say that arbitral tribunals should afford claimant investors more favourable treatment than respondent host States. Rather, the point is that investment arbitration is inequal by its very nature. Accordingly, tribunals should exercise caution in directly transposing principles of illegality under private commercial law between two private parties with equal access to arbitration.[38]

To decline jurisdiction over all claims involving an investment procured by corruption disproportionately prejudices investors. Investors stand to lose their exclusive right to accept the host State's open offer to arbitrate,[39] whilst the host State stands to lose nothing by admitting to corruption (except for reputational harm and loss of potential future foreign investment). To ensure one party is not punished more severely than the other for a common wrong, an investor's complicity in an investment procured by corruption should instead be considered only at the merits or damages phase (in the same manner as post-investment illegality[40]), and not be taken as a basis to summarily dismiss the claim *in limine*.

3 Exclusivity of Corruption

A. *Typology of corruption*

Corruption is a generic umbrella term encompassing a myriad of illegal acts that cannot be exhaustively defined.[41] However, guidance may be drawn from international conventions to identify the most egregious forms of corruption.[42] The *UN Convention Against Convention* mandates State Parties to criminalize bribery (public and private sector),[43] embezzlement,[44] trading in influence,[45] abuse of functions,[46] illicit enrichment,[47] and money-laundering,[48] concealment,[49] and

38 Ibid para 272.
39 Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP 2001) 218; *Limited Liability Company Amto v Ukraine*, SCC Arbitration No 080/2005, Final Award (26 March 2008) para 45.
40 *Fraport-I* (n 14) para 345.
41 Bulovsky (n 15) 128.
42 UN Convention against Corruption (entered into force 14 December 2005) 43 ILM 37 (UNCAC); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (entered into force 15 February 1999); Inter-American Convention against Corruption (adopted 29 March 1996) 35 ILM 724; Criminal Law Convention on Corruption (entered into force 1 July 2002) ETS No 173; African Union Convention on Preventing and Combating Corruption (entered into force 5 August 2006) 43 ILM 5.
43 UNCAC (n 42) art 15, 16 and 21.
44 Ibid art 17 and 22.
45 Ibid art 18.
46 Ibid art 19.
47 Ibid art 20.
48 Ibid art 23.
49 Ibid art 24.

obstruction of justice.[50] The *OECD Convention on Combating Bribery* specifically targets the offence of bribery of foreign public officials:[51]

> *'intentionally to offer, promise or give any undue pecuniary or other advantage … to a foreign public official … in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.'*

There is a grey area filled by activities prohibited by some countries but permissible in others. Such softer forms of corruption include:

- gifts;
- hospitality, entertainment and expenses;
- customer travel;
- political contributions;
- charitable donations and sponsorships;
- facilitation payments; and
- solicitation and extortion.[52]

The latter two activities are particularly problematic. A facilitation payment (colloquially known as "grease payment") is made '*to induce officials to perform routine functions they are otherwise obligated to perform*'.[53] Typically, the amount is small, and demanded by low-ranking officials in administrative positions (*e.g.* issuance of visa or custom clearance).[54] The OECD condemns facilitation payment as a '*corrosive phenomenon*' made illegal in certain countries yet stops short from equating it as a bribery offence.[55] Indeed, the inconsistency in state practice is glaring – the US Foreign Corrupt Practices Act permits certain exemptions to facilitation payments,[56] whilst the UK Bribery Act prohibits absolutely without exemption.[57]

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50 Ibid art 25.

51 OECD Bribery Convention (n 42) art 1.

52 OECD, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (26 November 2009), Annex II, A, para 5.

53 UK Ministry of Justice, 'The Bribery Act 2010 – Quick Start Guide' (11 February 2012), 7 <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf>.

54 Global Infrastructure Anti-Corruption Centre, Facilitation Payments (10 April 2020) <https://giaccentre.org/facilitation-payments/>.

55 OECD Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997), art 1, cmt 9.
US Securities and Exchange Commission, 'Investor Bulletin: The Foreign Corrupt Practices Act – Prohibition of the Payment of Bribes to Foreign Officials' (October 2011) <https://www.sec.gov/investor/alerts/fcpa.pdf>.

57 UK Ministry of Justice (n 53).

More complications arise when a facilitation payment is solicited under physical threat or economic coercion. This reaches to the level of extortion. Businesses often remain vulnerable to extortion at the entire life cycle of an infrastructure project. GIACC provides an illustrative example:[58]

> *'A government official may extort bribes as a condition of her/his approval of the project. For example, she/he may require: cash payment; shares in the project owner; a share in the profits of the project owner; a share in the profits of construction from the contractor; or the use of her/his own companies to provide construction services or supplies to the project owner.'*

How is an investment tribunal to address allegations of corruption of different shades and sizes? Setting a low threshold to catch all forms of corruption ignores the harsh reality that facilitation payments are often deeply ingrained in the business and institutional culture of developing States. Setting a high bar opens an escape hatch for ingenious offenders (ably assisted by professional advisors skilled in creative accounting and legal advocacy) to hide substantial masks under the cloak of gifts, hospitality, donation, or sponsorship.

The dividing line between an illegal bribe and a lawful facilitation payment may be blurry in some circumstances and more obvious in others. However, an investor cannot be absolved from responsibility by sheer naivety or willful blindness.[59] The *World Duty Kenya* arbitration provides an exemplary case study. The witness testimony of Mr. Ali, the claimant's agent and giver of the bribe, read:[60]

> *"I felt uncomfortable with the idea of handing over this "personal donation" which appeared to me to be a bribe. However, this was the President, and I was given to understand that it was lawful and that I didn't have a choice if I wanted the investment contract. I paid the money on behalf of House of Perfume, treating it as part of the consideration for the agreement and documented it fully as can be seen from the documentary evidence I have referred to."*

Unsurprisingly, the tribunal had little sympathy to the claimant's characterization of the US$2 million fee as facilitation payment:[61]

> *"Mr. Ali paid a substantial bribe in cash, in Kenyan schillings, to the Kenyan head of state in March 1989. The bribe was made covertly; and it was not*

58 Global Infrastructure Anti-Corruption Centre, 'How Corruption Occurs' (10 April 2020) <https://giaccentre.org/how-corruption-occurs/>.
59 *Churchill Mining* (n 32) para 504.
60 *World Duty Free* (n 4) para 130.
61 Ibid para 167.

included in the contractual consideration set out in Articles I(iii) and 3(A) of the Agreement of 27 April 1989, despite the "entire agreement" clause in Article 7(A) of the Agreement. This bribe was nonetheless an intrinsic part of the overall transaction, without which no contract would have been concluded between the parties: Mr. Ali himself regarded the payment as part of the contractual consideration paid by his principal, as did the Claimant in its written submissions in support of its claims (pleading the payment as a recoverable "investment cost" and "investment facilitation fee" …) Mr. Ali made the payment to the Kenyan President intending to induce the President to act in his principal's favour; and he also intended that bribe to remain confidential as between his side and the President, as it did from March 1989 until December 2002, more than thirteen years later.'

For now, arbitral tribunals have yet to truly grapple with corruption allegations straddling over the grey area. One practical reason may be that soft corruption is more likely to go undetected. Another reason is that governmental officials are more wary of exposing discrete and disguised acts of corruption, in fear of alerting regulators and enforcement authorities of their covert *modus operandi*. And perhaps there is genuine legal concern that such allegations face an uphill battle to meet the evidential threshold (see Part IV *infra*). At any rate, there is scarcity of arbitral awards addressing the vexing question of whether lighter forms of corruption will deprive the tribunal of jurisdiction or render a claim inadmissible.

B. *Principle of proportionality*

On the wider issue of illegality, there is an emergence of *jurisprudence constante* laying down guiding principles to assess the extent of which an investor's illegal act would affect a tribunal's competence to hear the investor's claim. The *Quiborax v Bolivia* tribunal has helpfully distilled the categories of breaches that would fall afoul of the legality criterion:[62]

(a) non-trivial violations of the host State's legal order;[63]

(b) violations of the host State's foreign investment regime;[64] and

(c) fraud to secure the investment[65] or profits.[66]

62 *Quiborax* (n 11) para 266.

63 *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 86; *LESI SpA and ASTALDI S.p.A. v People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction (12 July 2006) para 104; *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No ARB/05/17 (6 February 2008) para 104.

64 *Mr. Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010) para 119.

65 *Inceysa* (n 18) paras 236-238; *Plama* (n 18) paras 133-135; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010) paras 129 and 135.

66 *Fraport-I* (n 14) para 345.

In *Kim v Uzbekistan*, the tribunal propounded a novel proportionality-based approach in assessing illegality objections:[67]

> *"In the Tribunal's view, a more principled approach is to be guided in the interpretive task by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation. The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State."*

The tribunal took pains to clarify that the last limb focuses '*not on whether the law is fundamental but rather on the significance of the violation*'.[68] This is critical because an '*investor may violate a law of some import egregiously or it may violate a law of fundamental importance in only a trivial or accidental way*'.[69] Ultimately, the test of proportionality consists of three steps coupled with a non-exhaustive checklist of queries (reproduced in verbatim):[70]

(a) First the Tribunal must assess the significance of the obligation with which the investor is alleged to not comply.[71]

- What does the level of sanction provided in the law suggest as to the significance of the obligation to the State?
- What does a general non-enforcement of an obligation by the Host State suggest as to the significance to the state of that obligation?
- What does the specific decision of the Host State not to investigate or prosecute the particular alleged act of noncompliance suggest as to the significance to the state of the obligation in the specific context?
- What does evidence of widespread noncompliance suggest as to the significance of the obligation to the State?

(b) Second, the Tribunal must assess the seriousness of the investor's conduct.[72]

- Does the investor's conduct violate the obligation as alleged?

67 *Vladislav Kim v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017) para 396 (emphasis added).
68 Ibid para 398.
69 Ibid.
70 Ibid paras 405 and 409.
71 Ibid para 406.
72 Ibid para 407.

- What does the investor's intent suggest as to the seriousness of the investor's conduct?
- What does an unclear, evolving or incoherent law suggest as to the seriousness of an act of noncompliance?
- What does the exercise of due diligence by an investor suggest as to the seriousness of an act of noncompliance?
- What does a failure of the State to investigate or prosecute the alleged particular act of noncompliance suggest as to the seriousness of the investor's conduct?
- What does the subsequent conduct of the investor suggest as to the seriousness of the alleged act of noncompliance?

(c) Third, the Tribunal must evaluate whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined.[73]

This three-step methodology was applied by the *Cortec Mining v Kenya* tribunal in determining whether a mining license issued in breach of Kenyan environmental laws impaired its jurisdiction.[74] The tribunal found that: *first*, the laws protecting a gazette forest reserve violated by the investor "*were of fundamental importance'*;[75] *second*, the investor '*showed serious disrespect*' for the compliance of such laws;[76] and *third*, such grave non-compliance '*warrant the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention*'.[77] It is noteworthy that the proportionality analysis was undertaken by the tribunal in response to the investor's alternative argument that any non-compliance would only render the investment voidable and not void *ab initio*.[78]

At first blush, a proportionality analysis may seem excessive for trivial violations and redundant for egregious violations. Nevertheless, it makes perfect sense to widen the inquiry to whether an investor's violation of domestic law would directly impair the jurisdiction of a tribunal or admissibility of claim (rather than to narrowly examine the violation in abstract).

73 Ibid para 408.
74 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No ARB/15/29, Award (22 October 2018) para 343.
75 Ibid paras 345-346.
76 Ibid para 349.
77 Ibid para 365.
78 Ibid para 336.

Consider the hypothetical example of a foreign investor setting up a local subsidiary in the host State offering services as a contractor in major infrastructure projects. The investor commits the following types of violations:

(a) Inaccurate entry of information in public registry

- During the incorporation of the subsidiary, the investor misstates the personal information of its beneficiary shareholders (*e.g.* nationality and residential address based in State A only). Such non-disclosure is punishable by a small fine.
- The same investor lodges the error-strewn share certificates with the foreign investment office as mandated under law.[79] The foreign investment office approves local contracts awarded to the subsidiary on the mistaken belief that the ultimate shareholders are from State A (when in fact they hold dual nationalities under State A and State B). The host State's BIT with State A has less favorable terms than the BIT with State B.

(b) Fraud or forgery

- During the tender of a lucrative governmental contract, the investor submits along a dossier particularizing its range of expertise. The resume of one director contains false information of non-existent academic credentials and publications.
- The investor forges official documents to secure mining rights.[80]

(c) Corruption

- During the tender of a lucrative governmental contract, the investor lavishes gifts (*e.g.* expensive champagne lunches and one weekend getaway at the golf course) on a member of the investment committee advising the governmental agency overseeing the project. Their private correspondences reveal a warm cordial relationship but nothing about the tender. The committee merely advises the government agency's Board which made the final decision to award the contract to the investor.
- In the same scenario, the investor also bribed one of the three Board members.

In the first scenario for all three violations, the impact on the procurement of investment is rather remote. In the second scenario, the violation is undoubtedly egregious as the contract would likely not have been awarded to the investor

79 *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen*, ICSID Case No ARB/14/30, Decision on Jurisdiction (31 May 2017) paras 45–47.

80 *Churchill Mining* (n 32) para 528.

but for the offending act. Arguably, the worst offender is the investor hiding the nationalities of its shareholders because the risk of '*treaty shopping*' and '*abuse of process*' goes to the root of a tribunal's jurisdiction.[81]

To be clear, such thought experiments are *not* intended to downplay the crime of corruption. Rather, the overriding point is to demonstrate that the multifarious forms of corruption are suitably placed on the same sliding scale utilized by arbitral tribunals to measure the gravity of other types of illegalities.

Ultimately, the test of proportionality is much preferable than an '*all-or-nothing*' binary approach. The flaw in taking a myopic approach determined by temporal facts (**Part II**) that ignores the complexities of corruption (**Part III**) comes to fore when viewed in tandem with matters of evidence (**Part IV**).

4 Evidence of Corruption

A. *Standard of proof*

Due to the seriousness of corruption allegations and its drastic consequential effect of negating jurisdiction, it is no surprise that arbitral tribunals set a high threshold of proof for corruption allegations. This would deter investors from advancing unsubstantiated claims of BIT violations, as well as deter host States from raising frivolous objections to delay and frustrate proceedings. As opined by the *EDF v Romania* tribunal:[82]

> *'In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.'*

Time and again, arbitral tribunals emphasized on the strong probative weight of evidence required to establish corruption. The evidence must be '*clear and*

81 *Phoenix Action* (n 19) para 144; *Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award (15 March 2002) para 24; *Europe Cement Investment and Trade S.A. v Republic of Turkey*, ICSID Case No ARB(AF)/07/2, Award (13 August 2009) para 180.

82 *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) para 221.

convincing',[83] '*credible*'[84] or '*solid and persuasive*'[85] and cannot simply be premised on '*surmise and speculation*'[86] or '*mere insinuations*'.[87]

Still, tribunals are conscious of the clandestine nature of corruption and open to consider indirect evidence. Whilst recognizing that '*it is generally difficult to bring positive proof of corruption',* the *Oostergetel v Slovakia* tribunal further observed that '*corruption can also be proven by circumstantial evidence*'.[88] Similar sentiments were expressed by the *Metal-Tech v Uzbekistan* tribunal:[89]

> *'Instead, the Tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence.'*

Nevertheless, the reception of circumstantial evidence does not detract away from the high standard of proof. As clarified by the second tribunal in *Fraport AG v Philippines*:[90]

> *'The Tribunal holds that considering the difficulty to prove corruption by direct evidence, the same may be circumstantial. However, in view of the consequences of corruption on the investor's ability to claim the BIT protection, evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred. Having reviewed the Parties' positions and the available evidence related to the period prior to Fraport's Initial Investment, the Tribunal has come to the conclusion that Respondent has failed to provide clear and convincing evidence regarding corruption and fraud by Fraport.'*

An evidential aspect often overlooked by arbitrators is the establishment of a causal link between the corruption and investment. It is one thing to prove that corruption occurred, but quite another to demonstrate that the corruption '*tainted*' the investment at its very core. As lucidly explained in the *Tethyan Copper v Pakistan* award:[91]

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83 Ibid; *Fraport-II* (n 20) para 479; *Kim* (n 65) para 614.
84 *Cortec Mining* (n 74) para 399.
85 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Jurisdiction and Liability (10 November 2017) para 402.
86 *Cortec Mining* (n 74) para 391.
87 *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, UNCITRAL, Final Award (23 April 2012) para 303.
88 Ibid para 303.
89 *Metal-Tech* (n 16) para 243.
90 *Fraport-II* (n 20) para 479.
91 *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (10 November 2017) para 336.

> *'As to the term "contract obtained by corruption" established by the World Duty Free tribunal as well as the term "procured by corruption" used by the Niko Resources tribunal, the Tribunal does not understand these to impose a strict but-for requirement. It rather appears that they required a causal link in the sense that the act of corruption must have contributed to obtaining a right or benefit related to the investment – while such contribution may not be remote, it need not be the only cause and the right or benefit need not be one to which the investor would not be entitled or that it would not have been able to obtain by legitimate means. In that sense, one can say that the investment must be "tainted" or, as put by Judge Schwebel, it must be "obtained … furthered, renewed or implemented" by corruption.'*

The standard of proof is material contribution and not the strict '*but-for*' test. This was the rationale given by the tribunal:[92]

> *'In particular, the recognized evidentiary difficulties in connection with allegations of corruption may often relate not only to the act of corruption itself but also to the link between the act of corruption and the investment. In fact, it may in some instances be close to impossible to prove that, but for a payment made to obtain a certain right or benefit, such an advantage could not have been obtained if the payment had not been made.'*

B. *Corruption normalized and weaponized*

So much for the legal technicalities. What is of greater practical interest to our analysis is how the arbitral treatment of corruption allegations affects the behavior of investors and governments on the ground.

Counter-intuitively, a high evidential threshold does not necessarily alleviate the concerns of investors. It is doubtful whether the imposition of a high burden of proof truly deters host States from raising baseless corruption allegations as a tactical maneuver, and more pertinently, deters institutions and individuals from indulging in corruption itself. On the contrary, the opposite effect is far likelier to ensue.

First, the difficulty of proving corruption serves as a strong signal to investors and governments that only egregious displays of corruption (*e.g.* bribery) are illegal whilst softer forms (*e.g.* facilitation payments) are perfectly permissible. This is reinforced by the tendency of arbitral tribunals to treat corruption as a black-or-white crime in absolute terms rather than a complex phenomenon with shades of grey warranting a proportionality analysis similar with other illegalities (**Part III**).

92 Ibid para 335.

Second, even if investors are conscientious enough to know that a *small* bribe is still a bribe regardless of amount, they may still be tempted to bribe officials in exchange of favors due to the low risk of getting caught and high prospects of reward. This false (or true?) sense of security normalizes low-level corruption as an acceptable low-risk-high-reward business practice worth taking. Businesspeople are akin to nosy neighbors or hive creatures. If a foreign investor wins a lucrative contract by dining and wining with local elites, word will get around the block. More investors are bound to join the fray – willingly or grudgingly – to neutralize the playing field or gain a competitive edge. Slowly but surely, this sets of an arms-race where investors will keep upping the ante and appetite for risk. Indeed – as has been echoed by many before – corruption spreads like cancer.[93]

Third, governmental officials are equally prone to fall to temptation. Their position of power and close connection with enforcement authorities builds an additional layer of immunity that emboldens them to act in impunity. Cynicism breeds corruption – and vice versa. A truly cynical corrupt official will treat corruption as a form of insurance policy. By tainting the conscience of investors, one bribe leads to another. Evidence of past bribes can be used to blackmail remorseful investors to refrain from rejecting future solicitation or spilling the beans.

Fourth, high-level governmental functionaries may even be tempted to use corruption as leverage over foreign investors during negotiations. In a tightly-contested investment opportunity, it is not absurd to envision the following candid conversation taking place one sunny morning at the golf course between the Country Manager of an international bank (CM) and public official of a sovereign fund (PO):

CM: How much are they offering?

PO: 100 million plus 5 percent.

CM: That's less than the 120 million that we're putting on the table.

PO: Well, yes… But 5 percent is more than zero percent, hm?

CM: Fine. How about 100 plus 10 then?

PO: Done deal! And you also save yourselves 10 million!

CM: But if the loan defaults and 10 percent leaks out, recovery won't be easy.

PO: That's the trade-off from saving 10 million, eh?

To their credit, arbitral tribunals are not blind to the cruelties of the real world. Their procedural toolbox contains a blunt weapon to punish host States for corruption

93 David Cameron, 'Corruption: More Than Cancer' (Transparency International UK, 13 December 2017) <https://www.transparency.org.uk/corruption-more-cancer>.

and deter them from future wrongdoings – order for cost. In *Cortec Mining v Kenya*, the tribunal upheld Kenya's jurisdictional objection due to the investor's non-compliance with environmental laws but reduced the costs claimed by Kenya by 50% primarily due to Kenya's failure to substantiate its bribery allegation.[94] In *Metal-Tech v Uzbekistan*, tribunal opined:[95]

> *'The Tribunal found that the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear – and rightly so – that in such a situation the investor is deprived of protection and, consequently, the host State avoids any potential liability. That does not mean, however, that the State has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the Parties share in the costs.'*

Would investors sleep easier feeling that governments will not lightly raise corruption allegations in fear of testing the tribunal's patience and being hit by punitive costs? Likely not. A reduction of cost from US$6.4 to US$3.2 million is pocket change compared to Kenya's potential savings from paying compensation for expropriating mineral-rich lands valued at US$2.8 to US$6 billion.[96]

Ultimately, investors are experienced enough to appreciate that corruption is yet another form of '*investment risk*'.[97] The certainty of arbitral tribunals jettisoning an investment claim tainted by corruption is the risk that some (if not most) investors are willing to take to maximise their chances of winning a lucrative contract. After all, any cost-benefit analysis would tilt more heavily towards the short-term gain of realizing an investment opportunity *immediately* over the long-term risk of the investment turning sour and losing access to arbitration *in the distant unforeseen future*.

5 Concluding Remarks

Due to the asymmetrical nature of investment arbitration, it is inevitable that investors stand to lose more than host States when both parties are equally complicit in corruption. Yet, despite having noble intentions, the strict rigid approach taken by arbitral tribunals in addressing preliminary objections grounded on corruption allegations leaves much to be desired.

94 *Cortec Mining* (n 72) paras 399–401.
95 *Metal-Tech* (n 16) para 422.
96 *Cortec Mining* (n 72) para 81.
97 Bulovsky (n 15) 123.

First, the notion that only corruption at the inception of an investment strikes at the heart of the tribunal's jurisdiction is arbitrary and myopic (**Part II**). Tribunals excessively focus on the temporal aspect of the legality criterion of BITs rather than considering the fundamental norms on the effects of illegality on contracts (void and voidability).

Second, corruption should be treated no differently as other types of illegality (**Part III**). There is no principled reason for corruption to be subjected to different legal standards or analysis.[98] The artificiality in distinction is exemplified by the very nature of corruption encompassing a wide range of activities that can fall anywhere between two extreme ends of the spectrum ('*prohibited*' and '*permissible*'). Instead, the test of proportionality is more well-suited to determine exactly when corruption is egregious enough to impair the jurisdiction of tribunal or admissibility of claim.

Third, the high evidential threshold to prove corruption is sound in principle but does little to deter host States from condoning corruption or raising frivolous corruption allegations (**Part IV**). The arbitral practice of taking into account their complicity and cynical attempts to concoct unsubstantiated corruption allegations in awarding cost is laudable but insufficient. Ironically, setting a high bar to catch only the most egregious forms of corruption may serve to normalize the culture of low-level corruption and concretize bribery as an investment risk that can be deployed as a bargaining chip during investment negotiations.

Ultimately, arbitral tribunals should not lose sight of the woods for the trees. A quantum of circumspection should be spared for policy considerations. Indeed, corruption is antithetical to economic development. As opined by the *F-W Oil Interest v Trinidad and Tobago* tribunal:[99]

> *'We ought not, however, to leave the matter simply there without making it plain that this Tribunal (as, we assume, any ICSID Tribunal) is bound to take the most serious view of allegations of State corruption – if backed by proper evidence. This is not merely because of the potential effect of such claims on the persons involved, but equally because of the dire and pernicious effect that corruption has been shown to have on economic development, (notably so in developing countries), and economic development is after all the purpose which Bilateral Investment Treaties and the World Bank itself were created to serve.'*

98 Perhaps part of the blame lies with the propensity of academic scholars to either write specifically on corruption, or generally on illegality excluding corruption (see for example: Caline Mouawad & Jessica Chrostin, 'The illegality objection in investor–state arbitration' (2021) 37 Arbitration International 57, 57-58; Florian Haugeneder, 'Corruption in Investor–State Arbitration' (2009) 10(3) Journal of World Investment & Trade 339).

99 *F-W Oil Interests, Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award (3 March 2006) para 212.

Yet, denying investors access to arbitration is scarcely the solution to cultivate economic development. To disentitle an investor of all substantive protections guaranteed under a BIT due to a single bribe in the early stage of an investment would come across as disproportionate to most fair-minded commercial people. Once investor confidence in the investment arbitration system erodes, capital flow to developing States will recede in turn.[100]

Hence, whilst it takes two parties for corruption to crystallize, only the investor bears the brunt of its consequences. Aggrieved remorseful investors may instead feel that another common adage holds truer in investment arbitration: '*the House always wins*'.

100 Bulovsky (n 15) 134-135.

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