Kluwer Arbitration Blog

2025 PAW: The Growing Influence of Criminal Law in International Arbitration

Veronika Korom (ESSEC Business School; Paragon Advocacy) · Friday, April 11th, 2025

As part of Paris Arbitration Week 2025, ESSEC Business School hosted a roundtable discussion on "The Growing Influence of Criminal Law in International Arbitration." The event was chaired by Veronika Korom (ESSEC Business School) and moderated by Geneviève Helleringer (ESSEC Business School).

The panel brought together an exceptional group of ESSEC alumni active in the field of international arbitration, including Juliette Asso (Lalive), Grégoire Bertrou (Willkie Farr & Gallagher LLP), Ophélie Divoy (DLA Piper), Amina Khoungui (Forensic Risk Alliance), and Daniel Schimmel (Foley Hoag), as well as leading criminal law specialist Bruno Quentin (Gide Loyrette Nouel).

This article outlines the key themes and insights from a panel discussion exploring the evolving interplay between criminal law and international arbitration from two interrelated perspectives. First, how arbitration engages with criminal law—particularly the way tribunals handle corruption allegations and other criminal issues that arise during proceedings. Second, and less commonly examined, how criminal law interacts with arbitration—specifically the impact of criminal investigations and enforcement actions on the arbitral process, including the potential exposure of arbitrators to criminal liability.

How Arbitration Views Criminal Law

Amina Khoungui opened the discussion by outlining the historical rise of criminal law issues—especially corruption—in international arbitration. She pinpointed the early 2000s as pivotal, with the U.S. ramping up enforcement of the Foreign Corrupt Practices Act ("FCPA"), triggering high-profile investigations and hefty penalties for cross-border bribery. This ushered in a wave of high-profile investigations and substantial penalties for companies involved in transnational bribery. This trend quickly went global. Landmark legislative instruments such as the UK Bribery Act (2010), Brazil's Clean Company Act (2013), and France's Loi Sapin II (2016) reflected a growing international anti-corruption consensus, boosting cross-border enforcement and corporate liability. In response, companies adopted robust compliance programmes to mitigate legal, financial, and reputational risks. This evolution soon reverberated in the arbitration world, where allegations of corruption began surfacing with more frequency and influencing arbitral

strategy, procedure, and decision-making.

Daniel Schimmel echoed these observations, reflecting on the evolving approach of arbitral tribunals and counsel toward corruption allegations. Historically, such allegations were often either sidestepped or dealt with through a narrow contractual lens, with tribunals reluctant to engage with the deeper factual or criminal dimensions. Tribunals often adopted a high standard of proof for corruption allegations and proceeded to deny these allegations. This has changed significantly in recent years, particularly in response to a more interventionist approach by national courts in annulment or enforcement proceedings—most notably in decisions such as *Belokon* (France) and *P&ID* (United Kingdom). Such decisions required tribunals to be proactive and focused on corruption allegations. Schimmel also gave practical examples of the type of initiatives tribunals have taken to satisfy judicial expectations in cases involving allegations of corruption or illegality. These range from posing questions to witnesses during their examination at the hearing, without interfering with counsel's line of questioning, to, in complex cases involving allegations of illegality, granting applications to appoint tribunal-appointed experts to assess whether a party has complied with its document disclosure obligations. These are powerful tools, which must be balanced with practical and procedural considerations, such as cost, time, and due process concerns.

In this context, Khoungui highlighted a number of typical red flags that may signal corruption as well as typical schemes used to channel funds to influence decision makers, such as the use of third-party intermediaries, gifts and entertainment, joint ventures structured to obscure payment flows, and forgiven loans and overvalued equity investments made in structures controlled by decision makers. She also discussed the role of forensic accounting and financial data in uncovering corruption red flags, noting that the combined review of structured (accounting records) and unstructured (emails, loose documents) data often holds the key to proving misconduct.

Juliette Asso offered insights from the perspective of investor-State arbitration, where findings of corruption or other unlawful conduct can significantly affect the outcome. She identified key stages where such findings are particularly impactful: (i) the jurisdictional stage, especially when BITs require investments to comply with host State laws to qualify for treaty protection; and (ii) the merits stage, where actions by the host State—such as launching criminal proceedings against the investor—may breach treaty protections. Asso also addressed the possibility of requesting provisional measures to suspend domestic criminal proceedings that threaten the fairness and integrity of the arbitration. Although tribunals are generally reluctant to interfere with national legal systems, they have granted such measures in exceptional circumstances. Notable examples include: (i) *Quiborax v. Bolivia*, where criminal proceedings were suspended due to their chilling effect on witnesses; (ii) *Hydro v. Albania*, where an extradition request was withdrawn to allow the claimant to participate in the arbitration; and (iii) *Boyko v. Ukraine*, where interim measures were granted to protect the health and safety of an individual and to lift the freezing order on his assets.

Ophélie Divoy highlighted how allegations of criminal conduct are increasingly misused to obstruct arbitration. As corruption gains prominence, some parties—particularly respondents—have raised unfounded corruption claims to challenge jurisdiction or admissibility, or to delay the arbitration. In more extreme instances, criminal complaints have been filed against arbitrators to intimidate tribunals and disrupt proceedings—a tactic she identified as a rising form of guerrilla strategy. Divoy also noted the use—and abuse—of criminal proceedings by both commercial and State parties as a means of circumventing the limitations of the arbitral process,

particularly regarding access to evidence. In some cases, parties resort to criminal complaints as a tactical tool to gain access to documents or information that would not otherwise be obtainable through the arbitration's procedural framework, including through document production mechanisms.

Grégoire Bertrou discussed the *Belokon* case and the broader policy questions it raises, particularly: (i) whether arbitral tribunals should suspend proceedings to await criminal court findings; and (ii) whether, in annulment proceedings, national courts should consider new evidence of corruption that was not available to the tribunal at the time of the award. He examined the tension between efficiency and integrity in arbitration—balancing the need for expedient proceedings with the obligation to address serious criminal allegations, which may warrant suspension. While acknowledging due process concerns raised by recent French annulment decisions, Bertrou argued that the duty to investigate and combat corruption should ultimately prevail.

In this context, Schimmel referred to the report of the French Ministry of Justice Working Group on modernizing French arbitration law, which proposes to allow the Court of Appeal to stay annulment proceedings to enable tribunals to resume proceedings and consider certain factual elements—such as evidence of corruption—to eliminate annulment grounds. This proposal is similar to Article 34(4) of the UNCITRAL Model Law and to the laws of certain jurisdictions. It aims to prevent annulment and preserve the finality and integrity of arbitration, while providing a mechanism to address mandatory public policy issues within the arbitral framework.

How Criminal Law Views Arbitration

Shifting to the second dimension of the discussion, Bruno Quentin provided a criminal law practitioner's perspective on the growing intersection between criminal law and international arbitration. He underscored the distinct purposes underpinning each system: while criminal law prosecutes and punishes wrongdoing in the public interest under strict, codified rules, arbitration is designed to resolve private disputes confidentially using broader, more flexible standards chosen by the parties. Despite this divergence, Quentin noted the increasing convergence of the two spheres, particularly in relation to arbitrator accountability. Whereas arbitrators were traditionally regarded as enjoying broad immunity for actions undertaken during arbitral proceedings, there is now a growing recognition that they may face criminal liability—especially where they are alleged to have engaged in or been complicit with unlawful conduct. He referred to recent cases in which media exposés or leaked documents have prompted criminal investigations into arbitrators, including instances where the annulment of an award due to concerns over independence or impartiality has led to subsequent criminal complaints against the arbitrator involved. Quentin pointed to the Tapie Case as a particularly instructive example, noting that Pierre Estoup was convicted alone, while the other two tribunal members were not. In cases of clear collusion, criminal justice will no longer hesitate to intervene in an arbitral process.

Bertrou built on these concerns by referencing the 2017 Report of the Club des Juristes on the responsibility of arbitrators. The report identified the risk of instrumentalisation of the criminal justice system by a party to an arbitration, whereby criminal proceedings are initiated not in pursuit of justice, but to disrupt or undermine arbitral proceedings. To guard against such abuse, the report recommended that prosecutorial authorities be granted discretion to decline to pursue criminal

complaints where it is evident that the complaint is abusive and strategically motivated. He also referred to a recent and high-profile illustration of this phenomenon, the criminal complaint filed by the Republic of the Congo, alleging that a billion-euro ICC award rendered against the State was procured through corruption. Although the criminal proceedings were ultimately dismissed, the case underscores the growing exposure of arbitrators and arbitral processes to criminal scrutiny—even in the absence of substantiated misconduct.

As criminal law considerations continue to shape arbitral proceedings, balancing efficiency, fairness, and integrity will be paramount.

*This post is part of Kluwer Arbitration Blog's coverage of **Paris Arbitration Week 2025**.*

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