Combating Money Laundering in Arbitration through Enhanced Transparency

by Kamila Sulaimankulova

LLM Capstone Thesis
SUPERVISOR: Markus Aurel Petsche
Central European University - Private University
Quellenstrasse 51-55, 1100 Vienna
Austria

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Abstract

International commercial arbitration is attractive for parties due to its selling feature – confidentiality. Despite confidentiality being a cornerstone of arbitration and fostering an environment favoring the resolution of disputes, it can provide an ideal environment to conceal and disguise the origin of money. An arbitral award – issued in terms that enshrine a settlement between the parties – might be seen as the perfect means to legitimize money flows, that have an illicit origin. As the tension between confidentiality and transparency is becoming a subject of growing controversy, one of the important issues to be aware of is the issue of abuse of the institution of arbitration for money laundering.

This paper focuses on one category of cases of money laundering in arbitration – in particular, the issue of "fake" disputes, where all parties are familiar with all illegal activities and have the intention to commit money laundering in participating with each other. It has been argued that in case arbitrators suspect money laundering, there are very limited number of solutions for this issue and guidelines are usually unhelpful in solving it. This paper proposes another solution to help reduce or prevent the issue of misuse of institution of arbitration for money laundering, which is to increase the overall transparency of proceedings through publication of redacted awards. The present paper argues whether or not it is possible to increase transparency, while not creating a tension with confidentiality, in such a way to reduce misuse of arbitration for money laundering.

Introduction

Despite transparency being discussed as of significant importance to investor-state arbitration, more recently the discussion on transparency has extended to commercial arbitration as well. This is to note that the current paper presents discussion in terms of the international commercial arbitration, and primarily focuses on institution-based commercial arbitration proceedings.

Money laundering is extremely damaging to societies, and has a potential to affect a large number of citizens and businesses, and this issue, unfortunately, remains relevant nowadays[1]. Moreover, it is admitted that corruption and money laundering are relevant in arbitration[2]. Despite existing guidelines and tool-kits, arbitrators often find themselves unable to find a proper decision on what should be done in case of suspecting money laundering. In case of dismissing the concerns, the arbitral tribunal may face charges of complicity in facilitating money laundering activities, terminating proceedings does not seem to be a proper solution as well[3]. The role of arbitrators is objectively difficult, since there is no commonly agreed standard of actions[4]. Thus, it is important to research on the issue of "fake" disputes used for concealing illicit origin of funds, and search for how to increase transparency in such a way, that the course of actions in such cases for arbitrators is clearer and easier.

It has been argued, however, that fraudulent arbitrations are extremely rare and only make up a negligible percentage of the thousands of legitimate international arbitrations that occur each year[5]. In this regard, such blasphemous cases as Contax v. KFH, where an arbitral award was a complete

[1] Kathrin Betz, Nadia Darwazeh, et al., 'Navigating Through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel', in Maxi Scherer (ed), (2019), Journal of International Arbitration, (Kluwer Law International, Volume 36 Issue 6), pp. 671 – 678;
[2] *Ibid.*
[3] Jaffar Yakkop Alkhayer, Chander Mohan Gupta, 'Arbitrators' suspicion of money laundering: choices against principles', (2023), Journal of Money Laundering Control, Emerald Publishing Limited, pp. 1368-5201, [available at: https://www.emerald.com/insight/1368-5201.htm], accessed 11 June 2024;
[4] *Ibid.*
[5] Sidney Larsen, William Kirtley, 'Fraudulent Arbitrations: A Few Bad Apples?' (2024);

fabrication overall, and The Sheikh Ahmad Al-Sabah Arbitration, which involved forgery of documents related to a fraudulent arbitration, should be mentioned, which highlight the importance of the issue of fraudulent arbitration cases.

The question explored in this paper is whether or not it is possible, and how to increase transparency, while not creating a tension with confidentiality, in such a way to reduce misuse of arbitration for money laundering, taking into account the fact that institutions are reluctant to work on increasing transparency due to the need of ensuring confidentiality during proceedings. It is needed to be mindful of the fact that the arbitrators are often rendered with no clear guidelines on this issue and thus must decide on their own whether they have the authority to bring up the subject of money laundering on their own initiative if they have reason to believe that the contract was contaminated by money laundering, since this issue collides with the principle of party autonomy, the concept of arbitrability and legality of dispute, the nature of the arbitral process and the finality of the arbitral award among other principles and facts[6].

The thesis statement is that transparency and confidentiality are different, but not contradicting to each other, and increased transparency and certain actions taken by the institutions themselves, such as publication of sanitized awards, can reduce the number of cases of "fake" disputes without contradicting confidentiality and party autonomy. The paper specifically focuses on measures adopted by the International Chamber of Commerce, International Court of Arbitration (ICC) and London Court of International Arbitration (LCIA).

The paper consists of two chapters, explaining the essence of the issue of misuse of commercial arbitration for money laundering, followed by the dilemma faced by arbitrators in such cases and overview of the existing ways of solving the issue in the first chapter; the second chapter explores the possible ways of increase in transparency, in particular, how willing are institutions to work

[6] Teichmann, F., Boticiu, S.R. and Sergi, B.S.,'Compliance issues in arbitration proceedings – bribery, money laundering and other abuses', (2023), Journal of Financial Crime;

on increasing the transparency, exploring of the duty of confidentiality, its importance and whether or not it limits transparency in this context, methods that can be used in order to increase transparency in the context of money laundering, as well as it proposes recommendations on increasing transparency based on the existing experience of implementing different methods for it.

CHAPTER 1: The issue of misuse of commercial arbitration for money laundering

1.1 Definition of money laundering

Money laundering has been defined as "the process by which criminals attempt to hide and disguise the true origin and ownership of the proceeds of their criminal activities, thereby avoiding prosecution, conviction, and confiscation of the criminal funds"[7]. More frequent are cases where an apparently legitimate contract ends up in arbitration that, in fact, involves money laundering[8]. In the commercial arbitration there are two potential scenarios where money laundering may arise; first, a claimant may raise a money laundering defense during the arbitration proceedings, which could be used as a means to challenge contract enforcement in the given situation; the second scenario is when no such claims are raised, but the arbitrators have a suspicion of money laundering due to some red flags or prima facie evidence[9]. The paper focuses on the latter issue, in particular the issue of the whole dispute being "fabricated" as a mean of concealing illicit origin of funds.

1.2 Explanation of the definition of "fake" disputes;

"Fake" disputes can be described as cases where all parties are familiar with all illegal activities and have the intention to commit money laundering in participating with each other, this presumption commonly emerges when the entire matter is part of a broader scheme involving money laundering. In such situations, the arbitral tribunal is being exploited in order to facilitate

[7] Joint Money Laundering Steering Group, Prevention of Money Laundering - Guidance Notes For The Financial Sector 5 (2003);
[8] McDougall, Andrew de Lotbiniére, 'International Arbitration and Money Laundering' (2005), American University International Law Review 20, no. 5, 1021-1054;
[9] Hwang, M. and Lim, K., 'Corruption in Arbitration – law and reality', (2012), Asian International Arbitration Journal, Vol. 8 No. 1., pp. 595–596; Alkhayer, J. and Gupta, N., 'Money laundering through the arbitral process: controversial issues wait for solutions BT', (2023); Cremades, B.M. and Cairns, D.J., 'Transnational public policy in international arbitral decision making: the cases of bribery, money laundering and fraud', (2003), Dossiers of the ICC Institute of World Business Law, Kluwer Law International, Philadelphia Vol. 1, p.81;

the transfer and legitimization of illegal profits, without any genuine dispute existing between the parties involved[10]. For instance, a common scenario involves two distinct businesses collaborating, establishing a new enterprise that involves excessive trading of goods or the provision of services at significantly inflated prices, in contrast to the market rates for similar goods and services[11]. The underlying contract includes an arbitration clause that prevents the involvement of the court system in resolving any potential contractual disagreements[12]. A dispute in such cases is manufactured and the required evidence is gathered to substantiate the claims[13].

1.3 Dilemma faced by arbitrators and overview of the existing ways of solving the issue

It has been argued that in case arbitrators suspect money laundering, there are very limited number of solutions, including such solutions as disregarding suspicions, initiating an investigation sua sponte, shifting the burden of proof to the allegedly corrupt party, termination of the proceedings altogether[14].

The choice of ignoring the suspicions is based on the principle of party autonomy[15]. This approach has been developed based on the ICC Case No. 6497, where it has been stated: "tribunals do not have the power to make an official inquiry and have not the duty to search independently for the truth"[16]. However, this approach is dangerous due to the possibility of arbitrators facing liability

[10] Kathrin Betz, Nadia Darwazeh, et al., 'Navigating Through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel', in Maxi Scherer (ed), (2019), Journal of International Arbitration, (Kluwer Law International, Volume 36 Issue 6), pp. 671 – 678;
[11] Glucksmann, E. and Morbach, R., 'Hot-Button issues in international arbitration: a survey among arbitrators', (2020), Journal of International Arbitration, Vol. 37 No. 2, pp. 257-270; Wilske, S., "International arbitration and its dark sides, in particular corruption: what arbitral institutions could and should do to tackle such unwelcome issues", (2019), Contemporary Asia Arbitration Journal (CAA Journal), Vol. 12;
[12] *Ibid.*
[13] *Ibid.*
[14] Jaffar Yakkop Alkhayer, Chander Mohan Gupta, 'Arbitrators' suspicion of money laundering: choices against principles', (2023), Journal of Money Laundering Control, Emerald Publishing Limited, pp. 1368-5201, [available at: https://www.emerald.com/insight/1368-5201.htm], accessed 11 June 2024;
[15] Gaillard, E., "The emergence of transnational responses to corruption in international arbitration", (2019), Arbitration International, Vol. 35 No. 1, pp. 1-19;
[16] ICC Case No. 6497, Consultant vs Contractor, Final Award, ICC Case No. 6497 in Albert Jan van den Berg (ed.), Yearbook of Commercial Arbitration, Vol. XXIV, Kluwer Law International, pp. 71–79;

for alleged violation of anti-money laundering laws or even face charges of complicity in facilitating money laundering activities[17].

The option of initiating an investigation sua sponte exists as well. In this case, an investigation on money laundering suspicions is conducted at the arbitrators' discretion. This approach can be perceived as a matter of the arbitrability of the dispute, where it is asserted that the arbitrators have a responsibility to determine the arbitrability of the dispute brought before them and, if necessary, undertake an inquiry into the matter proactively to address jurisdictional issues[18]. This option has been criticized due to its alleged violation of the principle of party autonomy[19].

It has been argued that "while it does not explicitly address sua sponte investigations, the UNCITRAL Model Law does provide that "[a]ll statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party" and that "any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties"[20]. The closer analysis of this provision provides an implication that the arbitral tribunal has a right to seek additional evidence from the parties subjected to the requirement of communication among the parties. According to this provision, the existence of investigative powers of arbitrators that are based on their own volition could be drawn. Based on the duty to observe public policy and the provision on the investigative powers of arbitrators included in UNCITRAL Model Law, it has been argued that the power to investigate corruption sua sponte by arbitrators prevails[21].

[17] Wronka, C., 'Anti-money laundering regimes: a comparison between Germany, Switzerland and the UK with a focus on the crypto business', (2022), Journal of Money Laundering Control, Vol. 25 No. 3, pp. 656-670;
[18] Kolarov, T., 'International commercial arbitrator addressing money laundering sua sponte', (2022), Journal of Money Laundering Control, Vol. 25 No. 3, pp. 637-644;
[19] Hedberg, C., 'International Commercial Arbitration and Money Laundering: Problems That Arise and How They Should Be Resolved', (2016) Uppsala University;
[20] Baizeau, Domitille, Tessa Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte', Menaker, Andrea (ed.), (2017) International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19. The Hague: Wolters Kluwer, p. 241;
[21] Michaela Garajová, 'International Arbitration and Corruption – The Arbitrators' Right to Investigate Corruption Sua Sponte', Drlickova, Klára (ed.), (2018), Cofola International 2018: Conference Proceedings. 1st editions.;

It has been argued that given the tribunal's limited powers to compel the parties to submit evidence and that is has only limited investigatory powers, this may be a futile exercise, and if the parties indeed agreed to stage the arbitration proceedings, they are unlikely to provide the necessary evidence to substantiate the tribunal's allegations[22].

However, it must be noted that the arbitral tribunal acting according to the LCIA Rules has an additional power "to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute."[23] The right to investigate however means that they must require evidence, proving the allegations, from parties and moreover, give them a reasonable opportunity to state their opinions and views on that matter[24].

It has also been argued that it might be appropriate for tribunals to shift the burden of proof to the allegedly corrupt party where prima facie evidence of corruption exists[25]. In ICC case no. 6497 the Tribunal endorsed shifting the burden of proof stating that: "The alleging party has the burden of proof [to demonstrate the existence of bribery]". The alleging party may bring some relevant evidence for its allegations, without these elements being conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven. However, such change in the burden of proof is only to be made in special circumstances and for very good reasons.[26]"

[22] Patricia Nacimiento, Tilmann Hertel, Catrice Gayer, 'Arbitration and Money Laundering: What Are The Obligations Placed On Counsel And Arbitrators And What Risks Do They Face?', (November 2017), [available at: https://arbitrationblog.kluwerarbitration.com/2017/11/10/arbitration-money-laundering/], accessed 11 June 2024;
[23] The LCIA Arbitration Rules, 1998, Article 22(1)(c);
[24] Marc D. Veit, 'Proving Legality Instead of Corruption', (2017), Wolters Kluwer;
[25] Concepcion, F. Carlos, 'Combating Corruption and Fraud from an International Arbitration Perspective', (2016), Arbitraje: Revista de Arbitraje Comercial y de Inversiones, Vol. 9, no. 2, p. 375;
[26] ICC Arbitration Case of 1994, no. 6497;

Shifting the burden of proof is considered to be too radical to depart from such a basic and widely accepted rule that a party must prove the facts upon which it wishes to rely[27]. The attitude of shifting the burden of proof, as an example, was rejected in the Rompetrol Group N. V. v. Romania case where it was held that such a procedure confuses "the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence"[28]. In majority of the cases, the idea of shifting the burden of proof was rejected and was even considered as breaching the principle of due process and contrary to the right to fair trial[29]. In this regard, arbitrators generally seem to apply the "balance of probabilities" standard.

Another option would be to terminate proceedings, which is usually not an advisable solution, however when the arbitrator has uncertainties about their obligation to disclose money laundering under the laws of the arbitration seat, they may choose to resign[30].

Thus, it can be seen that the role of arbitrators is objectively difficult, since there is no commonly agreed standard of actions. Neither of the solutions seem to be fully satisfactory. Thus, a different approach should be explored.

[27] Hwang, M., Lim, K., 'Corruption in Arbitration – Law and Reality', (2012), Asian International Arbitration Journal, Vol. 8, no. 1, p. 8;
[28] Award of 6 May 2013, ICSID Case no. ARB/06/3, The Rompetrol Group N. V. v. Romania case;
[29] Betz, K., 'Economic Crime in International Arbitration', (2017), ASA Bulletin, Vol. 35, no. 2, p. 285; Domitille and Richard H. KREINDLER, 'Addressing Issues of Corruption in Commercial and Investment Arbitration' (2015), Dossiers of the ICC Institute of World Business Law, Vol. 13, p. 79;
[30] Hedberg, C., 'International Commercial Arbitration and Money Laundering: Problems That Arise and How They Should Be Resolved', (2016), Uppsala University;

CHAPTER 2: Enhanced transparency as a way to fight money laundering

2.1. Illusion of clash of confidentiality and transparency

Increase in transparency, and therefore enhance of predictability, is essential for advancing the acceptance of international commercial arbitration within the business community. It is of substantial importance to make commercial arbitral awards more accessible and transparent. Importantly, an enhanced transparency does not conflict with the duty of arbitrators to maintain confidentiality, which is to be discussed as following.

2.1.1 Defining confidentiality in commercial arbitration

It is generally accepted that an arbitrator is bound by the duty to maintain confidentiality[31]. The existence of this duty results from the very nature of arbitrators' function. It would be incompatible with the mandate of an arbitrator to divulge information about arbitration to third parties[32]. The duty to maintain confidentiality is the key part of arbitrator's role[33].

Privacy and confidentiality are also indicated as the advantages of international commercial arbitration and as one of the main reasons why parties prefer arbitration to litigation[34]. However, confidentiality is not to be mistaken with privacy. It must be noted in this regard that confidentiality

[31] Lew, Julian D. M., Loukas A. Mistelis, et.al., 'Comparative International Commercial Arbitration', (2003), The Hague: Kluwer Law International, p. 283; Smeureanu, Ileana M., 'Confidentiality in International Commercial Arbitration', (2011), The Hague: Kluwer Law International, p. 142; Born, Gary B., 'International Commercial Arbitration', (2014), Volume II. 2nd ed. Alphen aan den Rijn: Kluwer Law International, p. 2004; De Ly, Filip, Mark Friedman a Luca Radicati Di Brozolo, 'International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration', (2012), Arbitration International, Vol. 28, no. 3, p. 373;

[32] Smeureanu, Ileana M., 'Confidentiality in International Commercial Arbitration', (2011), The Hague: Kluwer Law International, p. 142; Born, Gary B., 'International Commercial Arbitration', (2014), Volume II. 2nd ed. Alphen aan den Rijn: Kluwer Law International, p. 2004;

[33] Born, Gary B., 'International Commercial Arbitration', (2014), Volume II. 2nd ed. Alphen aan den Rijn: Kluwer Law International, p. 2004; De Ly, Filip, Mark Friedman a Luca Radicati Di Brozolo, 'International Law Association International Arbitration Committee's Report and Recommendations on Confidentiality in International Commercial Arbitration', (2012), Arbitration International, Vol. 28, no. 3, p. 373;

[34] Blackaby, N., Partasides, C., Redfern A., Hunter M., *Redfern and Hunter on International Arbitration*, 6th ed. Oxford: Oxford University Press, (2015), p. 30; Noussia, K., *Confidentiality in International Commercial Arbitration*, Berlin – Heidelberg: Springer – Verlag, (2010), p. 1; Buys, C.G., 'The Tension between Confidentiality and Transparency in International Arbitration' (2003), The American Review of International Arbitration, Vol. 14, p. 121;

is not absolute and exists with certain carve-outs. There is no uniform attitude to the confidentiality in international commercial arbitration; its existence, scope or limits are conditioned by the nature of information, arbitration agreement, arbitration rules, law applicable to arbitration agreement and lex arbitri (law applicable to the procedure). Accordingly, legislation, arbitration rules, court decisions, international treaties either did not address the issue or did not precisely define confidentiality[35].

Typically, aspects covered by the obligation of confidentiality include the existence of the arbitration[36], all information concerning the details of the dispute and of the arbitration, such as the identity of the parties, the causes of action, the prayers for relief, the amounts claimed, the existence of counterclaims, the composition of the arbitral tribunal, and the identity of parties' counsel and of witnesses and experts, as well as the details of the proceedings, such as hearing dates, deadlines for submissions and the identity of witnesses[37]. The IBA Rules on the Taking of Evidence in International Commercial Arbitration mandate confidentiality concerning "all documents produced by a Party"[38]. The ICC Rules contain a general provision in Article 28(2) stating that awards shall not be made available to anyone other than the parties. The obligation of confidentiality for the institution and its members and staff is generally spelled out in the relevant institutions' internal rules.'[39].

Reasonable exceptions to an obligation of confidentiality may include: (a) prosecuting or defending the arbitration or proceedings related to it (including enforcement or annulment proceedings), or pursuing a legal right; (b) responding to a compulsory order or request for information of a governmental or regulatory body; (c) making a disclosure required by law or by the rules of a securities exchange; or (d) seeking legal, accounting or other professional services,

[35] ILO Report on Confidentiality in International Commercial Arbitration, 2010, pp. 5-10; Noussia, K., *Confidentiality in International Commercial Arbitration*, Berlin – Heidelberg: Springer – Verlag, (2010), p. 1;
[36] Tribunal de Commerce de Paris, February 22, 1999, *Bleustein et autres v. Socidtd True North et socidtd FCB International*, Rev. arb. 2003, p. 373;
[37] 'International Commercial Arbitration', (2010), 74 Int'l L Ass'n Rep Conf 201;
[38] The IBA Rules on the Taking of Evidence in International Commercial Arbitration, 2020, Art. 3.12;
[39] The Internal Rules of the ICC International Court of Arbitration, Art. 1;

or satisfying information requests of potential acquirers, investors or lenders; provided that in each case disclosure is no broader than necessary to satisfy the legitimate purpose of the disclosure and that where possible the producing party takes reasonable measures to ensure that the recipient preserves the confidentiality of the information provided[40]. Thus, it is seen that the obligation of confidentiality exists to protect interests of the parties, however, this obligation is not of an absolute nature.

The obligation of confidentiality is generally considered to extend to the award and to "all orders and other decisions of the arbitral tribunal,"[41] although it is usually admitted that these texts can be published for research purposes if appropriately redacted and "sanitized" (e.g. omitting the names of the parties and possibly of the arbitrators," and all details relating to the dispute capable of disseminating information which is covered by the confidentiality obligation)." In practice redacted awards are often published for scientific purposes even in the absence of the parties' consent[42]. Publication of sanitized awards does not contradict the duty of confidentiality and serves many purposes, which is to be discussed later in this chapter.

Confidentiality is of great importance in arbitral proceedings, which exists for the protection of legitimate interests of parties in commercial arbitration. Overall, confidentiality preserves the integrity of the arbitration process, making it an attractive and effective mechanism for resolving international commercial disputes, however it is not absolute, is subject to certain carve-outs and generally does not contradict the publication of sanitized awards.

[40] 'International Commercial Arbitration', (2010), 74 International Law Association Conference, p.14;
[41] LCIA Rules, Art. 30(3),
[42] 'International Commercial Arbitration', (2010), 74 International Law Association Conference, p.14;

2.1.2 Defining transparency

Transparency can lead to a higher degree of trust and acceptance of the arbitral process. Transparency increases accountability as the arbitrator, counsel, and parties to an arbitration are mindful that their behavior is likely to be scrutinized by the public[43].

Transparency also renders the decision-making process in arbitration more accurate, as arbitrators who know that their awards will be rendered public are more inclined to thoroughly research and investigate before reaching a conclusion[44]. It helps to guarantee democratic principles such as the right of access to information and also promotes fairness, the rule of law, equity, and due process[45].

The benefits of arbitral transparency include the consistency of arbitral awards, development of arbitral law, prevention of prospective disputes, better openings to develop the arbitral system, and increased efficacy in determining the expertise of an arbitrator[46].

It has been argued by scholars that confidentiality in some cases can be perceived as a way to mask arbitrators' incorrect or unethical decisions[47]. Transparency would allow arbitral circles to assess the professionalism and competence of arbitrators[48]. It would also prevent the exploitation of the system as a safe haven in which to hide evidence[49] that might otherwise assist the court or a party. Furthermore, given the inherent secrecy in arbitration, courts should not allow confidentiality to asphyxiate the ability to expose any unlawful activity that might have transpired during the arbitral proceedings[50].

[43] Claudia Reith, 'Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?', (2012), 2 Y.B. ON INT'L ARB. 297, 300;
[44] Claudia Reith, 'Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?', (2012), 2 Y.B. ON INT'L ARB. 297, 300;
[45] *Ibid.*,
[46] Matthew Carmody, 'Overturning the Presumption of Confidentiality: Should the UNCITRAL Rules on Transparency be applied to International Commercial Arbitration?', (2016), 19 INT'L TRADE & BUS. L. REV. 96, 157, p.168;
[47] Bernardo M. Cremades & Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis', (2013), 23 J. OF ARB. STUD. 25, 26, pp. 33-34;
[48] Bazil Oglinda, 'The Principle of Confidentiality in Arbitration: Application and Limitations of The Principle', (2015), 4 PERSPS. OF BUS. L, J. 57, 59, p. 60;
[49] Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, (2006), 54 U. KAN. L. REV. 1255, 1256;
[50] David St John Sutton, et al., *Russell on Arbitration*, (2015), 24th ed.;

Moreover, arbitral awards whereby claims, that are shown to rest on corruption, money laundering or fraud are admitted, may be set aside and refused recognition and enforcement by courts which do not accept such practices[51] - if the recognition or enforcement of an award would be contrary to public policy, it may be refused; see New York Convention, Article V2(b).

Thus, it is seen how transparency is needed and valued in commercial arbitration, the feature that has a potential to make commercial arbitration attractive for future parties. Increase in transparency would serve several functions, such as increase of trust in institutions, help expand research in field of commercial arbitration, as well as help reduce the risk of money laundering, which is to be discussed as following.

2.1.3. The need and the possibility to strike a balance

As transparency comes across confidentiality, "the conflict between transparency and confidentiality cannot permit the victory of one on the other, and their settlement turns out necessary"[52].

A conflict emerged during the 1990s between the 'inherent confidentiality' of the arbitral process and the desire for publication of awards in the interests of establishing a body of precedent that might guide other arbitrators. The prevailing trend appears to favor publication[53].

2.1.3.1 Possibility of publication of sanitized awards

The demands for a more transparent process are growing; awards are increasingly published and scrutinized, and open hearings are beginning to take place in certain contexts. Global standards are changing, and national and international non-government organizations are taking a heightened interest in cross-border disputes, particularly when environmental, human rights, or other public

[51] Allan Philip, 'Chapter 8. Arbitration, Corruption, Money Laundering and Fraud: The Role of the Tribunals', (2003), in Kristine Karsten and Andrew Berkeley (eds), ICC Dossier No. 1: Arbitration: Money Laundering, Corruption and Fraud, Dossiers of the ICC Institute of World Business Law, Volume 1 (Kluwer Law International; International Chamber of Commerce (ICC)), p. 156;
[52] F. Fages, La confidentialité de l'arbitrage à l'épreuve de la transparence financière, Rev. arb., 2003, (5), pp. 5-39;
[53] Redfern and Hunter on International Arbitration, 7th Edition, (Kluwer Law International; Oxford University Press 2023, p.581;

interest issues are at stake[54]. The increasing use of challenges in the arbitral process has caused institutions to review the traditional practice of maintaining the confidentiality of the challenge decision. The LCIA has begun to publish such decisions in redacted form in the interests of transparency[55]. In the area of arbitration in general, together with other similar forums[56], Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEMID) informally introduced an era of greater transparency within the world of international arbitration.

The International Dispute Resolution Procedures Including Mediation and Arbitration Rules (AAA-ICDR Rules) provide that, unless otherwise agreed by the parties, selected awards may be made publicly available, with the names of the parties and other identifying features removed. There are other circumstances in which, even without the consent of the parties, an award may find its way into the public domain[57]. The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings[58].

In line with ICC commitments to facilitate access to justice, enhance the global rule-based order, and improve transparency in arbitration, ICC has started to provide trusted arbitration content, which enables full public access to all publishable ICC International Court of Arbitration awards and related documents made as of 1 January 2019[59].

[54] Bishop and Stevens, 'The compelling need for a code of ethics in international arbitration: Transparency, integrity and legitimacy' (2011) 15 ICCA Congress Series 391, at 394;
[55] Baker and Greenwood, 'Are challenges overused in international arbitration?', (2013), 30 J Intl Arb 101,
[56] See, e.g., Investment Treaty Arbitration website, [available at http://ita.law.uvic.ca/];
[57] The International Dispute Resolution Procedures Including Mediation and Arbitration Rules, (hereinafter AAA-ICDR Rules), Art.27.8;
[58] Appendix II – Internal Rules of the International Court of Arbitration, Art.1.5;
[59] ICC - Jus Mundi partnership, [available at: https://iccwbo.org/dispute-resolution/resources/publication-of-icc-arbitral-awards-jus-mundi-not-icc-publication/#:~:text=In%20line%20with%20ICC%20commitments,Jus%20Mundi's%20AI-powered%20technology], accessed June 11, 2024;

In addition, there exist the Guidelines for the Anonymous Publication of Arbitral Awards by the Milan Chamber of Arbitration[60], which aim to provide a set of common and uniformly applicable standards in order to publish arbitral awards and provisions anonymously and confidentially, thus ensuring the publication of arbitral awards in such a way as to not violate the privacy interests of parties.

Thus, the publication of sanitized awards in international commercial arbitration is both possible and encouraged, as it does not contradict confidentiality obligations. It has already been in use for years and proven to be useful. By redacting sensitive information, arbitral institutions can provide for transparency and share valuable jurisprudence while safeguarding the privacy of the parties involved. This practice supports the integrity of the arbitration process and promotes its effectiveness as a reliable method for resolving international commercial disputes.

2.1.3.2 Publication of sanitized awards increases coherency, which serves as a guidance for arbitrators

It has been argued that greater transparency would bring many practical advantages to the system, since opacity creates inefficiencies, imprecision and potential inequities in the international commercial arbitration system[61]. Increase in transparency by publication of awards grants an advantage of wider predictability and further fosters harmonization of the international commercial arbitration. By making previous awards accessible in a sanitized form, arbitrators can refer to established decisions and reasoning in similar cases, which promotes consistency and uniformity in arbitral rulings, reducing the risk of divergent outcomes in comparable situations. When arbitrators have access to past arbitral awards, they can identify common legal principles

[60] The Milan Chamber of Arbitration Guidelines for the Anonymous Publication of Arbitral Awards, [available at: https://www.camera-arbitrale.it/Documenti/guidelines-anonymous-publication-arbitral-awards.pdf], accessed June 11, 2024;
[61] Catherine A. Rogers, 'Transparency in International Commercial Arbitration', (2006), 54 U. Kan. L. Rev. 1301;

and factual determinations, which helps maintain a more predictable and reliable arbitration process.

Moreover, as it was stated, one of the goals of publication of awards include research purposes, which further proves that the publication of awards is necessary as a guidance for arbitrators. Such publication would serve as a great method of guidance of arbitrators in many ways, but most notably, in the issues of "fake" disputes, since the published awards can be studied for decision-making process.

2.1.3.3 Publication of sanitized awards increases visibility of arbitrators' decision-making

The publication of awards, decisions, and procedural rulings in investor-State proceedings has introduced a new perspective on the problems that we are considering today. One consequence of this increased level of transparency in the proceedings is that greater scrutiny of not just substantive but also procedural issues may be expected in the future. This goes to the heart of the legitimacy of the international arbitral system[62].

2.1.3.3.1 Red flag system:

It has been argued that the red flag system is to be developed and used for tackling the issue of corruption and money laundering; certain circumstances in a given case may point to the possible existence of bribery and corruption in the underlying transaction and on the basis red flags arbitrators may make a procedural presumption that the parties' transaction is unlawful and shift the burden of proof to the party accused of corruption to present counter-evidence of the legitimacy of their contract[63]. The red flag system has already been in use, as the ICC Guidelines on Agents,

[62] Bishop and Stevens, 'The compelling need for a code of ethics in international arbitration: Transparency, integrity and legitimacy', (2011), 15 ICCA Congress Series 391, at 394;
[63] Khvalei, V., 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbor for Contracts that Disguise Corruption', (2013), ICC Digital Library [accessed on: https://jusmundi.com/en/document/publication/en-using-red-flags-to-prevent-arbitration-from-becoming-a-safe-harbour-for-contracts-that-disguise-corruption], accessed June 11, 2024;

Intermediaries and Other Third Parties[64] state general warning signs which may be considered in the course of arbitration.

In ICC Case No. 8891/1998, the arbitral tribunal termed excessively high fees or commission of the agents as a 'red flag' for corruption. As an example, in the ICC case no. 6248 the Tribunal investigated its suspicions about an illicit behavior of one of the parties based on the evidence they gathered on their own and certain documents provided by one of the parties. More arbitration decisions concerning wrongdoing seem to draw conclusions on the basis of inference, either because a party did not produce evidence when asked to do so by the tribunal or because that party should have had within its possession exonerative evidence but did not produce it[65]. Adverse inferences were drawn also in cases related to corruptive behavior. In ICC case No.3916 the Tribunal held that the impugned party's repeated refusal to disclose the "personal actions" taken to procure a public contract gave rise to corrupt activities being concealed[66]. Accordingly, adverse inferences were applied in ICC Case no. 6497[67].

2.1.3.3.2 Case discussion:

ICC case no. 8891 of 1998, where the parties concluded a consultancy contract under which the Claimant had to assist the Respondent in obtaining an increase in the price of two contracts which the Respondent had already concluded with State X.

The arbitral tribunal started by declaring that the illegality of contracts establishing bribery is well recognized by arbitral tribunals, which usually apply national law as their primary source and refer to international general principles as a supplementary source. The tribunal in this case preferred to give precedence to international sources.

[64] ICC Guidelines on Agents, Intermediaries and Other Third Parties, (2010);
[65] Liamzon, A., Sinclair A., 'Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct', (2015), Van den Berg, Albert J. (ed.). Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18, The Hague: Wolters Kluwer, p. 463.
[66] Hwang, M. and Lim, K., 'Corruption in Arbitration – law and reality', (2012), Asian International Arbitration Journal, Vol. 8 No. 1., p.9;
[67] ICC Arbitration Case of 1994, no. 6497, ICC Digital Library;

Concerning the difficulty of proving illegality, the arbitral tribunal stated that there were four indicia on the basis of which an arbitral tribunal may, in general terms, base its assumption of illegality:

a) the inability of the agent to provide evidentiary proof of his activities,

b) the duration of the agent's intervention,

c) the manner and method of remunerating the agent, and

d) the amount of money agreed to be payable to the agent as compared to the advantages obtained by the principal.

After listing the above standards or indices, the arbitral tribunal applied them to the case in question and concluded that the consultancy contract was entered into with the intent of conducting bribery and was to be declared, pursuant to international public policy, null and void. As a result, the arbitral tribunal rejected the claim[68].

The case illustrates the application of a red flag system to a case and flagging suspicious behavior and unusually high fees of agents, citing international sources. the fact that the agent was to receive a fee calculated as a percentage of the contract awarded to the principal can be circumstantial evidence for the existence of a corrupt practice. If an agent refuses, without just grounds, to disclose information about his or her ultimate beneficiaries and past and present activities, the legitimacy of the latter is suspect.

Another case is ICC case no. 5943 of 1990. The two parties concluded a contract, declaring their intention to establish a joint venture company having as its purpose the construction and management of a hotel. Certain payments were made by the Claimant, ostensibly as a contribution to the company's joint venture capital, but the money was in reality paid to a consultant engaged by the Claimant's parent company in order to obtain a successful armaments contract between the

[68] ICC, 1998, Award No. 8891, 1998, in Journal de Droit International Clunet, Issue 4, 2000, p.1082;

Claimant's parent company and country X. The hotel contract was conceived in order to create a vehicle for the payment of a commission on the acquisition of the armaments contract. The contract not having been obtained, the Claimant sought to be repaid.

The arbitrator found that, under a provision of the Korean Civil Code, a fictitious declaration of intention made in collusion with the other party was null and void. He therefore declared the payment provision in the agreement null and inapplicable and dismissed the Claimant's claim on the ground that the Claimant had no legal entitlement to restitution of an illicit or undue payment. Even though the Respondent introduced the notion of bribery in order to avoid reimbursement, the arbitrator did not apply international public policy principles or other international law principles condemning corruption. He simply denied the Claimant's right to reimbursement on the basis of Korean Civil Code. The conflict between stated (but fictitious) terms of an agreement and the true intention of the parties, which was to pay an intermediary for a completely different type of service, was discussed. Falsity of the declared intention renders the contract null under Korean law. Arbitral jurisdiction was not affected by the nullity of the agreement containing the arbitration clause[69].

The case illustrates reciting national law as a basis for flagging suspicious behavior and declaring the contract to be null and void.

These cases illustrate that the publication of sanitized arbitral awards where the red flag system has been used to expose illicit behavior can significantly enhance the visibility and understanding of this system. By sharing these sanitized awards, arbitral tribunals can better recognize and address illicit activities, such as money laundering and corruption, in future cases. Making arbitral awards publicly accessible provides an opportunity for arbitral institutions to provide valuable insights into how the red flag system can be effectively applied in real-world scenarios. This

[69] ICC, 1990, Award No. 5943, 1990, in Journal de Droit International Clunet, 1996, p.1014;

practice not only improves the effectiveness of detecting and preventing illicit behavior but also reduces the risks of international arbitration being abused for such purposes.

Moreover, this practice contributes to a broader deterrent effect, signaling to potential wrongdoers that the arbitrators are vigilant and equipped to identify and prevent abuse. It fosters greater trust and confidence in the arbitration system by demonstrating a commitment to maintaining its integrity and fairness. Ultimately, the publication of sanitized awards utilizing the red flag system aids in the immediate detection of illicit behavior. This proactive approach enhances the credibility and reliability of international arbitration as a secure and just means of resolving commercial disputes.

It must be noted, that the red flag system and guidance are amplified by publication of awards as an example of use of such red flag system in practice. With publication of arbitral awards, the system becomes clear to other arbitrators and helps them to determine suspicious behavior of parties.

Sanitized awards can serve as valuable precedents for arbitrators, offering concrete examples of how specific issues and challenges have been addressed. This guidance is especially beneficial in such cases where has been an attempt to conceal an illicit behavior, and, as has been demonstrated, clear course of action for arbitrators may not exist. By learning from past decisions, arbitrators can apply tested reasoning and methodologies, enhance the quality and robustness of their own rulings.

Thus, publication of awards helps arbitrators better understand the application of the red flag system and identify possible “fake” disputes as early as possible.

2.1.3.4 Overall better transparency of institutions, leads to abstaining from committing money laundering under that institution

Money laundering and bribery are secret offenses and a reoccurring problem in large international commercial contract settings[70]. The international arbitration community has a strong record of fighting bribery[71]. This issue illustrates the international arbitration system's potential to respond to issues of public importance and the utility of disclosure mechanisms. These developments demonstrate that in the context of bribery and corruption, arbitrator conduct is generally attentive to public interests. To ensure more reporting, it is possible to promulgate disclosure obligations that are contemplated within the arbitration community[72].

The awareness that arbitral decisions may be published, even in a redacted form, has a potential to act as a deterrent against attempts to misuse the arbitration process for illicit purposes, namely money laundering. Parties are more likely to engage in arbitration in good faith, knowing that their actions and the outcomes of their disputes could be scrutinized and made part of the public record.

Therefore, one can argue that increase in transparency, including in the method of publication of awards, will make future parties hesitate to commit money laundering through the commercial arbitration. As more and more awards are published, facts of misuse of arbitration cannot hide from the public eye, which can create reluctancy in attempts to create "fake" disputes.

2.1.3.5 Increased transparency increases trust in these institutions.

It is undisputable that the primary purpose of transparency reforms is to make the system more reliable and predictable for its direct users[73]. Despite the lack of legal authority to enforce transparency reforms, institutions themselves tend to increase transparency with a goal of increasing trust in these institutions. Published awards reflect arbitrators' decision-making process

[70] Daniel Patrick Ashe, 'The Lengthening Anti-Bribery Lasso of The United States: The Recent Extraterritorial Application of The U.S.', (2005), Foreign Corrupt Practices Act, 73 FORDHAM L. REV. 2897, 2907-08;
[71] Northrop Corp. v. Triad Int'l Mktg. S.A., 811 F.2d 1265, 1271 (9th Cir. 1987);
[72] Catherine A. Rogers, 'Transparency in International Commercial Arbitration', (2006), 54 U. Kan. L. Rev. 1301;
[73] Catherine A. Rogers, 'Transparency in International Commercial Arbitration', (2006), 54 U. Kan. L. Rev. 1301;

in cases of encountering "fake" disputes. Potential parties will be able to clearly witness how the institution treats such issues and make an informed decision.

In conclusion, the trend in international commercial arbitration increasingly favors the publication of sanitized awards. This practice allows for greater transparency while maintaining the confidentiality of sensitive information. By redacting proprietary business details and other confidential elements, arbitral institutions and parties can balance the need for public access to arbitration outcomes with the protection of private interests. This approach fosters trust and confidence in the arbitration process, promoting its continued use as an effective means of resolving international commercial disputes. The publication of sanitized and redacted arbitral awards significantly contributes to the coherence and predictability of decision-making in international commercial arbitration. Providing a source of arbitral awards, which serves as a guidance, it supports arbitrators in delivering consistent rulings, while also enhancing transparency and deterring illicit activities.

2.2 Measures taken by the institutions to increase transparency:

The ICC announced several new policies recently, including that it will provide parties with reasons for administrative decisions, including with respect to challenges to arbitrators, and that it will publish the names and nationalities of arbitrators sitting in ICC cases[74]. The decisions which are communicated to parties will not be made public, and should therefore have no effect on the confidentiality and privacy of proceedings.

[74] Rajinder Bassi, Jon Newman, 'Increased transparency in international commercial arbitration', (2016), [available at: https://www.financierworldwide.com/increased-transparency-in-international-commercial-arbitration] accessed June 11, 2024;

Since 2019, there has been a presumption that ICC awards may be published, with parties having an opportunity to object or require anonymization[75]. As it can be seen, there are many awards by ICC that are publicly available these days[76].

LCIA has also taken other steps toward increased transparency. In November 2015, it published data on the average costs and duration of LCIA arbitrations, stating that it sees it as its "responsibility to contribute to informed decision making" by providing such information.

It has been discussed and expected that parties to international arbitration welcome greater transparency from arbitral institutions, as discontent with the lack of insight into the decision-making of arbitral institutions and the efficiency and performance of arbitrators has been shown[77]. As more institutions take steps to show they are open about their decision-making processes, such transparency will gradually be more present in institution-based commercial arbitration.

Thus, it can be seen that institutions currently are striving towards increase in transparency and publication of sanitized awards is possible, encouraged, and serves many useful functions.

2.3 Conclusion:

The first chapter of this paper has explored the issue of misuse of commercial arbitration for money laundering through submitting "fake" disputes, explained the importance of this issue for current time. Several methods of combatting this issue were explored, with their advantages and disadvantages presented, as well as the issue of absence of a uniform approach to the "fake" disputes. The second chapter has discussed the confidentiality as a feature of commercial arbitration and as a duty. Transparency in this regard was discussed, as a feature that is not only

[75] Simon Sloane, Emily Wyse Jackson, Yin Yee Ng, 'Tackling Corruption in the Arbitral Process: Reflections on Nigeria v Process and Industrial Developments Limited', (March 2024), [available at: https://arbitrationblog.kluwerarbitration.com/2024/03/03/tackling-corruption-in-the-arbitral-process-reflections-on-nigeria-v-process-and-industrial-developments-limited/] accessed June 11, 2024;
[76] See, ICC - Jus Mundi partnership, [available at: https://jusmundi.com/en/icc-dispute-resolution-library] accessed June 11, 2024;
[77] International Arbitration Survey: Improvements and Innovations in International Arbitration, QMUL, (2015), p.22;

needed to be present in arbitration, but also a feature that can be present without violating the parties' right to confidentiality, considering the growing need to balance confidentiality and transparency. Further, the paper presented arguments for transparency to help solve the issue of money laundering in arbitration, in particular through publication of sanitized awards. Such method helps increase coherency in arbitral awards issued for similar issues, which can serve as a guidance for arbitrators in addressing "fake" disputes. In addition, the "red flag" system, which was developed in order to combat money laundering and corruption in general in arbitration, can be more visible and its application can be clearer for further cases with publication of redacted arbitral awards, which was discussed together with arbitration cases, where illegal behavior was attempted to be concealed. Furthermore, it was discussed how publication of sanitized awards can increase trust in institutional arbitration by helping reflect arbitrators' decision-making process in cases of encountering "fake" disputes. Thus, it was demonstrated how publication of sanitized awards has a potential to reduce or combat "fake" disputes in international commercial arbitration.

Institutions have several incentives to increase transparency, despite the absence of a legal authority demanding it. ICC, LCIA and several other institutions are striving to provide for publication of sanitized awards. This growing trend is not only useful for increasing trust in these institutions and aiding the research in the field of arbitration, but also favors the goal of revealing and combatting illegal behavior concealed as a legitimate dispute. Therefore, it is expected in the near future for "fake" disputes to be reduced and the chances of commercial arbitration to be abused for money laundering to decrease.

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