CHAPTER 14

Corruption and Arbitration: Swedish Perspectives Against a French Backdrop

Simon Arvmyren & Chloé Heydarian[*]

§14.01 INTRODUCTION

Corruption is an unwanted reality from which arbitration is not spared. Many of the most common business sectors in arbitration are the most exposed to corruption; such as, construction, infrastructure, defence and natural resources. There is a risk that dubious parties will try to find a 'safe haven' in arbitration by exploiting the privacy and integrity of arbitration proceedings.

In most jurisdictions, corruption falls under the concept of international public policy (or *ordre public international*), the violation of which will render an award invalid or unenforceable. If contested, a national court will review the award, but the depth of the review differs among jurisdictions. Some jurisdictions have adopted a *minimalist approach* (e.g., Switzerland and the United Kingdom), while others have adopted a *maximalist approach* (e.g., France and the Netherlands).[1] The minimalist approach can be defined as a review based only on the facts established in the award. This excludes the possibility to correct or supplement the arbitrators' findings ex officio, even if such facts were established in a manner that is manifestly incorrect or contrary to the law.[2] The maximalist approach allows a court to go beyond the findings laid down in the award. The maximalist approach is neither limited to the evidence

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1. The terms 'minimalist approach' and 'maximalist approach' are not official terms or fixed in the sense that commentators will always use and define them in the same way. In this chapter we only use the terms to discuss the scope of the courts' review of an award in relation to facts. Other factors, such as standard of proof, are discussed separately from these terms.
2. *Alexander Brothers v. Alstom*, 4A_136/2016 (Swiss Federal Court, 3 November 2016).

produced before the arbitrators nor bound by their findings, assessments or qualifications.[3]

Using French case law as a comparative backdrop, this chapter seeks to study whether Swedish courts lean towards the minimalist or the maximalist approach, and to what extent Swedish law puts a duty of activity on arbitrators to raise issues regarding corruption ex officio and on their own initiative (sua sponte).

§14.02 WHAT IS CORRUPTION AND WHY IS IT RELEVANT FOR ARBITRATION?

Arbitration is a much-preferred form of commercial dispute resolution due to, among other things, its private nature. In arbitration, the parties are free to choose the arbitrators as well as the rules, place and language of the proceedings.[4] However, the possibility to adapt the procedure to the wishes of the parties comes with both pros and cons.[5] Owing to the private (and sometimes confidential) nature of arbitration, there is generally no public transparency or control of the process and the flexibility of arbitration can be used to reduce the public influence to a minimum, for example, by waiving the right to invoke certain grounds for challenging an award.[6] As a result, the incentives to confront and pursue corruption may be lower in arbitration than court litigation. One could even argue that the private nature of arbitration leads to a greater risk that corruption is realised, facilitated or rewarded when using arbitration compared to using court litigation.[7]

Transparency International defines corruption as 'the abuse of entrusted power for private gain'.[8] The definition is relatively general, which seems unavoidable given that corruption comes in many forms. Article 1 of the ICC Rules on Combating Corruption (2011) stipulates four main categories of prohibited practices: (i) bribery, (ii) extortion or solicitation, (iii) trading in influence and (iv) laundering the proceeds of such corrupt practices.[9] Corruption can be manifested through payments, undue advantage or excessive gifts and hospitality, such as luxury items or travel, which may be given to employees of companies or public entities to influence business decisions or secure an advantage. In relation to agents or intermediaries, bribes may be disguised

3. CA Paris Ch.1, 28 May 2019, No. 16/11182 and Cour de Cassation, 29 September 2021, No. 19-19.769.
4. L. Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Huntington, N.Y.: Juris Publishing, Cop. 2003) 13.
5. J. Kvart and B. Olsson, *Tvistlösning genom skiljeförfarande* (Juno, Version 3 2012) 15–16.
6. Cf. s. 51 of the SAA.
7. Cf. International Chamber of Commerce (ICC), International Court of Arbitration, *Tackling Corruption in Arbitration* (Bulletin, Volume 24, Supplement, 2013), 14.
8. Transparency International, *What is corruption?*, https://www.transparency.org/en/what-is-corruption (accessed 13 April 2022). Transparency international is a global civil society organisation that leads the fight against corruption. The organisations have over 90 offices worldwide with an international secretariat in Berlin.
9. '*These ICC Rules are intended as a method of self-regulation by business against the background of applicable national law and key international legal instruments*', in ICC Rules on Combating Corruption (2011), 4.

as a fee or commission. If a fee or commission exceeds what is considered as the industry standard it might be identified as a bribe.[10]

Extortion and solicitation can take the form of a demand for a bribe that may be coupled with a threat if the demand is refused. It may involve requests for payments or gifts in return for making decisions or conducting specific business-related tasks. Trading in influence is the sort of corruption illustrated by a business employee bribing a public official with the expectation to receive an undue advantage from the public authority in return. In relation to giving remuneration for receiving confidential information, other forms of corruption, such as insider trading,[11] might be a better label. Embezzlement occurs when employees misappropriate anything of value that was entrusted to them because of their position. There are also more subtle measures that may be considered as corruption, such as favouritism, nepotism, cronyism and clientelism, which all concern situations when a person or a group of persons are given unfair preferential treatment at the expense of others. Collusion is yet another form of corruption, which can be defined as a secret agreement for an illegal purpose. Collusion can be manifested through, for example, a labour union employee and a member of the company's management team exchanging favours that result in the employee's interests not being accurately represented.[12] It can also be illustrated by parties agreeing to make up a phoney dispute and resolve it in arbitration, to try to circumvent national law and launder money through obligations laid down in an award.[13]

All in all, the concept of corruption in business is very broad and can occur at different levels of corporate activity or spheres of influence. It goes well beyond what falls within the concept of bribery. This being so, we have, for the purposes of this chapter, limited the concept of corruption to the act of bribing public officials or private individuals in order to obtain a contract (unless stated otherwise).

§14.03 COMPARATIVE BACKDROP FROM THE FRENCH PERSPECTIVE

[A] Introduction

One issue that cuts across the board when discussing corruption in arbitration is the scope and standard of review to be applied by national courts when awards are challenged based on allegations of corruption. In a recent decision of 23 March 2022 (the *Belokon* case), the French Cour de Cassation may have put an end to the question of how thorough a review of an award should be in relation to international public policy in France.[14]

10. UNODC, United Nations Office on Drugs and Crime, *Forms and manifestations of private sector corruption*, https://www.unodc.org/e4j/en/anti-corruption/module-5/key-issues/forms-and-manifestations-of-private-sector-corruption.html (accessed 13 April 2022).
11. *Ibid*.
12. *Ibid*.
13. *See,* e.g., NJA 2002 Note C 45.
14. Cour de Cassation, 29 September 2021, No. 19-19.769.

[B] The *Belokon* Case

The judgment of 23 March 2022 of the Court de Cassation closed the Belokon saga, which started more than ten years ago. In 2007, a Latvian citizen, Mr Belokon, acquired the National Bank of the Kyrgyz Republic and renamed it Manas Bank. Political tensions later led to the fall of the Kyrgyz Republic's president and the new government placed Manas Bank under temporary administration and eventually a receivership. Criminal proceedings followed. In 2011, Mr Belokon commenced arbitration based on Article 9.2(d) of the bilateral investment treaty between the Republic of Latvia and the Kyrgyz Republic and Article 3 of the UNCITRAL[15] Arbitration Rules. By an award rendered in Paris in 2014, the tribunal ordered the Kyrgyz Republic to pay approximately USD 15 million in damages to Mr Belokon's. In so doing, the tribunal, among other things, rejected the Kyrgyz Republic's allegations that Mr Belokon had been involved in money laundering.[16]

The Kyrgyz Republic brought an action to have the award set aside at the Paris Court of Appeal.[17] The court set aside the award based on the conclusion that recognising the award would make Mr Belekon benefit from the result of criminal activities in a manner that would be in 'manifest, effective and concrete' violation of international public policy. For its reasons, the court raised ex officio that it has an obligation to investigate whether enforcement of an award might breach international public policy.

Mr Belokon appealed the judgment to the Cour de Cassation. The Cour de Cassation quoted the Paris Court of Appeal's statement that as a matter of principle money laundering cannot be tolerated by the French legal system, even in an international context, and especially since the fight against money laundering is part of international consensus, as expressed in particular by the United Nations Convention against Corruption.

The Cour de Cassation concluded that it was possible to qualify Mr Belokon's acts as money laundering based on 'serious, precise and conclusive evidence'.[18] The Paris Court of Appeal had already established that the connection between Mr Belokon and the son of the former president of the Kyrgyz Republic, Mr Bekiev, had been 'inappropriate'. Mr Bakiev occupied the top floor of the bank's building without a rental contract and without paying rental fees and other costs. The set-up was characterised by the Paris Court of Appeal as a misuse of social assets.[19] The Paris Court of Appeal had established that it was the privileged connection with the holder of economic power that guaranteed Mr Belokon freedom from 'real control' of his activities, which in turn facilitated money laundering. The Paris Court of Appeal concluded that the overwhelming success of Manas Bank, in such a short time and in such a poor country, could not be explained by normal banking practices.

15. The United Nations Commission on International Trade Law (UNCITRAL).
16. *Valeriy Belokon v. The Kyrgyz Republic*, UNCITRAL Award, 24 October 2014.
17. CA Paris Ch.1, 21 February 2017, No. 15/01650.
18. In French 'grave, précis et concordant'.
19. In French 'abus de biens sociaux'.

By its judgment in the *Belokon* case, the Cour de Cassation recognised the maximalist approach by adopting the view of the Paris Court of Appeal that the court's investigation of possible breach of international public policy was neither limited to the evidence produced before the arbitrators nor bound by the findings, assessments and qualifications made by them. The court's primary duty, in this respect, had been to ensure that the evidence presented before it complied with the principles of contradiction and equality of arms. Finally, the Cour de Cassation concluded that the Paris Court of Appeal had not revisited the merits of the award. Instead, the court had made its own assessment regarding the limited question of whether there was 'serious, precise and conclusive evidence' showing that recognition of the award would allow Mr Belokon to benefit from money laundering.

[C] The *Belokon* Case in Relation to Previous Case Law

The impact of the *Belokon* case in the French panorama cannot be fully appreciated without seeing a few cases such as the *Indagro* case or the infamous *Alstom* saga which have paved the way towards a maximalist approach.

[D] The *Indagro* Case

Before the *Belokon* case, the Cour de Cassation rendered another judgment (the *Indagro* case),[20] which was also on appeal from the Paris Court of Appeal.[21] The two companies Indagro and Ancienne Maison Marcel Bauche (Bauche) had entered into a contract for the sale of urea granules from Russia to Benin and Togo. There was a delay in the underloading of the vessel carrying the goods and Indagro claimed demurrage. Bauche initiated arbitration.[22] During the arbitration, which was seated in London, Bauche alleged that its purchasing agent had been bribed during the conclusion of the contract. In parallel, Bauche also brought an action based on the same allegation before the Paris Criminal Court. The sole arbitrator decided to suspend the arbitration proceedings in anticipation of the judgment of the criminal court, but on the condition that Bauche put up as security an amount corresponding to the litigious claim. Bauche agreed to post security but was unable to renew it at a later stage. As a result of this, the sole arbitrator ruled against Bauche.

Bauche brought an action to set aside the award before the Paris Court of Appeal on the argument that allowing enforcement of the award would be contrary to international public policy. In support of its action, Bauche relied on the judgment from the Paris Criminal Court, which had been rendered after the award. The sentence confirmed that the purchasing agent had indeed been bribed.[23] The Paris Court of Appeal stated that the principle of res judicata in criminal cases makes such cases

20. Cour de Cassation, 13 September 2017, Nos 16-25.657 and 16-26.445.
21. CA Paris Ch.1, 27 September 2016, No. 15/12614.
22. *Indagro v. Bauche*, Final Award, 6 May 2015.
23. Tribunal Correctionnel de Paris, 12 May 2016.

binding in subsequent civil processes. Thus, the Paris Court of Appeal was not bound by the findings of the sole arbitrator and set aside the award by application of international public policy. The court used the maximalist approach. Indagro appealed the judgment, but the Cour de Cassation also found that the award was in violation of international public policy and confirmed that the judgment of the Paris Criminal Court had res judicata effect. Among other things, the Cour de Cassation concluded that the court's review of the award 'cannot be conditioned by the attitude of a party before the arbitrator'.

[E] The *Alstom* Cases

The lengthy dispute between Alstom Transport and Alstom Network (Alstom), on the one side, and Alexander Brothers Ltd (ABL), on the other, came before the review of various different national courts. Alstom tried to set aside the award in front of the Swiss Federal Tribunal in 2018, the Paris Court of Appeal in 2019, the High Court of Justice of England and Wales in 2020 and finally, the Cour de Cassation in 2021. In short, the English and Swiss courts favoured the minimalist approach, while the Paris Court of Appeal, unsurprisingly, favoured the maximalist approach.

[F] Background

Alstom had signed three consultancy agreements with ABL regarding tenders for rail transport equipment in China. The agreements provided for staggering success fees if Alstom won the tenders. Alstom was awarded all three contracts by the Chinese Minister of Transport and paid the first terms of two contracts in 2006 and 2008 but did not pay the remaining balance and made no payment under the third contract. ABL commenced arbitration in Geneva in 2013.[24] During the arbitration, neither of the parties raised the allegation that the contracts were obtained through bribery. Alstom did not state that it had proof of acts of corruption, but expressed 'softer' concerns relating to ABL not having complied with Alstom's so-called Ethics and Compliance Policy and that Alstom was unable to pay ABL due to the risk of ABL possibly having been engaged in corrupt practices in the performance of the consultancy contracts and the subsequent risk for criminal prosecution. The arbitrators ordered Alstom to pay ABL.

[G] The Swiss Federal Tribunal

Unsatisfied with the decision, Alstom tried to set aside the award in the Swiss Federal Tribunal, arguing that the enforcement of the award would breach international public policy.[25] The Swiss Federal Tribunal adopted a minimalist approach and upheld the

24. *Alexander Brothers Ltd. v. Alstom Transport S.A. and Alstom Network UK Ltd.*, Award, 29 January 2016.
25. *Alexander Brothers v. Alstom*, 4A_136/2016, Swiss Federal Court, 3 November 2016.

award. It stated that the decision was based on the facts established in the award and that the court cannot correct or supplement the arbitrators' findings ex officio, even if the facts have been established in a manner that is manifestly incorrect or contrary to the law. The court added that its 'mission' is only to examine if objections against an award are well-founded. Allowing the parties to make factual allegations other than those established in the award would not comply with the court's function (other than in exceptional cases), even if such new factual allegations were established by evidence that had been submitted in the arbitration.

[H] The High Court of Justice of England and Wales

Alstom made the same allegations in its application to resist enforcement before the High Court of Justice of England and Wales (the High Court).[26] The High Court stated that Alstom 'could and should' have raised the issue of corruption before the tribunal as it 'had in its mind, and had the materials for, a bribery case', but that 'there is no explanation why this was not done'.[27] Unlike the Paris Court of Appeal, the High Court concluded that the evidence relied on was not particularly strong and that Alstom's allegations were 'entirely unspecific and based on suspicions and inferences'.[28] Therefore, the High Court concluded that there were no such 'exceptional circumstances' that would allow enforcement to be refused. The High Court also declared that there are several levels of seriousness of corruption.[29] In the present dispute, the bribery was considered as incidental, 'not planned, not contracted for, not suspected', and thus according to the court 'somewhat less serious'.[30]

[I] The Paris Court of Appeal and the Cour de Cassation

Following the decision of the Swiss Federal Court, ABL also sought enforcement before the Paris Court of Appeal.[31] The Paris Court of Appeal took the maximalist approach and noted that while the court is not the judge of the contract, it is the judge when it comes to the incorporation of the award into the national legal order. The review of the Paris Court of Appeal aimed to ensure that the recognition or enforcement of the award did not result in a 'manifest, effective and concrete' violation of international public policy. The court analysed the facts of the case on an ex officio basis and concluded that Alstom's payments to ABL had been used by ABL to bribe Chinese government officials and that sums payable under the award were 'intended to finance or remunerate acts

26. *Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited* [2020] EWHC 1584.
27. *Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited* [2020] EWHC 1584, at para. 174.
28. *Ibid*.
29. *Ibid*., at para. 159.
30. *Ibid*.
31. CA Paris Ch.1, 28 May 2018, No. 16/11182.

of bribery'. The Paris Court of Appeal refused to enforce the award by applying international public policy.

The Cour de Cassation reversed the decision, finding that the Paris Court of Appeal had misunderstood a witness transcript, thereby wrongly refusing to enforce the award.[32] The Cour de Cassation rendered a so-called arrêt de cassation avec renvoi, which means that the Cour de Cassation sent the case back to another lower court (the Versailles Court of Appeal) for a retrial. It would seem that it was not the approach regarding the scope and standard of review in relation to the international public policy taken by the Paris Court of Appeal that was problematic, but the appreciation of evidence.

[J] Discussion

The *Belokon case* confirms that the Cour de Cassation has taken a further step towards the maximalist approach. An adoption of the maximalist approach would mean that, going forward, the Paris Court of Appeal will be allowed to independently investigate all elements, factual and legal, relevant to an issue of international public policy in the context of corruption.[33] A further indication that the Cour de Cassation is creating a uniformed approach, is that it does not require the violation to be 'manifest, concrete and effective' or 'flagrant, concrete and effective', as previously stressed by the Paris Court of Appeal.[34] Instead, the Cour de Cassation simply seems to adopt the wording of Article 1520, paragraph 5 of the French Code of Civil Procedure, which states that 'an arbitral award may only be set aside when recognition or enforcement of the award is contrary to international public policy' as a sufficient standard. As Professor Pierre Mayer has rightly pointed out, the relevant question is not whether an award violates international public policy, but whether the *recognition of the award* would be compatible with international public policy.[35] However, we note that the Cour de Cassation has decided not to publish the *Belokon case* in the *Rapport annuel de la Cour de Cassation*, which references the most important cases. We think that additional cases are needed to finally determine whether the maximalist approach has fully triumphed and to which extent.

At first, the minimalist approach might be perceived as more arbitration friendly since it does not allow room for a court to raise issues outside the scope of the parties' causes of action. However, the potential negative long-term effects of arbitration of the minimalist approach could lead to the opposite conclusion. In cases where the

32. Cour de Cassation, 29 September 2021, No. 19-19.769.
33. T. Granier, *Une nouvelle confirmation du contrôle effectif et concret de la conformité à l'ordre public de la reconnaissance et de l'exécution des sentences internationales en matière de corruption privée, et une application discutable de l'article 519 CPC, note sous Paris, Pôle 1 – Ch. 1, 30 juin 2020*, Revue de l'Arbitrage (© Comité Français de l'Arbitrage; Comité Français de l'Arbitrage 2021, Volume 2021 Issue 1) 133, pp. 129–144.
34. CA Paris Ch.1 18 November 2004, No. 2002/19606, CA Paris Ch.1, 30 June 2020, No. 17/22515, CA Paris Ch.1, 16 January 2018, No. 15/21703.
35. S. Arvmyren's notes from the speech by Professor P. Mayer at the meeting of the ICC Commission on Arbitration and ADR on 29 March 2022.

arbitrators do not raise the issue of corruption despite numerous indicators, such as in the *Alstom* case, there is a risk that awards that violate international public policy become enforceable, which in turn may be detrimental to the perception, integrity and legitimacy of arbitration in the longer run. The maximalist approach is, however, not a flawless alternative. Why should a party that has stayed silent during the arbitration suddenly be allowed to successfully contest the award by invoking international public policy? The maximalist approach arguably benefits a party that, for tactical or obstructive purposes, chooses to 'save' an allegation of corruption for possible set aside proceedings or as a basis for opposing enforcement. That is of course undesirable, since it causes unnecessary further legal proceedings.

§14.04 POSSIBLE MEANS OF CONTROLLING CORRUPTION IN ARBITRATION UNDER SWEDISH LAW

[A] Introduction

It is a reasonable starting point that rules governing arbitration must serve the purpose of preventing arbitration from being used to realise, facilitate or reward corruption. It is also a reasonable starting point that such rules must be adapted to the reality of the arbitrators responsible for the award and the proceedings, but also take into account that the arbitrators' mandate is contractually based. It would be naïve, and probably counterproductive, to think that arbitrators should (or could) police arbitrations with the same authority and diligence as public enforcement agencies are expected to do.

The means of controlling corruption in arbitration should not go beyond the usual means of ensuring that arbitration proceedings are conducted within acceptable standards of rule of law and due process, and that awards do not give rise to offensive results. Controlling corruption in arbitration should be limited to the same means of control as already exist.[36] The increasing awareness of corruption globally may, however, lead to a need to reassess the methods and standards of how such means of control shall be understood and applied. For example, the arbitrator may have a *duty of activity* with respect to facts that indicate corruption, which goes further than in relation to other facts and that is stricter than has previously been believed to be the case. Swedish arbitration law should take into consideration the developments in other jurisdictions.

In the following, when we talk about 'controlling corruption', we mean such means of control already exist under Swedish law to prevent arbitration from being used to realise, facilitate or reward corruption.

36. Cf. ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *Addressing Issues of Corruption in International Arbitration*, November 2021, 6, http://www.rettig.icc.se/wp-content/uploads/2021/11/Corruption-report-The-Swedish-National-Committee-Nov2021.pdf (accessed 13 April 2022).

[B] Controlling Corruption by Setting Aside the Award

The ultimate, and perhaps most obvious, means of controlling corruption is the possibility to *set aside* an award that is, in some respect, the result of corruption. Setting aside the award would effectively reverse the corruptive implications of the award. The legal effect of setting aside an award is that the award will be annulled and lose all legal effect, sending the issue decided by the arbitrators back to an absolute zero point.

Swedish law distinguishes between two legal concepts for setting aside an award which are dealt with in two separate provisions of the Swedish Arbitration Act (SAA) (sections 33 and 34 of the SAA). The first legal concept protects third-party interests (such as aspects of competition law, intellectual property law or family law) or interests that are subject to the legitimate state monopoly over those parts of the legal system that uphold civilian authority (such as criminal law, tax law, other fields of administrative law, the protection of fundamental rights and some particular aspects of private law). An award that infringes such third-party or public interest is *invalid*, a nullity, and may be set aside without restriction in time. The legal concept of invalid awards deals, among other things, with cases of an issue *not being arbitrable* or an issue being *contrary to Swedish public policy*.[37]

The second legal concept for setting aside an award protects various aspects of party interest and is subject to strict time limits with respect to bringing an action to set aside (a challenge of the award).[38] The legal concept of *challengeable* awards deals, among other things, with cases of an issue not being covered by a valid arbitration agreement, an arbitrator not being impartial and independent or the occurrence of procedural errors affecting the outcome of the dispute.[39]

[C] Controlling Corruption by Refusing Enforcement

Given that the possibility of setting aside an award is limited to the seat of arbitration, the controlling function by national courts over foreign awards can only be exercised at the enforcement stage.

In order to enforce a foreign award in Sweden, one must first apply to the Stockholm appellate court (the Svea Court of Appeal) for a declaration of recognition and enforceability of the award. The conditions for declaring an award enforceable are set out in sections 53–55 of the SAA. Section 55 provides that an application for recognition and enforceability shall be rejected if the court finds that the award includes the determination of an issue that may not be decided by arbitrators under Swedish law (arbitrability) or that it would clearly be incompatible with the basic principles of the Swedish legal system to enforce the award (public policy). The bases for refusing enforcement under section 55 of the SAA mirror the bases for setting aside an award due to it being invalid. Furthermore, section 54 of the SAA contains a

37. Section 33 of the SAA.
38. Section 34 of the SAA.
39. *Ibid*.

possibility to refuse enforceability if the party against whom the award is raised can prove, for example, that the arbitration agreement is invalid, that the party was not given proper notice of the arbitration or the appointment of an arbitrator, or that the party was otherwise unable to properly present its case. This section protects the party interest of not having to tolerate an award that is challengeable.

[D] The Minimalist or Maximalist Approach?

Under Swedish law, set aside and enforcement proceedings are subject to standard rules of civil procedure, which provide that the parties can submit and invoke new facts and evidence, including facts and evidence beyond what was submitted in the arbitration. Under the so-called principle of free assessment of evidence, the court is free to assess the evidentiary value of such new evidence. This is what courts regularly do and it indicates a maximalist approach, although the court may of course assess that new evidence will not outweigh the assessment made in the award. We believe that although Swedish courts would likely be prevented from using the minimalist approach in the strict sense, the actual assessment might result in an outcome similar to what would have been the case if a minimalist approach was used.

In the Supreme Court Case NJA 2015 p. 433, concerning an application for recognition and enforceability of an award, the Supreme Court stated that a court should raise and assess, on its own motion, circumstances that have been disclosed in the matter that may lead to the application of public policy.[40] With 'the matter', the court referred to the matter before the court, thus not limiting itself to what had been disclosed in the arbitration. The Supreme Court also expressed, however, that the court's obligation does not go beyond this duty of activity (to 'raise and assess'), and it is not the function of the court to independently attempt to find or research circumstances. One could say that the court should not assume the role of the police or a public prosecutor.

In one sense, the Swedish approach is even more maximalist than, for example, the French approach since under Swedish procedural law, a sentence following criminal proceedings would not have a res judicata effect in a subsequent arbitration or in a case before civil court, even if exactly the same allegations of corruption are raised.[41] Under Swedish law, this would, among other things, be an effect of the parties not being the same in criminal proceedings, which is between the state (the public prosecutor) and the defendant, and in the civil case. A sentence has strong evidentiary value, but in theory, the court would be able to go beyond the conclusions in the criminal proceedings if something new and material comes up (it goes without saying,

40. *See* Svea Court of Appeal, Judgment of 22 April 2021 in Case No. T 603-1 where the court emphasised that although the departure point is the arbitrators' assessment of the evidence, the court has to make an independent assessment with respect to evidence that had not been presented in the arbitration.
41. ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *Addressing Issues of Corruption in International Arbitration*, *supra*, 1–8, 2.

however, that a sentence cannot be reversed in a civil case). At the same time, Sweden and France are similar in the sense that in both jurisdictions, a court is not bound by the arbitrators' findings if corruption has taken place.[42] The stricter application of the res judicata principle in France, making a sentence in criminal proceedings binding upon a civil court seems to be more a question of method and principle, than having a different view on the maximalist approach. Thus, in our opinion, there is no doubt that Swedish law adheres to the maximalist approach when it comes to such bases for an action to set aside or refuse enforcement that would render the award invalid, but also in relation to other party interests that are axiomatic to arbitration; such as the existence of a valid arbitration agreement or that an arbitrator must be impartial.[43]

[E] Arbitrability as the Legal Basis for Controlling Corruption

Under section 33(1) of the SAA, an award is invalid and shall be set aside if the issue determined by the award is not arbitrable. As a main rule in Sweden, disputes which are arbitrable are those that the parties can resolve through settlement.[44] With respect to issues of corruption, the departure point seems to be that an issue involving an allegation of corruption is capable of settlement and thus arbitrable. One author, Professor Kaj Hobér, states that an allegation of bribery and corruption does not deprive the arbitrators of jurisdiction due to non-arbitrability.[45] Another author, former Supreme Court Justice Stefan Lindskog, confirms the international tendency to move the concept of arbitrability from a procedural context to more of an issue of substantive law.[46] In Lindskog's opinion, arbitrators tend to accept jurisdiction over an issue involving an allegation of corruption, but rejecting the claim on the merits.[47] Lindskog argues that rejecting a claim on the merits prevents immorality in a more effective way, which seems to be in contrast with previous ideas.[48]

An ICC Sweden national committee report discusses cases involving some form of corruption, fraud or alleged illegality. The authors conclude that there is a high

42. *Ibid*.
43. Other commentators have expressed the opposite belief, arguing that Swedish law lies nearer to the minimalist approach as adopted in the UK. However, this conclusion seems to be based on a confusion of the scope of the courts' review of an award in relation to facts and the applicable standard of proof. *See* C. Sanderson, *GE Pays Out after Losing Corruption Challenge in Legacy Case*, Global Arbitration Review https://globalarbitrationreview.com/article/ge-pays-out-after-losing-corruption-challenge-in-legacy-case (accessed 6 May 2022).
44. *See* s. 1(1) of the SAA and Prop. 1998/99:35, 48.
45. K. Hobér, *International Commercial Arbitration in Sweden* (Second edition, Oxford University Press 2021) 117.
46. S. Lindskog, *Skiljeförfarande: en kommentar* (Juno, Version 3 1 June 2020) Chapter 33, 4.4.1.
47. *Ibid*.
48. Cf. the illustrative statements by Lagergren in the ICC Case No. 1100. The Swedish Judge Gunnar Lagergren acted as a sole arbitrator and declared that he did not have jurisdiction to decide over a dispute in which the main contract resulted from bribery. Contrary to some of the criticisms of this decision, Lagergren rejected the idea that issues of corruption were not for arbitrators. In his opinion there were well-founded indicators of corruption, but they remained unproven and the parties refused to cooperate. He averred: 'In these conditions, I cannot deal with the request to order performance of the contract. What can I do? I can only say that I have no jurisdiction.'

threshold for the arbitrators to find themselves lacking jurisdiction on the basis that the case is not arbitrable.[49] In this respect, we note that the prevailing view internationally seems to be that when jurisdiction is challenged due to an allegation of corruption, the dispute will still be considered arbitrable.[50] This is supported by an unpublished ICC award from 2003,[51] in which the arbitrators found that the contract in dispute was invalid since its purpose was to bribe a public official in order to obtain another contract. The arbitrators applied the doctrine of separability and concluded that the arbitration agreement was separate and, as such, remained valid.[52]

Having said the above, it is questionable whether *all* disputes involving corruption are arbitrable, without considering the extent and severity of the corruption. We note that Swedish courts have in several cases pointed to the necessity of a *real legal relationship* between the parties as a condition for a court, or arbitrators, to be able to adjudicate the issue. In NJA 2002 note C 45, two brothers had colluded with each other in order to establish an award confirming the transfer of ownership of a real estate property from one brother to the other, thereby excluding the property from being included in the first brothers' bankruptcy estate. For its reasons, the Supreme Court implied that the brothers had created a fictitious transfer document to deceive the bankruptcy estate. The court refused to enforce the award and concluded that it did not reflect a real legal relationship.[53] In NJA 2015 p. 433, the Supreme Court identified several factors indicating that the disputed agreement was a sham agreement and noted that courts shall not assist in enforcing awards where it would be highly offensive to do so. In a case from the Stockholm Court of Appeal (the *Stati* case),[54] the court stressed the importance of a real legal relationship between the parties, despite finally concluding that a fraudulent scheme together with falsified evidence was, on the facts of that case, not enough to conclude the absence of a real legal relationship.[55]

It is possible that in a situation where the corruption is so severe or collusive that the contract must be considered a sham or not reflecting a real legal relationship, the issue could be considered as not arbitrable. But, it would also be possible to see it as an issue of public policy which might be an easier route.

49. ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *Addressing Issues of Corruption in International Arbitration*, *supra*, 1–8, 8.
50. International Chamber of Commerce (ICC), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 13.
51. *See* C. Albanesi and E. Jolivet, 'Dealing with Corruption in Arbitration: A Review of ICC Experience', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 27–38, 30.
52. *Ibid*.
53. ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *Addressing Issues of Corruption in International Arbitration*, *supra*, 1–8, 7.
54. Svea Court of Appeal, Judgment of 9 December 2016 in Case No. T 2675-14.
55. ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *Addressing Issues of Corruption in International Arbitration*, *supra*, 1–8, 7.

[F] Public Policy as the Legal Basis for Controlling Corruption

The French legal system makes a distinction between 'national' public policy and 'international' public policy (*ordre public international*).[56] In Sweden, the topic is not extensively discussed. In theory, it might be possible to make a distinction, but this chapter does not pretend to bring a solution. One author, Hobér, points out that 'in practice it would seem likely that if application of any law or rule would be deemed to be contrary to international public policy such application would in all likelihood also violate the national public policy'.[57] In the context of corruption, we believe that under most legal systems corruption is considered to fall within the standard of international public policy as an example of immoral and socially destructive behaviour.[58] It is generally accepted that corruption goes against 'fundamental rules of law' and 'principles of natural justice'.[59] This being so, the possibility of setting aside an award based on public policy is still intended to be applied restrictively by the courts.[60]

Under section 33(2) of the SAA 'an award is invalid if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system'. This was further elaborated upon in the preparatory works, which stated, among other things, that section 33(2) of the SAA is applicable when the award orders a party to perform a payment that is an agreed-upon bribe.[61] It is possible to consider corruption as a matter of public policy under Swedish law.[62] An award may also come in conflict with public policy if the contract in question is considered to be a so-called *pactum turpe*, an illegal or immoral contract,[63] or enforces a right based on a *pactum turpe*.[64] Under Swedish law, the doctrine of *pactum turpe* is a

56. Under French law, ordre public international is defined as 'the principles of universal justice considered in French opinion as endowed with absolute international value', French in the original, 'principes de justice universelle considérés dans l'opinion française comme doués de valeur internationale absolue', *Lautour case*, Cour de Cassation, 25 May 1948.
57. K. Hobér, *International Commercial Arbitration in Sweden* (Second edition, Oxford University Press 2021) 53.
58. P.L. Ullmer, *The Arbitrator's Dilemma: Does the Potential Arbitrator's Duty to Investigate Corruption on His/Her Own Initiative Create Conflicts with the Parties' Due Process Rights?* (Master Thesis, Stockholm University 2021) 11.
59. P. Lalive, 'Transnational (or Truly Transnational) Public Policy', in Comparative Arbitration Practice and Public Policy in Arbitration, Pieters Sanders Edition, ICCA Congress Series, Volume 3 (ICCA & Kluwer Law International 1987), 290–291.
M. Hwang and K. Lim, *Corruption in Arbitration: Law and Reality*, Asian International Arbitration Journal (© Singapore International Arbitration Centre (in co-operation with Kluwer Law International); Kluwer Law International 2012, Volume 8 Issue 1), 1–119, 101.
World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award 4 October 2006, para. [148].
Final Award in ICC Case No. 13914 (Extract) para. 230.
60. *See* SOU 1994:81, *Skiljedomsutredningen,* 289; Prop. 1998/99:35, 142; Svea Court of Appeal, Judgment of 22 April 2021 in Case No. T 603-19.
61. *See* Prop. 1998/99:35, 234.
62. *See* Svea Court of Appeal, Judgment of 22 April 2021 in Case No. T 603-19.
63. F. Andersson et al., *Arbitration in Sweden* (Jure 2011) 62.
64. Prop 1998/99:35, 141.

'super-mandatory' norm, which applies irrespective of the law otherwise applicable to the contract.[65]

As in most jurisdictions, Swedish legal theory makes a distinction between procedural and substantive public policy.[66] This is confirmed by Professor Lars Heuman, who divides public policy into the said two categories.[67] Another author, Lindskog, states that procedural public policy means that something in the procedure does not live up to the necessary requirements for the rule of law; and that substantive public policy means that the content of an award is in some way contrary to the foundations of the Swedish legal system.[68]

[G] Procedural Public Policy

Fundamental procedural principles, such as due process, impartiality, the right to legal representation and the right to be heard, may all raise public policy concerns.[69] If a party influences one or more arbitrators to take a certain action by using bribery or another criminal act, procedural public policy may be applicable.[70] Procedural public policy may also be applicable if an arbitration clause contains provisions that constitute a serious deviation from fundamental procedural principles.[71]

However, not all serious procedural shortcomings amount to an award being contrary to procedural public policy. In the Government official report preceding the SAA, the committee suggested that awards based on *false evidence*, such as an expert or a witness committing perjury or falsified documents being relied upon, should be considered contrary to public policy.[72] The suggestion was not adopted in the final Government proposal. In choosing between the interest of substantively correct awards and the parties' interest in having the dispute resolved quickly, the legislature considered that the latter outweighed the first. It was an explicit objective of the SAA to satisfy, to the greatest extent possible, the interest of having a final and binding award through a speedy and efficient proceeding.[73]

65. F. Andersson et al., *Arbitration in Sweden* (Jure 2011) 62.
66. *See* Prop. 1998/99:35, 232; SOU 1994:81, *Skiljedomsutredningen*, 289.
67. L. Heuman, *Skiljemannarätt* (Norstedts Juridik AB, edition 1:6, 1999) 600.
68. S. Lindskog, *Skiljeförfarande: en kommentar,* Chapter 33-4.2.1–4.2.3.
69. S.A. Budok, S.U Gürman and C.Ç. Kadıoglu, *International vs. Domestic Public Policy in International Arbitration: Where Does It Begin, Where Does It End?* (Lexology 2019) 31–33, 31, https://www.lexology.com/library/detail.aspx?g=8edc0dee-29e9-45e9-9879-e0b4deb80105 (accessed 13 April 2022).
70. L. Heuman, *Skiljemannarätt*, 600; SOU 1994:81, *Skiljedomsutredningen,* 172, 182 and 289; Prop. 1998/99:35, 142, 150 and 234.
71. L. Heuman, *Skiljemannarätt*, 601; SOU 1994:81, *Skiljedomsutredningen,* 172 and 289; Prop. 1998/99:35, 142, 150 and 234.
72. SOU 1994:81, *Skiljedomsutredningen*, 182.
73. *See* Prop. 1998/99:35, 149.

[H] Substantive Public Policy

The situation that an award is contrary to substantive public policy constitutes an exception to the rule that an award may not be reviewed on the merits and represents one of those exceptional instances when it is more important to have a decision that reflects the true condition of things than to preserve the finality of the award.[74] This implies that courts should apply substantive public policy restrictively. Objections based on substantive public policy should relate to the principles of '*pacta sunt servanda*, good faith, abuse of right, prohibition of bribery and corrupt practices, and protection of individual rights'.[75] Specific examples of the latter are when the award allocates criminally acquired funds or if an arbitrator has failed to comply with some mandatory rule of law, regarding a third-party or public interest, at least if the arbitrators have failed to apply a particularly important legal standard.[76] It is also possible that offensive cases of incorrect application of the law, assessment of evidence and other things may in exceptional cases cause an award to be invalid as being contrary to substantive public policy if the result of the award is truly unreasonable.[77]

§14.05 THE ARBITRATORS' OBLIGATION TO ENDEAVOUR TO ACHIEVE AN AWARD THAT IS NOT INVALID, CHALLENGEABLE OR UNENFORCEABLE

[A] Introduction

The basis upon which an arbitration comes into existence is the arbitration agreement[78] and accordingly the arbitrators' mandate is also *contractually based*. Under section 27(1) of the SAA, there is a mandatory procedural requirement that the dispute referred to the arbitrators shall be decided by an award. This requirement also encapsulates a contractual undertaking by the arbitrators, but besides some supplementary provisions concerning the formal content[79] the SAA does not provide for any particular standard of quality of an award.[80] Where the quality of performance is left undetermined, general principles of Swedish contract law assumes that the performance shall be of *normal standard*[81] or, in other words, of a standard that is reasonable and not less than

74. N. Voser and A. George, *Revision of an Srbitral Award*, ASA No. 38 Post Award Issues, 43–74, 43, https://www.swlegal.ch/media/filer_public/32/63/32637dcf-3c36-46a1-b8bf-98f3cdf21573/09-chapter-3.pdf (accessed 13 April 2022).
75. S.A. Budak and S.U. Gürman, *International vs. Domestic Public Policy in International Arbitration: Where Does It Begin, Where Does It End?* (Lexology 2019) 31–33, 31, https://www.lexology.com/library/detail.aspx?g=8edc0dee-29e9-45e9-9879-e0b4deb80105 (accessed 13 April 2022).
76. S. Lindskog, *Skiljeförfarande: en kommentar*, Chapter 33-4.2.2.
77. *Ibid*.
78. S. Lindskog, *Skiljeförfarande: en kommentar*, 724. Here disregarding the rare instances of statutory based arbitration.
79. *See* s. 31 of the SAA.
80. Cf. S. Lindskog, *Skiljeförfarande: en kommentar*, 710.
81. *See* for example K. Rodhe, *Obligationsrätt* (1956) 219 et seq.; J. Ramberg and J. Herre, *Internationella köplagen (CISG): en kommentar*, ss 7.2.2 and 7.2.4, Juno (accessed 29 June

average in the circumstances.[82] In our opinion, this principle provides an appropriate starting point for the standard of quality applicable to awards;[83] a standard that arbitrators have an obligation to endeavour to achieve in order to preserve the integrity of the arbitration.[84]

The purpose of this article is not to set out all elements of what the normal standard of an award should be,[85] but an award that is invalid, challengeable or unenforceable would, in our opinion, not fulfil the requirement of being of normal standard.[86] The arbitrators must, as a minimum, endeavour to achieve an award that is free from such encumbrances. In our opinion, this shall mean that the arbitrators have a duty of activity with respect to such facts or indicators of fact, such as corruption, that threatens the achievement of an award that is invalid, challengeable or unenforceable.

[B] Procedural Guidance

The rules and steps of the arbitration process are laid down by the arbitration agreement together with any additional procedural agreements between the parties, as supplemented by the SAA and other sources of law. As a starting point, procedural rules are binding for the arbitrators, but they also provide the arbitrators with certain powers or tools. Some rules allow for a fair portion of discretion. An important instrument to exercise control over the arbitration process and protect the integrity of the arbitration is the arbitrators' obligation, and corresponding right, to use procedural

2022); T. Sandström, *Mönster i förmögenhetsrätten*, ss 5, 112, footnote 6 and 7, Juno (accessed 29 June 2022); J. Kihlman, *Fel*, s. 1.6.2., Juno (accessed 29 June 2022); Arrhed, *Offentlig upphandling av komplexa IT-tjänster*, ss 5.3, 78, footnote 20, Juno (accessed 29 June 2022); and cf. Norwegian law V. Hagstrøm, *Obligasjonsrett* (Second edition 2011) 166–175.

82. Cf. Art. 5.1.6 UNIDROIT Principles 2016 and Art. 6:108 Principles of European Contract Law.
83. Cf. A. Gomez-Acebo, 'Chapter 3: The Right to Make a Unilateral Appointment', in *Party-Appointed Arbitrators in International Commercial Arbitration*, International Arbitration Law Library, Volume 34 (© Kluwer Law International; Kluwer Law International 2016), 39–68, footnote 101, 'a good award is an award which is right and can be enforced. "Right" means right on the merits, the materialisation in each particular case that justice is done. A bad award is one that is wrong in its decision on the merits or is not enforceable (at least in some places)'.
84. We note that to some extent the parties can dispose of the standard of an award by way of agreement, which can lead to tricky considerations; for example, if the respondent does not participate in the arbitration or takes a passive approach. Cf. S. Lindskog, *Skiljeförfarande: en kommentar*, IV:0-5.3.7, in particular on 720–722, commentary to 8 §, Allmänna anmärkningar.
85. Cf. S. Lindskog, *Skiljeförfarande: en kommentar*, Chapter IV, in particular on 723–732. Lindskog does not relate standard of the award to the contractual norm of normal standard, but reasons along the same lines, stating, among other things, that the dispositive part of the award must be 'adequate' and provide for an order that is enforceable, or a declaration that can serve as basis for further adjunction (on 724). Lindskog also notes that it must be assumed that arbitrators 'should' provide reasons for the determination of issues referred to them, since it would improve the 'quality' of the award (on 727).
86. Cf. s. 9 of the Swedish Promissory Notes Act, which contains a rule regarding the standard of quality in relation to monetary obligations; determining the standard to be that the obligation must be 'valid' (*veritas*), but not that the obligation must be 'good' (*bonitas*) in the sense that the obligor will actually perform the obligation. Depending on the contractual context, s. 9 of the Promissory Notes Act can be applied to other types of obligations. Cf. E.M. Runesson, *Licens till patent och företagshemligheter i avtals- och kontraktsrätten*, 96 et seq.

guidance (Swedish: *materiell processledning*) in order to actively deal with issues that arise during the proceedings.

By way of analogy, the obligation to pursue procedural guidance finds its legal support in section 8 of Chapter 42 and section 4 of Chapter 43 of the Swedish Code of Civil Procedure, which prescribes that a court shall, from what is demanded under the circumstances, endeavour to achieve that the issues in dispute are clarified and that the parties specify everything they want to rely on in the proceedings. The court shall exercise procedural guidance by asking questions and making statements with the aim of remedying ambiguities and incompleteness in the parties' submissions. The extent to which the court shall pursue procedural guidance is determined, on the one hand, by the parties' right to an effective remedy before court and, on the other hand, by the court's duty to remain impartial.[87] The use of procedural guidance shall be applied restrictively and it should, in principle, be limited to aiding the parties, to the extent necessary, to *clarify* their request for relief, the various bases for the request and what evidence they wish to adduce.[88] Procedural guidance is primarily to be used during the preparatory steps of the proceedings and thus before the evidentiary hearing.[89] The court's obligation to pursue procedural guidance is stricter in relation to mandatory law, typically protecting third-party or public interests.[90] It is a fair assumption that the court's duty of activity is also stricter in relation to indicators of corruption.

There are some differences in how procedural guidance is to be used in arbitration compared to court proceedings. For several reasons, arbitrators should use procedural guidance more restrictedly than a court. In arbitration, many of the interests that justify procedural guidance are not as prevalent. For example, although it may appear somewhat cynical, the arbitrators are not, at least not to the same extent as a court, guided by the same higher purpose of achieving a decision that is right on the merits[91] (although arbitrators would of course also be inclined to reach a correct outcome given the finality of an award). This perspective is mirrored by the fact that an award cannot be appealed, but only set aside under certain rather limited conditions. Also, arbitrators do not have to consider that less restricted procedural guidance could save the courts' resources and thus have a positive economic effect on public spending.[92] The more restricted approach in arbitration seems to have been confirmed by the Supreme Court in older case law, where the court stated that it is uncertain whether an omission to exercise procedural guidance by arbitrators constitutes a ground for setting aside an award.[93] Naturally, a more extensive obligation for arbitrators to exercise procedural guidance would limit party autonomy and possibly the speediness of arbitration proceedings.[94] Exercising procedural guidance should reflect the parties' reasonable expectations on the arbitration process.

87. *See* Prop. 1986/87:89, 105.
88. *See* Prop. 1986/87:89, 106.
89. *See* Prop. 1986/87:89, 216.
90. *See* Prop. 1986/87:89, 104, 108, 196 and 217.
91. B. Lindell, *Alternativ tvistlösning* (First edition, Iustus 2000) 173–175.
92. *Ibid*.
93. *See* NJA 1973 p. 740.
94. B. Lindell, *supra*, 175.

Independence and impartiality will in practice be considered with a higher degree of sensitivity than in relation to judges, which coincides with the fact that arbitration is based on trust in the arbitrators.[95] It is axiomatic that an arbitrator must be impartial,[96] and under Swedish law this principle is laid down in sections 7–9 of the SAA. The meaning of impartiality and independence is, among other things, that the arbitrator shall act without considering the parties' material interests.[97] As regards the use of procedural guidance, Lindskog claims that the use of procedural guidance cannot be deemed to damage the confidence in the arbitrator, if the parties are treated equally.[98] However, it has been suggested that procedural guidance should in general be exercised with caution, not be perceived as lacking objectivity.[99] If the arbitrators are uncertain whether to use procedural guidance, they should limit themselves to such measures that are necessary, but without risking helping one of the parties to improve its case.

That being said, we submit that arbitrators do have duty of activity and that they shall use procedural guidance to raise issues on their own initiative (sua sponte) if something wrong threatens the achievement of an award of normal standard.[100] Deliberate or careless inactivity, causing a forthcoming award to be possible to set aside is not desirable and should not be a protected approach to arbitration proceedings. This seems to be particularly true considering Swedish courts being likely to use the maximalist approach in line with the French case law described above. The duty of activity must be especially strong in cases where the arbitrators perceive indicators that would render the award invalid under section 33 of the SAA, such as indicators of something being contrary to public policy or outside the scope of arbitrability. We believe this view to have solid support.[101] The arbitrators should actively raise issues regarding a well-founded suspicion that the claim is the result of corruption (such as a bribe) and doing so would normally not compromise the arbitrator's independence and impartiality,[102] at least as long as the issue is raised in a neutral manner preserving the

95. Cf. B. Lindell, *Alternativ till rättskipning: förhandling, medling, processförlikning, tvistlösningsnämnder och skiljeförfarande* (First edition, Iustus 2020) 300–301.
96. *Halliburton Company v. Chubb Bermuda Insurance Ltd*, UK Supreme Court [2020] UKSC 48.
97. S. Lindskog, *Skiljeförfarande: en kommentar*, commentary to 8 §, Allmänna anmärkningar.
98. S. Lindskog, *supra*, Särskilda fall.
99. *See* SOU 1982:26, 121.
100. Cf. Svea Court of Appeal, Judgment of 22 April 2021 in Case No. T 603-19; *see also* ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *Addressing Issues of Corruption in International Arbitration*, *supra*, 1, 3–5.
101. NJA 2015 p. 433; S. Lindskog, *Skiljeförfarande: en kommentar*, Chapter 33-3.3.2; F. Madsen, *Kompetenz-Kompetenz in Swedish Arbitration Law Is Being Recast, How Should It Be Done?*, SvJT 2016 653–673, 655.
102. In could be submitted that the arbitrators' choice to address corruption may endanger the principle of equal treatment by giving 'guidance' to one the parties. However, in the *Metal-Tech v. Uzbekistan* case it was stated that '[t]he idea […] is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act'. *See Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award 4 October 2013, para. [389].

parties' right to be heard.[103] We note, however, that arbitrators do not have an obligation to report suspicions of corruption to any relevant authorities.[104]

[C] The Principle of *Iura Novit Curia*

As an alternative to procedural guidance as a method for controlling issues of corruption in arbitration, the arbitrators could possibly also deal with problems from a substantive perspective using the principle of *iura novit curia* (in the arbitration context sometimes also called the principle of *iura novit arbiter*). The principle of *iura novit curia* could be said to mean three things. First, that the parties do not have to prove the content of the applicable law.[105] Second, that the court is generally not confined to the legal qualifications and arguments that the parties have made in the proceeding as applied to the pleaded facts.[106] And third, that a court can rule *non ultra petita*, interpreting or construing the request for relief sought, as long as that the judgment does go beyond or provides for something else than sought by the plaintiff.[107]

According to Supreme Court Justice Eric M. Runesson, *iura novit curia* in its first meaning does not apply in international arbitrations seated in Sweden, unless the parties and the arbitrators agree otherwise. As regards the second and third meaning, *iura novit curia* will apply in international arbitration seated in Sweden, again, unless the parties and the arbitrators agree otherwise.[108] Runesson recognises that this view leads to a wide mandate for the arbitrators, but that they do not have to stretch their mandate to the outer limits.[109] If the arbitrators would choose to use their mandate in a wide manner, their decision-making process must also not violate the adversarial nature of the proceedings.[110] This means that the arbitrators, as a starting point, shall give the parties a reasonable opportunity to be heard and that the arbitrators must avoid rendering an award with a surprising outcome caused by surprising reasoning, since such an award may be set aside due to a procedural error.[111] Runesson states that 'the significance of the surprise is that the parties by an objective assessment had no reason to address the possibility of the reasoning in their pleadings and submissions. In this way due process has been violated in the sense that the parties have not been given a reasonable opportunity to be heard'.[112]

103. *See* in D. Baizeau and T. Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte', in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Volume 19 (© Kluwer Law International; ICCA & Kluwer Law International 2017), 225–265, 246.
104. ICC, National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *supra*, 6.
105. E. Runesson, *Jura Novit Curia and Due Process with Particular Regard to Arbitration in Sweden*, Juridisk Tidsskrift, Nr 1 2017/18, 172–196, 172.
106. E. Runesson, *supra*, 172.
107. *Ibid*.
108. *Ibid*.
109. *Ibid*.
110. *Ibid*.
111. *Ibid*.
112. E. Runesson, *supra*, 190.

The idea that arbitrators should not use a surprising application of the law is supported by Finn Madsen.[113] This view also reflects the attitude of Swedish courts as regards the application of *iura novit curia*, namely that courts are obliged to inform the parties of such legal rules that have not been addressed by the parties but may be of significance for the outcome of the case.[114] It can be argued that the arbitrator also has a certain duty to draw attention to rules that the parties have not introduced.[115] We believe that the arbitrators will have a duty to draw the parties' attention to, for example, that contracts falling within the category of *pactum turpe* are ineffective. This could be done using the principle of *iura novit curia*. Similarly, if the arbitrators conclude that a claim is based on an undertaking to pay a bribe, the reasonable outcome should be that the claim is rejected on the merits.[116] Also, in such cases, the arbitrators can use the principle of *iura novit curia* to draw the parties' attention to legal rules and regulations that make it impossible for the arbitrators to uphold such a claim, since an outcome to the contrary would probably be considered as surprising.

[D] The Standard of Proof

Faced with a suspicion of corruption the arbitrators will find themselves in the dilemma of, on the one hand, potentially failing to perform their obligation to endeavour to achieve an award of normal standard (free from encumbrances) unless they react actively to the suspicion, and, on the other hand, potentially over-reacting and thereby – ironically – causing a forthcoming award to be challengeable as a result of the arbitrators exceeding their mandate or losing their impartiality. So, when should the arbitrators do something actively and when should they wait and see? Unfortunately, it appears impossible to establish a simple rule that can be applied in all circumstances, but some guidance can be given.

As said, the arbitrators' mandate is *contractually based*. Although the obligation to endeavour to achieve an award free from encumbrances is an obligation towards *both* the claimant and the respondent, failure to react actively to a suspicion of corruption will often benefit one of the parties (typically the claimant) and be a detriment to the other party (typically the respondent). In a certain sense, the arbitrators will make a choice between the interest of one party against the interest of the other; and inactivity will favour the party being responsible for the existence of corruption. Under section 29 of the Promissory Notes Act, which applies by way of analogy to most types of contractual obligations,[117] a party that is in the position of

113. F. Madsen, *Concerning the Principle of Jura Novit Curia in Arbitration from a Swedish Perspective*, Scandinavian Studies in Law, Volume 63, 196–218, 218. https://scandinavianlaw.se/pdf/63-10.pdf (accessed 13 April 2022).
114. *See,* e.g., NJA 1989 p. 614, 1993 p. 13 and 2017 N7.
115. SOU 1994:81, *Skiljedomsutredningen,* 150.
116. S. Lindskog, *Skiljeförfarande: en kommentar*, commentary to 1 §, *Särskilda frågor*.
117. *See* G. Wallin and J. Herre, *Lagen om skuldebrev m.m.: En kommentar* (Fourth edition, 2018) 243.

having to choose between two possible recipients of the same performance shall be considered to have performed to the correct recipient unless the performing party *knew* or had *reasonable cause to suspect* that said recipient was no longer entitled to the performance.[118] In our opinion, this rule provides a good and normative starting point for which standard of proof to apply in the situation of the arbitrators being faced with an indicator of corruption. Thus, if a suspicion of corruption is well-founded, in the sense that the arbitrators have reasonable cause to suspect corruption, the arbitrators must react actively.

Internationally the view seems to be that the arbitrators must, at least, raise an issue of corruption on their own initiative if they have a 'strong suspicion',[119] and not merely if they have a suspicion of corruption.[120] We agree that a mere suspicion is not enough, but we are, tentatively, somewhat sceptical towards a very high threshold, since we believe that arbitrators who react actively to a well-founded suspicion of corruption will not automatically form themselves an opinion that amounts to a conviction, and we see no reason why a well-founded suspicion of corruption shall be exempted from being brought to the parties' attention.

It is a different matter that another standard of proof must be applied when deciding whether an allegation of corruption can be proven to exist as a fact. On this point, Swedish law is clear.[121] The applicable standard of proof is the same as is generally applied for factual allegations in civil cases which the parties can resolve through settlement.[122] The party alleging corruption must prove (or show) (Swedish: *styrka* or *visa*) the allegation, which is a high standard of proof although not as high as the standard applied in criminal cases; that the offence must be proven beyond a reasonable doubt. In the present context, we note that some arbitrators have, however, taken the position that if 'reasonable doubts' remain, then it is not possible to establish the occurrence of bribery.[123]

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118. *See* s. 29 of the Promissory Notes Act which is applied by analogy to other contractual performances. It reads (unofficial translation): 'Where the debtor pays the transferor, notwithstanding that a non-negotiable promissory note has been transferred, such payment shall be valid, provided that the debtor neither knew that the transferor was no longer entitled to receive payment nor had reasonable cause to suspect so.'
119. B.M. Cremades and D.J.A. Cairns, 'Trans-national Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud', in *Dossier of the ICC Institute of World Business Law: Arbitration – Money Laundering, Corruption and Fraud* (2003), 1–30, 20.
120. ICC Case 7047 in C. Albanesi and E. Jolivet, 'Dealing with Corruption in Arbitration: A Review of ICC Experience', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 27–38, 29.
    EDF (Services) Limited v. Romania, Award, ICSID Case No. ARB/05/13, 8 October 2009.
121. *See* Svea Court of Appeal, Judgment of 22 April 2021 in Case No. T 603-19; ICC National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *supra*, 1–8, 3.
122. Svea Court of Appeal, Judgment of 22 April 2021 in Case No. T 603-19.
123. *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran* and *National Iranian Oil Compan*y, IUSCT Case No. 43, para. 25.

[E] The Red Flags Method

A suspicion can be described as the apprehension or imagination of the existence of something wrong, based only on inconclusive or slight evidence, or possibly even no evidence. It goes without saying that the mere suspicion of corruption must be an unsatisfactory basis to give rise to a duty for the arbitrators to react actively, and the mere suspicion does not attain the standard of proof of reasonable cause to suspect. This view finds some support in an ICC case where the arbitrators accepted jurisdiction over the dispute despite the allegation of bribery. In the award, the tribunal argued that, among other things, that a 'mere suspicion' of bribery was not enough.[124] In order to trigger activity, the suspicion needs to be based on an indicator or set of indicators of corruption that makes the suspicion conclusive or well-founded.

Indicators used to analyse the existence of corruption are better known under the name *red flags* and the method of using indicators could be called the *red flags method*. Colloquially, one could say that red flags are 'warning signs' which give the arbitrators hints as to the true nature of, for example, an agreement used to disguise corrupt activity behind a seemingly legitimate layer.[125] The list of red flags for identifying corruption is extensive,[126] and includes, among other things, the place of business or the place of performance of the agreement, which could be considered a high-risk country according to the Corruption Perception Index.[127] One author, Vladimir Khvalei, has grouped red flags into three categories that, according to the author, should trigger the arbitrators to pursue various degrees of activity.[128] First, 'light' red flags should trigger an arbitrator to investigate issues of corruption further.[129] Second, a medium category which creates a presumption of corruption.[130] And third, a serious category which shifts the burden of proof to the party under suspicion to disprove corruption.[131] There is not enough room in this chapter to discuss Khvalei's categories, but they are at least helpful for understanding the problem. Red flags include, but are not limited to: (i) the identity of the parties (typically state or publicly owned entities

124. ICC Case 7047 in C. Albanesi and E. Jolivet, 'Dealing with Corruption in Arbitration: A Review of ICC Experience', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 27–38, 29.
125. V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 15–26, 15.
126. ICC Case No. 8891. ICC Guidelines on Agents, Intermediaries and Third Parties (2010). https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-Guidelines-on-Agents-and-Third-parties-ENGLISH-2010.
127. Corruption Perception Index. https://www.transparency.org/en/cpi/2021 (accessed 13 April 2022).
128. V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 15–26, 15, 22 and 25.
129. *Ibid*.
130. *Ibid*.
131. *Ibid*.

whose real owners are difficult to identify); (ii) the location of the parties' dealings (in a country or a sector sensitive to corruption); (iii) the remuneration (timing, excessively high rates of commission, payments overseas, etc.); and (iv) the services to be provided (ill-defined and intangible); the parties' business activity (no evidence of real or prior activity, lack of qualified personnel and actual offices).[132] This information is very often available to the arbitrators through the case file. Khvalei submits that, based on a brief examination of the case bearing red flags in mind, arbitrators will easily be able to determine whether there is a strong indication of corruption.[133]

Other authors submit that red flags are not, on their own, sufficient to support the existence of corruption without first seeking explanations from the parties, but that they can serve to trigger activity by the arbitrators.[134] Of course, there can be no fixed idea of how many red flags should be present in order to attain reasonable cause to suspect corruption and trigger activity, but certainly, the more that are present, the greater the suspicion and the degree of activity that is justified.[135] To our knowledge, no case in Sweden has touched upon the issue of red flags or used such a method.[136] However, having seen the red flags method being used in other jurisdictions, such as France,[137] and in the absence of a better method, we believe the red flags method to be an appropriate tool also for a Swedish context.

§14.06 SUMMARY OF CONCLUSIONS

In our opinion, the raised awareness of corruption in arbitration will benefit arbitration as the preferred dispute resolution method for international trade, but if these questions are not taken seriously arbitration will risk coming under increased scrutiny. With this chapter, we submit that Swedish law is in most aspects aligned with French law when it comes to the choice between the minimalist approach and the maximalist

132. V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 15–26, 15.

133. V. Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption', in International Chamber of Commerce (ICC) (ed.), International Court of Arbitration, *Tackling Corruption in Arbitration*, Bulletin, Volume 24, Supplement (2013), 15–26, 17.

134. P.Y. Tschanz and J-M. Vulliemin, *Chronique de jurisprudence étrangère: Suisse*, 2001 Rev. Arb. 4, Comité Français de l'Arbitrage.

135. *See* in D. Baizeau and T. Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte', in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Volume 19 (© Kluwer Law International; ICCA & Kluwer Law International 2017), 225–265, 251.

136. ICC National Sweden Committee's answers to the Questionnaire from ICC Commission on Arbitration and ADR Task Force, *supra*, 1–8, 6.

137. Paris CA Ch.1, 18/02568, 17 November 2020. The Paris Court of Appeal indirectly confirms the use of the 'red flags' test and circumstantial evidence ('faisceau d'indices graves, précis et concordants') to determine whether the underlying contract was procured by corruption.
See also Paris Court of Appeal, 10 April 2018, No. 16/11182; Paris Court of Appeal, 15 September 2020, No. 19/09058.

approach. Both in the *Belokon case*[138] and in NJA 2015 p. 433, the French Cour de Cassation and the Swedish Supreme Court, respectively, have used the maximalist approach. To us, the maximalist approach must be the only reasonable approach if the means of control that are available to prevent corruption in arbitration shall be given true impact.

We also submit that Swedish law, with the maximalist approach as a backdrop, puts an obligation on arbitrators to endeavour to achieve an award of 'normal standard', free from encumbrances in the sense that the award is not invalid, challengeable or unenforceable. We believe that such an obligation would reflect the reasonable expectations of the parties and help protect the integrity of the arbitration. In the context of corruption, this obligation should be understood to put a duty of activity on the arbitrators whereby the arbitrators can use procedural guidance or the principle of *iura novit curia* to raise well-founded concerns. The applicable standard of proof for triggering activity should be when the arbitrators know or have reasonable cause to suspect the existence of corruption. If the standard of proof is attained, the arbitrators must react and endeavour to prevent that corruption will result in an award that is invalid, challengeable or unenforceable. The specific action to be taken will depend on the circumstances. For evaluating indicators of corruption, the arbitrators can be aided by the red flags method which provides some structure and good guidance.

138. Cour de Cassation, 29 September 2021, No. 19-19.769.