



# **Arbitration and Corruption**

## **Role of International Arbitration in Fighting Corruption**

Date: 1 February 2019

Place: Geneva, Switzerland



# The Panel

I.

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II.

**Prof. Dr. Dr. h.c. Mark Pieth**, Professor of Criminal Law,  
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III.

**Koh Swee Yen**, Wong Partnership

IV.

**Stephan Wilske**, Gleiss Lutz

# The Hypothetical Examples

The seat of the arbitration is Geneva. The arbitration is conducted under the Swiss Rules 2012 with Swiss law applicable to the dispute. The claimant is from Australia, respondent from Morocco. The co-arbitrators are from France and the chair is from Switzerland.

I Money laundering

II Contract procured through bribery

III Bribery of witness

IV Fabrication of evidence

V The over-zealous arbitrator

# The Legal Framework

## Prof. Dr. Dr. h.c. Mark Pieth

### **Arbitration and corruption (Swiss law)**

Is there a duty under Swiss law to report suspicions of corruption to criminal authorities ?

What happens if an arbitrator fails to report his or her suspicions?

## **Arbitration and corruption (Swiss law)**

If there is a duty or right, what is the evidentiary burden to report their suspicions to the relevant authority?

In the event of suspicions of corruption, what will the Public Prosecutor's Office do?

Can arbitrators be called upon to testify?

Role of the Public Prosecutor's Office in cases of corruption of witnesses or arbitrators and in cases of fabrication of evidence.

Investigation resources available to the Public Prosecutor's Office (search, secret telephone surveillance, arrest, sequestration, sequestration of the arbitrators' file, rogatory commission, spontaneous transmission of information to foreign authorities).

# Reporting Suspicion of Corruption versus Confidentiality

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1 February 2019

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# Tension between reporting and confidentiality

- Which law governs the duty of an arbitrator to report suspicion of corruption?
  - Law to which the tribunal members are subject?
  - Law of the seat of arbitration?

# Tension between reporting and confidentiality

- Which law governs the obligation of confidentiality?
  - Law of the seat of arbitration? (Legislation?)
  - Law of the arbitration agreement? (Institutional Rules?)
  - Law of the contract?
  - Law governing the professional obligations of the participants?



# Tension between reporting and confidentiality

- Exceptions to confidentiality obligation?
  - Legislation?
  - Institutional Rules?
  - Public Interest?
  - Does it make a difference whether it is international commercial arbitration or investor state arbitration?

# **IS THERE A NEED FOR FURTHER (CONCRETE) ACTION AND INITIATIVES BY THE ARBITRATION COMMUNITY?**

Dr. Stephan Wilske, Partner, Gleiss Lutz Stuttgart

1 February 2019

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# Is There a Need for Further (Concrete) Action and Initiatives by the Arbitration Community?

## A. Status Quo

### I. The Conceptualist's or Dogmatist's approach

- The dream of autonomous arbitration (delocalized and not controlled by national law)
- The paranoia of overregulation

### II. The Pragmatist's or Business People's approach

- Don't fix it if it's not (completely) broken!
- Let's not soil our own nest... It only helps our competitors if we do something.

## **Is There a Need for Further (Concrete) Action and Initiatives by the Arbitration Community?**

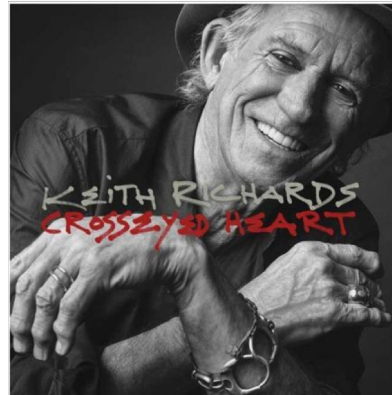
### A. Status Quo

**Or, in the words of this speaker's favorite English contemporaneous philosopher and guitar player:**

## Is There a Need for Further (Concrete) Action and Initiatives by the Arbitration Community?

### A. Status Quo

***“The cops I can't involve them, God knows what they could find”***



Keith Richards, *Robbed Blind* from his Album *Crosseyed Heart* (2015)

## **Is There a Need for Further (Concrete) Action and Initiatives by the Arbitration Community?**

B. What can be done – concretely! – by arbitral institutions?

### **Proclaim the “Rules of the Game”**

- Why not declare a “zero tolerance” approach?

### **Mandatory Compliance Programs for Arbitrators**

- Why should it be below the dignity of an arbitrator to go through a ten minute awareness program on corruption, money laundering etc.?

### **Corruption Ombudsman**

- What’s wrong with a person at the arbitral institution who has the institutional knowledge to assist parties and arbitrators

### **Blacklist Counsel and Parties who Were Proven to Be Associated with Corruption in Arbitration**

- Do you really need the business and company of these black sheep for your institution?

### **Call for Transparency in Corruption in Arbitration**

- What’s wrong with listing any such incidents on the homepage of the arbitral institution?
- Are you afraid you will lose the business of these black sheep?

## **Is There a Need for Further (Concrete) Action and Initiatives by the Arbitration Community?**

B. What can be done – concretely! – by arbitral institutions?

### **But please:**

- Do not wait for “international solutions”
- Do not wait for a “Global Corruption in Arbitration Council”



## **Is There a Need for Further (Concrete) Action and Initiatives by the Arbitration Community?**

### C. Conclusion

- **Further – concrete! – action is necessary!**
- **Do not hide behind buzz words and dogmatism!**
- **If you are offered “fishy” business, follow the advice of the wife of the 40<sup>th</sup> President of the United States and “*just say no*”!**



**Many thanks for your attention.**