

Arbitration and Crime  
Dealing with Allegations of Economic Crime in Arbitration  
Conference  
Thu 11 – Fri 12 January 2018  
Basel, Switzerland

Preliminary remarks by Marin **Mrčela**, President of the Group of States against Corruption (GRECO)

- Thank you for inviting me to this Conference. The Group of States against Corruption of the Council of Europe –GRECO in short - is the body which monitors compliance with the Council of Europe anti-corruption standards, and their effective implementation, by our 49 member States - that is the whole European continent from Iceland to the Urals, plus the United States of America.
- The Council of Europe has developed multilateral anti-corruption treaties since the mid-1990s. While the OECD anti-bribery Convention focuses on *bribery of foreign public officials in international business transactions*, the 1999 Council of Europe Criminal Law Convention on corruption has a broader scope: it deals with active and passive bribery of domestic, foreign and international public officials, judges, international officials and members of parliament, as well as with active and passive bribery in the private sector, accounting offences, money laundering offenses, and international cooperation. 48 States are Parties to this treaty.
- In 2003, our member States opened for signature an Additional Protocol to this Convention which is very relevant to our discussion today. In fact, this Protocol extends the scope of the Convention to arbitrators in commercial, civil and other matters: the 44 States Parties to this Protocol have committed to adopt the necessary measures to establish, as criminal offences, active and passive bribery of domestic and foreign arbitrators.

- The scope of this Protocol is not limited to commercial arbitration. Under the Protocol, the concept of “arbitration agreement” should be understood in a broad way in order to reflect the reality and variety of civil, commercial and other relations existing in our member states.
- GRECO monitored the compliance of our 49 member States with this Protocol during its Third Evaluation Round which started in 2007. These are some of the findings:
  - As regards the criminalization of active and passive bribery of domestic arbitrators, GRECO evaluations initially revealed a rather low level of compliance. For instance, the evaluation reports on many GRECO States highlight the absence of express provisions or voice doubts about the clarity of the way domestic laws deal with both the active and passive forms of bribery of domestic arbitrators.

In a number of member States the discussions between the evaluation team and their on-site interlocutors focused on whether the definition of an “official” was broad enough to embrace arbitrators.

GRECO issued specific recommendations to 18 member countries aiming at ensuring that all of the arbitrators’ functions are fully captured and that the scope of the criminal offence goes beyond situations involving international business transactions or employment by an international judicial institution.

- As regards the criminalization of active and passive bribery of foreign arbitrators, the problems identified by GRECO concerned, to a large extent, matters of clarity and a patchwork of coverage issues and lacunae.

Let me give you a few examples. The reports on two countries showed a lack of clarity on the definition of foreign arbitrators. The law in one member only covered arbitrators who are employed by international judicial institutions. The law of two other member countries had no provision for foreign arbitrators, while in another these functions were only covered if they were judicial or those of a public official. The law of one member provided non-express and imperfect coverage for foreign arbitrators, and the laws of two other members, in addition to the above issues, also sought to rely on their law governing extra-territorial jurisdiction in order to secure compliance with the Protocol.

GRECO issued recommendations to 32 countries to ensure that foreign arbitrators are fully covered by the relevant domestic anti-corruption provisions, including both the active and passive side of the offence, and irrespective of whether it occurs within or outside the context of international commercial activities.

- To conclude this initial comment from my side, I would say the following: when we started in 2007 our 3<sup>rd</sup> monitoring round covering, among others, the criminalization of corruption offenses in relation to arbitrators, the criminal legislation of many countries was not in line with the international standards. 10 years later, thanks to GRECO's strong compliance procedure, many countries have, by and large, complied, at least on paper, with the requirements of the Protocol. I look forward to our discussion today where practical challenges relating to implementation will certainly be discussed.