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Circumstantial evidence in corruption before international tribunals

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Introduction

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When doing business abroad, foreign investors, in particular construction contractors participating in tender proceedings, regularly rely on agents or intermediaries familiar with local laws and customs. For the purpose of this article, we will refer to such contracts as agency agreements¹ and to the parties as agent and principal. The nature and qualification of these agreements will vary according to the applicable law, but is not relevant for the purpose of this article. Such agreements, like most international commercial contracts, routinely contain an agreement to arbitrate. Indeed, such contracts have repeatedly given rise to arbitration proceedings, in particular under the auspices of the International Chamber of Commerce (ICC).² Most known precedents involve agency agreements governed by Swiss or French law and provide for arbitration in Switzerland or France.³

In many of these disputes, it is asserted or becomes apparent, in light of the evidence or parties' declarations, that in order to further the principal's business, the agent was required to pay bribes to local dignitaries or decision-makers. It is today almost universally accepted that bribes and corruption are not a "gentlemen's offence" but a plague on international commerce and an obstacle to development in countries where bribery is endemic. Recent efforts among OECD

members, which culminated in the adoption of a Convention now implemented in the domestic law of many countries,⁴ bear out this new awareness. From the point of view of international law, bribery is contrary to public policy.⁵ The crucial issue in arbitration proceedings where a case of corruption is alleged is not whether it must be punished, but rather whether corruption is demonstrated. Straightforward evidence of corruption is available only in rare cases. Devoid of any power to compel third party witnesses or to open a criminal investigation, arbitrators must rely on circumstantial evidence in order to decide whether a case of corruption has occurred. In this article, we shall provide an overview of circumstances that have been taken into consideration by international arbitral tribunals and examine how the evidentiary value of these circumstances has been weighed.

1. What must be demonstrated?

There is no universal definition of corruption. From the view point of international arbitration, it is generally accepted that giving a public official money or other advantages to favour the offering party or his or her principal is incompatible with public policy, whatever the law applicable. In instances where no such "hard" corruption exists, it will nevertheless be indispensable to determine the law applicable to the validity of the agency agreement.

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In this context, it should be stressed that "*trafic d'influence*" is not universally outlawed. Terms like "*trafic d'influence*", "*influence peddling*", "*trading in influence*" are often used as synonyms of corruption, and often wrongly so. In most countries, they describe a situation where a private person, independent of local decision makers, sells his influence, real or imagined, to a principal. Many countries do not ban contracts with such lobbyists, influence peddlers, or "*agents d'influence*" as long as no money or other advantage flows directly or indirectly to a public official.⁶ In fact, it stands to reason that influence is the main stock in trade of any agent. Only a foolish principal would retain an agent *without* influence. Agents may have acquired influence as a result of longstanding professional experience, through the force of their personality, by their standing in society or through their respected expertise. The Swiss Supreme Court (the Federal Tribunal)⁷ and several arbitral awards⁸ have invoked the distinction between "*trafic d'influence*" and hard corruption. Other countries, however - in particular France⁹ - outlaw influence peddling.

A further caveat must be made: the public official or the agent, paid or not, may violate a contractual or other duty of loyalty owed to third parties. In that event, the agency agreement may be void, not because of corruption, but because of the immorality of the interference with the duty to remain loyal. In two reported ICC cases, No. 5622¹⁰ and No. 9333,¹¹ the existence of such a duty was examined and denied. In one unusual matter, ICC arbitration case No. 6248, a loyalty obligation was admitted. The agent, who was also the owner's engineer, had agreed with the construction company, whose work he supervised on the owner's behalf, that he would receive a commission on payments for any increased work that he approved.¹²

In their fight against corruption, some countries enact stringent laws that prohibit the use of agents in relation to public procurement. In England, for instance, the fact that a contract is void in the country where it is to be performed, would be relevant if the parties had chosen English law to govern their contract. Other countries, such as Switzerland, will respect the decision to employ an agent unless a foreign mandatory law ("*loi de police*") prohibiting the use of an agent must be applied. The Swiss Federal Tribunal has held that a foreign law providing for a sweeping prohibition of agents is incompatible with the principle of freedom of contract ("*pacta sunt servanda*") and public policy. A number of arbitral awards explicitly refused to apply such statutes.¹³ The first *Hilmarton* award that declared void an agency agreement governed by Swiss law with an Algerian agent because Algerian law banned such agency agreements, was set aside by the Federal Tribunal. The dispute was remanded to the arbitral tribunal. While the first award was enforced in France despite having been set aside in Switzerland, the second award was enforced in England.¹⁴

2. What standard of proof applies?

In *Westinghouse*, the arbitral tribunal held that pursuant to the law of the Philippines, as well as U.S. law, the principle of "preponderance of evidence" applies. With respect to the allegation of corruption, however, a higher standard would apply: "clear and convincing evidence...fraud in civil cases must be proven to exist by clear and convincing evidence amounting to more than a mere preponderance, and cannot be justified by a mere speculation. This is because fraud is never to be taken lightly".¹⁵ The arbitral tribunal in *Hilmarton* demanded proof "beyond doubt".¹⁶

The question as to whether it is appropriate in corruption matters to apply a higher standard of proof can be left open. There is no reason to relax the standard of proof, especially if the party that accuses the other of corruption was itself party to the corruption contract.

Traditionally, the arbitral tribunal has wide discretion to assess and weigh the evidence adduced by the parties. This discretion is limited by the duty to treat the parties equally and to grant them a full right to be heard.¹⁷ An arbitral tribunal will adopt a more active or passive role in the gathering of evidence following the tradition of the legal system of the arbitrators, and their personality and experience. A tribunal may choose a more active role in order not to surprise a party, thus not risking a violation of the right to be heard.¹⁸

An "adverse inference" should be announced. Thus, the Swiss Federal Tribunal requires that if the arbitral tribunal intends to exclude from evidentiary proceedings certain facts that it considers irrelevant, it must communicate this to the parties. Inversely, a party who objects to this limitation must do so forthwith.¹⁹

3. What evidence is admissible?

Neither the ICC Rules, nor the Swiss PIL Act define admissible evidence.²⁰ In international arbitration all evidence which is apt to establish points of fact or law is admissible. Assessment of the weight of proof adduced rests in the discretion of the arbitral tribunal (IBA Rules on the Taking of Evidence in International Commercial Arbitration of June 1, 1999, Article 9.1).

With regard to witnesses, it should be stressed that in contrast to most civil procedure laws, there is no distinction between party and (independent) witnesses in international arbitration. The arbitral tribunal freely assesses the evidentiary value of statements made by witnesses. The fact that a witness has an interest in the outcome of the proceedings, or is linked to a party who has, will obviously play a role in the tribunal's evaluation. The arbitral tribunal is likely to give greater weight to declarations of a witness who is under a party's control, such as an employee, that do not support the statements made by his or her employer in the arbitration.²¹

Circumstantial evidence

In practice, it is very rare that direct proof of corruption is available. Most arbitral tribunals have to content themselves with circumstantial evidence. The decisive question is whether the circumstantial evidence constitutes a "*faisceau d'indices*" which establishes corruption. We will examine below circumstances that have been considered by arbitral tribunals in published awards.

1. The terms of the contract

In contrast to the Anglo-American tradition, most civil law countries admit that the terms of a contract are only the point of departure, not the end of the search for the parties' real agreement. The terms must be examined in light of the parties' real intentions. For civil law jurists, the latter are not necessarily mirrored in the former.²² *Parol evidence* is admissible. In case of Swiss law, its relevance is even borne out by statute: according to Article 18.1 of the CO, the parties' common intentions and not the name or the terms of the contract are decisive when interpreting a contract. The terms must be disregarded if they are used by the parties in error or in order to hide the real content of the contract ("*Falsa demonstratio non nocet*").

Vague contractual terms, especially with regard to the agent's obligations can, indeed, hide parties' illegal intentions. Inversely, very detailed contractual terms do not necessarily reflect the parties' true intentions. First, the contract may be simulated. Second, inexperienced draftsmen, inappropriate contract forms, and the parties' intention to circumvent provisions of a local law prohibiting the use of agents are all examples of more or less "legitimate" factors that may influence the terms of the contract, without necessarily indicating an intention to bribe local officials.

If the principal drafts the contract, the principal will not be able to rely on a vague description of the agent's obligations as an indication of the agent's corrupt intent.²³

2. The conduct of the parties

In the quest for the real intent of the parties, the parties' conduct is usually a more trustworthy guide than the terms of the contract. A principal who pays the agent, congratulates him on his services or who fails to make any reservations for incomplete work after the award of

the contract for which he retained the agent cannot complain in a subsequent arbitration that the agent failed to perform the contract.²⁴

3. Contemporaneous documentary evidence

While arbitrators will be aware that documents may be created by the parties to hide their true intentions (simulation) it stands to reason that documentary evidence from the time before a dispute arose between the parties often bears out their common understanding of the contract. Such documents are invaluable evidence.²⁵ A party's refusal to allow the arbitral tribunal access to such documents may lead the tribunal to draw an adverse inference.²⁶

4. The endemic nature of corruption in certain countries and lines of business

In ICC Arbitration No. 1110, the fact that the agent was supposed to bribe government officials was not disputed.²⁷ Rather the principal apologetically argued that without bribes it was impossible to secure a contract in Peron's Argentina. In fact, corruption was and still is endemic in many countries and in certain lines of business (public procurement, defence and arms contracts, and the aviation industry are notoriously corruption-prone, and not only in developing countries). In some instances, the principal tries to evidence corruption indirectly by adducing evidence for the endemic nature of "facilitation payments" in the agent's country. In ICC arbitration No. 3916 (1982), the widespread nature of corruption in Iran was considered to be circumstantial evidence for the existence of a corrupt practice in the contract before the arbitrator.²⁸ The ubiquity of corruption can indeed found or add to the arbitral tribunal's suspicion, provided that such practice is indeed evidenced, for instance, by conclusive surveys of international organisations and NGOs such as the ICC, Transparency International, and the OECD. However, recurrence of instances of corruption in a country should not alone be taken as evidence for corruption in a particular case. In one reported case, newspaper articles about a criminal trial related to a corruption scandal in the country concerned were dismissed as hearsay and contradicted by the direct evidence. The arbitrator considered that there was ample evidence of actual services rendered by the agent which flatly contradicted the allegation that the agency agreement was mere window-dressing.²⁹

It must also be emphasised that in light of the doctrine of *estoppel* a principal who attempts to establish bribery on the part of his agent by referring to the endemic nature of corruption in the country of performance cannot argue that he was unaware of his agent's intention or need to pay bribes.

5. The agent's fee

a) The percentage fee

Some arbitral awards have accepted that 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.³⁰ Indeed, Leboulanger and El Koshery express the view that such fees are unusual.³¹ It is submitted that this view is incorrect. From published case law, it appears that percentage fees are the rule rather than the exception in agency agreements.³²

b) The amount of the fee

An unusually high commission is a "red flag" for arbitrators.³³ But, the amount of the fee must be

examined in perspective. Whether a fee is unusually high can only be established in light of all circumstances.³⁴ The amount of the contract awarded to a principal is one important parameter. In ICC case No. 6497, commissions under various separate agreements were in dispute. One of them provided for a 33.33 per cent commission. The agent argued that the global amount of this commission represented only a small percentage of the total value of the contracts. The arbitral tribunal dismissed this argument since the 33.33 per cent commission arose from a contract that was separate from the others.³⁵ In ICC case No. 9333, a commission of FF 1.9 million, approximately 27 per cent of the value of the contract, was accepted as justified in light of all circumstances.³⁶

It cannot be overlooked, however, that the amount of the commission can be circumstantial evidence of corruption. For instance, where the agent in negotiation with the principal insists on a high fee, the agent may act as a front for public officials. In ICC arbitration No. 1110, concerning a public tender in Argentina in the 1950s, the agent claimed 2 per cent

for himself and 8 per cent for "Peron and his boys".³⁷

c) Disproportionate fees

A high commission can appear suspicious if there is no corresponding benefit to the principal. This appearance of illegality must be assessed in light of a number of considerations:

(i) The amount of the fee *per se* provides no indication as to the destination of the money (a public official), which is the decisive question when determining the legal or illegal nature of the agency agreement.

(ii) A high fee does not make the agency agreement void. As ICC award No. 7047 rightly points out, the proper sanction of excessive commissions is their reduction, if the applicable law permits.³⁸ With regard to Swiss law, Article 417 of the CO deserves mention. Pursuant to this provision, the reduction of an agent's fee is only possible for real estate agents or in relation to the referral of employment contracts. The *ratio legis* is obvious. An agent should not be allowed to take undue advantage of the principal's hardship. It stands to reason that such hardship is highly uncommon in international commercial transactions. In particular, if the fee is expressed as a percentage of the amount of the main contract, the principal will have made allowances in the contract price for the agent's fee. There is no reason to adapt the fee if it is not provided in the agency agreement. Any reduction of the fee would amount to serious interference with the principle of *pacta sunt servanda*. One might even argue, in light of this fundamental rule in international commercial arbitration, that contractual terms should be observed even if the applicable law allowed reduction,³⁹ especially if the law has not been chosen by the parties but by the arbitral tribunal. A reduction would seem to be justified only in cases of duress or error.

(iii) The agency contract and the amount of the commission is freely agreed between the parties. The principal has accepted the amount of the fee. The parties' leverage in negotiations, their negotiation skills, and the principal's expectations as to the long-run benefits of the contract are the main parameters. Arguably, the agent will try to obtain a maximum fee. There is no "just remuneration". In this respect, the award in ICC arbitration No. 7047 merits citation.⁴⁰ The arbitral tribunal summarised witness statements made by various intermediaries: "For Z., there were no standard commissions; for 'you don't get what you deserve, you get what you negotiate'". He had signed contracts with 25 per cent commissions on huge amounts. Mr A also stated that he took "whatever I could get". It must be stressed that a high commission may indicate greed on the part of the agent, but it is not necessarily conclusive proof of corruption.⁴¹

(iv) The parameter which must be put in relation to the fee is not the agent's expenses or costs, but the long-term potential of the project and the principal's chances of success.⁴² Only a global view will allow the principal to assess the project's value. The project may be particularly prestigious. In case of a fully or partially government-owned principal there may be cross-subsidies allowing for high fees. The principal may count on lucrative follow-up contracts, may for strategic reasons be keen on being active in the country or the business concerned,⁴³ may wish to deploy personnel or machines which would otherwise be idle, or may wish to gather experience with a novel

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technology. There may be a number of factors for which a principal is willing to pay a high commission to an agent for obtaining the award of a contract which taken alone is not necessarily or not in the short-term, profitable. On the other hand, a principal who is facing tough competition will have to pay a higher fee to the agent than a principal who is likely to succeed. A professional agent, especially if he has a high market share, will insist on a fee which takes into account the fact that he assists a principal less likely to be awarded the contract.⁴⁴

(v) It is also important to bear in mind that if the main contract was awarded to a principal with the help of the agent, the principal is singularly ill-placed to refuse to pay the agent's fee because it is allegedly disproportionate to the contract price. This was recognised in a 1975 arbitral award summarised by Derains⁴⁵ and in the Lunik case,⁴⁶ overlooked, however, in ICC award No. 8177.⁴⁷

6. Negotiations between the agent and the awarding authority

Serious negotiations between the agent and the awarding authority and/or between the awarding authority and the principal can be circumstantial evidence for the absence of corruption, in particular if the principal concedes substantial price reductions. Bribes tend to be in relation to the contract price, and one would expect a corrupt official not to unnecessarily jeopardise his or her remuneration.⁴⁸ It would be wrong, though, to lend too much weight to price reductions. The bribed official may not be the same who leads the negotiations or the official may select the objectively most favorable offer and insist on a bribe before the award is made. Moreover, it cannot be excluded that while accepting

bribes the official may still wish to negotiate a price that is favourable to the public authority. Finally, public officials may have been promised bribes from other bidders as well. In ICC arbitration No. 3916 the rapidity of the award of the contract has been considered as circumstantial evidence for the payment of bribes.⁴⁹

7. Internal structure and organisation of the agent

Arbitrators will have to be very prudent in case of occasional agents, without prior experience or track record, especially if the agent is an unknown off-shore company that lacks transparency. Such vehicles are suspect since they may conceal the involvement of public officials. On the other hand, reasons other than a corruption scheme may be at the origin of an odd structure. Tax optimisation, circumvention of laws prohibiting agents, and the fear of envy in one's home country may all be motives for the use of off-shore structures.

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.⁵⁰ The absence of an involvement of public officials should be proven in such circumstances, since many arbitrators will be inclined to assume that irregular payments were made. In ICC arbitration No. 6497, the agent's refusal to produce bank records of payments to third parties was considered to be decisive circumstantial evidence for the irregularity of the payments.⁵¹ In ICC arbitration No. 3916, where the agent refused to disclose information about its group structure, the arbitral tribunal concluded that this was a case of corruption.⁵²

The fact that the agent employs only a few operatives is not necessarily an indication of corruption. In the *Lunik* arbitration, the arbitral tribunal found that the agency agreement was subject only to the agent securing the main contract. The manner in which the agent achieved the desired result was left to the agent. The number of man hours or employees was not relevant. Moreover, the principal had selected the agent himself from a number of other agents.⁵³

8. Close personal relationship or friendship between the agent and the public official

The relevance of a close personal relationship between the agent and the public official is open to debate. In *Lunik*, the arbitrator refused to view the friendship between an agent and a public official as circumstantial evidence of bribery. In the absence of any other evidence of corruption, he assumed that in the context of such

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friendship first-hand information was made accessible to the agent without it being necessary to pay for it.⁵⁴ It should indeed be recalled that corruption, by definition, implies the payment of bribes or the grant of other undue advantages to a public official. On the other hand, friendship and bribes would not appear to be mutually exclusive, and may even be rooted in mutual business interest.⁵⁵ Moreover, to the extent that the disclosure of confidential information by the public official constitutes a violation of a contractual or other legal duty of loyalty that the agent owes to third parties, the agency agreement may be void (see the "Introduction" above).

9. The services rendered by the agent

a) Duration

In ICC arbitration No. 8891 the relatively short duration of the agency contract was deemed to be circumstantial evidence of a corrupt intent.⁵⁶ This factor should be examined on a case-by-case basis: The duration of the activities of the agent is not decisive. Albeit unusual, a single phone call or discussion may be instrumental for the award of a contract.⁵⁷

b) The services performed and the causal link

The parties can specify that the fee is due even in the absence of a causal link between the agent's activity and the award of the contract, but they cannot, at least not in light of the case law of the Swiss Federal Tribunal, dispense with the agent's duty to be active.⁵⁸ In order for the commission to become due, the agent must be active.⁵⁹ It is not unusual in principal-agent disputes that the former refuses to pay the latter because of his purported failure to perform services required by the agency agreement. Agency agreements may contain a vague mission statement or a very detailed one. According to Article 18 of the Swiss CO, the parties' common intentions, not the terms used in the contract, are decisive (see above). In many cases, the evidentiary proceedings will establish that the only prerequisite for the agent's entitlement to a commission is the award of the main contract to the principal, whatever the contract may provide in this respect. If, according to the contract or the applicable law, the fee is triggered by the award, the extent of the agent's

activities is irrelevant.⁶⁰

Most agency agreements provide that the agent's fee will depend on his services being the cause or reason for the award of the main contract to the principal (see also CO, Article 413.1). For the Swiss Federal Tribunal there is a presumption of causation if the agent has undertaken an activity that may result in the award of the contract.⁶¹ If under the applicable law causation is not a mandatory prerequisite, parties may dispense with the requirement in their contract. However, dispensing with proof of such a causal link may hide a common understanding that the agent was expected to pay bribes. In ICC arbitration No. 7047 (*Westacre*), the arbitral tribunal held that it "has given special attention to this point because the language of sect. 2 of the Agreement exonerates the Claimant from any proof of its services. Combined with other circumstances, this provision might imply joint illicit intentions of the parties. However, the copies of the Claimant's telefax letters to Defendant 1) establish that Claimant did indeed render services..."⁶²

In ICC arbitration No. 3916, the agent refused to disclose details about his activities. The arbitral tribunal concluded that this refusal was circumstantial evidence for the payment of bribes.⁶³ The ICC award in the *Westman* case was set aside because in the appeal proceedings the principal proved that the agent had provided forged statements of costs to the arbitrators. The award was annulled because of this procedural fraud. The appeal court added, however, that the absence of any activity on the agent's part was not necessarily proof of the parties' corrupt intentions.⁶⁴ In an ad hoc arbitration in 1995, the fact that the agent had supplied numerous services was viewed as evidence against the principal's defence according to which the agency agreement was fictitious and mere window dressing.⁶⁵

Contemporaneous records, such as congratulatory or thank you letters, as well as payments made to the agent, especially after the contract award, are evidence that the agent has rendered all services expected from him under the agency agreement.⁶⁶ In *Hilmarton*, the principal had never worried or inquired about the services actually performed by the agent. The arbitrator concluded that the principal tacitly approved of the agent's activity.⁶⁷

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10. Unusual payment terms

Unusual payment terms can be the result of hidden payments to public officials. Cash payments, apparently unrelated transfers to third parties, and especially the agent's refusal to provide information as to such transactions, are suspicious elements which the arbitral tribunal should duly consider. On the other hand, the fact that payment is to be made to a bank account outside the agent's country need not be decisive.⁶⁸ In most instances, this arrangement is made to evade local taxes. While certainly not condonable, this is not necessarily evidence of corruption.

Conclusion

Reported arbitral awards are not uniform in their approach to circumstantial evidence of corruption. No single element has been established in practice as being conclusive of bribery. Various elements which may characterise an agency agreement have been interpreted and their evidentiary value weighed differently.⁶⁹ One conclusion can, nevertheless, be drawn. In many cases, the arbitrators' common sense and curiosity will be more important than the results obtained through recourse to uniform evidentiary rules, which in light of the great diversity of cases before international arbitral tribunals are often inappropriate.

An arbitrator must establish the facts of the case as they flow from the parties' pleadings and the evidence offered. If an arbitrator detects corruption, but corruption is not argued by the parties, the arbitral tribunal may, as a last resort, have to resign in order to avoid becoming an accomplice to bribery.

Recent efforts of the OECD and other international organisations and NGO show that corruption, while remaining a reality in many countries, is universally outlawed and that the somewhat indulgent approach adopted in the past is banned. The annulment of an agency agreement that provides for the payment of bribes is the solution under most laws. It may not necessarily be the "just" solution in cases where the principal refuses to pay the agent after having been awarded the contract, especially if the principal has included the agent's fees and the bribes the latter would pay in the calculation of the contract price. The tribunal may take this into account when allocating the costs of the arbitration. Furthermore, in accordance with the principle "*in pari causa*", fees which have already been paid to the agent cannot be reclaimed.⁷⁰

International Arbitration and Corruption - Synopsis of Selected Arbitral

Awards

Award	Parties/State where services rendered	Place of arbitration	Applicable Law	Arbitral Tribunal	Publication	Comission	Proof and Sanction of corruption
ICC Case No. 1110 (1963)	X (Argentina) v. Company A/Argentina	F-Paris	Argentina	Gunnar Lagergren	(1994) 10 Arb. Int. 282	10% of 3,510,00 GBP (in 1950)	Admission that objective of contract included bribes. No forum available in arbitration or courts.
ICC Case No. 3913 (1981)	U.K. Company v. French Company / African country		France		Collection of ICC Arbitral Awards 197485, 497, 562	8% of contracts awarded	Admission that objective of contract included bribes. Contract void.
ICC Case No. 3916 (1982)	Agent (Iran) v. Greek Company / Iran	F-Paris	France	R. Loewe	Collection of ICC Arbitral Awards 197485, 507	2% of contracts awarded	Indirect proof of trading in influence: Corruption endemic in Iran/Refusal of agent to disclose details of its corporate structure and its interventions/Speed of award of contract.
ICC Case No. 4145 (1984)	Agent (FL/Arab) v. Company (S-Korea)	A-Vienna	Switzerland		Collection of ICC Arbitral Awards 197485, 559		No direct or circumstantial proof offered.
ICC Case No. 5622 (1988)	Hilmarton (Agenz) v. Omnium/Algeria	CH-Geneva	Switzerland		[1993] ASA Bull. 247; [1993] Rev. Arb. 327; [1992] Riv. dell'Arbitrato 773; (1994) XIX Y.B.Com.Arb. 105 (in English)	4% of contract	Contract void because in violation of Algerian law prohibiting traffic of influence [Award set aside by Geneva Court, annulment confirmed by Swiss Federal Tribunal (April 17, 1990, [1993] ASA Bull. 253; (1994) XIX Y.B.Com.Arb. 214) on the

							ground that no bribery proven and that trading in influence ("courtage") is admissibile in Swiss law.] Algerian law prohibiting all forms of intermediaries considered to be too far reaching, violating freedom of contract / Award enforced in France in spite of having been annulled in Switzerland/Second award enforced in U.K.]
CCIG February 23, 1988	X (U.K.) v. Y (F)/Algeria	CH-Geneva	Switzerland	J.-A. Reymond, P.A. Morand, P. Schellenberg	[1988] ASA Bull. 136		Prohibition of intermediaries under Algerian law is not mandatory for arbitrators in Switzerland applying Swiss law.
Ad hoc (1989)	Beta (Panama) v. Alpha (CH)	CH-Geneva	Switzerland		[1991] ASA Bull. 239	5% of contract amount	Brokerage is admissible under Swiss law. Prohibition of intermediaries under foreign public law is not mandatory for arbitrators sitting in Switzerland applying Swiss law.
ICC Arbitration (1989)	K Ltd (U.K.) v M. SA (Switzerland)	CH-Geneva	Switzerland	J. Dohm	[1993] ASA Bill. 216	7% of SwF 15.7 mio (in 1981)	Bribery neither asserted nor to be inferred from file before arbitrator.
ICC Case No. 6248 (1990)	Consultant v. Contractor	CH-Zurich	Switzerland		(1994) XIX Y.B.Com.Arb. 124		Evidence of violation of fiduciary duties :Consultant, an

							architect representing Owner, was in charge of supervision of Contractor. Agreement with contractor, undisclosed to Owner, according to which Consultant would obtain a percentage of all additional work awarded to the Contractor by Owner. Agreement void.
ICC Case No. 6401 (19.9.1991)	Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines /Philippines	CH-Geneva	Pennsylvania/New Jersey	Claude Reymond (Chair), Robert von Mehren, Serge Lazareff	Mealey's Int. Arb. Report, Jan 1992, Cov B-1		No Proof that Claimants intended to bribe President Marcos or that the latter agreed to accept bribes. [Award confirmed by Federal Tribunal, ATF September 2, 1993, BGE 119 II 380, [1994] ASA Bull. 244].
ICC Award (21.3.1992)	Westman International Ltd. (U.K.) v. Alstom Turbines à Gaz SA (F)/Iran		France		Summarised in [1994] Rev. arb. 359	Percentage not determined in contract. Arbitrator's award approx. CHF 5.7 million (4% of contract)	Circumstantial evidence not sufficient. Contract upheld. Award subsequently set aside for fraud in arbitration (forged statement of expense): Cour d'appel de Paris, September 30, 1993, [1994] Rev. Arb. 359.
ICC Case (1993)	Lunik v. Soliman (not	CH-Geneva	France	Pierre Lalive	[1998] ASA Bull. 210, 442	5% of U.S.\$ 4,220,000	No direct or circumstantial

	real names)						evidence.
ICC Case No. 7047 (1994)	Westacre (U.K.) v. Jugoimort (Yugoslavia)	CH-Geneva	Switzerland	H. Raeschke-Kessler, J.Patry, D. Mitrovic	[1995] ASA Bull. 301	15% of contract amounts of U.S.\$ 500,546,000 and of GBP 11,440,326. 10% of U.S.\$ 39,109,528	Local law limiting commercial agency not part of international public policy. Disproportionate fee is not sufficient circumstance to invalidate contract. Lobbying is legal. No evidence of bribery [Award upheld by Swiss Federal Tribunal on December 20, 1994 on the ground that the arbitrator had found no evidence for corruption: [1995] ASA Bull. 217; (1996) XXI Y.B.Com.Arb. 172. Award enforced in U.K.]
ICC Case No. 6497 (1994)	Consultant (FL) v. Contractor (Germany) / Middle Eastern country	CH-Geneva	Switzerland		(1999) XXIV Y.B.Com.Arb. 71	1.5%/5.5%/33.33% respectively under various contracts	No direct evidence. Circumstantial evidence: Alleged disproportion between consultant's costs and his fee (disproportion denied)/lack of transparency of consultants's group. Not sufficient. Refusal to disclose banking documents related to 33.33% contract is

							evidence for bribery.
Ad hoc July 28, 1995	S (Panama) v. Z	CH-Coppet	Switzerland	Claude Reymond	[1995] ASA Bull. 742		Services undisputed. Bribery alleged but not evidenced. Payment by consultant to a private third party not breach of contract or proof of bribery.
ICC Case No. 7664 (Award of July 31, 1996)	Frontier AG & Brunner Soc. v. Thomson CSF	CH-Geneva	France	B. Brunschwig, J.D. Bredin, J.P. Perez-Llorca	Reported by Sayed, Corruption in International Trade and Commercial Arbitration (Gevève, 2001), pp. 51, 248, 290, 565	1% of sale price. Thomson ordered to pay approx. U.S.\$25 million an FF 12.7 million.	Agent paid for trying to influence Chinese authorities in order to stop them from objecting to sale of war ships to Taiwan. Bribes not evidenced. Contract valid. Award confirmed by the Swiss Federal Tribunal on January 28, 1997, [1998] ASA Bull. 118. [Enforcement in France stayed: [2001] Rev. Arb. 583]
ICC Case No. 8113 (1996)	Agent v. Contractor	CH-Zurich			Reported by Sayed, above, pp. 271, 314, 547	3%	
ICC Case No. 8177 (1996)	Contractor (France) v. Agent (South-East Asian country)	CH-Lausanne	France		ICC Bulletin, Spring 2001, p. 85	8,75% of contract amount	No corruption alleged. Fee reduced for being excessive in light of service rendered.
ICC Case No. 9333 (1998)	Agent (North African State) v. Contractor	CH-Geneva	Switzerland	M. Scherer	[2001] ASA Bull. 757	FF 1.9 million out of contract amount of FF 7 million	No direct evidence. Contractor affirms that consultant orally confessed bribery.

							Circumstantial evidence. Fee rate is extraordinarily high but justified in this case. Absence of contemporaneous documents reflecting confession. Payments of fees subsequent to alleged confession. U.S. Foreign Corrupt Practice Act not applicable to foreign subsidiaries of U.S. corporations.
ICC Case No. 8891 (1998)			Amiable composition		J.D.I. - Clunet 4/2000, 1076	18.5% of all additional payments received from Owner for cost overruns of FF 700 million	No direct evidence. Circumstantial evidence: short duration of consultancy agreement/commission based on percentage of amount of the contracts awarded to the high principal/ Excessively high commission/no evidence of agent's activities/.
Ad hoc Award, May 4, 1999	Himpurna California Energy (Bermuda) v. PT Persero (Indonesia)	Indonesia-Jakarta	Indonesia / UNCITRAL Rules	J. Paulsson, A.A. de Fina, Setiawan SH	(2000) XXV Y.B.Com.Arb. 12, 44 et seq.		No evidence of corruption provided.

* The article is based on a speech delivered at the Annual Meeting of the Swiss Arbitration Association (ASA) of September 7, 2001 in Bern. A more comprehensive version of the article as well as other speeches delivered at the ASA Meeting are published in ASA Bulletin 4/2001. Very helpful comments on earlier drafts were provided by my colleagues Michael E. Schneider and Dr Arthur E. Appleton of Lalive & Partners.

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¹ There is no uniform name for these agreements. "Sponsoring Agreement", "Agency Agreement", "Consultancy Agreement" or "Intermediary Agreement" are denominations found in published arbitral awards.

² In most of the published awards the dispute opposes principal and agent, without participation of the procurement authorities of the country where the agent was to perform the agreement. Exceptions: ICC Case No. 6401, Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines, Award of December 19, 1991, published in Mealey's Int. Arb. Report, January 1992, Doc B-1; Ad hoc arbitration (UNCITRAL), Himpurna California Energy (Bermuda) v. P.T. Persero (Indonesia), award published in (2000) XXV Y.B.Com.Arb. 13 at 44 et seq.

³ See the synopsis of arbitral awards attached.

⁴ [OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of December 21, 1997](#). Switzerland ratified the Convention and implemented its rules in the framework of a revision of the Criminal Code.

⁵ Swiss Federal Tribunal, Decision of December 30, 1994 (Westacre), published in [1995] ASA Bull. 217 at 226.

⁶ Carlo Lombardini, Corruption et blanchiment (Anwaltsrevue, 9/2001), p. 7, 8; Philippe Reymond, "Trafic d'influence et contrats de distribution: quelques aspects de droit international privé" in I. Cherpillod (éd.) et al., Les contrats de distribution, Contributions offertes au Professeur Dessemontet (Publication CEDIDAC 38, Lausanne 1998), p. 311. See also Yves Derains, "Analyse de sentences arbitrales" in Les commission illicites, Institut du droit et des pratiques des affaires internationales (Publication CCI 480/2, Paris 1992), p. 61 at 66 et seq.; Ibrahim Fadlallah, "Les instruments de l'illicite" in L'illicite dans le commerce international (under the direction of P. Kahn and C. Kessedjian, Paris, 1996), p. 292.

⁷ Swiss Federal Tribunal, decision of April 17, 1990, Hilmarton v. Omnium, setting aside the arbitral award in ICC Case No. 5622, published in [1993] ASA Bull. 253. The arbitral award is published in (1993) ASA Bull. 247; [1993] Rev.Arb. 327; [1992] Rivista dell' Arbitrato 773; (1994) XIX Y.B.Com.Arb. 105 (in English).

⁸ [ICC Case No. 7047 \(1994\), Westacre v. Jugoimport \[1995\] ASA Bull. 301](#); ICC Case No. 5622 (1988), Hilmarton v. Omnium, *ibid*.

⁹ French Criminal Code, Art. 433-1 and 433-2. See also [ICC Case No. 3916 \(1982\), Collection of ICC Arbitral Awards 1974-85, S. 507, 510](#). See also Didier Lamethe, "L'illicite en matière de services liés au commerce international" in L'illicite dans le commerce international, *op. cit.* at n.6, p. 177 at p. 192.

¹⁰ *op. cit.* at n.7.

¹¹ Final award in [ICC Case No. 9333 \(1998\), published in \[2001\] ASA Bull. 757](#) (rendered by the author of the present article).

¹² [ICC Case No. 6248 \(1990\), published in \(1994\) XIX Y.B.Com.Arb. 124](#).

¹³ Geneva Chamber of Industry and Commerce (CCIG), Award of February 23, 1988, published in [1988] ASA Bull. 136; Ad hoc award (1989), published in [1991] ASA Bull. 239; [ICC Case No. 7047 \(1994\), Westacre v. Jugoimport \[1995\] ASA Bull. 301](#).

¹⁴ Ewan Brown, "Illegality and public policy - Enforcement of arbitral awards in England" [2000] Int.A.L.R. 31.

¹⁵ ICC Case No. 6401 (Westinghouse), *op. cit.* at n.2, p. 34. See also Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration (Thèse No. 613, Geneva, 2001), p. 212 et seq.; J. Rosell and H. Prager, "Illicit Commissions and International Arbitration, The Question of Proof" (1999) 15 Arbitration International p. 329 at 346; Andreas Reiner, "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arbitration International 336.

¹⁶ ICC Case No. 5622 (1988), Hilmarton v. Omnium, *op. cit.* at n.7.

¹⁷ See, for instance, Swiss PIL Act, Art. 182.3; ICC Rules, Art. 15.

¹⁸ Swiss Federal Tribunal, decision of March 2, 2001, Bank Saint Petersburg v. ATA Insaat Sanayi ve Ticaret Ltd, published in [2001] ASA Bull. p. 531, 536.

¹⁹ Swiss Federal Tribunal, decision of July 25, 2000, Nederlandse Aardolie Maatschappij BV (NAM) v. BEB Erdgas und Erdöl GmbH, Deutsche Shell Aktiengesellschaft, ESSO Deutschland GmbH.

²⁰ Michael E. Schneider, Kommentar zum Schweizerischen Internationalen Privatrecht (Basel, 1996), Art. 184. Regarding the issue of evidence see also Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration (Thèse No. 613, Genève, 2001), p. 212 et seq.; various authors, "The Standards and Burden of Proof in International Arbitration" Special Section (1994) 10 Arbitration International 365 et seq.; Manfred Knof, Tatsachenfeststellung in Streitigkeiten des internationalen Wirtschaftsverkehrs (Köln, 1995).

²¹ ICC Case No. 9333, *op. cit.* at n. 11.

²² The rule of interpretation "in claris non fit interpretatio" ("Eindeutigkeitsregel") - according to which clear terms need not be interpreted - was rejected by the Swiss Federal Tribunal in two recent cases (Decision of July 5, 2001, Official Court Reporter, 127 III 444; Decision of March 10, 1995, summarised in [1995] Z.B.J.V. 241).

²³ ICC Award of March 21, 1992, Westman International Ltd v. Alsthom Turbines à Gaz SA, summarised in [1994] Rev.Arb. 359 at 367.

²⁴ ICC Case No. 5622 (1988), Hilmarton, *op. cit.* at n.7; ICC Case Westman, p. 368, *op. cit.* at n.23, p. 368; ICC Case No. 9333 (1998), *op. cit.* at n. 11.

²⁵ Ad hoc award (1995), [1995] ASA Bull. 742; ICC Case No. 9333 (1998), *op. cit.* at n. 11.

²⁶ IBA Rules on the Taking of Evidence in International Commercial Arbitration, Arts 9.4 and 9.5.

²⁷ [ICC Case No. 1110 \(1963\)](#); (1994) 10 Arbitration International 282.

²⁸ [ICC Case No. 3916 \(1982\), Collection of ICC Arbitral Awards 1974-85, p. 507](#).

²⁹ Ad hoc Award (1995), [1995] ASA Bull. 742.

³⁰ ICC Case No. 8891 (1998), J.D.I. - Clunet 4/2000, 1076. J. Rosell and H. Prager, op. cit. at n.15, p. 333. The arbitral tribunal found, however, that in the country where the agent was to render the services success fees were the usual remuneration.

³¹ Ahmed S. El Kosheri and Philippe Leboulanger, "L'arbitrage face à la corruption et au trafic d'influence" [1984] Rev.Arb. 3 at 7.

³² Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration (Thèse No. 613, Geneva, 2001), p. 271 et seq. citing the award in ICC Case No. 8113 (1996). See also Yves Derains, La lutte contre la corruption - Le point de vue de l'arbitre international (Contribution to the 34th AIJA Congress, Montreux 1996), p. 9.

³³ ICC Case No. 8891 (1998), J.D.I. - Clunet 4/2000, 1076. Likewise, the U.S. Department of Justice in a brochure regarding the Foreign Corrupt Practice Act (FCPA) recalls that "the U.S. firm should be aware of so-called 'red flags/ i.e. unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer." (<http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>, visited on December 6, 2001, last updated October 24, 2001). See also D. Lamethe, op. cit. at n.9, p. 189 for whom a success fee exceeding 3-5% of the total value of the contract awarded is conclusive evidence for the payment of bribes to local decision makers.

³⁴ François Knoepfler, "Corruption et arbitrage international" in I. Cherpillod (éd.) et al., Les contrats de distribution, Contributions offertes au Professeur Dessemontet, op. cit. at n.6, p. 357 at p. 368.

³⁵ [ICC Case No. 6497, \(1999\) XXIV Y.B.Com.Arb. 71.](#)

³⁶ See n. 11 above.

³⁷ ICC Case No. 1110 (1963), (1994) 10 Arbitration International 290.

³⁸ ICC Case No. 7047, op. cit. at n.8, p. 337. In the Lunik case, to which French law applied, the principal did not argue that the fee was disproportional but claimed that the fee should be reduced due to the agent's purported failure to perform all services required under the agreement. The arbitral tribunal dismissed the argument ([1998] ASA Bull. 444 et seq.)

³⁹ Debatable, therefore, the award in ICC Case No. 8177 (ICC Bulletin, Spring 2001, p. 85), where, moreover, the applicable law had been determined by the arbitral tribunal based upon a letter sent by the agent to the (French) principal after the dispute arose. The fact that the agent invoked provisions of the French Civil Code in this letter was deemed to be a choice of law.

⁴⁰ ICC Case No. 7047, op. cit. at n.8, p. 335.

⁴¹ ICC Case No. 9333, op. cit. at n. 11, p. 763.

⁴² This aspect seems to have been overlooked in ICC Case No. 6497 (1994), op. cit. at n.35, p. 74; and No. 8177 (1996), ICC Bulletin, Spring 2001, p. 85 at p. 90.

⁴³ ICC Case No. 9333 (1998), op. cit. at n. 11, p. 765; ICC Award in Lunik [1998] ASA Bull. 222.

⁴⁴ ICC Award Lunik, op. cit. at n.38; ICC Case No. 9333, op. cit. at n. 11. See also D. Lamethe, remarks in round table discussion in L'illicéité dans le commerce international, op. cit. at n.6, p. 303.

⁴⁵ Yves Derains, "Analyse de sentences arbitrales" in Les commission illicites, Institut du droit et des pratiques des affaires internationales (Publication CCI 480/2, Paris 1992), p. 61 at p. 66.

⁴⁶ ICC Case Lunik, op. cit. at n.43, p. 228 et seq.

⁴⁷ op. cit. at n.42, p. 88.

⁴⁸ In ICC Case No. 4145 the arbitral tribunal established that the procurement agency in charge of the tender obtained price reductions of approximately U.S.\$41 million compared to the original price of U.S.\$415 million (Collection of ICC Arbitral Awards 1974-85, p. 559). See also Rosell and Prager, op. cit. at n.15, S. 346, 60n. In ICC Case No. 9333 the awarding authority negotiated a contract price of FF 7 million whereas the contractor's initial offer was FF 12 million (op. cit. at n. 11). In ICC Case No. 6401, op. cit. at n.2, the price was increased substantially but the higher price was justified by an increased scope of work.

⁴⁹ See n.9 above. Sayed, op. cit. at n.15, p. 263, observes that it should be borne in mind that the speed in obtaining government orders may also be taken as evidence for the agent's efficiency.

⁵⁰ ICC Case No. 8891 (1998), J.D.I. - Clunet 4/2000, 1076.

⁵¹ op. cit. at n.35.

⁵² op. cit. at n.9.

⁵³ ICC Case Lunik, op. cit. at n.43, p. 226 et seq.

⁵⁴ ICC Case Lunik, op. cit. at n.43, p. 218. See also ICC Case No. 9333, op. cit. at n. 11, p. 770.

⁵⁵ SAYED, op. cit. at n.15, p. 264.

⁵⁶ op. cit. at n.30.

⁵⁷ ICC Case Lunik, op. cit. at n.43, p. 229 et seq. See, however, ICC Case No. 3916, op. cit. at n.9, where the speed of

the award was considered to be circumstantial evidence for corruption.

⁵⁸ ICC Case No. 5622 (1988), Hilmarton, op. cit. at n.7.

⁵⁹ The award in the Westman case was set aside because the principal demonstrated in the appeal proceedings that the agent had not been active at all and that the statements of cost and expenses which the agent had produced in the arbitration were forged: op. cit. at n.23.

⁶⁰ See ICC Award (Westman), op. cit. at n.23, p. 363.

⁶¹ Fabienne Hohl, Procédure civile (Tome I, Berne, 2001), S. 206, 1080n. ICC Case Lunik, op. cit. at n.43, p. 229. See also the arbitration reported by Andreas Reiner, The Standards and Burden of Proof in International Arbitration (1994) 10 Arbitration International 334.

⁶² ICC Case No. 7047, op. cit. at n.8, p. 334.

⁶³ op. cit. at n.9. See also Yves Derains, La lutte contre la corruption - Le point de vue de l'arbitre international (Contribution to the 34th AIJA Congress, Montreux, 1996), p. 10: "C'est probablement l'incapacité dans laquelle se trouve l'agent d'apporter des preuves de son activité qui révèle le mieux une activité illicite."

⁶⁴ op. cit. at n.23, p. 368 et seq.

⁶⁵ Ad hoc award (1995), op. cit. at n.25, p. 746 et seq.

⁶⁶ Sayed, op. cit. at n.15, p. 262, with reference to ICC case No. 7047 (see n.8) and No. 4145 (see n.48) 67. op. cit. at n.7

⁶⁷ op. cit. at n.7.

⁶⁸ ICC Case Westman, op. cit. at n.23, p. 368, where payment of the agent's fees to the proverbial numbered Swiss bank account had been agreed. (In this context it might be added that contrary to a widely held belief, banks in Switzerland must ascertain the beneficial owner of any account, numbered or not.)

⁶⁹ See also Sayed, op. cit. at n.15, p. 293.

⁷⁰ Decision of the Swiss Federal Tribunal, Official Court Reporter, 123 III 101 at 107.

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery