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Corruption in International Arbitration

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CORRUPTION IN INTERNATIONAL ARBITRATION

By

INAN ULUC

A thesis submitted in partial fulfillment of the

requirements for the degree of

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ABSTRACT

Corruption represents a great menace to national and international development. It jeopardizes democracy, human rights, and social justice. Consequently, corruption is vehemently abhorred and denounced by members of the international arbitration arena. Unfortunately, while these players purport repugnance towards corruption and do not condone corrupt acts, there has arisen a misplaced distrust of arbitral process as a proper dispute resolution system. Further, when amalgamating the inherent opaqueness of the arbitral process, its structure founded upon party autonomy, and the clear lack of authority for arbitrators to compel evidence, such distrust persists and encourages belief that arbitration is a venue where agreements vitiated by corruption find legitimization and enforcement. Within this hostile climate, issues of corruption proffer challenges to the arbitral system and impose, simultaneously, arduous tasks and great responsibility upon arbitrators.

Indisputably, corruption's involvement in arbitration is far from novel. Nonetheless, there remains a lack of uniformity among arbitral tribunals on how to tackle corruption. The core issues causing divergence include: (i) arbitrability and admissibility of corruption issues; (ii) the burden of proof and the standard of proof; (iii) *sua sponte* arbitrator investigation and inquiry into corruption; (iv) disclosing corruption to arbitral institutions and public authorities; (v) and proper judicial review of an arbitral award when the legality of the award is challenged on the basis of corruption.

This study delineates these controversial concerns and analyzes practical solutions within the context of theory and practice. Further, this study scrutinizes commercial and investment-treaty arbitration cases, national and international court judgments, international conventions, national statutes, plus, other materials exploring corruption and arbitration.

By referencing a wide collection of historic and contemporary sources, this study will aid practitioners and scholars interested in the ongoing interaction between corruption and arbitration.

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INTRODUCTION

This paper explores and examines the nexus between corruption and international arbitration. To do this, several resources required consultation, including elusive published arbitral awards and eminent national court judgments. To begin, it is prudent to furnish a brief history of corruption.

Corruption in the international arena is widespread and worsens with each passing day. Pursuant to *Transparency International's Corruption Perception Index 2014*, “not one single country gets a perfect score and more than two-thirds [69 percent of countries] score below 50, on a scale from 0 (highly corrupt) to 100 (very clean).”¹ Additionally, the same Index reveals that 58 percent of G20 countries score below 50 out of 100. Astoundingly, the World Bank estimates that the annual cost of corruption is US\$1 trillion.² Further, it is approximated that, solely in developing countries, corrupt officials receive bribes amounting to US\$40 billion each year.³ In addition, a “first-of-its-kind” report issued by the European Union (hereinafter EU) illustrates the seriousness of the problem through accounting the costs of corruption to Europe. According to the report, corruption devastates the EU’s economy, reflected by an annual loss equating to US\$ 162.19 billion across 28 member states.⁴

¹ Corruption Perception Index 2014, available at <https://www.transparency.org/cpi2014/results>; Corruption Perception Index 2015, available at <https://www.transparency.org/cpi2015>.

² Daniel Runde, *It's Time To Get Serious About Global Corruption* (Jan. 22, 2015, 03:16 PM), <http://www.forbes.com/sites/danielrunde/2015/01/22/time-to-get-serious-global-corruption/#2715e4857a0b23994bb24fae>. See generally Sadika Hameed & Jeremiah Magpile, *The Costs of Corruption*, CSIS (January, 2014), <http://csis.org/publication/costs-corruption>; Stella Dawson, *Private Sector Corruption in Developing Countries Costs at Least \$500 Billion*, Thomson Reuters Foundation (Jan. 22, 2014, 08:25 AM), <http://www.trust.org/item/20140122080813-9hfpw>.

³ Runde, *supra* note 2.

⁴ Chris Morris, *Corruption across EU 'breathhtaking'* - EU Commission, <http://www.bbc.co.uk/news/world-europe-26014387> (last updated Feb. 3, 2014). ALOYSIUS P.

Corruption may be credited for obstructing efficient operation of fundamental human rights, rule of law, social justice, and democracy, regardless of that country's political system and level of development. Accordingly, corruption weakens institutions, breeds ineffectual governments, and erodes public confidence.⁵

In spite of these insidious threats, corruption has long been viewed as an inherent human condition, thus necessitating blueprints to successfully conduct business in challenging regions of the world in order to better “grease [] the wheels of progress.”⁶ However, corruption is no longer deemed inherent and inevitable. Rather, there is a “zero tolerance” attitude to accommodate it and today, corruption is

LLAMZON, CORRUPTION IN INTERNATIONAL ARBITRATION 39 (2014) (quoting from Peter Eigen, Transparency International's Head, “[...] The whole essence of paying a briber is that you want to buy a wrong decision. A wrong decision about an investment program, a wrong decision about the sizing and timing of a huge project in a country, a wrong decision about the indebtedness of a country and the allocation of scarce resources. Corruption is really the main reason for poverty in these countries and the reason for despair and hopelessness of billions of people who are affected.”)

⁵ Global Corruption Report: Education 15 (2013), available at http://www.transparency.org/whatwedo/pub/global_corruption_report_education (last visited Feb. 17, 2014). For further information see generally Johann Graf Lambsdorff, *Consequences and Causes of Corruption –What do We Know from a Cross-Section of Countries?* (2005), <http://econstor.eu/bitstream/10419/55031/1/684238772.pdf>; Sanjeev Gupta & Hamid Davoodi & Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty*, 1 (IMF Working Paper No. 98/76) (1998); Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L.J. 1253 (2012); Helmut Sohmen, *Critical Importance of Controlling Corruption*, 33 INT'L L. 863 (1999); RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENT 56-57 (2013) (“...both in developing countries and developed countries, corruption affects the greatest development needs, such as infrastructure including telecoms and construction, energy including nuclear power, natural resource development including oil and gas, and intellectual property including pharmaceuticals...The side effects of corruption, apart from lining the pockets of a select few, include exploitative work conditions, slave labor, child labor, discrimination, energy shortages and diversions, environmentally hazardous practices, unsafe medical drugs and practices, and defective and unsafe infrastructure.”)

⁶ Alford, *supra* note 5, at 1254 (citing John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, 77 Foreign Aff. 17, 17 (1998)). See Ban Ki-moon, Secretary-General's Message for 2015 International Anti-Corruption Day (“Global attitudes towards corruption have changed dramatically. Where once bribery, corruption and illicit financial flows were often considered part of the cost of doing business, today corruption is widely – and rightly – understood as criminal and corrosive.”)

internationally regarded with abhorrence.⁷ Fortunately, this vehemence led to a cascade of national statutes and international conventions, all of which condemn corruption and deploy policies against it.⁸ Although there is solidarity between national and international regimes against corruption, they do diverge on the definition and scope of corruption.

Due to this divergence, it is essential to clarify the meaning and scope of corruption. Despite the convergence of national and international laws denouncing corruption, there is no comprehensive, universally well-accepted definition. Definitions differ from one institution to the other in accordance with each institution's perspective. For instance, while *Transparency International* defines corruption as the “abuse of entrusted power for private gain”, the *United Nations*

⁷ Kofi A. Annan, The Foreword to the United Nations Convention Against Corruption (2003), http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the equality of life and allows organized crime, terrorism and other threats to human security to flourish.”); JAMES D. WOLFENSOHN, THE RIGHT WHEEL: AN AGENDA FOR COMPREHENSIVE DEVELOPMENT IN VOICE FOR THE WORLD'S POOR: SELECTED SPEECHES AND WRITINGS OF WORLD BANK PRESIDENT JAMES D. WOLFENSOHN, 1995-2005 140 (2005) (“Corruption is a cancer. Corruption is the greatest eroding factor in a society. Corruption is the largest impediment to investment. And it is not just a theoretical concept. It is a concept whose real implications become clear when children have to pay three times the price that they should for lunches. It becomes clear when people die from being given bad drugs, because the good drugs have been sold under the table. It becomes clear when farmers are robbed of their livelihood.”); Ban Ki-moon, Secretary-General's Message for 2015 International Anti-Corruption Day (“Corruption has disastrous impacts on development when funds that should be devoted to schools, health clinics and other vital public services are instead diverted into the hands of criminals or dishonest officials. Corruption exacerbates violence and insecurity. It can lead to dissatisfaction with public institutions, disillusion with government in general, and spirals of anger and unrest.”)

⁸ U.S. Foreign Corrupt Practices Act (15 U.S.C. §§ 78-dd-1, et. seq.) (1977); Inter-American Convention Against Corruption (1997); Convention on the Fight Against Corruption Involving Officials of European Communities or Officials of Member States of the European Union (1997); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999); Council of Europe Criminal Law Convention on Corruption (2002); Council of Europe Civil Law Convention on Corruption (2003); United Nations Convention Against Corruption (2005); ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005); African Union Convention on Preventing and Combating Corruption (2006); U.K. Bribery Act (2010).

Office of Drugs and Crime resists an express definition on the grounds that complications of such a definition are inevitable and will cause legal, criminological, and political problems.⁹

Further, one of the leading conventions, the *United Nations Convention Against Corruption* (hereinafter the UNCAC),¹⁰ approaches corruption in a different way. The UNCAC focuses on bribery in its Articles 15, 16, and 21. Article 15 concerns bribery of national public officials. Article 16 concentrates on bribery of foreign public officials and officials of public international organizations, and Article 21 targets bribery in the private sector. Thus, under the UNCAC, corruption is:

- “the promise, offering or giving , to a (foreign) public official (officials of a public international organizations), directly or indirectly, of an undue advantage, for the official himself or herself, or another person or entity, in order that the official acts or refrains from acting in the exercise of his or her official duties;
- the solicitation or acceptance by a (foreign) public official (officials of public international organizations), directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in

⁹FAQs On Corruption, available at http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/#defineCorruption (last visited Dec. 3, 2014); United Nations Office on Drugs and Crime, *The Global Program Against Corruption: UN Anti-Corruption Toolkit*, available at <http://www.unodc.org/pdf/crime/toolkit/fl1tof7.pdf>.

¹⁰ See *supra* note 8.

order that the official acts or refrains from acting in the exercise of his or her official duties.”¹¹

Further, note that the scope of bribery has extended to the private sector.

Under the UNCAC Article 21, each signatory state is obligated to adopt both legislative and other relevant measures to establish criminal offences committed intentionally in the course of economic, financial, or commercial activities. Article 21 is comprised of two sub-sections. Under the first sub-section (Article 21 (a)), a person commits a criminal offense when he or she promises, offers, or gives, directly or indirectly, an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself, or for another person, in order to effectuate he or she to breach his or her duties, through action or lack thereof.

However, under the second sub-section of Article 21 (Article 21 (b)), it is also a criminal offense to solicit or accept, either directly or indirectly, an undue advantage by any person who directs or works in any capacity for *a private sector entity*. This includes prohibition from accepting an undue advantage for himself, herself, or for another, when doing so would constitute a breach of his or her duties, through either action or inaction.¹² In sum, one of the greatest challenges facing diagnosis and

¹¹ Alexandre Petsche & Alexandra Klausner, Chapter IV: Crime and Arbitration: Arbitration and Corruption, in Christian Klausegger, Peter Klein *et al.* (eds), *Austrian Yearbook on International Arbitration 2012*, Austrian Yearbook on International Arbitration, Volume 2012 (Manz'sche Verlags- und Universitätsbuchhandlung 2012) pp. 348. *See also* Article 1 (1) of the OECD Anti-Bribery Convention defines bribery as “[the conduct] of any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or *through intermediaries*, to a *foreign public official*, for that official or for a third party, *in order that the official act or refrain from acting in relation to the performance of official duties*, in order to obtain or retain business or other improper advantage in the conduct of international business.”

¹² This kind of corruption is called “private sector corruption” and constitutively takes place amongst private companies and suppliers, subcontractors, staff members etc. *See* Global Corruption Report 20

treatment of corruption stems from the definitional variances of what actually constitutes corruption.

Corruption is a complex, versatile issue that influences infinite engagements. While corruption's manifestations evolve in accordance with surrounding circumstances, basic symptoms of corruption constitutively remain unaltered, such as abuse of power or abuse of a duty owed to the public in exchange for private gain. Because of the metamorphic and comprehensive complexion of corruption, its definition should reflect the dynamism of the term itself.

Thus, the definition of corruption must be broad, resilient, and free from a structured framework, to allow for an osmotic movement to ease confrontation of corruption's inherent complexity and versatility. The definition integrating these features will apply, not only to well-known forms of corruption, but also to the ones that do not fall within the boundaries of current corruption trends. Therefore, a proper definition of corruption, one that encompasses dynamism and modernity, may be written as:

“a violation of, or distortion of, fundamental rules, laws, policies, or exploitation of trust to provide illegal or unauthorized privileges and undue advantages, in exchange for either personal or third party gain, but to the detriment of public interest.”

Corruption embodies a variety of wrongful acts. The most basic and well-known examples of corruption include: bribery of national or foreign public officials,

(2009), *available at* http://www.transparency.org/whatwedo/pub/global_corruption_report_2009 (last visited Nov. 24, 2014) (“A senior accountant manager at Royal Bank of Canada was accused of accepting C\$362,000 (US\$300,000) in bribes from a now defunct metal supply company in exchange for approving loans, increasing the company's multimillion-dollar credit line preparing fraudulent financial statements.”)

‘trading in influence (also known as “influence peddling”)', abuse of public office with the intent of making a private gain, obstruction of justice, theft and fraud, illicit enrichment, improper political contributions, and money laundering.¹³

Notably, classification of fraud catalyzes divergence between legal scholars and practitioners because some experts propound that corruption and fraud are two distinct illegalities, while others lump them under one umbrella. Important to note however, is that one feature of corruption is “the deliberate abuse of authority or trust.”¹⁴ In this regard, corruption and fraud may be analogized to faces of a coin: while they appear different, they are closely related due to fraudulent conducts’ potential role in facilitating, or concealing corruption.¹⁵ Thus, for the purposes of this exploration and examination, fraud will be classified under corruption and referenced accordingly. Additionally, facilitation payments (otherwise known as “speed” or “grease” payments) shall also fall under the penumbra of this study’s corruption definition.

Unfortunately, corruption and its forms ventured into international arbitration. Today, arbitrators encounter and tackle corruption issues at an alarming rate of inflation in both international commercial arbitration and investment treaty

¹³ Petsche & Klausner, *supra* note 11, at 346. See also United Nations Office on Drugs and Crime, *The Global Programme Against Corruption: UN Anti-Corruption Toolkit*, available at <http://www.unodc.org/pdf/crime/toolkit/fltof7.pdf>; Daniel Litwin, *On the Divide Between Investor-State Arbitration and the Global Fight Against Corruption*, 10(3) TRANSNAT’L DISP. MGMT. 1, 3 (2013), <http://www.transnational-dispute-management.com/article.asp?key=1964>.

¹⁴ YAS BANAIFTEMI, CHAPTER 1: THE IMPACT OF CORRUPTION ON “GATEWAY ISSUES” OF ARBITRABILITY, JURISDICTION ADMISSIBILITY, AND PROCEDURAL ISSUES IN ADDRESSING ISSUE OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION, DOSSIERS XIII OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 16 (2015).

¹⁵ Carolyn B. Lamm, Hansel T. Pham & Rahim Moloo, *Fraud and Corruption in International Arbitration* in Miguel Ángel-Fernández-Ballesteros & David Arias (eds), in *Liber Amicorum Bernardo Cremades* 719 (2010).

arbitration. For example, in international commercial arbitration, a principle may allege corruption to avoid performing contractual obligations on the grounds that the intermediary contract is illicit (*contract of corruption*), or a party may raise corruption allegations to invalidate the main contract because it was procured by corruption (*contract obtained by corruption*).¹⁶ Next, as to investment treaty arbitration, state parties may raise corruption allegations with the intent to coerce an arbitral tribunal to deny jurisdiction or declare the investor's claims inadmissible.¹⁷ Regrettably, corruption allegations may also target the legality of the award-making process and, resultantly, the award falls prey to review on the basis of allegedly corrupt arbitrators, or corrupt witnesses (both fact and expert).¹⁸

¹⁶ SÉBASTIEN BESSON, CHAPTER 6: CORRUPTION AND ARBITRATION IN ADDRESSING ISSUE OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION, DOSSIERS XIII OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 103 (2015).

¹⁷ An arbitral tribunal in investment arbitration can deny jurisdiction on the basis of a violation of legality clause that requires an investment to be made in a manner complying with the host-State's law. For example, in *Metal-Tech v. Uzbekistan* and *Inceysa v. El Salvador* cases, the tribunals lacked jurisdiction because the investments were procured by corruption; thus, the investments were not implemented in accordance with the host-States' law; therefore, the disputes before the arbitral tribunals were not under the penumbra of the consent expressed by the host-States in the investment treaties. If there is no legality clause integrated into the respective investment treaty, it is believed that there is an implicit legality duty placed on investors by the ICSID Convention. In this regard, even if a tribunal claims jurisdiction over the case, it may dismiss the claims of an investor, who associated itself with corruption, on the basis of inadmissibility. This dismissal of the tribunal may be founded on "unclean hands doctrine" and "international public policy." See generally Carolyn B. Lamm, Brody K. Greenwald & Kristen M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29(2) ICSID Review 328-349 (2014); Utku Cosar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions* in Legitimacy: Myths, Realities, Challenges, 18 ICCA Congress Series 531-556 (2015); Aloysius Llamzon & Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in Legitimacy: Myths, Realities, Challenges, 18 ICCA Congress Series 451-530 (2015).

¹⁸ Stephen Wilske & Todd J. Fox, *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence*, 10(3) TRANSNAT'L DISP. MGMT. 489, 493 (2013), www.transnational-dispute-management.com/article.asp?key=1950. ("In December 2009, a Pennsylvania judge admitted to appointing an allegedly neutral arbitrator in an UM/UIM case in exchange for use of a New Jersey beach house. According to the information released at the time of

International arbitration is not a new forum to the issues of corruption. Arbitrators have effectively and efficiently fought corruption for years. However, this transparent fight against corruption could not prevent an emerging perception that arbitration may provide a platform where illegal contracts and contracts tainted by corruption find legitimization and enforcement. This perception is noticeable even in venues where arbitration is strongly advocated. For example, in France, while in-depth review of arbitral awards by courts is principally limited to “flagrant, actual, and concrete”¹⁹ violations of public policy, when an arbitrator renders an award subsequent to a decision on the corruption issue, a reviewing court will instigate full award review.²⁰

In this current climate of arbitration and arbitrator competence suspicion, corruption is an enormous hurdle standing before practitioners. However, while this hurdle looms large, it is essential for arbitral tribunals and their respective arbitrators to defeat, to show that arbitration is not an arena where illicit contracts become licit, but rather, is a venue through which public interests and international legal order are enforced and guarded. Adding challenge to this already vast impediment is that, available arbitral case law postulates that there is puzzlement among arbitrators regarding the appropriate method that should be employed in the campaign against corruption. The main cause behind this perplexity is a lack of systemic regulation.

this (meanwhile former) judge’s prosecution, the appointment was ‘corrupt, deceptive and biased and was made in a manner that undermined the fairness and integrity of the arbitral process...’”)

¹⁹ SA Thales Air Defense v. GIE Euromissile, CA Paris, November 18, 2004, N. 2002/19606.

²⁰ The standard of judicial review of an arbitral award may vary according to the venue where the award is challenged and the public policy principle (pro-enforcement policy v. public policy exception) that is favored. This issue is assessed in-depth under Chapter-V: The Standard of Judicial Review in the Face of Corruption Allegations (pp. 282-381).

Absent such regulation, which would outline which fundamental principles, there is no uniform strategy to apply in the face of corruption in arbitration.

This lack of regulation has unavoidably generated divergence among, not only arbitral tribunals but also reviewing national courts when the following issues arise: (i) arbitrability and admissibility of corruption issues; (ii) the burden of proof and the requisite standard of proof; (iii) *sua sponte* arbitrator investigation and inquiry into corruption; (iv) disclosing corruption to arbitral institutions and public authorities; (v) and proper judicial review of an award when the legality of the award is challenged on the basis of corruption.

This study endeavors to address these issues that leave arbitral tribunals and national courts between a rock and a hard place every time the issue of corruption is alleged. First, the discussion will analyze the nexus between corruption and arbitration in the context of an underlying contract, an arbitration agreement, and an arbitral proceeding (*Chapter-I*). Second, this analysis proceeds to examine the impediment corruption poses to arbitral jurisdiction and the tools that are available to an arbitral tribunal to vanquish this impediment (*Chapter-II*). Third, once jurisdiction is recognized, the arbitral tribunal must make findings relating to corruption. This leads to queries relating to the burden of proof and the standard of proof (*Chapter-III*). Fourth, after the resolution of evidentiary issues, answers to two critical questions require affirmation: (i) do arbitrators have a duty to probe into corruption in the absence of a party allegation and (ii) if the finding of corruption is made, do arbitrators have a duty to report this finding? (*Chapter-IV*). Fifth, the study concludes

by delving into the manner in which arbitral awards are greeted by national courts when challenged on the grounds that the award enforces an illegal contract or is tainted by corruption (*Chapter-V*).

CHAPTER-I

CORRUPTION and ARBITRATION

“By justice a king gives a country stability,
but those who are greedy for bribes tear it down”¹

Corruption is an insidious sickness that extends beyond international borders, finds solace in diversity, plagues every nation, and influences every government. Demonstrably, in *The Arthashastra*, a 2,400 year-old ancient Indian text, corruption’s timelessness is evident. In one part of this text, *Kautilya*, “one of the advisors of the emperor Chandragupta Maurya, talks about the inevitability of corruption, and of the need to restrain it.”²

Historically, corruption manifested itself in India, China, Rome, and Greece. Startlingly, the roots of corruption are traceable to Ancient Greek,³ where corruption pestered the Greek dispute resolution systems, particularly arbitration. Surprisingly, ancient Greek texts trace corruption in the arbitral process between Aphrodite and

¹ *Proverbs* 29:4 (New International Version).

² Mark J. Farrles, *What is Corruption?: A History of Corruption Studies and Great Definitions Debate* 4 (June 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739962 (“Imported goods shall be sold in as many places as possible...[and] local merchants who bring in foreign goods by caravan or by water routes shall enjoy exemption from taxes, so that they can make a profit. The King shall protect trade routes from harassment by courtiers, state officials, thieves and frontier guards....[and] frontier officers shall make good what is lost...Just as it is impossible not to taste honey or poison that one may find at the tip of one’s tongue, so it is impossible for a government servant not to eat up at least a bit of the King’s revenue...And there are about forty ways of embezzlement by the government servant....”)

³ DEREK ROEBUCK, ANCIENT GREEK ARBITRATION 42-43 (“The citizens of Athens exercised their democratic control of government primarily through meetings of the whole citizen body, an authority which they traced back to Solon...[W]hen they were acting as a tribunal to hear criminal prosecutions or decide civil disputes, they came to sit in smaller but still enormous committees. Any citizen of the age of thirty or above, untainted by loss of citizen rights, was eligible to sit as dikast on taking the annual oath. At first, there were six thousand members of a plenary session...Around 450BC pay of two obols a day was introduced, raised to three in the 420s. There were six obols to the drachma. It was abolished when democracy came to an end in the 320s. *The large numbers were considered necessary to prevent bribery, the pay to secure attendance.*”) (Emphasis added)

Persephone over Adonis.⁴ Evidently, both history and myth illustrate that corruption influenced the foundations of arbitration and thus, will likely continue to insidiously impact the arbitral process in the future.

Forging on with this reality, this chapter endeavors to illustrate the close-knit relationship between corruption and arbitration.

1. Corruption As An Increasing Concern in International Arbitration

International arbitration is an alternative to the domestic judicial system where parties from different countries may resolve their disputes without filing a lawsuit in court. It is a consensual process based upon the parties' mutual agreement to use arbitration as the dispute resolution method in which a non-governmental decision-maker dismantles the dispute and manufactures a legally final, binding, and enforceable ruling.⁵

Because of a paradigm shift in the legal framework for international arbitration, international arbitration accomplished great practical success all over the world. This success is reflected by

“the increasing number of international (and domestic) arbitrations conducted each year, under both institutional auspices and otherwise, the growing use of arbitration clauses in almost all forms of international contracts, the preferences of business users for arbitration as a mode of dispute resolution, the widespread adoption of pro-arbitration international arbitration conventions and national arbitration statutes,

⁴ See *supra* page 39.

⁵ Rashna Bhojwani, *Deterring Global Bribery: Where Public And Private Enforcement Collide*, 112 COLUM. L. REV. 66, 76-77(2012).

the refinement of institutional arbitration rules to correct deficiencies in the arbitral process...”⁶

As a consequence of the metamorphosis in private and public attitude, the scope of the arbitral system now extends to the resolution of disputes that were not previously under the penumbra of arbitration. Today, it is well established that intellectual property, securities, anti-trust disputes, and corruption claims are all arbitrable.

Clearly, the trend to proliferate the variety of disputes arbitration may settle, demonstrates a modern favoritism towards the arbitral process. However, despite this global trend favoring arbitration, the high prevalence of instances where corruption infects the justice system has led numerous societies to negatively perceive arbitration and its suitability to judge corruption claims. Because the arbitral process boasts non-transparency, in structure and arbitrator appointment, doubt is cast upon arbitration’s fairness and competence within the context of corruption charges. The ultimate result of this distrust is to view arbitration as an improper venue to adjudicate corruption.⁷

There are other reasons behind the growth in resistance against recognizing the arbitrability of corruption claims. These reasons are grounded on the arbitral tribunals’ circumscribed jurisdiction. The arbitral tribunal has limited power to compel parties to produce evidence and has an inability to impose criminal sanctions.⁸ This is in direct contrast with regulatory authorities, which are a) vested

⁶ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION VOLUME I* 2 (2009).

⁷ More detail related to arbitrability of corruption will be rendered under Chapter II (2).

⁸ Gary Born, *Bribery and an Arbitrator’s Task*, Kluwer Arbitration Blog (11 October 2011), <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/>.

with unlimited jurisdiction, b) have unrestricted power to make parties produce evidence, and c) authority to execute criminal penalties upon the corrupt party. These three concerns are at the heart of the jurisdictional debate between the arbitral tribunal's effectiveness when compared with the judicial process by virtue of their roles in addressing and successfully tackling corruption claims.⁹ This debate has led to a foundational question, the answer of which will define how much jurisdictional power the arbitral tribunal will be permitted to exercise. This question can be asked in the following way: on disputes submitted to arbitration involving suspicions of corruption, either by firm allegations or evidence of actual corrupt practices, can these matters be adjudicated by arbitration?¹⁰

Recently, the answer of this question, which was historically “no”, has shifted. The concept of arbitrability of corruption claims gained impetus with the decision by

⁹ Since corruption has spectacular influences upon major government functions and, accordingly, society, it is believed that courts are supposed to be the sole authority that adjudicates and prosecutes corruption. Even if the issue is entirely related to public interests, it does not represent an obstacle before the arbitrability of the issue. Today, the scope of arbitrability is interpreted in a broader context irrespective of public interests and it covers labor law, securities law, consumer law, and bankruptcy law (*see* MBNA Am. Bank, N.A. v. Hill, 436 F. 3d 104 (2d Cir. 2006); TexStyle, LLC v. Harry Group, Inc. (In re Texstyle, LLC), 2012 Bankr. LEXIS 1676 (Bankr. S.D.N.Y. 2012)). Today, there is an emerging consensus related to arbitrability of corruption. However, in the absence of a regulation that will provide arbitrators a standing while dealing with corruption, there will always be unpredictability related to outcome of the process and, accordingly, arbitrability of corruption will always be open to discussion. *See generally* Born, *supra* note 6, at 788-834.

¹⁰ The first answer to this question had been given in ICC Case No. 1110 of 1963 (The Lagergren Award). Judge Lagergren, acting as a sole arbitrator, held that he did not have jurisdiction over a contract dispute because the purpose of the contract was to secure commission payments that would then be used to bribe Argentinean officials. The Judge has concluded as follows: “After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any Court whether in the Argentine or in France, or for that matter, in any other civilized country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case.” *See* ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 63 n.65 (2004).

the Swiss Federal Tribunal in *National Power Corp v Westinghouse*.¹¹ In this case, the arbitral tribunal's exercise of jurisdiction on bribery contentions was approved. This decision by the Swiss Federal Tribunal catalyzed an emerging consensus that arbitrators *do* have jurisdiction to hear allegations of bribery and other forms of corruption raised by a party in an international arbitral proceeding.¹² Today, arbitrability of disputes involving corruption is well settled. However, arbitrators still labor with today's important and controversial issues, such as the standard of proof, the burden of proof, and evidence to be brought. Further, arbitrators must determine how to approach situations where no corruption allegations arise, but the presented facts bring suspicions of corruption to the arbitrator's attention.¹³

Corruption can manifest at any time during the arbitration procedure. It may originate from the underlying contract, arise during the arbitral process (*e.g.* appointment of arbitrators may be corrupt, arbitrators may be corrupt, either party may try to bribe a participant or witness of the opposing side in order to weaken that party's defense, etc.), or become apparent during the recognition and enforcement process. It is important to differentiate these corruption variances within the context of the enforceability of an arbitral award and the legality of an arbitral process because, depending on the manifestation, an award may or may not be conclusively enforceable.

¹¹ Judgment of 2 September 1993, *Nat'l Power Corp. v. Westinghouse*, DFT 119 II 380. *See also* *National Power Corporation (Philippines) v. Westinghouse (USA)*, Federal 1st Court Civil Court, 2 September 1993, 12 ASA Bulletin 244-247 (1994).

¹² Duncan Speller & Kenneth Beale, *Arbitration and Bribery: Open Questions* (Jan. 30, 2012), <http://www.cdr-news.com/categories/expert-views/arbitration-and-bribery-open-questions>.

¹³ Further insight related to these issues will be provided under the following chapters.

a) Corruption in Underlying Contract

First, corruption that stems from the underlying contract will be addressed.

Corruption, in particular bribery allegations, may arise in numerous ways in both commercial and investment arbitration. It is generally alleged when respondents seek to dismiss plaintiff's claims, which are generally contractual, such as damages or failure to perform. The plaintiff's claims and the defendant's replies to these claims can be categorized as the following:¹⁴

- (a) In the context of international commercial arbitration, corruption may be revealed under agency contracts where the principal fails to make the promised commission payment to the intermediary and alleges that the agency contract is null and void due to corrupt purposes;
- (b) Also within international commercial arbitration, when a foreign contractor initiates arbitration against a State-owned enterprise for the compensation of extra costs or damages from a public procurement contract, where the State-owned entity raises objections alleging that corruption procured the public contract and should be declared null and void;
- (c) Within investment arbitration, when an investor files a request for arbitration to redress its monetary damages caused by a host-State's contraventions of the investment treaty, the host-State may allege corruption whereby, it seeks to leave the investment out of the penumbra of the

¹⁴ Antonio Crivellaro, *The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption*, 10 (3) TRANSNAT'L DISP. MGMT. 1, 1-2 (2013), www.transnational-dispute-management.com/article.asp?key=1956.

investment treaty protection on the grounds of the infringement of the host-State's law (*legality requirement*);¹⁵

(d) Last, when an investor is subject to discrimination by a host-State because of his refusal to abide by demands for bribes, the claim may be brought before the arbitral tribunal.

Typically, these disputes arise upon the breaking of contractual obligations and depriving either the investor or intermediary of the commission, the future profit, or sometimes the entire investment. After the aggrieved party files the arbitration demand, both the host-State/State-owned entity and the principal usually prefer to divert their attacks to the underlying contract as the first step to declare it null and void. By attacking the underlying contract with claims of corruption, respondents seek to dismiss any claims based upon the contract.¹⁶ The respondent's contentions lead to two questions:¹⁷ (i) is the main contract null and void by virtue of being procured by corruption? and (ii) if the main contract is null and void, does it reach the contract's roots that breath life into the arbitral clause? If not, how will corruption determine the enforcement and recognition of the award?

¹⁵ See *supra* page 8 n.15.

¹⁶ Born, *supra* note 8, at 2.

¹⁷ Florian Haugeneder & Christoph Liebscher, *Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof* in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Arbitration Yearbook on International Arbitration* 539, 541 (2009).

i) Is the Main Contract Null and Void?

Now is the time to determine the fate of an underlying contract facing contamination allegation. However, first, the illegality of the underlying contract ought to be explored in the context of contract law.

Because of the variety of illegalities and illegitimate agreements, “[i]llegality is a highly complex area of contract law.”¹⁸ Some illegalities manifest in the contract and others do not. The latter category encompasses “various forms of broker, sponsoring, agency, consultancy, and intermediary agreements.”¹⁹ Such agreements may be contaminated through commission payments that serve illicit engagements.

The former category, illegal manifestations in the contract, includes

“criminal conduct, conduct prohibited by statute (even if not criminal), and conduct regarded as contrary to the public policy.... Where conduct is classified as illegal or contrary to public policy, it is generally held to be unenforceable.”²⁰

These conducts cover *contra bones mores*, such as “the proscription against piracy, terrorism, genocide, slavery, smuggling, [and] drug trafficking...”²¹ Thus, in the context of bribery and other corrupt practices, a contract that either promotes corruption or is tainted by corruption will be contrary to the public policy and is not

¹⁸ RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENT 61 (2013).

¹⁹ *Id.* at 63.

²⁰ *Illegality and Public Policy*, <http://www.australiancontractlaw.com/law/avoidance-illegality.html> (last visited Dec. 8, 2014).

²¹ International Law Association Committee on International Commercial Arbitration (New Delhi Conference-2002), *Final Report on Public Policy As a Bar to Enforcement of International Arbitral Awards*, 1(1) TRANSNAT’L DISP. MGMT. 1, 7 (2004), <http://www.transnational-dispute-management.com/article.asp?key=47>.

intended to be enforceable due to its impropriety, its violation of norms and customs, and its antagonism to modern law.²²

In international arbitration, the following three criteria are given primary consideration when deciding on whether illegal conduct took place and whether the underlying contract is valid: domestic law, international public policy, and defective consent.

First, domestic law is critical to consider when rendering a decision on whether conduct is legal or illegal, and resultantly, whether the underlying contract is valid. With respect to the influence of domestic law, it is helpful to illustrate how national laws vary in defining corrupt action. In this regard, the following paragraphs examine how national laws approach influence peddling and facilitation payments (otherwise known “speed” or “grease” payments).

Influence peddling (intermediary agreement) is defined as either using one’s influence in government or exploiting one’s connections with persons of authority to obtain favors or preferential treatment for a third party, usually in exchange for payment.²³ These agreements are not *per se* illegal. The illegality of these agreements depends upon the jurisdiction and the parties’ motivations to enter into the agreement.

²² In *Niko Resources (Bangladesh) Ltd v. People’s Republic of Bangladesh, BAPEX, and PETROBANGLA* case, the tribunal has distinguished “contract of corruption” from “contract obtained with corruption” in the context of international public policy. This differentiation will be assessed with details under oncoming paragraphs.

²³ S. Nadeau-Seguin, *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?*, 10 (3) TRANSNAT’L DISP. MGMT. 1, 3 n. 6 (2013), www.transnational-dispute-management.com/article.asp?key=1963 (“The English approach is that a representation agreement is not *per se* illegal merely because it contemplates the use of personal influence. Non-disclosure of the intermediary’s financial interest to the public official who is influenced, however, is one of the factors determine if it is improper.”)

For instance, lobbying reflects influence peddling when performed by former officials with connections to current officials. When lobbying is assessed under United States domestic law, it is entirely legal and further, is considered to be an integral part of the United States political system.

In addition to the United States domestic law, the Swiss obligations law also legitimizes intermediary agreements, commonly termed ‘agency contracts’ or ‘brokerage contracts.’²⁴ The *Hilmarton* case reflects this tendency. In *Hilmarton* case,²⁵ the Swiss Federal Court stated:

“It is allowed in our legal system to use intermediaries to follow dossier within an administration. As long as the task of the intermediary is not that corrupting officials or ministers, following of an administrative dossier is perfectly legitimate. Hence, the violation of a foreign law does not offend morality in Swiss law in the present case.”²⁶

As to facilitation payments, the assessment is supposed to be made in the context of the United States Foreign Corrupt Practices Act of 1977 (hereinafter FCPA) and the United Kingdom Bribery Act of 2010. The approaches taken by each law diverge when assessing facilitation payments. Facilitation payments are

²⁴ KREINDLER, *supra* note 18, at 97 (“Pursuant to Article 412 (1) of the Swiss Code of Obligations (“CO”):

‘A brokerage contract is a contract whereby the broker is instructed to alert the principal to an opportunity to conclude a contract or to facilitate the conclusion of a contract in exchange for a fee.’ Furthermore, pursuant to Article 412 (2), CO, ‘the brokerage contract is generally subject to the provisions governing simple agency contracts’ (Art. 412 (2), CO (which includes Arts. 394-406, CO)).” See also KREINDLER, *supra* note 18, at 101 (citing *Westacre v. Jugoimport*, ICC Case No. 7047 (1994), Award, 28 February 1994, *ASA Bulletin*, Vol. 13 (1995)) (“Lobbying as such is not an illegal activity. Lobbying by private enterprises to obtain contracts in third countries is frequently carried on with active support from state.”)

²⁵ *Omnium de Traitement et de Valorisation – OTV v. Hilmarton*, Tribunal Fédéral [Supreme Court], 17 April 1990 in Albert van den Berg (ed), 19 Yearbook Commercial Arbitration 214, 219 (1994)

²⁶ *Id.* at 219.

“payment[s] made with the purpose of expediting or facilitating the provision of services or routine government action which an official is normally obliged to perform.”²⁷

These payments are permitted in the United States and acts as a defense to bribery allegations when payments are reasonable and *bona fide* business expenses. Therefore, in the United States, engaging in facilitation payments will not constitute a violation of the FCPA. Outside of the United States, these payments are permitted in Australia, Canada, New Zealand, and South Korea.²⁸ In marked contrast to the FCPA, the United Kingdom Bribery Act strictly prohibits these payments.

Next, when domestic law applies, it strongly influences whether an underlying contract is valid in ICSID cases. For example, in *World Duty Free Company Limited v. the Republic of Kenya*,²⁹ the tribunal applied domestic law and found the underlying contract unenforceable by virtue of English and Kenyan laws.³⁰

Further, in addition to illustrating domestic law application, the *World Duty Free* case exemplifies grand corruption, as the tribunal tackled US\$ 2 million worth

²⁷ Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8(1) Asian International Arbitration Journal 1, 5 (2012) (citing UK Law Commission Consultation Paper No. 185 App F, para F. 5).

²⁸ KREINDLER, *supra* note 18, at 93-94. See also *Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business*, available at <http://www.justice.gov/criminal/fraud/fcpa/docs/combabribe2.pdf> (“Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence.”).

²⁹ *World Duty Free Company Limited v the Republic of Kenya*, ICSID Case No. ARB/00/7 (Award Date October 4, 2006).

³⁰ Haugeneder & Liebscher, *supra* note 17, at 542.

of bribery. Grand corruption surfaces with the misuse of public power,³¹ which is simply the “improper use of entrusted public authority”³² by government officials for private benefit.³³ This improper use of power relates to the activities of the state, especially to the state’s monopoly and discretionary powers.³⁴

In *World Duty Free*, a lease contract was made between investor, House of Perfume Company, and the Government of Kenya for the construction, maintenance, and operation of duty-free complexes at Nairobi and Mombasa International Airports. The value of the lease for the airports was US\$1 million per year for a 10-year period. Mr. Nasir Ibrahim Ali signed the Agreement on behalf of the House of Perfume Company (later replaced via amendment by World Duty Free Company, Ltd. on May 11, 1990.).³⁵

When the Government unilaterally renounced the lease agreement, the investor (now claimant) filed a request for arbitration with the International Centre for

³¹ Sagar A. Kulkarni, *Enforcing Anti-Corruption Measures Through International Investment Arbitration*, 10 (3) TRANSNAT’L DISP. MGMT. 1, 3 (2013), www.transnational-dispute-management.com/article.asp?key=1957.

³² Texas Penal Code Ann. § 39. 02. (“(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly: (1) violates a law relating to the public servants’ office or employment; or (2) misuses government property, services, personal, or any other thing of value belonging to the governmental that has come into the public servant’s custody or possession by virtue of the public servant’s office or employment.”)

³³ As far as the quantum of corruption is concerned, another type of corruption, which is committed by government officials, is petty corruption. It is distinguishable from grand corruption in the context of the amount that is sought by government officials. Petty corruption refers to “everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies.” See Petty Corruption, http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2 (last visited Dec. 8, 2014).

³⁴ Robert McNab & Kathleen Bailey, *Manuscript 2: Defining Corruption*, available at [http://www.nps.edu/About/USPTC/pdf/Faculty_Publications/Manuscript%202%20-%20Defining%20Corruption%20-%20McNab-Bailey%20\(17%20Sep\).pdf](http://www.nps.edu/About/USPTC/pdf/Faculty_Publications/Manuscript%202%20-%20Defining%20Corruption%20-%20McNab-Bailey%20(17%20Sep).pdf).

³⁵ *World Duty Free*, *supra* note 29, at 20.

Settlement of Investment Disputes (hereinafter ICSID).³⁶ ICSID received the demand on June 16, 2000, and on June 19, 2000, the request for arbitration was directed to the Republic of Kenya.³⁷ After the appointment and subsequent acceptance of the arbitrators,³⁸ the tribunal was deemed constituted.

The claimant contended that Mr. Ali and President Arap Moi entered into a fraudulent scheme amounting to at least US\$438 million.³⁹ Prosecution commenced under the pressures of the International Monetary Fund in 1994. However, according to the claimant, in hopes of avoiding prosecution, the Kenyan government took some steps and expropriated World Duty Free Company's assets and shares.⁴⁰ After expropriation, the Kenyan court appointed a beneficial owner. When Mr. Ali allegedly tried to have the beneficial owner discharged, he "was informed that the company would only be taken out of receivership and restored to its contractual position if he declined to give prosecution evidence..."⁴¹ Upon his decline, Mr. Ali was taken into custody by Government order and deported to the United Arab Emirates.⁴² Accordingly, the claimant contended that the Government of Kenya violated his rights by expropriating his business and his assets.⁴³

In response, the Kenyan government alleged that its underlying contract with the claimant was unenforceable because it had been obtained with a "personal

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ *See id.* at 4-5 (The claimant appointed the Honorable Andrew Rogers, QC; the respondent appointed Professor James Crawford, SC; both appointed Judge Gilbert Guillaume).

³⁹ ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 107 (2014).

⁴⁰ *Id.*

⁴¹ *World Duty Free*, *supra* note 29, at 22.

⁴² *Id.*

⁴³ Crivellaro, *supra* note 14, at 11.

donation” of US\$2 million to the President and thus, the agreement was tainted. The investor, in its Statement of Claim and Memorial, also referenced the payment:

“In order to be able to do business with the Government of Kenya, Mr. Ali was required in March 1989 to make a “personal donation” to Mr. Daniel arap Moi, then President of the Republic Kenya. The claimant adds that this donation amounted to US\$2 million, and he contends that the donation was ‘part of the consideration paid by House of Perfume to obtain the contract.’”⁴⁴

Mr. Ali transferred this money to Mr. Sajjad’s London bank account.⁴⁵ In light of these facts,⁴⁶ the tribunal concluded that the payment was made to Mr. Sajjad for President Arap Moi. The evidence of corruption was established beyond doubt.

However, the arbitral tribunal retained jurisdiction and rendered its decision upon domestic and international public policies. The arbitral tribunal found the underlying contract null and void by virtue of *ex turpi causa*⁴⁷ and concluded that it was not possible to uphold claims for ICSID tribunals premised on agreements obtained via corruption.⁴⁸

In addition to domestic law, the next criterion relating to the validity of the underlying contract is international public policy. International public policy basically

⁴⁴ *World Duty Free*, *supra* note 29, at 21.

⁴⁵ According to the claimant’s statements, Rashid Sajjad was a Kenyan citizen who was politically and powerfully connected in Kenyan government. *See generally World Duty Free*, *supra* note 29, at 37.

⁴⁶ To see entire facts that have carved out the arbitral tribunal’s conclusion *see World Duty Free*, *supra* note 29, at pp. 37-39.

⁴⁷ <http://www.oxfordreference.com/search?siteToSearch=aup&q=ex+turpi+causa&searchBtn=Search&isQuickSearch=true> (last visited Dec. 8, 2014) (“*Ex turpi causa non oritur action*: [No action can be based on a disreputable cause] The principle that the courts may refuse to enforce a claim arising out of the claimant’s own illegal or immoral conduct.”)

⁴⁸ Crivellaro, *supra* note 14, at 11.

rests upon domestic conceptions of justice and morality.⁴⁹ Although international public policy is ambiguous and lacks material definition, there is global consensus that its ingredients include fundamental economic, legal, moral, political, and social values. It reflects universal standards, shared norms, and general principles widely accepted by the international community.⁵⁰

International public policy is carved out by both surrounding circumstances and emerging concerns within a society. Until the late 1970s, there was no significant effort to combat international corruption. In 1977, the United States took a big step through criminalizing the payments of bribes to foreign officials by passing the Foreign Corrupt Practices Act following the U.S. Securities and Exchange Commission's investigation.⁵¹ This undoubtedly raised awareness relating to threats that corrupt activities pose.

Investigations by the U.S. Securities and Exchange Commission debunked that over 400 U.S. companies entered into questionable or illegal payments in excess of US\$300 million to foreign government officials, politicians, and political parties.⁵² In fact, 117 of the top Fortune 500 corporations were among those engaging in

⁴⁹ Carolyn B. Lamm, Hansel T. Pham & Rahim Moloo, *Fraud and Corruption in International Arbitration* in Miguel Ángel-Fernández-Ballesteros & David Arias (eds), in *Liber Amicorum Bernardo Cremades* 707 (2010).

⁵⁰ *Id.* at 708.

⁵¹ For detailed information related to the investigation see Rashna Bhojwani, *Deterring Global Bribery: Where Public And Private Enforcement Collide*, 112 COLUM. L. REV. 66, 70 (2012). See also Watergate: The Scandal That Brought Down Richard Nixon, available at <http://watergate.info/>.

⁵² Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From The Foreign Corrupt Practices Act To The OECD Anti-Bribery Convention To The U.N. Convention Against Corruption*, 23 IND. INT'L & COMP. L. REV. 1, 3 (2013) (citing Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look At the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 271 (1998)).

dubious payments.⁵³ Following the investigations conducted by the United States, the international community came to recognize the dangers corruption poses to societal development. As a result, not only have states enacted laws that grant no quarters to actions engaging in corruption,⁵⁴ but also, they, via international conventions, now actively cooperate internationally to fortify their positions against corruption.⁵⁵

Today, national laws and international conventions converge on the internationally applicable public policy against corruption. International arbitration reflects this convergence. For instance, arbitral tribunals recognize, apply, and refer to this public policy.⁵⁶ To illustrate, in *Niko Resources v. Bangladesh, BAPEX, and Petrobangla* case,⁵⁷ an ICSID tribunal stated:

“Normally, arbitral tribunals respect and give effect to contracts concluded by the parties which agreed on the arbitration clause from which they derive their powers. However, party autonomy is not without limits. In international transactions the most important of such limits is that of international public policy. A contract in conflict with international public policy cannot be given effect by arbitrators.”⁵⁸

⁵³ *Id.*

⁵⁴ Foreign Corrupt Practices Act of the United States; the UK Bribery Act of 2010; the Prevention of Corruption Act of India; the Belgian Criminal Code (Article 246-252 and 505bis-505ter); the French Criminal Code (Articles 435 and 445); the Italian Criminal Code (Article 317 to 322ter).

⁵⁵ See *supra* page 3 n.8.

⁵⁶ Lamm, Pham & Moloo, *supra* note 49, at 713; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000) (An ICSID tribunal stated that corruption is contrary to *international bones mores*); *Inceysa Vallisoletna S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (2006) (an ICSID tribunal has stated that fraudulent misrepresentation in a bidding process for a government contract was contrary to a principle of international public policy).

⁵⁷ *Niko Resources (Bangladesh) Ltd v. People’s Republic of Bangladesh, BAPEX, and PETROBANGLA*, ICSID Case Nos. ARB/10/11 and ARB/10/18 (Decision on Jurisdiction date 19 August 2013).

⁵⁸ *Id.* at 118.

By emphasizing supremacy of international public policy over party autonomy, this tribunal essentially indicated that contracts contrary to international public policy will not be honored. In other words, contracts that rest upon corruption (“contract of corruption”), such as bribery, influence peddling, or fraud, are “denied effect by international arbitrators.”⁵⁹

Notwithstanding this policy, the tribunal noted that “contract[s] obtained by corruption” merits further consideration. In “contracts of corruption,” the underlying motive is corrupt and both contracting parties share this motive.⁶⁰ In “contract[s] obtained by corruption,” while one party is aware of the corruption, the other party may not be cognizant of it.⁶¹ For instance, in the *World Duty Free* case, while the investor, the official, and the President of the country acted with corrupt motives, Kenya – as a state party – was not aware of the corrupt transaction.

Notably, a key determinative of a contract’s enforceability is if one party fails to entertain corrupt intent throughout contract formation. Thus, if there is a *bona fide* party who is unaware of the other party’s illegal intent, the contract may survive unless the *bona fide* party invokes invalidity. A good illustration of this concept is found within the Court’s judgment of *Archbolds v. Spangletti*:

“If at the time of making the contract there is an intent to perform it an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all.”⁶²

⁵⁹ *Id.* at 119.

⁶⁰ *Id.* at 121.

⁶¹ *Id.*

⁶² SAYED, *supra* note 10, at 359 n.1085 (See also *St. John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 Q.B. 267, 283 (“There are two general principles. The first is that a contract which is entered

Therefore, in covert bribes, an innocent party of the corruption may have a justified interest in preserving the contract obtained by corruption.⁶³ Thus, the contract may be labeled as a *voidable* contract. To illustrate what a voidable contract is, the *Niko Resources* tribunal, in referencing Article 50 of the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention), and the United Nations Convention against Corruption Article 34,⁶⁴ classified a contract obtained by corruption *voidable*.⁶⁵ Additionally, the tribunal stated that this is a “general principle of public international law as well as general principle of law and as such, applicable to contracts concluded by states.”⁶⁶ In other words, these articles should apply to any contract entered into by a State and further, that an innocent victim should be entitled to choose whether to rescind the transaction or “if it is too late to rescind, to bring it

into with the object of committing an illegal acts in unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and if unilateral, it is unenforceable at the suit of the party who is proved to have it.”))

⁶³ *Id.*

⁶⁴ Article 50 of the Vienna Convention on the Law of Treaties (“If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State *may* invoke such corruption as invalidating its consent to be bound by the treaty.”) (emphasis added); Article 34 of the United Nations Convention against Corruption (“With due regard to the rights of third parties acquired in good faith, each State party shall take measures, in accordance with the fundamental principles of its domestic law, to address the consequences of corruption. In this context, State parties may consider a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.”).

⁶⁵ LLAMZON, *supra* 39, at 190; *Niko Resources*, *supra* note 57, at 122 (English law, which is also in the same vein with the Vienna Convention, states: “...a contract procured by bribery is *voidable* at the instance of the party whose agent was bribed.”)

⁶⁶ LLAMZON, *supra* 39, at 190.

to an end for the future.”⁶⁷ This example demonstrates the attractiveness of *voidable* contracts and how arbitral tribunals seek to protect the interests of innocent parties.

Next, “contracts of corruption” not only offended the arbitral tribunal in *Niko Resources*, but these contracts also affront other adjudicators. For example, in the cornerstone ICC Case No.1110, Judge Lagergren marked corruption as a “gross violation of good morals and international public policy.”⁶⁸ He came to this conclusion when he investigated the bribery of Argentinian officials and learned of “contract[s] of corruption.”⁶⁹ Furthermore, he stated:

“Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.”⁷⁰

Judge Lagergren’s words reveal the animosity adjudicators feel for “contracts of corruption” and the unlikelihood of condolences they will bestow upon parties seeking justice in any dispute resolution system.

The third and last criterion that tribunals look to determine whether the underlying contract is valid, is by investigating defects of the parties’ consent.

Generally,

“a defect of consent is a circumstance under which the ‘free’ expression of consent is obstructed, by internal or

⁶⁷ *Niko Resources*, *supra* note 57, at 123 (citing *LogiRose v. Southend United Football Club* [1988] 1 W. L. R. 1256, at 1260).

⁶⁸ Lamm, Pham & Moloo, *supra* note 49, at 714.

⁶⁹ *Niko Resources*, *supra* note 57, at 119.

⁷⁰ Alexandre Petsche & Alexandra Klausner, *Chapter IV: Crime and Arbitration: Arbitration and Corruption* in Christian Klausegger, Peter Klein *et al.* (eds), *Austrian Yearbook on International Arbitration* 345, 349 (2012) (citing ICC Case No. 1110 of 1963, 10 (3) *Arbitration International* 292 (1994)).

external causes, in such a way as to induce a party in concluding a contract, where if such circumstance did not exist, the party would not have concluded the contract.”⁷¹

Corruption will therefore be deemed a source of defect in consent, particularly in the context of public procurement contracts. As to public procurement contracts, the prospective contracting party will engage in corrupt action to induce its counterparty to accept the contract and will try to prevent that party from entertaining the free exercise of choice.⁷² These corrupt deeds performed by the “bad actor” should therefore result in the contract being declared invalid due to defect of consent.

Ruling text supports contract invalidation when the contract is obtained via corruption or when proper consent is lacking. First, Article 50 of the Vienna Convention encourages the supposition that State parties should declare these contracts null and void. Accordingly, a State party bound by treaty as a result of its representative’s direct or indirect engagement in corruption, may claim that the corruption invalidates its consent. Further, the Civil Law Convention on Corruption of the Council of Europe includes rules pertaining to defective consent. For example, pursuant to Article 8 (2) of the Convention states that State parties to the Convention shall provide, in their international law, guidelines for declaring a contract void when the contract is undermined by corruption.⁷³ The provisions found in both the Vienna Convention and the Civil Law Convention clearly demonstrates the ubiquitous

⁷¹ SAYED, *supra* note 10, at 81.

⁷² *Id.*

⁷³ The Civil Law Convention on Corruption of the Council of Europe, Art. 8 (2) (“Each party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.”)

presence of corruption and the necessity to penalize those parties who resort to corruption to obtain consent.

In sum, in international arbitration, the tribunal will look to domestic law, to international public policy, and to defect in consent when determining whether the underlying contract is null and void. Case history shows that, where suspicion of corruption occurs, underlying contracts may be invalidated pursuant to each separate criterion. However, the tribunal inquiry does not end here. Following the determination of whether the underlying contract is null and void comes the question of whether the invalidity of the underlying contract dictates the fate of the arbitration agreement.

ii) Is the Arbitration Agreement Null and Void?

After declaring the underlying contract null and void, the question now becomes whether the arbitration clause or the connected arbitration agreement is also null and void. This inquiry will determine whether jurisdiction of the arbitral tribunal is proper. The concentration here will be on the nexus between the underlying contract and the arbitral clause. If the underlying contract is invalidated due to domestic law, international public policy, or defect in consent, the question becomes whether this nullity also infects the related arbitration agreement. If the answer is in the affirmative, the tribunal must abstain from jurisdiction.⁷⁴

The analysis of this question begins through investigation of a main pillar and cornerstone principle of arbitration law: the doctrine of separability (or severability).

⁷⁴ SAYED, *supra* note 10, at 43.

While the doctrine of separability will be analyzed in greater detail in a later chapter, it is prudent to briefly introduce the doctrine here for the purpose of answering this title's inquiry.

The doctrine of separability (also known as the “separability presumption”) permits the separation of an arbitration agreement from the contract if there are defects in the underlying contract. This principle is universally accepted and allows arbitral tribunals to retain jurisdiction notwithstanding a voided contract.⁷⁵ By virtue of this doctrine, an arbitration agreement is treated as “separable and distinct” from the underlying contract.⁷⁶

The separability doctrine distinguishes the fate of the arbitration agreement from the fate of the underlying contract. The effect of this separation is to treat deficiencies in the underlying contract as having no impact on the arbitral clause unless the deficiencies manifest themselves independently of the arbitral clause.⁷⁷ In other words, when the underlying contract is under attack, the validity of the arbitration agreement, as a stand-alone agreement, is not influenced (and *vice versa*).

Those who practice and study arbitration are well versed that “the arbitral clause is autonomous and juridically independent from the main contract in which it is contained.”⁷⁸ Thus, the arbitration agreement's independence and autonomy has earned acceptance in both the English and the U.S. legal systems. Thus, the majority

⁷⁵ *Id.*

⁷⁶ BORN, *supra* note 6, at 312.

⁷⁷ THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW ON ARBITRATION 168 (2014).

⁷⁸ BORN, *supra* note 6, at 312 (citing Final Award in ICC Case No. 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999)). *See also* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d. 402, 411 (2d Cir. 1959) (“the mutual promises to arbitrate [generally] form the *quid pro quo* of one another constitute a separable and enforceable part of the agreement.”)

of court judgments from these venues exemplifies the global view that the doctrine of separability is to be both respected and enforced. For example, in the *Westacre Investment Inc.* case, the court stated:

“The[] characteristic[s] of an arbitration agreement... are in one sense independent of the underlying or substantive contract [and] have often led to the characterization of an arbitration agreement as a ‘separate contract.’ [An arbitration agreement] is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract.”⁷⁹

In sum, the arbitration agreement, for all intent and purpose, is distinct from the underlying contract. Under the doctrine of separability, the termination, suspension, or nullity of the underlying contract does not have the parallel effect of voiding the arbitration agreement. Therefore, even if the underlying contract is tainted, the arbitration agreement may maintain its validity and render a safe ground for the arbitral tribunal to issue an award. Further, the rendered award may be enforced unless there is an excessive violation of public policy.

However, while the doctrine of separability usually rules, there are particular circumstances that prevent the separability doctrine from applying. In the presence of these circumstances, the arbitration agreement will not be regarded as distinct from the underlying contract and the flaws in the underlying contract will also infect the

⁷⁹ BORN, *supra* note 6, at 312 (citing *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. and Others* [1998] 4 All E.R. 570 (Q.B.)). *See also* *OK Petroleum AB v. Vitol Energy SA* [1995] C.L.C. 850, 857 (Q.B.) (“...ancillary and therefore separable nature of an arbitration clause”); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 217 F. 2d. 402, 411 (2d Cir. 1959) (“the mutual promises to arbitrate [generally] form the *quid pro quo* of one another and constitute a separable and enforceable part of the agreement.”)

arbitration agreement. These contexts will be analyzed with detail in the following chapter.

b) Corruption in the Arbitral Process

Historically, arbitration faced disapproval. It was held in low regard by virtue of alleged carelessness of its management, flaws in its decision-making process, and because of the reputation that arbitration solely handled unequal bargaining agreements. Courts fanned the flames to this distrust through reluctance to lend support to arbitration because arbitration and arbitrators were viewed as competitors to judges and the judicial system.⁸⁰

Recently, this view has shifted and arbitration is now the preferred dispute resolution method, especially in the realm of international transactions. The significant dominance of international arbitration over litigation is established by the advantages⁸¹ arbitration provides to parties in conjunction with the inherent disadvantages of litigation.

In the context of international quarrels, parties seek to ensure that their disputes are handled by a dispute resolution method that best serves their interests. Thus, litigation is not a preferable method for many due to concerns related to local

⁸⁰ Jan Paulsson, *Why Good Arbitration Cannot Compensate for Bad Courts – Freshfields Hong Kong University Arbitration Lecture*, 30 (4) *Journal of International of International Arbitration* 345, 345 (2013).

⁸¹ An entire arbitration process is driven parties arbitration agreement. Once parties have agreed to submit their dispute to arbitration, they will be able to carve out the process as they wish. They can pick an applicable substantive and procedural law, a legal seat, and their arbitrators. Furthermore, the arbitral tribunal's award shall be final and binding unless it is vacated due to some exceptional circumstances by legal seat country's courts. Even if it is vacated, the award's enforceability will still be probable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Article V by virtue of its non-binding language.

bias, language barriers, inconvenience to parties, incompetence by adjudicators, procedural arbitrariness, issues of enforceability and recognition of the judgment, and corruption. Parties harbor these conceptions about litigation because, “in some states, basic standards of judicial integrity and independence are lacking. The simple reality is that corruption, nepotism, and personal favoritism are rife in at least some national legal systems. Particularly in cases against local litigants or state entities, the notion of a fair, objective proceeding...can be chimerical.”⁸² Further supporting these views, are those propounded by the Transparency International’s *Global Corruption Report 2007* (hereinafter TI).⁸³

According to TI, judicial corruption consists of “any inappropriate influence on the impartiality [of] the judicial process by [an] actor within the court system.”⁸⁴ For instance, a judge may disregard significant evidence in favor of either party or may distort witness testimony. Court staff may manipulate court dates and may make difficulties for a party who does not comply with their illegal demands. These illicit conducts originate from an array of reasons, such as

“undue influence by the executive and legislative branches, social tolerance of corruption, low judicial and court staff salaries, fear of retribution, poor training

⁸² BORN, *supra* note 6, at 79.

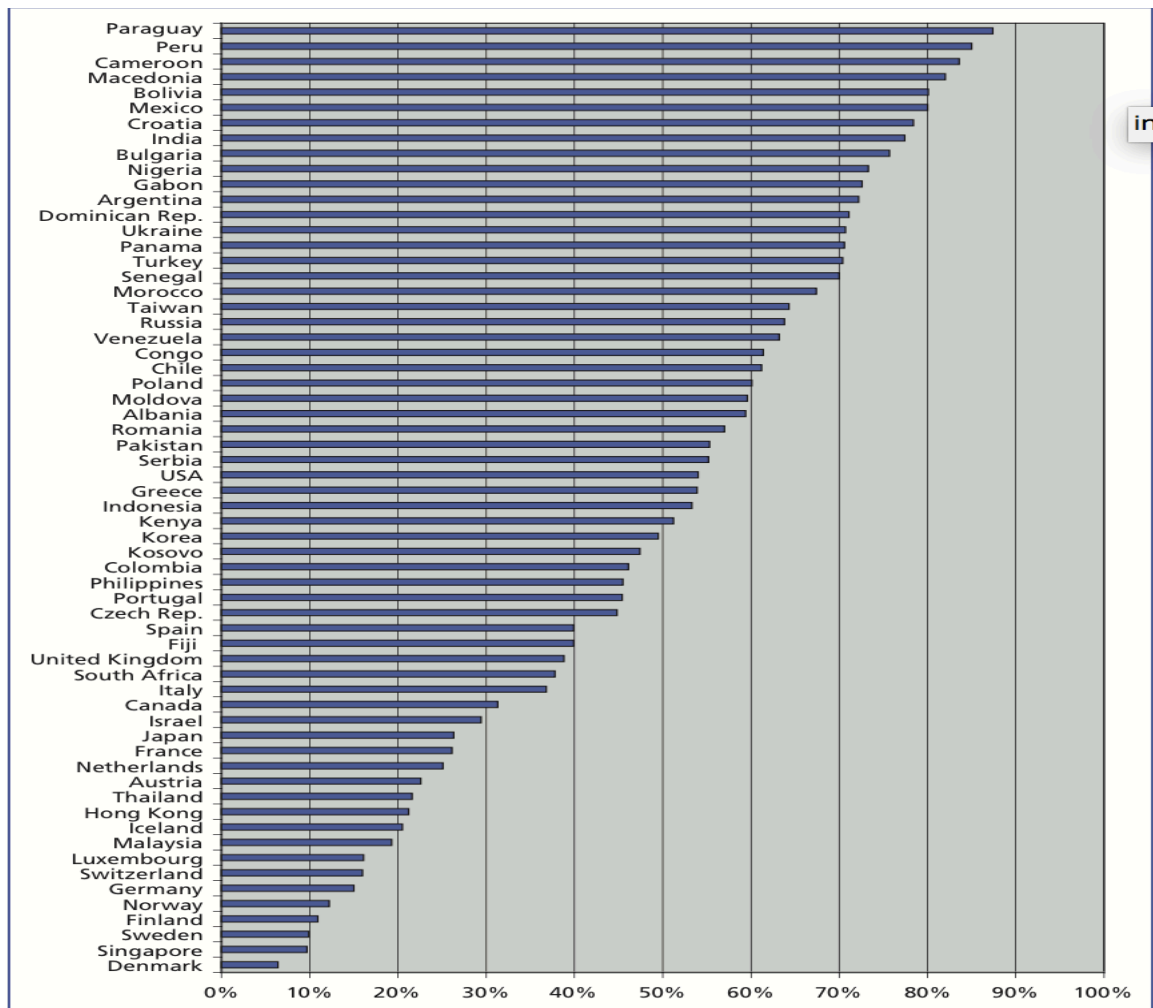
⁸³ Transparency International is a kind of international organization concerned with estopping corruption and promoting transparency, accountability, and integrity at all levels and across all sectors of society, and developing measures to handle corruption. Transparency International scores countries from 0 (highly corrupt) to 100 (very clean). TI’s mentioned report assesses the corruption within judicial systems. It focuses on how judicial systems are contaminated in the context of judges, court personals, and courts. Furthermore, it also focuses on how judicial corruption affects human rights, economic development and good governance.

⁸⁴ Global Corruption Report: Corruption in Judicial System XXI (2007), *available at* http://www.transparency.org/research/gcr/gcr_judicial_systems/0/.

and lack of rewards for ethical behavior, inadequately monitored administrative court procedures”⁸⁵

and lack of external control mechanisms.

According to TI’s survey, supported by the tables (1 and 2)⁸⁶ below, in many parts of the world, individuals who have interacted with the local judiciary have come to the conclusion that the judicial system is corrupt.



⁸⁵ *Id.* at 6.

⁸⁶ *Id.* at 11-13 (TABLE 1:Percentage of respondents who described their judiciary/legal system as corrupt (i.e. gave it a score of 4 or 5 out of 5, when 1 = not at all corrupt and 5=extremely corrupt); (TABLE 2: Percentage of respondents who had interacted with the judiciary in the past year and had paid bribes)

Table 1: Percentage of respondents who had interacted with the judiciary in the past year and had paid bribes

Region ³	Percentage of people who have had contact with the judiciary in past year	Percentage of those having contact who paid a bribe
Africa	20%	21%
Latin America	20%	18%
Newly Independent States	8%	15%
South East Europe	9%	9%
Asia-Pacific	5%	15%
EU / other Western European countries	19%	1%
North America	23%	2%

In countries where the judiciary is corrupt, citizens seek arbitration or other alternative dispute resolution systems. Citizens of those countries bypass litigation to avoid vicious circles of judicial corruption by submitting their disputes to negotiation, mediation, or arbitration. However, corruption is an increasing concern in international arbitration as well. Although arbitration is seen as an “emergency exit” to break the corrupt chain of the judiciary, that exit may link parties to other corrupt chains.

Corruption’s manifestations in arbitration do not catch the eye readily because they are disguised by the different approaches taken by arbitrators, parties, and courts:

- “Arbitrators generally do not think they have an obligation to track down corruption issues; it is believed they are not equipped with sufficient apparatus to handle corruption contentions, and they engraft a higher standard of proof upon the parties because of the seriousness of the contentions;

- Parties prefer to avoid raising corruption claims due to risk of dismissal of their substantive claims; risk of dismissal of allegations of corruption for lack of evidence, and risk of forfeiting the right to allege the same with national courts at the enforcement stage;
- State courts' review related to arbitral awards is limited, and they generally do not want to infringe arbitral tribunal's authority by reconsidering the merits of the award."⁸⁷

Corruption charges in arbitration rarely manifest because of these reasons and this results in making parties view arbitration as a more secure resolution mechanism than litigation, particularly when corrupt activities are presumed. The roots of corruption in arbitration, however, are deeply rooted. It is even possible to encounter marks of corruption in Ancient Greek arbitration. For example,

“Eriphyle, the sister of the King Argos, appears to have been ‘one of the first recorded instances of a corrupt arbitrator’, accepting bribes (of a magic necklace and a magic robe), to decide, inter alia, against her husband.”⁸⁸

In addition, there exists an Ancient Greek corruption tale, relating to the enforcement of an award ending a dispute between Aphrodite and Persephone over who should have Adonis as their lover.⁸⁹ This dispute was brought before Zeus who refused to arbitrate such an unsavory quarrel and thus tasked Calliope to hear it. Calliope handled the dispute wisely. She entered the judgment that they could share

⁸⁷ Vladimir Khvalei, *Why Corruption Goes Uncovered in Arbitration?*,

http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/red_flags_to_uncover_corruption_in_arbitration_-_vladimir_khvalei.pdf.

⁸⁸ DEREK ROEBUCK, ANCIENT GREEK ARBITRATION 71 (2001).

⁸⁹ *Id.* at 83

Adonis and, in addition, she divided the year into three parts, one for him to lie with Aphrodite, one with Persephone, and one to lie fallow.⁹⁰ It was Aphrodite who cheated by not adhering to the terms of the award.⁹¹ In sum, it is clear from these ancient examples that corruption has long plagued arbitration.

Because arbitration's roots cannot be disentangled from corrupt precedent, and because present-day arbitration may be influenced by both bribery of arbitrators and cheating party players, there are hazards to be clarified prior to choosing arbitration as a sound dispute resolution process.⁹² It is therefore practical to discuss forms of corruption responsible for influencing arbitral proceedings. These forms may be classified into three groups: (a) Corrupt arbitrators, (b) Corrupt witnesses, and (c) Fraud in the Arbitral Proceedings.

i) Corrupt Arbitrators:

Arbitration has become a solid alternative to litigation and, accordingly, has earned a sort of 'special status' within the dispute resolution system. Arbitration is considered an arena where parties, acting in good faith, solve their disputes. However, recently, because of the visible escalation in corruption allegations, the need to battle corruption, once a fight isolated to other areas of law, has found its way to the arbitral process' forefront.⁹³

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Marc Henzelin, *Ratifications of the Additional Protocol to the Criminal Law Convention of the European Council on Corruption*, 24 (3) ASA Bulletin 449, 449 (2006).

Accordingly, arbitrator corruption became a hot topic of debate. In arbitration's modern history, as far as the author of this study is aware, there are neither recorded cases where an arbitral tribunal dismissed an arbitrator from the tribunal, nor are there cases illustrating a court vacating an arbitral award on the grounds of a corrupt arbitrator. Notably, Francis Bacon (1561-1626), an English philosopher, statesman, and scientist, represents a sole recorded deviation in this regard. When accused of corruption, Bacon encountered twenty-eight bribery charges, three of which originated from arbitration.⁹⁴ The arbitration case that led to Bacon's bribery sentence originated from a dispute arising from an alliance between the old grocers' company and the apothecaries against an upstart society of grocers.⁹⁵ Bacon agreed to arbitrate their dispute.⁹⁶ However, the prosecution embarked against Bacon exposed that he took "£200 from the old grocers, a gold fish from the apothecaries worth £400-500 and – to keep up proper appearances – £100 from the new lot."⁹⁷ The House of Lords unanimously found Francis Bacon guilty and convicted him of bribery.⁹⁸

Today, there is no substantial precedent leading to the interference that arbitrators tend to be corrupt. However, the international arena is taking pre-emptive steps to dissuade arbitrators from being corrupt. For instance, the Council of Europe, with its enactment of the "Additional Protocol to the Criminal Law Convention on

⁹⁴ DEREK ROEBUCK, A MISCELLANY OF DISPUTES 66 (2000).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 67.

Corruption (hereinafter the Protocol)” in 2005, exemplifies one approach taken to combat corruption of arbitrators.⁹⁹

The Criminal Law Convention on Corruption (hereinafter the Main Convention),¹⁰⁰ represents a regional consensus on how to respond to the criminal dimensions of trans-border corruption and criminalizes a wide variety of corrupt activities: (a) active and passive bribery of domestic and foreign public officials; (b) active and passive bribery of national and foreign parliamentarians and members of international parliamentary assemblies; (c) active and passive bribery in the private sectors; (d) active and passive bribery of officials of international organizations; (e) active and passive bribery of domestic, foreign, and international judges, and officials of international courts; (f) active and passive trading influence; (g) money-laundering of proceeds from corruption offences; and (h) accounting offences connected with corruption offences.¹⁰¹

The Council of Europe instituted the Protocol to supplement the Main Convention. The provisions of the Protocol not only supplement the Main Convention, but also broaden the Main Convention’s scope to cover *arbitrators*, along with public officials, members of parliaments, assemblies, and judges.¹⁰² Thus,

⁹⁹ Council of Europe, *Additional Protocol to the Criminal Law Convention on Corruption*, <http://conventions.coe.int/Treaty/en/Treaties/Html/191.htm>. This Protocol entered into force on February 1, 2005.

¹⁰⁰ *The Criminal Law Convention on Corruption*, <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>

¹⁰¹ *Compendium of International Legal Instruments on Corruption*, http://www.unodc.org/documents/corruption/publications_compndium_e.pdf (last visited Feb. 20, 2014).

¹⁰² Andrew de Lotbiniere McDougall, *Combating the Corruption: Update on the Additional Protocol to the Criminal Law Convention on Corruption*, White & Case (Dec. 2006), <http://www.whitecase.com/files/Publication/3a3738ce-5542-4a42-97ef->

State members adhering to the Protocol are obliged to criminalize active and passive bribery of both domestic and foreign arbitrators. Because arbitrators long enjoyed immunity from criminal accusation, the Protocol illustrates a new direction that regulatory authorities are taking to avoid and quash arbitrator corruption.

Next, it is necessary to define what conduct is deemed criminal when determining whether to penalize an arbitrator. Therefore, it is important to shed light on the differences between active and passive bribery. Active bribery is defined as

“when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage¹⁰³ to an arbitrator exercising his/her functions under the national law on arbitration of the Party, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.”¹⁰⁴

Thus, to be classified as active bribery, an individual must intend to influence an arbitrator, by a) promising, or b) offering, or c) giving an arbitrator an unjust advantage.¹⁰⁵

First, in the context of active bribery, the act of ‘promising’ includes situations where an individual acts to provide an undue advantage to an arbitrator at a later

139b1280c6d7/Presentation/PublicationAttachment/24a86576-623d-4317-b77b-162b59dbec91/article_Combating_the_Corruption_of_Arbitrators.pdf

¹⁰³ Henzelin, *supra* note 93, at 450-51. (There is no precise definition of undue advantage due to ambiguity it contains. “Under Swiss law, the term ‘undue advantage’ compasses all liberalities granted freely, whether material or immaterial, to the extent that they are objectively measurable. ... ‘Material undue advantages’ will encompass any payment, in cash or otherwise, the grant of goods or assets, the renunciation of credits or charges in favor of the arbitrator, such as free transportation or accommodation. ... ‘Immaterial advantages’ include company or professional advantages, such as promotions, better career prospects, voting rights, admission on a board of directors, as well as distinctions, titles or sexual advantages.”)

¹⁰⁴ Additional Protocol to the Criminal Law Convention of Corruption, Art. 2.

¹⁰⁵ McDougall, *supra* note 102, at 2.

stage, after the arbitrator has performed the requested act.¹⁰⁶ Second, ‘offering’ relates to incidents where the briber shows his willingness to render the undue advantage.¹⁰⁷ Third, ‘giving’ is illustrated by when the briber passes the undue advantage to the arbitrator.¹⁰⁸

In contrast to active bribery, passive bribery is

“...when committed intentionally, the request or receipt by an arbitrator exercising his/her functions under the national law on arbitration of the Party, directly or indirectly, of any undue advantage for himself or herself or for anyone else, of the acceptance of an offer or promise of such an advantage, to act or refrain acting in the exercise of his or her functions.”¹⁰⁹

In essence, an arbitrator initiates passive bribery upon making a request for any undue advantage for himself, herself, or for anyone else, in order for him or for her to act or refrain from acting in the exercise of his or her functions.

So far as passive bribery is concerned, ‘requesting’ consists of a situation where an arbitrator makes it known that he or she is ready to act or refrain from acting in exchange for an undue advantage.¹¹⁰ ‘Receiving’ indicates the arbitrator’s, or someone else’s, actual taking of the benefit.

Now that the definitions of active and passive bribery have been examined, it is important to address the reasoning behind the Convention’s decision to target

¹⁰⁶ Henzelin, *supra* note 93, at 451.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Additional Protocol to the Criminal Law Convention of Corruption, Art. 3.

¹¹⁰ McDougall, *supra* note 102, at 3.

bribery of arbitrators. Pursuant to the Explanatory Note of the Protocol¹¹¹, the extension of the Convention to bribery of arbitrators is desirable in two different ways: first, because arbitrators rule on disputes involving both significant amounts of money and economic consequences, maintaining good faith is essential, and second, because the duties performed by judges and arbitrators are analogous, arbitrators must be held to high standards of morality and justice. Further, because arbitration has a contract-based framework that prioritizes the parties' wills and preserves privacy, the very structure of arbitration that is so attractive to parties may impair its resistance to illicit conduct.¹¹²

Keeping these weaknesses in mind, arbitration undoubtedly provides a tempting venue for individuals who seek:

- (i) Mechanisms that facilitate transferring illegal funds. For example, a dispute may appear to be about a debt relating to supplies, but reality reflects that the dispute is fabricated and relates to a contract transferring money or assets (such as shares);¹¹³

¹¹¹ *Additional Protocol to the Criminal Law Convention on Corruption*, <http://conventions.coe.int/treaty/en/Reports/Html/191.htm>

¹¹² KRISTINE KARSTEN, MONEY LAUNDERING: HOW IT WORKS AND WHY YOU SHOULD BE CONCERNED IN ICC DOSSIERS, ARBITRATION-MONEY LAUNDERING, CORRUPTION AND FRAUD 18-19 (2003) (“A complicit but apparently unrelated party in Country X asserts a spurious or inflated claim against a party in Country Y seeking to move large amounts of cash into Country X. The defendant (or respondent) then contrives to lose the action and makes payment of the judgment or award entered against it using cash or thinly-disguised proceeds of criminal activity (for example, the balance of a bank account created using cash deposits). And *voilà*, the plaintiff (or claimant), which in reality is controlled by or acting for the same principals as the defendant (or respondent), acquires a significant amount of cash (which in many countries is considered as a tax-free income) that it can easily explain to its banker and the tax authorities, and the defendant has, potentially, a loss that it can set off against its local obligations.”)

¹¹³ *Spotlight on International Arbitration*, <https://www.lawsociety.org.uk/advice/articles/spotlight-on-international-arbitration/>.

- (ii) Solution for a dispute generated from an illicit agreement without any public authority involvement (e.g. seeking a commission payment originating from a contract of corruption, under the cover of a consultancy agreement). The *Soleimany* case shows an attempt to enforce these illegal contracts. The English court refused to enforce the award on the basis that the contract from which the award derived was illegal. The court elaborated: “The parties cannot, by procuring an arbitration, conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.”¹¹⁴

Ironically (or perhaps not), the uniqueness of the arbitral process making it so attractive to good faith party disputes has also provided safe harbor for those parties seeking to abuse it. Therefore, the aforementioned vulnerabilities of arbitration confirm the necessity for regulating arbitration’s and arbitrators’ conduct and illustrate the importance of the Protocol in its fashioning rules concerning illicit conduct of arbitrators and making them subject to the Main Convention. This is notable because all other conventions and instruments tackling corruption only regulate corruption of (foreign) public officials.¹¹⁵

The Protocol is an indispensable tool utilized by legislators who seek to address corruption in arbitration. For example, in 2008, the Austrian legislator

¹¹⁴ *Soleimany v. Soleimany*, [1998] 3 WLR 811.

¹¹⁵ Petsche & Klausner, *supra* note 70, at 353 (“This does not exclude, however, that under national legislations arbitrators can be qualified as public officials, or that states have enacted specific legislation on the corruption of arbitrators.”)

employed the same approach as the Council of Europe.¹¹⁶ “The term ‘arbitrator’ was explicitly mentioned in the Austrian Criminal Code (hereinafter ACC) for the first time in the amended version dated January 1, 2008.”¹¹⁷ The Austrian lawmakers expanded the scope of their existing corruption laws and inserted arbitrators as those who may be targeted.¹¹⁸ Furthermore, “the Austrian legislator has once again made profound changes to ACC in its ‘Act Amending the Anti-Corruption Legislation 2012 (*Korruptionsstrafrechtsänderungsgesetz 2012*)’, which entered into force on January 1, 2013.”¹¹⁹ Once again these changes pertained to arbitrators. These changes have been broadly interpreted to extend to arbitrators who are not Austrian and to crimes committed abroad.¹²⁰ The ACC is an excellent example of the modern approach in tackling corruption in arbitration and reflects how crucial the Protocol is to legislation around the world.

Next, light will be thrown on how bad-faith actors, in the context of arbitrator corruption, are able to exploit the contract-based structure of arbitration. Due to the

¹¹⁶ See also China Arbitration Law, Art. 34: “In one of the following circumstances, the arbitrator must withdraw, and the parties shall have the right to challenge the arbitrator for a withdrawal: (1) the arbitrator is a party in the case or a close relative of a party or of an agent in the case; (2) the arbitrator has a personal interest in the case; (3) the arbitrator has another relationship with a party or his agent in the case which may affect the impartiality of the arbitration; or (4) the arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.”; Japan Arbitration Act of 2003, Art. 50-52.

¹¹⁷ Irene Welser, *Chapter III: The Arbitrator and the Arbitration Procedure*, “Sweetening” or “Baiting” – A New Crime for Arbitrators, in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Arbitration Yearbook on International Arbitration* 151, 151 (2013).

¹¹⁸ See also the Swiss Criminal Code, Title 19 (Offences Against Official or Professional Duty) Article 322. (The Swiss Criminal Code criminalizes not only active and passive bribery of Swiss public officials, but also active and passive bribery of foreign public officials. In this respect, the Code outlaws the bribery of “any person ... member of a judicial or other authority, a public official, an officially appointed expert, translator or interpreter, *an arbitrator*, or a member of the armed forces...” (Emphasis added).

¹¹⁹ Welser, *supra* note 117, at 151.

¹²⁰ *Id.*

contract-based structure of arbitration,¹²¹ practical application of anti-corruption laws to arbitrators is more complex than applying anti-corruption laws to public officials. “A public official is generally appointed for an indefinite, long period of time. He performs clearly defined public duties and the cases dealt with are, basically, pre-defined by their subject matter and the local competency of the authority for which he acts.”¹²² This definition is inapplicable to arbitrators. Even if primary consideration is given to people who have acted as arbitrator, it is not clear what their next arbitration case will be or even whether they will be appointed again.¹²³ Although there are some arbitral institutions that solely allow the people who are on their arbitrator list to arbitrate, ambiguity still exists as to their appointment and it may not be fair to make “potential” arbitrators invariably subject to anti-corruption laws.

Therefore, to fairly treat arbitrators, the following two questions must be answered: *first*, when is a person considered an arbitrator? And *second*, what is the limit of an arbitrator’s immunity?

The answer to the first question is a stepping-stone, not only for initiating arbitrator immunity, but also for answering these follow-up questions:¹²⁴ Are

¹²¹ See Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 Melb. J. Int’l L. 205, 209-211 (2005) (There are three leading theories – contractual, jurisdictional and hybrid – related to nature of arbitration. The contractual theory focuses on contract and sees the entire process from constitution of the arbitral tribunal to arbitrators’ powers and the award. Unlike contractual theory, jurisdictional theory places an emphasis upon sovereignty. According to jurisdictional theory, every operation occurring in a state’s territory becomes subject to that state’s jurisdiction. Hybrid theory, on the other hand, can be seen as the mixture of foregoing theories. It is contractual because the arbitration process is driven by the parties arbitration agreement; however, it is jurisdictional at the same time because states have a discretion upon the enforceability and recognition of the award.)

¹²² Welser, *supra* note 117, at 153.

¹²³ *Id.*

¹²⁴ *Id.*

invitations of ‘potential’ arbitrators by ‘potential’ parties prohibited?; If the answer is in the affirmative, is there a timeframe established before a specific arbitration has started?; Can a dinner invitation made by a party to a potential arbitrator be considered an unlawful contact?; If the potential arbitrator accepts the invitation, will it be construed as a violation of anti-corruption laws, or will the law not be effectuated because he or she has not yet been officially designated?; What influences will the processes of constituting the tribunal have over the arbitrators’ conducts?; If the arbitral tribunal has not been formed yet, but two of them have already accepted their positions, is it illegitimate for either of these arbitrators to engage in a communication with a potential presiding (or third) arbitrator?; and finally, would this be construed as an attempt to prejudice the (potential) third arbitrator?¹²⁵

By giving primary consideration to the ACC’s and the Protocol’s definition of arbitrator, it seems unlikely that persons who have not yet been appointed as arbitrators will be covered by the anti-corruption laws.

The ACC Section 74 paragraph 1 (4c) defines an arbitrator as: “[a]ny decision-maker of a court of arbitration as defined in Sections 577 of the Austrian Code of Civil Procedure (Zivilprozessordnung, ZPO) with its seat in Austria or a seat not yet determined (Austrian arbitrator) or with its seat in another country.”¹²⁶

Within the Protocol, the term, arbitrator, is used in Articles 2 through 4. Paragraph 1 of Article 1 defines “arbitrator” in two ways:

¹²⁵ *Id.*

¹²⁶ *Evaluation Report on Austria Incriminations (ETS 173 and 191, GPC 2) (Theme I)*, <http://www.justiz.gv.at/web2013/file/2c948485342383450134d2f4f5770326.de.0/evaluierungsbericht%20-%20englisch.pdf>.

“on the one hand it refers to the respective national laws –as does the Criminal Law Convention on Corruption concerning the term ‘public official’ (cf. Article 1 *littera a* of the Convention: “...*shall be understood by reference to the definition...in the national law of the State...*”); on the other hand – and contrary to the Convention – it establishes an autonomous definition insofar as it sets a commonly binding minimum standard.”¹²⁷

Pursuant to Article 1’s autonomous definition, arbitrator is “a person who by virtue of an arbitration agreement is called upon to render a legally binding decision in a dispute submitted to him/her by the parties to the agreement.”¹²⁸

Taking these definitions into account, in order to be considered an arbitrator, the “arbitrator’s contract” must be formed. In contract law, the meeting of the minds, which requires the existence of an offer and an acceptance of the offer, needs to take place. Thus, parties of an arbitration agreement approach a potential arbitrator with a request and the prospective arbitrator is free to accept or to reject. In other words, the parties’ request to assign that individual as an arbitrator constitutes an offer and the arbitrator’s acceptance of request constitutes...an acceptance, which gives rise to the arbitrator’s contract.¹²⁹ With the formation of the contract, an arbitrator’s powers and responsibilities “kick in”¹³⁰ and the person is treated as an arbitrator.¹³¹

¹²⁷ Chapter One of the Explanatory Report to the Additional Protocol to the Criminal Law Convention on Corruption,
<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380c>.

¹²⁸ *Id.*

¹²⁹ BORN, *supra* note 6, at 1609.

¹³⁰ Cort v. American Arbitration Ass’n, 795 F. Supp. 970, 972 (N.D. Cal.1992) (The court has acknowledged that an arbitrator’s authority was generated from the parties’ agreement but focused more upon that the agreement was for the invocation of “ ‘the arbitrators’ independent judgment and discretion.”)

Following this arbitrator appointment, the second question (relating to immunity) plays a decisive role in the applicability of anti-corruption laws. When an arbitration contract is formed, it is coupled with arbitrator immunity. This immunity may incentivize corrupt conduct. Notwithstanding this risk, arbitrator immunity is a necessity due to an arbitrator's duties. Because the arbitrator acts as a "quasi-judicial officer[who]... [exercises] judicial functions. There is as much reason...[to protect and insure]... in his case for his impartiality, independence, and freedom from undue influence, as in the case of a judge or juror."¹³²

Historically, arbitrator immunity was interpreted in a broader context that covered, not only omissions of arbitrators, but also their "bad faith or intentional misconduct, non-disclosure of conflicts, and similar malfeasance."¹³³ Pursuant to one U.S. court decision, arbitrators are immune even where they allegedly behave "fraudulently and corruptly."¹³⁴ However, recently, the tables have turned. For instance, U.S. judicial decisions limit the scope of arbitrator immunity and now arbitrator immunity is denied upon failure to render an award in a timely manner, failing to make a decision, or engaging in misconduct.¹³⁵

¹³¹ Under Japan Arbitration Act, a person, who is about to be appointed as an arbitrator, is also subject to anti-corruption laws. Japan Arbitration Act of 2003, Art. 50 (2) states as follows: "When a person to be appointed an arbitrator accepts, demands or promises to accept a bribe in relation to the duty to assume with agreement to do an act in response to a request, imprisonment with labor for not more than five years shall be imposed in the event of appointment."

¹³² BORN, *supra* note 6, at 1654 (citing *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (Mass. 1884)).

¹³³ *Id.* at 1655-56.

¹³⁴ *Id.* at 1655 n.349 (*Jones v. Brown*, 6 N.W. 140, 142-43 (Iowa 1880) ("immunity where arbitrator allegedly behaved 'fraudulently and corruptly.'"))

¹³⁵ *Id.* at 1656.

Other common law countries have adopted similar approaches to arbitrator immunity. For example,

“New Zealand courts have held that arbitrators are entitled to immunity with respect to their ‘judicial’ functions. Australian, Singapore and Hong Kong courts have adopted similar reasoning, holding however, that immunity does not extend to cases where the arbitrator did not act in good faith or his or her other conduct was fraudulent.”¹³⁶

Clearly, U.S. precedent has catalyzed other common law nations to follow homogenized treatment of arbitrator immunity.

Similar to common law courts, courts of civil law jurisdictions adhere to broad arbitrator immunity while making it subject to exceptions, such as fraud and other misconducts intentionally exercised. This treatment of arbitrator immunity resulted from a consensus between judicial decision, legislation, and scholarly opinion from important arbitral jurisdictions, such as Switzerland, Belgium,¹³⁷ Holland, Finland, and Spain.¹³⁸

In conformity with national legislations and court judgments, leading arbitral institutions have fashioned rules relating to arbitrator immunity. It is, however, important to note that there is no article related to arbitrator immunity in the UNCITRAL Model Law on International Commercial Arbitration (hereinafter the Model Law). In contrast to the Model Law, both International Chamber of Commerce

¹³⁶ *Id.* at 1656-57 (“Civil law jurisdictions have adopted similar approaches, generally recognizing relatively broad arbitrator immunity, subject to exceptions for fraud or similar intentional misconduct.”)

¹³⁷ *Id.* at 1657 n.362 (Judgment of 21 January 1992, unpublished (Antwerp Cour d’appel)) (“Arbitrator only liable for serious offences such as claims of fraud and false representation.”)

¹³⁸ *Id.* at 1657.

(hereinafter ICC) Rules and the London Court of International Arbitration

(hereinafter LCIA) Rules regulate arbitrator immunity.¹³⁹ Therefore, while some arbitration guidelines provide helpful resources when tackling arbitrator immunity challenges, there are some that prove unhelpful and outdated.

Clearly, there is consistency among courts and arbitral institutions of how arbitrator immunity is to be treated. Because arbitrators must be provided leeway to execute their decisions free from fear of retaliation, both courts and arbitral institutions broadly interpret rules on arbitrator immunity.¹⁴⁰ However, should arbitrators engage in corrupt practices, neither the courts nor other members of the respective arbitral tribunal would allow them to hide behind a shroud of immunity. Rather, institutions adhering to modern treatment of immunity in arbitration will drag corrupt actors out of their haven and impose liability.

¹³⁹ ICC Rules, Art 40 (“The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.”); the LCIA Rules, Art. 31 (1) (“None of the LCIA (including its officers, members and employees), the LCIA Court (including its President, Vice-Presidents, Honourary Vice-Presidents and members), the Registrar (including any deputy Registrar), any arbitrator, any Emergency Arbitrator and any expert to the Arbitral Tribunal shall be liable to any party howsoever for any act or omission in connection with any arbitration, save: (i) where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing committed by the body or person alleged to be liable to that party; or (ii) to the extent that any part of this provision is shown to be prohibited by any applicable law.”); the Stockholm Chamber of Commerce Arbitration Rules, Art. 48 (“Neither the SCC nor the arbitrator(s) are liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes willful misconduct or gross negligence.”)

¹⁴⁰ *Babylon Milk and Cream Co. v. Horvitz*, 151 N. Y. S. 2d. 221, 224 (N.Y.S.Ct. 1956) (“Arbitrators exercise judicial functions and while not *eo nomine* judges they are judicial officers and bound by the same rules as govern those officers. Considerations of public policy are the reasons for the rule and like other judicial officers; arbitrators must be free from the fear of reprisals by an unsuccessful litigant. They must of necessity be uninfluenced by any fear of consequences for their acts.”)

However, proving corruption is not easy. Because of the difficulties in proving corruption, it is unlikely to find cases illustrative of the ramifications of arbitrator corruption. Nevertheless, there is “one reported case where corruption was alleged by the respondent to oppose enforcement of an award.”¹⁴¹ Still, one case is hardly sufficient to demonstrate the complications of arbitrator corruption.

Because of the lack of precedent illustrating how corruption is identified, it should be discussed how to identify when arbitrators engage in corrupt practice. The main purpose that encourages parties to engage in corruption (e.g. bribery, grease payments etc.) is to influence decision-makers with either material or immaterial advantage, so that they rule in their favor. In other words, the essence of corruption is partiality.¹⁴² Thus, when tackling corrupt arbitrators, corruption should be interpreted in a broader context and any conduct that impairs an arbitrator’s impartiality and independence should be assessed in the context of corruption. In consonance with this statement, the United Nations Office for Drug Control and Crime Prevention regarded *favoritism* as a manifestation of corruption.¹⁴³

Although courts are commonly accused of biases in favor of their race, culture, or language, it is also possible to encounter the same biases in arbitration that

¹⁴¹ Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings* in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions*, 11 ICCA Congress Series 261, 263 n.1 (2003) (“The case where a party-appointed arbitrator assists the party which appointed him in drafting its submissions and receives payment for drafting may be put in the same category as corruption.”)

¹⁴² Bo Rothstein, *The Quality of Government: Corruption, Social Trust and Inequality in International Perspective* 15 (2011) (“Corruption involves a holder of public office violating the impartiality principle in order to achieve private gain.”)

¹⁴³ United Nations Office on Drugs and Crime, *The Global Programme Against Corruption: UN Anti-Corruption Toolkit*, available at <http://www.unodc.org/pdf/crime/toolkit/fltof7.pdf>.

“threatens to color [arbitrator’s] impartiality and ability to see the matter in a clear and balanced manner.”¹⁴⁴ This bias can vary from a simple misunderstanding to racism. For example, some arbitrators may think “third world cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race.”¹⁴⁵ This may lead an arbitrator to perceive testimony of a witness from a developed country as superior to testimony of a witness from a “Third World” country. This is just one example of possible arbitrator bias, but it demonstrates how serious biases and prejudices may affect case outcome.

In the context of corrupt arbitrators, another issue that deserving attention is *ex parte* communications. *Ex parte* communications can be depicted as oral or written communications between a party, party representative, and an Arbitrator (or prospective arbitrator), concerning the substance of the dispute, absent the knowledge or presence of the opposing party or parties.¹⁴⁶

The prohibition of *ex parte* communications is addressed with clarity by the arbitration rules of major arbitration institutions. For example, according to Article 13(6) of the International Centre for Dispute Resolution (ICDR), “no party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with

¹⁴⁴ Karen Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto* in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions*, 11 ICCA Congress Series 288, 297 (2003).

¹⁴⁵ *Id.*

¹⁴⁶ IBA Guidelines on Party Representation in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

any arbitrator, or with any candidate for party-appointed arbitrator...”¹⁴⁷ In a similar vein, Article 13(4) of the LCIA Arbitration Rules states,

“during the arbitration from the Arbitral Tribunal’s formation onwards, no party shall deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties’ dispute with any member of the Arbitral tribunal or any member of the LCIA Court exercising any function in regard to the arbitration...”

The institutional rules as to *ex parte* communications mainly prohibit parties from commencing or attempting to commence communication with an Arbitrator or prospective arbitrator. However, the same institutional rules are not directed at the contact initiated by arbitrators, possibly on the presumption that arbitrators would

¹⁴⁷ Article 13(6) of the ICDR Arbitration Rules (“No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidates’ qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.”); Article 11(5) of the Hong Kong International Arbitration Centre Rules (“No party or its representatives shall have any *ex parte* communication relating to the arbitration with any arbitrator, or with any candidate to be designated as arbitrator by a party, except to advise the candidate of the general nature of the dispute, to discuss the candidate’s qualifications, availability, impartiality or independence, or to discuss suitability of candidates for the designation of a third arbitrator, where the parties or party-designated arbitrators are to designate that arbitrator. No party or its representatives shall have any *ex parte* communication relating to the arbitration with any candidate for the presiding arbitrator.”); Article 10(7) of the Arbitration Rules of the Singapore International Arbitration Centre (“No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator or with any candidate for appointment as party-nominated arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.”); Article 13(4) of the LCIA Arbitration Rules (“During the arbitration from the Arbitral Tribunal’s formation onwards, no party shall deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties’ dispute with any member of the Arbitral tribunal or any member of the LCIA Court exercising any function in regard to the arbitration (but not including the Registrar), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal (if comprised of more than one arbitrator) and the Registrar.”)

compromise neither their impartiality nor the credibility and legality of the arbitration process by engaging in any improper contact with a party.¹⁴⁸ Yet, the scandal that erupted during the arbitral process between the Republic of Croatia and the Republic of Slovenia illustrated that this presumption cannot always be made. Furthermore, this case exhibits that *ex parte* communications harbor concomitant risks of corruption.

On November 4, 2009, the Republic of Croatia's Government and the Republic of Slovenia's Government entered into an arbitration agreement to submit their territorial and maritime dispute to arbitration under the Registry role of the Permanent Court of Arbitration (hereinafter PCA).¹⁴⁹ According to the press release posted on the PCA's website on July 10, 2015, the arbitral tribunal held its first procedural meeting on April 13, 2012 and contemplated rendering the award in mid-December 2015.¹⁵⁰

However, in July 2015, a Croatian newspaper disclosed the telephonic conversations between the Slovenian-appointed arbitrator, Dr. Jernej Sekolec, and the Slovenian agent, Ms. Simona Drenik. This disclosure caused a great shock and sparked a scandal.¹⁵¹ The transcripts of tapped telephone conversations reflected that

¹⁴⁸ There are, however, ethical rules that require arbitrators to avoid any unilateral contact with any party or its representatives regarding the case. *See generally* BORN, *supra* note 6, at 1523-1524, 1535-1543.

¹⁴⁹ *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, PCA-CPA.ORG, <http://www.pcacases.com/web/view/3> (last visited Jan. 29, 2016). The arbitral tribunal was composed of Judge Gilbert Guillaume, Professor Vaughan Lowe QC, Judge Bruno Simma, Dr. Jernej Sekolec, and Professor Budislav Vukas.

¹⁵⁰ *PCA Press Release*, PCA-CPA.ORG, <http://www.pcacases.com/web/sendAttach/1308> (last visited Feb. 24, 2016).

¹⁵¹ *PCA Press Release*, PCA-CPA.ORG, <http://www.pcacases.com/web/sendAttach/1313> (last visited Feb. 24, 2016).

Dr. Sekolec revealed “confidential details about the tribunal’s deliberations and discussing how to influence the other arbitrators by putting new information before them that was not part of the official case record.”¹⁵² Further, the transcripts indicated that Sekolec and Drenik also spoke about the possible outcome of the case and manipulating the arbitral process by implanting new evidence and arguments favorable to Slovenia after the time for producing new evidence lapsed.¹⁵³

Following this unexpected development, the Croatian authorities regarded the entire arbitration process corrupted on the basis of alleged difficulties in sieving evidence illegally introduced to the tribunal out of evidence legally submitted.¹⁵⁴ Thus, the Croatian Parliament terminated the arbitration agreement signed with Slovenia in 2009.¹⁵⁵

It is not clear how this scandal will influence the fate of the arbitral proceedings between Croatia and Slovenia or the enforcement of the final award if it can be rendered.¹⁵⁶ It is, however, crystal clear that this scandal raised concerns in the

¹⁵² Douglas Thomson, *New Faces on Troubled Balkan Border Panel*, Global Arbitration Review (GAR) (August 19, 2015), available at <http://globalarbitrationreview.com/news/article/34178/new-faces-troubled-balkan-border-panel/>.

¹⁵³ Alison Ross, “*Poisoned Waters*”: *Croatia’s Stance on the Sekolec Scandal*, 10(4) Global Arbitration Review (GAR) (August 19, 2015), available at <http://globalarbitrationreview.com/journal/article/34069/poisoned-waters-croatias-stance-sekolec-scandal> (“Sekolec and Drenik consider how to place the list of *effectivités* before the tribunal given that the time for producing new evidence has long passed. Their plan involves Drenik preparing documents that can be transferred to Sekolec’s computer so it appears as if he were the author. These will then be presented to his fellow arbitrators and to the PCA as his own work or given to the case registrar ... to include in a summary passed to the tribunal.”)

¹⁵⁴ *Id.* (“It is no longer possible to distinguish between evidence which is part of the official record legally and evidence which is part of the tribunal’s record as a result of illegal behavior, nor [...] to establish how those illegal pressures are reflected in viewpoints of certain members of the tribunal,” states the Croatian Prime Minister Zoran Milanović.)

¹⁵⁵ *Id.*

¹⁵⁶ After the occurrence of the scandal, Jernej Sekolec (Slovenia-Arbitrator) and Budislav Vukas (Croatia-Arbitrator) stepped down from their positions at panel. The PCA effectuated Article 2(2) of

international arbitration community regarding the conducts of arbitrators.

Specifically, it raises concerns as to whether *ex parte* communications, between an arbitrator (or a prospective arbitrator) and a party or party representative, may result in corruption.

Observation of U.S. case law reveals that some judgments involving *ex parte* communications led to a presumption that the award was procured by corruption. For example, in *the Crosby-Ironton* case,¹⁵⁷ the Supreme Court of Minnesota held that *ex parte* communication during the course of the arbitration process gave rise to “a strong presumption that the ultimate award was procured by corruption, fraud or other undue means...”¹⁵⁸ The Illinois Court of Appeals evidently embraced this stance in its 2001 *Rosenthal* judgment.¹⁵⁹ The court stated that “*ex parte* contact [between the arbitrator and a party to the dispute] involving disputed issues raises a presumption that an arbitration award was procured by fraud, corruption or other undue means.”¹⁶⁰

the Arbitration Agreement and, accordingly, recomposed the arbitral tribunal by designating Mr. Rolf Einar Fife of Norway and Professor Nicolas Michel of Switzerland on September 25, 2015. The recomposed tribunal will have to deal with the legal implications of the scandal and the unilateral termination of the arbitration agreement by Croatia.

¹⁵⁷ *Crosby-Ironton Federation of School Teachers v. Independent School District*, 285 N.W.2d 667 (1979).

¹⁵⁸ *Id.* (“Any case reaching this court involving review of arbitration awards where *ex parte* contacts are made, orally or in writing, in regard to the issue under dispute, without notifying all other parties to the dispute, will raise a strong presumption that the ultimate award was procured by corruption, fraud or other undue means, and thus subject to vacation...”)

¹⁵⁹ *Rosenthal-Collins Group, L.P., Lehigh Valley Futures, Inc., Gregory Deuth v. Reiff*, 748 N.E.2d 229 (2001).

¹⁶⁰ DAVID E. ROBBINS, *CALLING ALL ARBITRATORS: RECLAIM CONTROL OF THE ARBITRATION PROCESS – THE COURTS LET YOU* IN AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON ARBITRATION PRACTICE 101-102 (2010) (citing *Rosenthal*, 748 N.E.2d. at 234).

Thus, the Court affirmed vacatur of the arbitral award on the basis of *ex parte* contact initiated by a party to the case.¹⁶¹

Inevitably, *ex parte* communications create an atmosphere fraught with skepticism about arbitrator impartiality and arbitral fairness. This atmosphere not only impairs credibility and legality of the arbitral award, but may also lead to challenges directed at the award on the grounds of partiality, corruption, or public policy contravention.

However, *ex parte* communications should not give rise to a presumption of corruption *per se* unless there is proof evincing that such communications either emanated from the arbitrator's *favoritism*¹⁶² – as happened in the *Slovenia* case – or resulted in transfer of money or other undue advantage to the arbitrator. In either case, the alleging party should furnish evidence of improper intent by the arbitrator or relevant party, as well as evidence showing how arbitration's outcome was materially and adversely affected by the *ex parte* communication.¹⁶³

Within the global climate favoring arbitration,¹⁶⁴ courts rarely find that arbitrators engage in corruption. However, for the sake of avoiding corruption challenges and preserving award enforceability, arbitrators must be cautious about *ex parte* communications. Thus, they should avoid embarking on communication with a

¹⁶¹ ROBBINS, *supra* note 160, at 102 n.14.

¹⁶² According to the Global Programme Against Corruption: UN Anti-Corruption Toolkit of the United Nations Office for Drug Control and Crime Prevention, *favoritism* falls under the scope of corruption.

¹⁶³ BORN, *supra* note 6, at 1524. *See also* BORN, *supra* note 6, at 1524 n.851 (Nat'l Bulk Carriers, Inc. v. Princess Mgt Co., 597 F.2d 819 (2d Cir. 1979) ("even assuming that settlement information was provided *ex parte* to tribunal, no evidence that this affected deliberations."); Spector v. Torenberg, 852 F.Supp. 201 (S.D.N.Y. 1994) ("To vacate award based upon *ex parte* contacts 'a party must show that this conversations deprived him of a hearing and influenced the outcome of the arbitration.'"))

¹⁶⁴ The term "global climate" was borrowed from SAYED, *supra* note 10, at 393.

party in the absence (or without knowledge) of other party/parties. Notably, if a party initiates such communication, the arbitrator should record the contact and disclose it to other tribunal members and other relevant parties.¹⁶⁵

When an arbitral award is in fact challenged on the basis of corrupt arbitrators, an arbitrator's concern for reputation and dignity deserves as much attention as the legality of an arbitral award. Thus, debates relating to corrupt arbitrator conduct must be scrutinized and concluded with care and discretion. A perfect case example of the discretion and care required when investigating claims of arbitrator bribery and fraud is *Gulf Petro Trading Co. Inc. v Nigerian National Petroleum Corp.*¹⁶⁶ Here, a party exercised its "first resort" challenge for award-debtors when it questioned an award regardless of accuracy, on the basis of arbitrator bribery.

In the *Gulf Petro* case, the dispute arose from a 1993 agreement between a Texas company, Petrec International, Inc. (hereinafter Petrec), a wholly owned subsidiary of Gulf Petro Trading Company Inc., and the Nigerian National Petroleum Corporation (hereinafter NNPC).¹⁶⁷ Under the agreement, Petrec was tasked with forming Petrec (Nigeria) Ltd (PNL) to "reclaim and salvage slop oil created by NNPC's operations."¹⁶⁸ A dispute surfaced between the parties after Petrec alleged, "NNPC had both failed to contribute its share of capital to PNL and refused to provide access for the salvage operation."¹⁶⁹ By effectuating the arbitration

¹⁶⁵ ROBBINS, *supra* note 160, at 102.

¹⁶⁶ *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F. 3d. 742 (5th Cir. Tex. 2008).

¹⁶⁷ *Gulf Petro Trading Co. Inc. v. Nigerian National Petroleum Corp.*,

http://www.crowell.com/documents/Gulf-Petro-Trading_v_Nigerian-National-Petroleum_IALR.pdf

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

agreement, Petrec commenced arbitration proceedings before a three member Tribunal in the Chamber of Commerce and Industry of Geneva.

In its partial award, the tribunal stated:

“The Tribunal decided that Petrec had standing to pursue its claim and found that NNPC had failed to contribute its share of capital to PNL, but that Petrec did not have an exclusive right to the slop oil. Following a hearing regarding damages (at which NNPC again challenged Petrec’s standing by introducing evidence that Petrec was incorporated several years after execution of the agreement and after the date of the demand for arbitration), the arbitrators issued their Final Award on October 9, 2001 and decided that Petrec lacked standing to maintain its claims against NNPC. Petrec challenged the Final Award in the Swiss Federal Court. In April 2002, the Swiss Federal Court upheld the arbitrators’ Final Award.”¹⁷⁰

Following the Swiss Federal Court’s approval of the final award, Petrec filed a claim in the Northern District of Texas to have the Partial Award confirmed.

However, this motion was dismissed for lack of subject-matter jurisdiction because “the suit was effectively a request that the Final Award be set aside or modified.”¹⁷¹

Further, the court held that it was not possible to decree the relief sought by Petrec due to preclusions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention)¹⁷² and “the doctrines of *res judicata* and international comity.”¹⁷³

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² The New York Convention was adopted in New York, on 10 June 1958, and entered into force on June 7, 1959. It applies to both enforcement and recognition of foreign arbitral awards, which is rendered within the territory of another contracting state. The New York Convention obliges contracting parties to recognize arbitral awards as binding and enforce them. Both contracting states’

Thereafter, in September 2005, Petrec challenged the award in the Eastern District of Texas on the basis of fraud, bribery, and corruption. Particularly, Petrec claimed:

“...it had a letter evidencing a US\$25 million bribe paid by NNPC to one of the arbitrators in exchange for a favorable award. It also alleged that two of the three arbitrators engaged in undisclosed dealings and *ex parte* communications with NNPC.”¹⁷⁴

By raising corruption and bribery contentions, Petrec looked to the FAA Section 10:

“(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means...”

Then, on March 15, 2006, the District Court overruled the complaint’s demands and granted the defendant’s motion to dismiss for lack of jurisdiction under the New York Convention to vacate or modify the final award.¹⁷⁵

Subsequently, Petrec appealed the judgment of the District Court. The Court of Appeals for the Fifth Circuit reviewed the dismissal for lack of subject matter jurisdiction and held:

high rate of compliance with it and adoption by a majority of countries (so far 153 State parties have adopted the New York Convention) have provided the New York Convention a strong ground by comparison with other international conventions. Furthermore, it has also played a cardinal role in the promotion of international arbitration.

¹⁷³ See *supra* note 167.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

“The award at issue was clearly a foreign award for the New York Convention purposes, and drew a clear distinction between the regimes for review of arbitration awards in the courts of the jurisdiction in which the award is made (“primary jurisdiction”) and the place where recognition and enforcement of the award is sought (“secondary jurisdiction”). Primary jurisdiction allows a court to annul an award on the grounds available under local law; secondary jurisdiction is limited by the New York Convention to assessing whether the award should be recognized and enforced within that jurisdiction.”¹⁷⁶

The Fifth Circuit summarily rejected Petrec’s claims. However, the judgment was based on lack of jurisdiction. Therefore, the contentions relating to bribery and corruption of the arbitrators were neither examined nor considered. As a result, because the Court did not acquit the arbitrators of the corruption allegations, these contentions placed them under suspicion.

Recently, the Second Circuit mimicked the Fifth Circuit’s treatment of corruption charges. In *Kolel Beth v. YLL*,¹⁷⁷ the Second Circuit faced with corruption allegations against arbitrators. The dispute erupted from a contract in which the parties agreed to share the benefits of a life insurance policy. The dispute went to arbitration. On April 10, 2012, two members of the tribunal furnished the award in favor of Kolel and, subsequently, YLL filed a lawsuit to have the award vacated. YLL’s motion rested upon Section 10 (a) (1), which states “the award procured by fraud, corruption, or undue means” may be vacated. YLL claimed one of the arbitrators was corrupt and caused the tribunal to issue the challenged award. YLL

¹⁷⁶ *Id.*

¹⁷⁷ *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust et al.*, 729 F.3d.99 (2d Cir. 2013).

contended that not only had its party appointed arbitrator been deliberately excluded from the proceedings, but also the allegedly corrupt arbitrator made a promise to Kolel for a favorable award. The Court thereafter required the alleging party to bring “abundantly clear evidence” of arbitrator corruption. In the absence of such evidence, YLL’s allegations were not acceptable. Because YLL was unable to satisfy this burden, the claim of corruption was unsuccessful.

Both the *Gulf Petro* and *Kolel Beth* decisions are significant because they reflect judicial deference of arbitral awards as well as courts reluctance to intervene in the arbitral process. However, while both judgments promote arbitration as a dispute resolution system, because they failed to address the corruption allegations, they left arbitrator reliability murky. This is a practical issue for arbitration. Because arbitration’s success is inextricably linked to the good reputation of arbitrators, both the Fifth Circuit and Second Circuit holdings actually harm arbitration as an institution. In the light of increasing reports of corruption allegations directed at tribunals, courts should practice prudence in guarding arbitrator reputation and dignity. Absent reliable and trusted arbitrators, parties will seek other, less functional means of dispute resolution.

Demonstrably, the *Gulf Petro* and *Kolel Beth* cases show that not only are bribery allegations main pillars to challenge awards, but the cases also exhibit how corruption most commonly appears with respect to the arbitral process. Importantly, bribery is not the sole modality of corruption in arbitration. In fact, depending on a jurisdiction’s interpretation of corruption, undisclosed relationships with parties may

be classified as corruption. For instance, in *Azteca Construction v. ADR Consulting* case, the court held that an arbitrator's failure to disclose information that could have an impact on their selection constituted fraud.¹⁷⁸ Thus, corruption's appearance may morph, is largely dependent on case circumstance, and commonly frustrates successful regulation.

Unfortunately, there is insufficient data to aid in determining the prevalence of corruption among arbitrators. However, it is possible to infer that corruption in arbitration has reached a saturation point and, accordingly, the legal climate is bitter when addressing it. Both arbitral tribunals and institutions extensively condemn bribery and corruption. Besides verbal condemnation, concrete actions taken by arbitral tribunals and institutions are apparent.

First, actions by arbitral tribunals against corruption have been diverse and effective. Principally, arbitral tribunals began prioritizing international public policy that obviously condemns corruption. This resulted in tribunal refusal to legitimize contracts of corruption or contracts obtained by corruption.¹⁷⁹ Additionally, arbitral institutions invested greater efforts into battling corruption. For instance, through institution initiative, events are held to develop a supra-national code of conduct for avoiding corrupt behaviors in arbitration. The ICC held one such event in 2010 on the topic of "Arbitration and Public Policy." Here, it was suggested that, "an international professional association, like the International Bar Association, adopt a code of

¹⁷⁸ *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156, 1168 (Cal. App. 3d Dist. 2004).

¹⁷⁹ Tamar Meshel, *The Use and Misuse of the Corruption Defence in Investment Arbitration*, 30 (3) *Journal of International Arbitration* 267, 276 (citing ICSID Case No. ARB/00/7, Award (4 Oct. 2006), available at <http://italaw.com/documents/WDFv.KenyaAward.pdf>)

conduct for lawyers representing parties in international arbitration in order, *inter alia*, to avoid corruption.”¹⁸⁰ In addition, arbitral institutions were encouraged to bar counsels from acting in future cases who previously engaged in illegality.¹⁸¹ Clearly, arbitral institutions are taking active steps to curb the fears of prospective parties and are successfully providing appropriate paths for parties to take.

Notably, because of the steps thus far taken, arbitrators are not corrupt in the majority of cases. Arbitrators are, however, under the spotlight due to an escalating number of corrupt arbitrator allegations, generally raised by award-debtors.¹⁸² Because corruption is a sore spot for societies, even if the allegation lacks foundation, once corruption contentions are raised, public attention is drawn. This attention not only impairs award credibility, but also, in the long run, erodes social support for arbitration.

In sum, to end abuse and strengthen public confidence of both arbitration and arbitrators, it is clear that criminal law in the venue of arbitration must take effective action.

¹⁸⁰ Mohamed Abdel Raouf, *How Should International Arbitrators Tackle Corruption Issues?*, 24 (1) ICSID Review Foreign Investment Law Journal 116, 136 (2009).

¹⁸¹ Kyriaki Karadelis, *How should we deal with dishonest behavior in arbitration?*, Global Arbitration Review (GAR) (May 7, 2010), available at <http://globalarbitrationreview.com/news/article/28397>.

¹⁸² See *supra* note 166.

ii) Corrupt Witnesses

Both expert and fact witnesses¹⁸³ are integral to every dispute resolution system. They may play considerable roles throughout adjudication and bring clarity to complex disputes and grave contentions.

One incentive that guides parties to enter arbitration rather than litigation is ease of access to expertise. Many international arbitration cases involve complex disputes such as construction, oil and gas, and accounting. Thus, parties may need particular knowledge relating to the subject matter of their dispute. Arbitration bestows a chance upon arbitrating parties to gain access to necessary knowledge by permitting them to choose their own arbitrators. Because arbitrators may need to analyze complex, controversial legal issues under a particular jurisdiction's law,¹⁸⁴ tribunals may appeal to expert witnesses whose testimony regarding the complex issue at hand may play a vital role.

Expert testimony can be presented via experts designated by parties or the tribunal. Many national arbitration statutes¹⁸⁵ and institutional rules¹⁸⁶ contain

¹⁸³ Further detail will be given under Chapter 3: Exhibiting Corruption in International Arbitration (pp. 166-250).

¹⁸⁴ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOL. II 1860 (2009).

¹⁸⁵ Article 26 (1) of the UNCITRAL Model Law bestows a power upon an arbitral tribunal to appoint "one or more experts to report to it on specific issues to be determined by the arbitral tribunal." *See also* English Arbitration Act of 1996 Sect.37 (1); Netherlands Code of Civil Procedure, Art. 1042; Japanese Arbitration Law, Art. 34

¹⁸⁶ ICC Rules, Art. 25 ("The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned."); LCIA Rules, Art. 21 ("The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal."); SIAC Arbitration Rules of 2013, Art. 23 ("Unless the parties have agreed otherwise, the Tribunal: (a) may following consultation with the parties, appoint an expert to report on specific issues; and (b) may require a party to give such expert

provisions pertaining to appointment of expert witnesses. The appointment of an expert witness, particularly by a party, raises concerns because a party's motive for designating an expert is, in most cases, to receive an opinion favoring their position. Thus, the likelihood of an expert witness exploiting his or her position in the case and engaging in corruption is high.

Corruption of an expert witness may risk not only the validity of the arbitral award, but also its enforcement and recognition. In this regard, the issues that will determine the fate of the award and its enforcement are the classification attached to expert witnesses under the applicable law¹⁸⁷ and the interpretation of *ordre public* (public policy) under relevant law.

In most of the jurisdictions, expert witnesses are not classified as public officials. Thus, the rules pertaining to corrupting of public officials are inapplicable to the corruption of expert witnesses.¹⁸⁸ This point requires further examination of the respective jurisdiction's legislation in order to clarify whether the corruption of private parties is illegal and should therefore be penalized.¹⁸⁹ For example, the United Kingdom Bribery Act exercises a robust stance against corruption that does not differentiate public corruption from private corruption.¹⁹⁰ In this respect, corruption

any relevant information, or to produce or provide access to any relevant documents, good or property for inspection.”).

¹⁸⁷ Petsche & Klausner, *supra* note 72, at 354.

¹⁸⁸ *Id.* For example, according to 18 U.S. Code § 201 (a) (1), the term public official means “Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.”

¹⁸⁹ *Id.*

¹⁹⁰ §§ 1&2 of the U.K. Bribery Act 2010. §1 of the Act regulates the offences of bribing another person while §2 of the Act regulates offences relating to being bribed.

of an expert witness may lead to annulment of the award or refusal to enforce and recognize it in the United Kingdom.

Where legislation fails to prohibit corruption of private parties (expert witnesses in our case), an expert witness' loss of impartiality and independence due to corruption may be construed as a public policy violation. Accordingly, the public policy exception may lead to award vacatur or refusal to enforce and recognize the award.¹⁹¹

Conspicuously, the majority of leading arbitral institutions' regulations note the fundamentality of expert witness independence and impartiality, while underscoring that expert witnesses are not "hired guns"¹⁹² who are tasked with advocating a party's position. This position is evidently stated by the Preamble and Article 4 of "the Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration"¹⁹³ (hereinafter the Protocol) issued by the Chartered Institute of Arbitrators. The Preamble of this Protocol states that,

¹⁹¹ Petsche & Klausner, *supra* note 72, at 355-356.

¹⁹² Peter J. Rees, From Hired Gun to Lone Ranger – The Evolving Role of the Party-Appointed Expert Witness, 2 (2008), available at

https://www.ciarb.org/scotland/downloads/from_hired_gun_to_lone_ranger.pdf ("A number of problems with expert evidence were identified by Lord Woolf in his reports. These included insufficient observance of the confines of expert evidence, and a tendency to expand into the realms of rival submissions, as well as an unwillingness to agree issues, and limit the battle to the really essential questions. All of these problems were caused by experts having departed from the traditional role of the expert witness, and having become 'a very effective weapon in the parties' arsenal of tactics.'").

¹⁹³ *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration*, <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/the-use-of-party-appointed-experts.pdf?sfvrsn=2>; LCIA Arbitration Rules of 2014, Art. 21 (2) ("Any such expert shall be remain impartial and independent of the parties; and he or she shall sign a written declaration to such effect, delivered, to the Arbitral Tribunal and copied to all parties."); IBA Rules on the Taking of Evidence in International Arbitration, Art. 6 ("The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal."); The Milan Rules of 2010, Art. 26 ("The expert witness shall comply with the duties of

“experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them.” Further emphasis has been given in Article 4 of the Protocol stating “an expert’s opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process of by any Party.”

In this respect, the effectuation of the public policy exception is dependent upon the interpretation of the public policy in the respective jurisdiction. By adopting a comprehensive approach, expert witnesses’ lack of impartiality and independence may be construed as a public policy violation.¹⁹⁴

The next issue requiring attention in the context of corrupting expert witnesses is the contingency fee.¹⁹⁵ A Contingency fee arrangement principally takes place in the context of the attorney-client relationship. Under this arrangement, the compensation of an attorney is conditioned upon his or her success in obtaining a judgment favorable to the client.¹⁹⁶ In the United States’ legal system, contingency fees are considered an excellent recourse for parties who may be lacking current financial resources to compensate their attorneys. In contrast, in other jurisdictions, contingency fee arrangements are either flatly forbidden or strictly regulated.¹⁹⁷

independence imposed on the arbitrators under these Rules. The challenge provision relating arbitrator shall also apply.”)

¹⁹⁴ See *Bonar v. Dean Witter Reynolds, Inc.*, 835 F. 2d. 1378, 1383 (11th Cir. 1998) (vacating arbitration award where prevailing party’s expert witness had falsified his credentials.)

¹⁹⁵ *Contingent Fees for Expert Witnesses in Civil Litigation*, 86(8) Yale L.J. 1680, 1681 n.3 (1977) (“A fee is contingent if its payment is conditioned on occurrence of the event that is the object of the services performed. Attorney contingent fee fees are usually conditioned on recovery of a monetary judgment or settlement by the hiring litigant. The fee is usually a percentage of the recovery, although the parties may agree to a contingent lump sum or an hourly rate instead.”)

¹⁹⁶ BORN, *supra* note 183, at 2312.

¹⁹⁷ *Id.* See also Chapter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, available at

http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

Unsurprisingly, when expert witnesses are compensated on a contingency fee basis, there is much skepticism. Because expert witness impartiality and independence is fundamental to the fair operation of the expert witness system, contingency fee compensation obviously has an inherent corrupt presumption. Contingency fee arrangements transform expert witnesses into interested parties and doubt is subsequently cast upon the witness' independence and impartiality. In this respect, the overriding debate becomes whether contingency fee assurances for expert witnesses may be isolated from corruption. Undeniably, these fee agreements harbor risks of corruption. These arrangements are premised upon a party vowing to compensate an expert witness with a fee contingent upon a result, only if rendered in favor of the respective party. Therefore, due to the *promise of payment* and the expert witness' interest in the outcome, these contingency fee agreements may fall under the penumbra of corruption under major international conventions and national statutes that consider not only offering or giving any undue advantage, but also *promising* any undue advantage as corrupt.

Inherent and inevitable in the contingency fee agreement is a promise of payment. Thus, the contingency fee arrangements should not automatically be deemed corrupt unless evidence substantiates that the expert witness did in fact

(Commentary on Article 3.3 – *Pactum de Quota Litis* states: “These provisions reflect the common position in all Member States that an unregulated agreement for contingency fees (*pactum de quota litis*) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. The provisions are not, however, intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful, provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice.”)

engage in corrupt conducts, such as altering his or her testimony, skewing facts, or altering scientific/technical principles in favor of the appointing party.

Next, in addition to necessary expert witnesses, fact witnesses are also critical to the fact-finding process in arbitration. The role of fact witnesses is to aid the arbitral tribunal in the investigative process through supplementing evidentiary materials. Particularly, in commercial transactions, fact witnesses open doors to clarity. Additionally, because many fact-witnesses are likely to have had some connection with either side of the transaction, they have personal knowledge invaluable to the arbitrators.¹⁹⁸ Therefore, fact witnesses play a vital role in fact-finding and subsequent arbitral award.

However, tribunals must exercise caution when crediting to fact witness testimony. Because a fact witness could have either direct or indirect interest in the outcome of the case, he or she may attempt to sway testimony towards his or her own interests, or his or her employer's interests. For instance, a fact witness may develop an interest in the case outcome when:

“[the fact witness] has been paid by a party to alter his testimony, ...his employment with one of the parties is at stake, ...he is himself interested in the outcome of the case, ...he is partisan out of sheer nationalism, for example, in large cases involving the interests of a State or a State entity.”¹⁹⁹

¹⁹⁸ ALAN REDFERN, J. MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 401 (2009).

¹⁹⁹ Hanotiau, *supra* note 141, at 264-65.

Naturally, these fact witness concerns make them even more susceptible to corruption than expert witnesses. Therefore, most arbitral tribunals do not credit the testimony of fact witnesses when documentary evidence is available.

However, tracing corrupt fact witnesses is no easy feat. For instance, while deviation from the truth is always “on the table” in a fact witness’ testimony, it is not likely to affirmatively establish fabrication or perjury in the course of the arbitral proceeding. In further support of this observation, Hanotiau states:

“It may happen however that a witness will recognize in the course of the procedure that he did not state the truth. Or a subsequent investigation and comparison of the information supplied by the witness with documents available to the party challenging the testimony may lead to the objective conclusion that the witness did not tell the truth. The fact that the witness lied will not therefore always come to light in the course of the arbitral procedure but sometimes only after the award has been rendered.”²⁰⁰

It is important to acknowledge that, because human beings are imperfect, so too are their memories. An imperfect memory and resulting imperfect truth does not automatically signify a lie. Thus, to successfully accuse a fact witness of corruption, an accusing party will likely be encumbered with a heavy burden of proof.

However, if it is proven that the fact witness based his or her testimony upon fraudulent acts, the award may be unenforceable by virtue of public policy. This is exactly what transpired in *S.A. Thomson CSF v. Société Brunner Sociedade Civil de*

²⁰⁰ *Id.* at 265.

Administração Limitada & Société Frontier AG Bern.²⁰¹ In this case, Thomson challenged award enforcement before the Paris Court of Appeal on the grounds of an international public policy violation due to the submission of false testimony with the intent to influence arbitrators.²⁰² The challenge raised by Thomson was the object of two judgments rendered by the Paris Court of Appeal on September 10, 1998 and September 7, 1999.²⁰³ The Court “ordered in its first judgment the communication of the criminal file” and its later judgment, deferred to its former decision and chose to wait for the Criminal Court’s judgment.²⁰⁴

iii) Fraud in the Arbitration Process

Next, in addition to arbitrator and witness corruption, fraud in the arbitration process is a dominant impediment to a healthy arbitral system. Fraud is an economic crime resting upon either deceitful practice or willful device. Fraud is committed with the intent to deprive another of his or her rights.²⁰⁵ Fraud covers state agent conduct (e.g. illegal trade networks, smuggling etc.) as well as party conduct. The focus here is on the latter.

Due to escalating incidents of fraud allegations in arbitration, it is necessary to understand what fraud, in this context, means. Fraud has a variety of definitions. Some legal scholars define it as “some act of deceit perpetrated on the arbitral

²⁰¹ A. Thomson CSF v. Société Brunner Sociedade Civil de Administração Limitada & Société Frontier AG Bern

²⁰² Hanotiau, *supra* note 141, at 265. Further details pertaining to enforcement and recognition of an award will be given under “the Challenges that the Award Faces By Virtue of Corruption in Arbitral Process” title.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ <http://thelawdictionary.org/fraud/>

tribunal (e.g. providing the arbitral tribunal with falsified certificates of ownership of property claimed), or on the other party (i.e., if the arbitral tribunal was a party to the fraud),”²⁰⁶ while other legal scholars define it as “a knowing misrepresentation of the truth of a material fact to induce another to act in a manner that is detrimental to their interests.”²⁰⁷ Irrelevant here is which definition applies. What is relevant, is noting that fraud’s characteristics may include, but are not limited to, deceit, falsity, and misrepresentation.

Fraud is prevalent forms of corruption in international arbitration. It generally surfaces when parties engage in misconducts such as forgery, document concealment,²⁰⁸ and misrepresentation. An illustration of forged documents constituting fraud is found in the Paris Court of Appeal’s judgment of *European Gas Turbines S.A. v. Westman International Ltd.*²⁰⁹ In this case, the tribunal rendered an award in favor of *Westman*. Subsequently, *European Gas* challenged the award before the Paris Court of Appeals on the ground of fraudulent expense reports. Because the expenses declared by *Westman* during litigation were a miniscule proportion of what

²⁰⁶ Christoph Liebscher, *The Challenge of Awards on the Basis of Criminal Acts* in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions*, 11 ICCA Congress Series 300, 302 (2003) (citing D. Sutton & J. Gill, *Russell on Arbitration* (2003) marg. No. 8-046 in fn. 14)

²⁰⁷ Lamm, Pham & Moloo, *supra* note 49, at 699 (citing Black’s LawDictionary 685 (8th ed. 2004)).

²⁰⁸ Hanotiau, *supra* note 141, at 270 (“It happens from time to time that a party refuses to submit a document to the other party or the arbitral tribunal which is central to the dispute, generally because the document contains information which goes against the party’s position.”).

²⁰⁹ *Id.* (Paris Court of Appeal, 30 September 1993, *European Gas Turbines S.A. v. Westman International Ltd.*, Rev. Arb. 359 (1994))

had been claimed during arbitration,²¹⁰ the Court concluded that newly submitted evidence reflected that fraud infected the tribunal's award.²¹¹

Yet another demonstration of fraud and how it manifests is seen in the *Inceysa v. El Salvador* case.²¹² Here, a dispute arose under the El Salvador-Spanish bilateral investment treaty and was arbitrated under the ICSID Convention.

In *Inceysa*, the dispute arose from a service contract for vehicles' mechanical inspection stations' installation, management, and operation. The parties of the contract were the Ministry of the Environment and Natural Resources of the Republic of El Salvador and Inceysa Vallisoletana, S.L.²¹³ The host government claimed that Inceysa, during the procurement procedure, had illegally influenced the outcome with fraudulent acts "among them *making false financial statements, submitting forged documents, and misrepresenting* its actual level of experience in the field of vehicle inspections."²¹⁴ The tribunal credited these contentions and applied the public international law to assess the investor's conduct and concluded that the investor violated the general principle of good faith.²¹⁵ This case is critical to exhibit how courts should address claims of fraud. Additionally, *Inceysa* shows the successful application of public international law by a court when assessing corruption.

²¹⁰ SAYED, *supra* note 10, at 384.

²¹¹ Hanotiau, *supra* note 141, at 269.

²¹² Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID ARB/03/26, Award of 2 August 2006. The tribunal was composed of Rodrigo Oreamuno Blanco, Burton A. Landy, and Claus von Wobeser, *available at* <http://www.italaw.com/cases/documents/564>.

²¹³ ANDREAS KULLICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 128 (1st ed. 2012).

²¹⁴ *Id.* (emphasis added)

²¹⁵ Hege Elisabeth Kjos, Applicable Law In Investor-State Arbitration: The Interplay Between National and International Law 179 (1st ed. 2013).

Recently, a tribunal addressed claims of fraud in *Plama v. Bulgaria*.²¹⁶ The dispute arose from the privatization procedure of a Bulgarian company subject to privatization control. Here, the right to sell any shares was made conditional upon approval by the Bulgarian Privatization Agency (hereinafter the Agency). The Plama Consortium (hereinafter the Consortium) obtained necessary approval and assumed the company's shares. The Agency's approval relied upon the Consortium's representations that it was comprised of two large and experienced international companies possessing the required knowledge to operate the refinery.

During the course of arbitration, the host-State claimed that consent given by the Agency was obtained by fraudulent misrepresentation because the claimant was not a consortium at all and was owned solely by Mr. Jean-Christophe Vautrin. Upon evidence evaluation, it was obvious that the claimant represented itself to the host-State government as a consortium and this was true at the outset of negotiations.²¹⁷ However, when circumstances changed and two companies withdrew from the consortium, Mr. Vautrin "failed, deliberately, to inform Respondent of the change in circumstance, which the Tribunal considers would have been material to Respondent's decision to accept the investment."²¹⁸ Accordingly, from the Tribunal's point of view,

"the investment...was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the

²¹⁶ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, available at <http://www.italaw.com/documents/PlamaBulgariaAward.pdf>.

²¹⁷ *Id.* at 38.

²¹⁸ *Id.*

transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery.”²¹⁹

Because Mr. Vautrin intentionally failed to disclose material facts to the Respondent, his actions were deemed fraudulent and performed in bad faith.

In yet another investment arbitration case involving fraud, an ICSID tribunal applied a strategy similar to the *Plama* tribunal. Here, the tribunal stated:

“The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through *misrepresentations, concealments or corruption*, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.”²²⁰

Clearly, the modern trend of tribunals in targeting fraud disfavors both violations of host State laws and bad faith investments. This trend allows for predictability in tribunal holdings and reliability in its encouragement of good actors.

Clearly, allegations of fraud commonly arise when the defendant accuses a claimant of engaging in fraudulent actions. These allegations can be made either during the arbitral process or before the courts after the award is rendered. Regardless of when the allegation arises, the seriousness of fraud claims must not be curtailed. Fraud plays a key role with respect to fraudulent record keeping and facilitating

²¹⁹ *Id.* at 38-39.

²²⁰ Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 (15 April 2009), Award of 15 April 2009, para. 100 available at <http://www.italaw.com/sites/default/files/case-documents/ita0668.pdf>. The tribunal was composition of Brigitte Stern, Andreas Bucher, and Juan Fernández-Armesto (emphasis added).

concealment of corrupt practice such as money laundering. In this respect, arbitral tribunals and courts should enforce a “no-nonsense” policy to eradicate fraud and deter those seeking to commit it.

Unfortunately, despite the gravity of these corrupt practices, fraud is subject to lesser scrutiny than other forms of corruption like bribery.²²¹ Noting this defect, BERNARDO CREMADES and DAVID CAIRNS remark upon the absence of international cooperation and governance against fraud.²²² Absent such attention, it is unlikely that fraudulent acts will be successfully deterred.

Nonetheless, despite the apparent lack of international cooperation, there is an emerging international public policy addressing entire forms of corruption while providing sufficient ground to target fraud. Conventions, arbitral tribunals, courts, and prominent legal scholars collectively illuminate this policy. While there is an obvious absence of international homogeneity targeting fraud, there is a collective force by others in the field to establish a global public policy, one that is equally effective, to be enforced until the void in international cooperation and guidance is filled.

c) Challenges to Arbitral Awards On the Basis of Corruption

The escalating necessity of arbitration for investment and commercial disputes has fashioned by arbitration-friendly doctrines, such as separability and competence-competence. While these two principles rely on maintaining the arbitration agreement’s validity and arbitral tribunal’s jurisdiction, there a third principle that

²²¹ *Id.* at 719.

²²² *Id.*

takes the stage after an award is rendered. This principle is the judiciary's "presumptive obligation to recognize and enforce international arbitral awards."²²³

Under this presumption, it is assumed that the arbitral award meets jurisdictional muster. The presumption also compels a presumptive obligation upon national courts to recognize the international arbitral award.²²⁴ Without this presupposition, the arbitral process could not function. For arbitration to be effective and efficient, the parties must have faith that their efforts they put into the arbitral process and the cost they bear throughout this process will be honored with award enforcement and recognition.

In this respect, contemporary international arbitration conventions and statutes acknowledge the necessity of maintaining a reliable arbitral process²²⁵ and impose presumptive obligations to recognize and enforce international arbitral awards. For instance, Article 3 of the New York Convention states:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees of

²²³ BORN, *supra* note 184, at 2711.

²²⁴ *Id.* at 2711 n.41 (“It is well-settled that the Convention’s recognition provisions apply to awards of both monetary and non-monetary relief.”)

²²⁵ The Federal Arbitration Act, Sect. 9 also favors presumptive obligation to recognize and enforce international arbitral awards. Pursuant to the Section 9, “If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award – made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in Sect. 10 and 11 of this title...”; English Arbitration Act, 1996, Section 58 (1) (“Unless otherwise agreed by the parties, an award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding.”); Swiss Law on Private International Law Article 190 (1) (“The award is final from its notification....”).

charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”

Basically, Article 3 of the New York Convention dictates signatory states to exercise comity and enforce arbitral awards rendered in other countries, thus, ensuring that these awards are not subject to more burdensome procedural conditions than domestic arbitral awards.

Similar to the New York Convention, the Inter-American Convention on International Commercial Arbitration (hereinafter the Inter-American Convention)²²⁶ imposes the same obligation upon courts to recognize foreign arbitral awards subject to the Inter-American Convention. For instance, Article 4 of the Inter-American Convention states:

“An arbitral decision or award that is not appealable to under the applicable law or procedural rules shall have the force of a final judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.”²²⁷

²²⁶ The Convention adopted by the Organization of American States (OAS) in 1996. The Convention entered into force in March 1997, and has been ratified by all OAS member states except for Barbados. The Convention solely addresses corruption in public sector. It places a burden upon signatories to criminalize act of corruption in a way that will cover both active and passive bribery. *See* <http://www.oas.org/juridico/english/treaties/b-35.html>.

²²⁷ BORN, *supra* note 184, at 2726 (“In contrast, the European Convention does not expressly impose a presumptive obligation to recognize and enforce international arbitral awards. Instead, as discussed elsewhere, the Convention limits the grounds on which a court may rely upon a decision vacating an arbitral award. This implies an expectation that Contracting States will presumptively recognize and enforce arbitral awards, but that obligation is not expressly imposed.”). *See* also the UNCITRAL Model Law on International Commercial Arbitration Article 35 (“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provision of this article and of article 36.”)

Although there is a presumption that an arbitral award is valid and must be recognized and enforced, there are grounds available to challenge such awards.

The expression, “challenge of the award”, covers any judicial recourse to set aside, either in whole or in part, an arbitral award, or refusing to enforce and recognize an award. And while award-debtors usually comply with an arbitral award rendered against them, occasionally, a party may seek vacatur for tactical reasons or for sense of justice.²²⁸ Under these circumstances, parties will seek vacatur and file a demand to have the award set aside in the courts of an arbitral seat (*primary jurisdiction*),²²⁹ which determines the grounds available for vacatur. Neither the New York Convention nor other international conventions place international limits on the standings available for vacatur.²³⁰ Therefore, the national laws of the place of arbitration carve vacatur grounds that are available to have the award set aside. However, most contemporary arbitration regimes adopt similar vacatur grounds to the New York Convention Article V (which lists the grounds applicable to non-recognition of awards).²³¹

Therefore, it may be inferred that most national arbitration legislation permits the vacatur of international arbitral awards if:

²²⁸ BORN, *supra* note 184, at 2552.

²²⁹ *Karaha Bodas Co., L.L.C. v. Persahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F. 3d. 274, 287 (5th Cir. Tex. 2004) (“Under the Convention, ‘the country in which, or under [arbitration] law of which, [an] award was made’ is said to have primary jurisdiction over the arbitration award.”)

²³⁰ BORN, *supra* note at 184, at 2552; BORN, *supra* note 184, at 2560 (“Most other international arbitration conventions are similar to the New York Convention in their treatment of vacatur arbitral awards. The Inter-American Convention adopts essentially the same approach as the New York Convention (in Article 5)...The European Convention is somewhat different, in that expressly addresses (in Article IX) the consequences of decision in the arbitral seat setting aside arbitral awards, providing that such decisions will not be a basis for non-recognition of an award unless they rest on specified grounds...”)

²³¹ *Id.* at 2252.

“(a) there was no valid arbitration agreement; (b) the award-debtor was denied an adequate opportunity to present its case; (c) the arbitration was not conducted in accordance with the parties’ agreement or, failing such agreement, the law of the arbitral seat; (d) the award dealt with matters not submitted by the parties to arbitration; (e) the award dealt with a dispute that is not capable of settlement by arbitration; or (f) the award is contrary to public policy. In addition, many arbitration statutes also provide for the vacatur of arbitral awards; if (g) the arbitral tribunal lacked independence or impartiality; (h) the award was procured by fraud; or (i) in some states, the arbitrator’s substantive decision was seriously wrong on the merits.”²³²

Apart from vacatur, award-debtors may challenge the enforcement and recognition of an award in the courts of the country where enforcement and recognition is sought. Generally, conventions and national statutes provide a limited number of grounds applicable for non-recognition of awards. The grounds on which the majority of national and international arbitration regulations concur include: (a) lack of a valid arbitration agreement; (b) excess of authority; (c) misapplication of parties’ arbitration agreement; (d) bias by the arbitral tribunal; (e) non-arbitrability of the dispute under the law of the country where enforcement and recognition is sought; (f) violation of public policy; and (g) vacatur of the award in the arbitral seat.

Under Article V of the New York Convention,

“recognition and enforcement of the award may be refused, at the request of the party against him it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

²³² *Id.* at 2553.

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected if or, failing any indication thereon, under the law of the country where the award was made²³³; or
 - (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or²³⁴
 - (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or²³⁵
 - (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where arbitration took place; or²³⁶
 - (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.²³⁷
- (2) Recognition and enforcement of an arbitral award may also be refused of the competent authority in the country where recognition and enforcement is sought finds that:

²³³ Inter-American Convention, Art. 5 (1) (a); European Convention, Art. IX (1) (a)

²³⁴ Inter-American Convention, Art. 5 (1) (b); European Convention, Art. IX (1) (b)

²³⁵ Inter-American Convention, Art. 5 (1) (c); European Convention, Art. IX (1) (c)

²³⁶ Inter-American Convention, Art. 5 (1) (d); European Convention, Art. IX (1) (d)

²³⁷ Inter-American Convention, Art. 5 (1) (e).

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;²³⁸
or
- (b) The recognition or enforcement of the award would be contrary to public policy of that country.’’²³⁹

As seen from Article V (c), it is possible for courts to distinguish portions of an award that are unenforceable from the other portions which are subject to neither non-recognition or non-enforcement.

Next, the public policy ground (The New York Convention, Art. V (2) (a) (b) and the Model Law Article 34 (2) (b) (ii)) will be under the spotlight. In the presence of corruption, the public policy ground inhibits recognition and enforcement of international arbitral awards.

The public policy exception recognizes a State’s right to protect its *ordre public* against international arbitral awards that are adverse to domestic law and values. In fact, this ground may become a pillar of hostility towards arbitration because of uncertainty and inconsistency due to challenges of interpretation and application of international public policy.²⁴⁰ In response to this risk, and in hopes of clarification and prevention of exploitation of the public policy ground, some

²³⁸ Inter-American Convention, Art. 5 (2) (a).

²³⁹ Inter-American Convention, Art. 5 (2) (b).

²⁴⁰ Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 (2) *Arbitration International* 217, 217 (2003) (“There is a tension, however, which the legislature and the courts must resolve between: on the one hand, not wishing to lend the State’s authority to enforcement of awards which contravene domestic laws and values; and, on the other hand, the desire to respect the finality of foreign awards.” In this regard, in some jurisdictions, courts may prefer former to latter due to alleged violation of national law or values. In such a case, the ambiguity that resides within the term public policy will become handy while justifying why the recognition and enforcement of an award has been overruled.)

legislatures and courts²⁴¹ chose to interpret public policy within the context of public good, morality, and notions of justice. The English Court of Appeal has adopted this approach and in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v. Ras Al Khaimah National Oil Company*²⁴² stated:

“Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.”²⁴³

Additionally, and similarly to the English Court of Appeal, but in a separate approach towards public policy, Judge Joseph Smith in *Parsons & Whittemore*, stated:²⁴⁴ “enforcement of a foreign arbitral award may be denied on public policy grounds ‘only where enforcement would violate the forum state’s most basic notions of morality and justice.’”²⁴⁵

²⁴¹ *Id.* at 220 (“The Court of Appeal of Milan has stated “International public policy is understood to be narrower than domestic public policy: not every rule of law which belongs to the *ordre public interne* is necessarily part of the *ordre public externe* or *international*. Professor Sanders states that ‘international public policy, according to generally accepted doctrine is confined to violation of really fundamental conceptions of legal order in the country concerned.’”); (The German Bundesgerichtshof has stated that “A violation of essential principles of German law (*ordre public*) exists only if the arbitral award contravenes a rule which is basic to public or commercial life, or if it contradicts the German idea of justice in a fundamental way. A mere violation of the substantive or procedural law applied by the arbitral tribunal is not sufficient to constitute such violation.”))

²⁴² *Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v. Ras Al Khaimah National Oil Company* [1987] 2 Lloyd’s Rep. 246.

²⁴³ Sheppard, *supra* note 240, at 218.

²⁴⁴ *Id.* at 219 (citing *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l’Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974)).

²⁴⁵ *Id.*

Demonstrably, there is an emerging consensus on vacatur, non-recognition, and non-enforcement of an award when in the presence of a violation of fundamental moral or legal principles. Correspondingly, it is undisputable that there is also an international consensus propounding that recognition and enforcement of an award should be declined if induced or influenced by corruption or fraud.²⁴⁶ This notion is further supported by the Report of the United Nations Commission on International Trade Law.²⁴⁷ The report stated that

“it was understood that the term ‘public policy’ which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.”

These statements from well-respected reports augment the undisputable fact that courts and arbitration institutions are enforcing a no-tolerance policy for violations of morality and justice.

Further, corruption, such as bribery and fraud, may arise at the enforcement stage of the award and constitute grounds for non-enforcement or vacatur due to public policy. For instance, the FAA Sect.10 (1) sets forth that an award may be vacated where it was procured by corruption, fraud, or undue means.²⁴⁸ Second, under the United Kingdom Arbitration Act of 1996 Sect. 68 (2) (g), an award obtained by

²⁴⁶ *Id.* at 238

²⁴⁷ *Report of the United Nations Commission on International Trade Law on the Work of its 18th Session* (3-21 June 1985), <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html>; Born, *supra* note 163, at 2763 (“In cases involving flagrant breaches of basic procedural guarantees (e.g. fraud, corruption, and evident partiality), which taint the entire arbitral process, non-recognition should result even without a showing of a specific effect on the arbitrators’ decision.”)

²⁴⁸ U.S. FAA, 9 U.S.C. § 10 (1).

fraud indicates serious irregularity and gives standing to challenge.²⁴⁹ Third, according to Section 8 (7A) of Australian International Arbitration Act of 1974, enforcement of a foreign award would be contrary to public policy if fraud induced or affected the creation of the award.²⁵⁰ All three authorities show that enforcement of awards procured by corrupt engagements is challengeable with a great likelihood of success.

In addition to national arbitration statutes, international arbitration regulations exercise a similar approach of vacatur. “ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter ICSID Convention)”, Art. 52 (1) states that “each party may request vacatur of the award on or more of the following grounds...that there was a corruption on the part of a member of a tribunal.”²⁵¹ Clearly, there is harmonization between national and international regulations concerning the treatment of awards when the issue comes to corruption and other forms illegality.

Under these circumstances, it is evident that if an arbitral process is contaminated by corruption (e.g. fraud, in the form of forgery, concealed documents, perjury, or corrupt arbitrators, fact witnesses, expert witnesses), the award will be vacated or subject to non-enforcement and non-recognition.

In practice, the majority of challenges arise from a particular sub-set of corruption: fraud. It is invoked in cases illustrating questionable conduct, such as

²⁴⁹ The United Kingdom Arbitration Act of 1996, Sect. 68 (2) (g).

²⁵⁰ The Australian International Arbitration Act 1974 Sect. 8 (7A). *See also* New Zealand Arbitration Act of 1996 Sect. (36) (3) (a); The Arbitration and Conciliation Act of 1996 Sect. 48 (2).

²⁵¹ ICSID Convention, Rule 52 (1) (c).

perjury, distorted evidence, concealed documents, and forgery. Fraudulent engagements by the parties may vitiate the entire character of the arbitration. Consequently, fraud represents a solid defense when challenging award recognition and enforcement.²⁵² When parties apply the public policy defense to recognition and enforcement in the context of fraud, there is high risk of jeopardizing award finality. To obviate this hostility, jurisdictions have taken diverse approaches. While some jurisdictions fashion criteria that requires fulfillment by the contending party, other jurisdictions prefer to turn a blind eye to those contentions.²⁵³

For example, in the United States, for fraud to justify vacatur, the following three requirements must be met: First, the contending party must establish the existence of fraud by clear and convincing evidence, second, the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration, and third, the person challenging the award must demonstrate that the fraud

²⁵² BORN, *supra* note 184, at 2813. *See, e.g.* *Europcar Italia, S.P.A v. Maiellano Tours*, 156 F. 3d. 310, 315 (2d Cir. N.Y. 1998) (“Article V (2) (B) of the Convention allows a court to refuse enforcement where to do so would violate the public policy of the enforcing state. However, this public policy exception is to be construed very narrowly and should be applied “only where enforcement would violate our ‘most basic notions of morality and justice’...A fraudulently obtained arbitration agreement or award, which might violate public policy and therefore preclude enforcement.”); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 814 (D. Del. 1990) (“Intentionally giving false testimony in an arbitration proceeding would constitute fraud” and might vindicate non-recognition, non-enforcement, or vacatur.)

²⁵³ BORN, *supra* note 184, at 2813 n.540 (“Compare Judgment of 26 January 2005, XXX Y.B. Comm. Arb. 421 (Austrian Oberster Gerichtshof) (the fact that “the foreign arbitral award is therefore based on an intentionally false witness statement does not make recognition and enforcement of the arbitral award at odds with public policy.”); Judgment of 3 April 1987, XVII Y.B. Comm. Arb. 529 (Italian Corte di Cassazione) (no public policy defense based on fraud in arbitration.)”)

materially related to an issue in the arbitration.²⁵⁴ The American vacatur test is illustrated by the *Karaha Bodas* case.²⁵⁵

In *Karaha Bodas*, the parties entered into a contract pertaining to the development of geothermal resources in Indonesia. Following this contract creation, the company's president, Karaha Bodas Company, L.L.C. (hereinafter KBC), invoked Force Majeure Clauses of the agreements and sought arbitration in Switzerland. The tribunal granted KBC approximately US\$260,000,000.00.²⁵⁶ The award imposed liability and damages against the Indonesian-owned company, Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (hereinafter Pertamina).

Subsequently, KBC filed a demand in the federal district court in Texas to enforce the award under the New York Convention and, additionally, filed enforcement demands in Hong Kong and Alberta. While there were pending enforcement demands, Pertamina appealed the award in the Swiss courts for vacatur. The Swiss courts overruled the vacatur demand and upheld the enforcement demand.

²⁵⁴ See *Barahona v. Dillard's Inc.*, 376 Fed. Appx. 395, 397-98 (5th Cir. La. 2010) ("Under the FAA, a party who alleges that an arbitration award was procured by the fraud must demonstrate: (1) that the fraud occurred by clear and convincing evidence; (2) that the fraud was not discoverable by due diligence before or during the arbitration hearing; and (3) the fraud materially related to an issue in the arbitration."); *Trans Chm. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 304 (S.D. Tex. 1997) ("Under the FAA a party who alleges that an arbitration award was procured through fraud or undue means must demonstrate that the improper behavior was (1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence."); *Gingiss Int'l v. Bormet*, 58 F. 3d. 328, 333 (7th Cir. Ill. 1995) ("In order to vacate the award on these grounds, the Bormets must demonstrate that the corruption, fraud, or undue means was (1) not discoverable upon the exercise of due diligence prior to the arbitration; (2) materially related to an issue in arbitration; and (3) established by clear and convincing evidence.")

²⁵⁵ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F. 3d. 274.

²⁵⁶ *Karaha Bodas Company L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2010 ABQB 172 (2010).

However, Pertamina filed another vacatur demand in the Indonesian court and that court granted the demand.

Pertamina propounded that the award was vulnerable to attack because KBC obtained the award by fraud. Pertamina argued that,

“the alleged fraud was perpetrated by actively misleading the arbitrator respecting the proven and possible production of usable geothermal energy...Pertamina alleges that it received a number of boxes of documents from KBC in November 2002. It argue[d] that the document it received (“the undisclosed documents”), which it did not examine until August of 2005, establish that the claims made by KBC at the arbitration as to the extent and nature of recoverable resource were known by it to be untrue and misleading.”²⁵⁷

While Pertamina raised a valid defense, the Court of Appeal for the Fifth Circuit ruled that Pertamina’s claims were not timely and that there was no deliberate action by KBC to mislead the tribunal. Further, the court found that the tribunal gave Pertamina ample opportunity to pursue discovery.

Notwithstanding Pertamina’s untimely charges, the Fifth Circuit analyzed whether the arbitration award was indeed infected by fraud. The Fifth Circuit stated that enforcement of an arbitration award might be refused if the award-creditor submitted perjured evidence to the tribunal or if the award was tainted by fraud. In addition, the court followed a “three-prong test” to determine whether the arbitration award had been infected by fraud:

²⁵⁷ *Id.*

- (1) The movant must come up with “clear and convincing” evidence.²⁵⁸ This is a high-burden of proof placed upon the movant. Therefore, courts may not vacate an award for mere inconsistencies. For instance, if there is a forgery, perjury etc., the movant must illustrate willful misconduct of the other party;
- (2) The fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration.²⁵⁹ In other words, the intent of this element is to prevent the movant from taking a ‘second bite at the apple.’ If the fraud is discoverable upon the exercise of due diligence during the course of arbitration, it should be brought to the attention of the arbitral tribunal by the movant. This principle has become applicable through the *AAOT Foreign Econ. Ass’n (VO) Technostroyexport v. International Dev. & Trade* case.²⁶⁰ In this case, the appellant sought review of the judgment of the District Court for the Southern District of New York that confirmed two international arbitral awards in the face of evidence corroborating corrupt tribunal contentions. The United States Court of Appeals for the Second Circuit upheld the District Court’s judgments relating to the arbitral awards and stated, “use of the public policy exception is not appropriate where one party to an arbitration has initiated the situation itself prior to the commencement of the arbitration

²⁵⁸ See *Karahabodas*, 364 F. 3d. 306 (2004); *Low v. Minichino*, 126 Haw. 99, 107 (Haw. Ct. App. 2011).

²⁵⁹ See *Karahabodas*, 364 F. 3d. 306 (2004); *Low*, 126 Haw. 107 (2011).

²⁶⁰ *AAOT Foreign Econ. Ass’n (VO) Technostroyexport v. International Dev. & Trade Servs.*, 139 F. 3d 980 (2d Cir. N.Y. 1998).

hearing, participated thereafter fully in the arbitration, received an unfavorable award, and then alleges that the arbitral proceeding was corrupt as a means of avoiding an unfavorable result; and the appellant waived its right to assert the public policy exception where it had knowledge of the facts but remained silent until an adverse award was rendered.”²⁶¹ Thus, a losing party will not be rewarded by courts or shown mercy for failure to investigate.

- (3) Last, the movant must show a nexus between the fraud and an issue in the arbitration. Courts have taken different approaches to this element. The court in *Karaha Bodas* held that it is not necessary to show that the result of arbitration would have been different if the fraud had not occurred. On the other hand, the court in *Low* held that “the movant must demonstrate a nexus between the alleged fraud and the arbitral outcome. Where fraud concerns only a minor or collateral issue that did not influence the arbitrator’s decision, it is insufficient to support a vacatur.”²⁶² This element is jurisdiction dependent and open to judicial interpretation.

Similar to the United States judiciary, English courts battled and fashioned tests to handle fraud allegations in arbitral awards. As previously noted, under the English Arbitration Act 1996, Sect. 68 (2) (g), an award may be challenged if

²⁶¹ See *AAOT*, 139 F. 3d 981 (1998).

²⁶² See *Low*, 126 Haw. 108 (2011). See also *Forsythe Int’l, S.A. v. Gibbs Oil Co. of Texas*, 915 F. 2d 1017, 1022 (5th Cir.1990) (“where the [arbitration] panel hears the allegation of fraud and then rests its decision on grounds clearly independent of issues connected to the alleged fraud, the statutory basis for vacatur is absent.”); *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135, 1137-38 (M.D. Fla. 1987) (“An examination of the record establishes that ...perjury did not lead to an award procured through fraud. ... testimony concerned the issue of suitability of the stock, a relatively minor issue.”)

obtained by fraud. When an award is challenged for fraud in English courts, the judiciary will apply a standard comparable to that employed in the United States. The party challenging the award in England is required to illustrate intentional, deliberate fraud and its effect upon the outcome.²⁶³ “In one court’s words, ‘where perjury is the fraud alleged, i.e., where the very issue before the arbitrators was whether the witness or witnesses were lying, the evidence must be strong that it would reasonably be expected to be decisive at a hearing, and if unanswered must have that result.’”²⁶⁴ Both the United States and English judicial approach place a heavy burden on the claimant, indicating the strong presumption of arbitral award enforcement.

One example how the English courts wrestle fraudulent claims is the *Cuflet Chartering* case.²⁶⁵ Here,

“the claimant alleged that the respondent had misled it by conduct, which would violate public policy. The owner sued the charterers for unpaid hire. The charterers did not a reply and entered into settlement negotiations. The arbitrator extend[ed] the time for filing the reply but made clear that it would render an award were the new time not met.”²⁶⁶

Subsequently, Cuflet Chartering filed a lawsuit for vacatur in the Commercial Court. In this action, The Honorable Justice Moore-Bick stated:

“It will be apparent from this brief summary of...submissions that Cuflet’s case turns not simply on the allegation that the owners acted in a devious and underhand manner, but that they did so in a way which

²⁶³ BORN, *supra* note 184, at 2635.

²⁶⁴ *Id.* (citing *Westacre Inv. Inc. v. Jugoisimport-SPDR Co. Ltd.* [1999] 2 Lloyd’s Rep. 65 (English Court of Appeal)).

²⁶⁵ *Cuflet Chartering v. Carousel Shipping (The “Marie H”)* [2001] 1 Lloyd’s Rep 707 (QBD (Comm. Ct.)).

²⁶⁶ Liebscher, *supra* note 206, at 302.

misled Cuflet into thinking that they had taken steps to prevent [the arbitrator] from proceeding to an award and that if Cuflet had been aware of the true position it could and would have taken steps itself to protect its interests.”²⁶⁷

In addition, Justice Moore-Bick set forth the standards to invoke fraud for setting aside the award:

“Public policy is capable of covering a wide variety of matters and it is neither necessary nor desirable in this case to attempt to define the circumstances in which subsection (2) (g) is capable of being invoked. However, where, as in the present case, one party to arbitral proceedings bases his complaint on the manner in which the other conducted himself in relation to the proceedings, I doubt whether anything short of unconscionable conduct would justify the court in setting aside the award. [The arbitrator] was therefore right in my judgment to concede that it would not be enough to show that the owners that inadvertently misled Cuflet, however carelessly they might have expressed themselves. However, once it is recognized that the allegation is one of serious impropriety it must also be recognized that cogent evidence will be required to satisfy the court the owners did behave in such a manner.”²⁶⁸

These words illuminate, yet again, the high burden placed upon challengers of arbitral awards. Simple inadvertent deception is not enough to invalidate an arbitration award. Clearly, the standard of proof is set deliberately high to encourage of the nature of finality of arbitral proceedings.

Another example showing how the English courts handle fraud is the *Westacre Investments Inc.* case. Here, the court placed a standard requiring

²⁶⁷ *Id.* at 206

²⁶⁸ *Id.*

exhaustion of due diligence upon the party who challenged the award on the grounds of perjured evidence. In *Westacre Investments Inc.*, the defendants filed a demand to vacate the award on the grounds that several witnesses called by the plaintiffs at the arbitration presented perjured evidence. As a result, the defendants argued that, enforcement of the award, as a fruit of a poisoned arbitral process, would be contrary to public policy.

In response to this allegation, the court stated:

“that normally the issue could not be reopened unless the evidence to establish the fraud was not available to the party alleging fraud at the time of hearing before the arbitrators; that where the allegation was of perjury the evidence must be so strong that it could reasonably be expected to be decisive at a hearing, and must if unanswered be decisive; that in the instant case the defendants had shown no good reason why they should not have raised with the Swiss Federal Tribunal within 90 day period allowed the allegation that the award had been obtained by perjured evidence; and that accordingly, the defendants should not be granted to leave to amend.”²⁶⁹

In sum, the trend by common law courts in treating allegations of fraud is that the contentions must be asserted timely and if the court deems that, as result of a party failing to exercise due diligence during arbitration, that fraud was not raised, that a party may not seek redress by a court to invalidate an arbitral award.

Civil law jurisdictions take a similar approach to that of common law courts.

For instance, in France,

²⁶⁹ Hanotiau, *supra* note 141, at 280 n.62 (*Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd. and others*, [2000] Q. B. 28).

“the Paris Court of Appeal confirmed that the international public policy set forth in Sect. 1502 (5) of the New Code of Civil Procedure (hereinafter NNCP) is violated if ‘fraudulent manoeuvres’ by a party influenced the arbitrators’ decision.”²⁷⁰

In other words, a challenge may be successful only if the fraud was determinative of the outcome of the arbitration.²⁷¹

Further, Swiss law applies a similar approach to that of France, England, and the United States. Swiss law states that, “an award may be vacated if it was influenced by criminal acts, including false testimony, forgery of documents, and bribery.”²⁷² Clearly, the uniformity by which various nations treat those who raise fraud to attack arbitral awards indicates the undeviating enforcement of arbitral authority worldwide.

Internationally, this strong judicial policy to enforce arbitral awards is one of most attractive qualities that arbitration offers to contracting parties. The main objective and attraction of international arbitration is its sustainability and effectiveness. To prevent these two features of arbitration from eroding, arbitral tribunals should pay attention to the possible misuse of a corruption defense in both investment and commercial arbitration. Because of the escalating number of

²⁷⁰ Liebscher, *supra* note 206, at 304.

²⁷¹ *Id.* See also Hanotiau, *supra* note at 141, at 277-78 (“A ground for setting the award aside must have been raised whenever possible before the arbitral tribunal itself. A violation of international public policy is however, by its nature, the only ground which cannot be ratified by the parties. Nevertheless, where the claim against the award could have provided the basis for a challenge of the arbitrators but no challenge was made, French courts consider the action available under Art. 1502 (5) to be no longer admissible. On the other hand, a party will naturally not be penalized for having failed to raise an objection before the arbitral tribunal if it only became aware of the grounds for that objection after the award had been made.”)

²⁷² BORN, *supra* note 184, at 2636.

examples where parties raise corruption allegations during arbitration, either to impair credibility of the contract and the claims emanating from the contract or during the post-award stage to resist the enforcement and recognition of the award, this is indeed an issue of import for arbitral tribunals.

As a consequence of arbitrators' legal and moral obligations, their attention must focus on forms of conducts or transactions inconsistent with international public policy. Further, arbitral tribunals that encounter wrongful, illicit or immoral violations must exercise utmost care and inquire deeply into the matter even if it results in directing the parties to produce further evidence.²⁷³ Because every arbitral tribunal's approach tackling corruption and other misdeeds will carve out the fate of the award in the context of enforcement and recognition, each and every arbitrator must exercise extreme care and concern in every proceeding where these allegations are raised.

2. Closing Remarks For Chapter-I

In recent years, the battle between corruption and international arbitration, particularly in investment arbitration, has generated significant consideration from both practitioners and scholars. Since Judge Lagergren's award in ICC Case No. 1110, corruption has been at the center of attention. As a result, there is more discussion pertaining to how arbitral tribunals should handle corruption. The strategy arbitrators choose to apply when faced with corruption will shape the arbitral process as a dependable dispute resolution alternative. This strategy should aim not only at eradicating perceptions that arbitration provides safe haven for corruption, but also

²⁷³ *Id.* at 1626.

should strive to prevent those bad actors who attempt to exploit the “don’t ask, don’t tell” sensitivity of corruption by using arbitration. It is time to make corruption a prime topic of conversation within the context of arbitration.

Unfortunately, thus far, precedent cases handling corruption allegations have failed to achieve these goals. In accordance with this observation, CECILY ROSE, a scholar in the field stated:

“Of the more than fifty cases...tribunals found that there was corruption in only eight cases, six of which are ICC awards that date back at least one, if not two or more decades. Within the last fourteen years, *World Duty Free and Nikos Resources (Bangladesh) Ltd. v. People’s Republic of Bangladesh et al.* appear to represent the only cases in which arbitrators have made findings of corruption in publicly available awards.”²⁷⁴

This unsatisfactory performance may be attributed to some of the following factors: (a) Challenges of gathering evidentiary materials due to expense, and time-consuming, and intensive investigations; (b) The arbitral tribunals’ lack of authority to compel parties to produce required evidence and party unwillingness to devote adequate resources to corruption investigations; (c) The confidentiality principle of arbitration (sometimes considered to be at odds with public interest in adjudicating corruption);²⁷⁵ and (d) The hesitance of arbitral tribunals to tackle corruption

²⁷⁴ Cecily Rose, *Questioning the Role of International Arbitration in the Fight against Corruption*, 31 (2) Journal of International Arbitration 183, 197 (2014).

²⁷⁵ *Id.* at 185-86 (“International arbitration, however, is an inherently private form of international dispute settlement that shields allegations of corruption from public awareness or scrutiny: hearings are closed to public, pleadings are generally unavailable, and awards may or may not be published. Moreover, the relatively recent ability of third parties to participate in ICSID proceedings through the submission of *amici curiae* briefs does little to provide broad public access...”)

allegations. In this regard, the dedication and persistence exercised by arbitrators will craft the fate of the relationship between arbitration and corruption.

Additionally, in some cases handling corruption allegations, tribunals maneuvered to avoid the issue by either declining jurisdiction²⁷⁶ or granting jurisdiction, but giving precedence to other issues.²⁷⁷ In other cases, arbitral tribunals could not rule on the issue due to the parties' withdrawal of corruption allegations.²⁷⁸ However, tribunals appear to be taking steps to rule on such allegations. Nonetheless, tribunals historically have lacked the evidence requisite to make a finding that corruption took place.²⁷⁹

Importantly, the ultimate goal of arbitrators is to render an enforceable award. Therefore, arbitral tribunals should pay attention to issues that could jeopardize the fate of an arbitral award. By giving primary consideration to corruption allegations (rather than engaging in maneuvers to avoid tussling with them), arbitrators would undoubtedly perform their task more effectively. This approach, however, brings vital

²⁷⁶ *Id.* at 187 (citing *International Systems & Controls Corp. v. Industrial Development & Renovation Organization of Iran, Iran Wood & Paper Industries, Mazandaran Wood & Paper Industries & Islamic Republic of Iran*, Award 256-439-2 (1986) 12 Iran-USCTR 239).

²⁷⁷ *Id.* at 189 (citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 Nov. 2005, paras 250-51, *available at* <http://www.italaw.com/cases/131>) (The claimant, Bayindir Insaat, brought the allegations of malpractice and corruption before the arbitral tribunal. Furthermore, Bayindir stated "it is public knowledge that the award of Bayindir's investment to the Pakistani consortium was riddled with corruption." In the face of corruption contentions, the arbitral tribunal gave primary consideration to fair and equitable treatment claims while putting corruption contentions aside. The arbitral tribunal stated "there is no need for the tribunal to discuss Bayindir's additional allegations of corruption at this stage...")

²⁷⁸ *Id.* at 190 (citing *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award of 3 Mar. 2006). It is also possible that both parties deny that the underlying contract is illegal. *See* KREINDLER, *supra* note 18, at 73 ("The fact that both parties deny an underlying illegality does not necessarily make any less compelling the grounds for the tribunal's suspicion to the contrary; indeed the fact or manner of mutual denial may actually fire the tribunal's suspicions all the more. The mutual denial may be a concerted effort to shield the illegality from the tribunal.")

²⁷⁹ *Id.* at 186.

questions that require answers by the tribunals:²⁸⁰ (a) is the tribunal permitted to hear the matters vitiated by corruption?;²⁸¹ (b) can arbitrators take an initiative and investigate corruption *sua sponte*?; (c) do they have a duty/right to report their suspicions or findings of corruption to the public authorities?; (d) what is the applicable standard of proof when the issue comes to corruption?; (e) should a reviewing national court revisit the corruption issues during the judicial proceeding for the vacatur, or enforcement and recognition of the award?;²⁸² if they should, how comprehensive should the judicial review be?

The following chapter seeks to address these inquiries within the context of corruption allegations and will delve further into the main pillars of international arbitration: competence-competence and separability.

²⁸⁰ These are foundational questions that are principally raised by every arbitration practitioner and scholar when the issue comes to evaluating the complications that the issue of corruption causes in international arbitration. *See generally* Vladimir Pavic, *Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy*, 43 Victoria University Wellington Law Review (VUWLR) 661-686 (2012), available at SSRN: <http://ssrn.com/abstract=2252499>.

²⁸¹ Nudrat B. Majeed, *Commentary on the Hubco Judgment*, 16 (4) Arbitration International 431, 434-435 (2000) (“The Court decided by a majority of three to two that *prima facie* allegations of fraud, illegality and corruption sufficed to preclude arbitration, the allegations themselves constituting matters of public policy to be determined by the appropriate courts in Pakistan.”)

²⁸² Pavic, *supra* note 280, at 668.

CHAPTER-II

ARBITRABILITY, SEPARABILITY and COMPETENCE-COMPETENCE

DOCTRINES

“If you see the extortion of the poor,
or the perversion of justice and fairness in the government,
do not be astonished by the matter.
For the high official is watched by a higher official,
and there are higher ones over them.”¹

Criminal law and arbitration allegedly originate from two different planets that never intersect. This understanding may be justified through observation of the discrepancies that exist between these two legal branches. First, where arbitration derives legitimacy from private contracts made between parties, criminal law endeavors to guard the general interest of public, regardless of an individual's motivation. Second, where arbitration aims at assisting contracting parties, criminal law serves entire societies. And third, where arbitration is supposed to be autonomous from State interference, criminal law is situated at the very core of a State's mandatory laws.

These comparative points arguably justify why arbitration and criminal law are deemed distinct from each other by virtue of their *raison d'être*. However, this assessment provides neither solid nor adequate ground to state why they are regarded as independent. Inevitably, matters falling within the boundaries of criminal law will

¹ *Ecclesiastes 5:8* (New English Translation).

reveal themselves in arbitration and determine the fate of the underlying contract, the arbitration agreement, and the arbitral procedure.²

Undeniably, corruption is becoming more prevalent in international arbitration. Parties who engage in illicit transactions prefer to submit disputes to arbitration, rather than the courts due to the inherent public nature of court proceedings and possible criminal repercussions. Parties who engage in illegal acts commonly appeal to the arbitral tribunal for settlement because they perceive that, by virtue of arbitration's contract based structure, the absence of adequate investigative powers, and arbitrator concern about violating confidentiality, *ultra petita* and/or *ultra vires*, the likelihood of exposure is low. Because arbitrators historically desired to limit duties solely to contract enforcement, parties continue to rely on arbitrators failing to investigate or report criminal engagements to public authorities.

Consequently, arbitrators are labeled "as the servants of selfish individual interests and, hence, as a potential instrument"³ who facilitate corruption in arbitration. This misconception could ignite anti-arbitration sentiment and catalyze questions and answers that jeopardize the fate of the arbitral process.

Critical questions deemed determinative of the future of the arbitral process include:

- How should arbitrators approach criminal engagements? Should they decline jurisdiction due to alleged non-arbitrability of criminal conducts? In

² In this regard, it is important to identify whether there is a contract of corruption or contract obtained by corruption, *see* pages 19-20.

³ Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 (1) Arbitration International 95, 97 (2006).

the absence of party allegations pertaining to arbitrability, should arbitrators take an initiative *ex officio*?

- Should criminal ingredients and fate of an underlying contract influence the arbitration agreement and its validity?
- When either party challenges the legality of an underlying contract, who will judge the challenges related to jurisdiction and existence, validity, or legality of the underlying contract: Courts or arbitral tribunals?

These questions shall be addressed and discussed in the following paragraphs.

1. The Doctrine of Arbitrability

Arbitrability considers the capability of arbitration to resolve subject matters of a dispute. As the words of Karim Youssef illustrate, “arbitrability involves a general enquiry as to what types of disputes are ‘capable of settlement by arbitration’”.⁴ Further, arbitrability draws the boundaries of a parties’ freedom to arbitrate.

However, this narrow applicability of arbitrability is not the only means by which to apply it. Arbitrability may be identified in a broader context, as a more inclusive term incorporating questions whose answers are in a close-knit relation: does an arbitration agreement exist?; is that agreement valid and enforceable?; are

⁴ KARIM ABOU YOUSSEF, *Part I Fundamental Observations and Applicable Law, Chapter 3- The Death of Inarbitrability* in LOUKAS A. MISTELIS & STAVROS L. BREKOULAKIS, *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 49 (2009).

both parties signatories to the agreement?; and does the agreement encompass the particular dispute?⁵

Today, arbitrability is defined and assessed narrowly⁶ and determines what issues may be heard by arbitrators. Some disputes incorporate issues inextricably linked to public interest and therefore require judicial involvement, rather than arbitration. An example of when arbitration is ill suited to handle disputes is when criminal law, under the domain of public authority, is involved. Thus, during arbitration, if corruption contentions are raised, and these contentions fall within the boundaries of criminal law, arbitrability concerns appear. Therefore, the main question is whether an arbitral tribunal can rule on assertions that the contract under which the arbitration is brought is tainted by corruption. Should an allegation of bribery or corruption relating to either an underlying contract or an arbitration agreement deprive arbitrators of their jurisdiction?

a) The Doctrine of Arbitrability

Essential to understanding the answer to these questions is comprehension of the importance that the doctrine of arbitrability “brings to the table.”

The doctrine of arbitrability rests upon a simple question. That question is, what type of disputes can be submitted to arbitration? Party autonomy in arbitration

⁵ George Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37(1) YALE J. INT’L L. 1, 10 (2012).

⁶ The narrow definition of arbitrability exercises conformity with international usage. For instance, the New York Convention Article 5 (2) (a) states that recognition and enforcement of the award may be refused if the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

allows parties to submit any dispute to arbitration. However, national laws restrict the doctrine of arbitrability.⁷

For example, an applicable national law governing mandatory rules and public policy would be a dominant factor, determinative of the dispute's arbitrability.

Although there is a general acceptance to increase the scope of arbitrability, some disputes remain non-arbitrable under the laws of one country but remain arbitrable under another country's laws.⁸ There is no such international rule or regulation outlining which issues are arbitrable and which are not. Because of this absence, arbitrators must pay attention to applicable laws governing arbitrability in each dispute. An arbitral tribunal is charged with determining which law applies to the arbitration agreement and subsequently, assess whether the dispute is capable of being settled by arbitration under applicable law.

Laws applicable to arbitrability vary according to the stage in which the arbitrability question arises. If the question of arbitrability arises at the pre-award stage, as far as the practice of national courts is concerned, courts are inclined to cast their vote in favor of their national law.⁹ In contrast, if the arbitrability question arises

⁷ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOLUME I 768 (2009).

⁸ JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 188 (2003).

⁹ *Id.* at 191 (citing *Meadows Indemnity Co Ltd v. Baccala & Shoop Insurance Services Inc.*, 760 F. Supp. 1036, 1045 ("The claimant initiated court proceedings in the US, despite an arbitration agreement, alleging that the dispute in question was not arbitrable under the law of Guernsey, where it was incorporated and where an award would have to be enforced... The court held that 'reference to the domestic laws of only one country, even the country where enforcement of the arbitral award will be sought, does not resolve whether a claim is 'capable of settlement by arbitration' under Article II(1) of the Convention. The determination of whether a type of claim is 'not capable of settlement by arbitration' under Article II (1) must be made on an international scale, with reference to the laws of the countries party to the Convention. The purpose of the Convention, to encourage the enforcement of

during the enforcement and recognition stage, it is likely that the law of the country where enforcement and recognition is sought will be decisive on arbitrability. The New York Convention Article 5 (2) (a) corroborates this idea and states,

“recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration *under the law of that country*.”¹⁰

Further, similar to the New York Convention, the European Convention on International Commercial Arbitration of 1961, Article 6 (2) states that, “...the courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.” Both conventions illustrate that when an award is seeking enforcement, and arbitrability is in dispute, the country where the enforcement is sought may apply its own laws.

The question of how a nation determines whether a dispute is arbitrable is shaped by diverse factors of domestic import. These laws derive essence from political, social, and economic concerns of that specific country. Accordingly, these elements carve the approach taken by national laws to arbitrate delicate issues, such as anti-trust and competition, securities transactions, insolvency, intellectual property rights, and corruption. Historically, disputes in these areas were treated as non-arbitrable and left to the courts to adjudicate because of the public interest elements at stake. The theory behind this practice is that even if the right at issue is private, when

commercial arbitration agreements, and the federal policy in favor of arbitral dispute resolution require that the subject matter exception of Article II (1) is extremely narrow.”))

¹⁰ Emphasis Added.

entangled with public interest, the enforcement of that right will have public effects external to the private parties and, thus, society has an interest in the proper enforcement of these rights.¹¹ Therefore, the prevailing perception was, and continues to be, a distrust of arbitrators who are allegedly “biased to business and hostile to public regulation of commercial activity, or presumably unable to deal with complex law issues.”¹²

Gradually, this perception is reforming due to escalation in international commercial transactions. Inextricably related to the rise in international commercial transactions is an increase in international disputes, a lack of expertise in intricate issues, public acknowledgement of the cumbersome and time-consuming nature of litigation, and an understanding of the advantages arbitration provides.¹³ Today, the doctrine of arbitrability is expanding its sphere and is gaining the upper hand over public policy. Consequently, national courts in most jurisdictions forsake the hostile approach towards arbitration and are relying less and less on the refuge of public policy.¹⁴

¹¹ YOUSSEF, *supra* note 4, at 50.

¹² *Id.*

¹³ The main advantages of arbitration can be listed as follows: party control of the process, relatively lower cost and shorter time to conclude dispute, opportunity to select an arbitrator with qualifications tailored to the needs, confidentiality, fair and impartial process, and finally, awards are internationally well-recognized and enforceable.

¹⁴ YOUSSEF, *supra* note 4, at 56 (Increasing trend in favor arbitrability has fashioned a new dimension, which is “ ‘universal arbitrability’ ... On the level of legal technique, universal arbitrability is implemented by national laws in one of two ways: Either all matters are considered, *a priori*, arbitrable unless particular disputes are reserved to exclusive court jurisdiction. Alternatively, arbitrable claims are defined very broadly to encompass all disputes involving an economic or a financial interest. Accordingly, legal rights would be arbitrable by default, unless they fall outside a general criteria set by the law, or are specifically excluded from the scope of arbitrability.”)

The evolution of the doctrine of arbitrability reveals itself in both common law and civil law countries. This evolution is well illustrated in jurisdictions like “the United States, the United Kingdom, France, Germany, and Switzerland.”¹⁵ In these countries, disputes where courts historically reigned supreme under public policy concerns have fallen one after the other to the ever-expanding boundaries of arbitrable claims.¹⁶

b) Arbitrability of Corruption

Through the simultaneous decrease of public policy as a ground for courts to disallow arbitral adjudication and the “assimilation of arbitrators to judges,”¹⁷ the scope of arbitration now extends to disputes involving claims of corruption, bribery, and other types of illegality. Besides adjudication of criminal and administrative liability and imposition of relevant sanctions, civil claims relating to corruption and bribery are now capable of settlement by arbitration in major arbitration venues.¹⁸

Today, arbitrability of corruption is well accepted. However, corruption allegations arising throughout the life of arbitral process generate serious complications, particularly within the context of arbitrability. For example, early judgments frequently held that challenges directed at the underlying contract also infected the integrated arbitration agreement. Accordingly, the majority view deemed arbitral tribunals as lacking jurisdiction and ineligible to conclude these disputes.

¹⁵ For evaluation of the arbitrability doctrine in these jurisdictions, *see* BORN, *supra* note 7, at 775-788.

¹⁶ YOUSSEF, *supra* note 4, at 51.

¹⁷ *Id.* at 52. (YOUSSEF)

¹⁸ BORN, *supra* note 7, at 803.

Supplementing this view, arbitral tribunals showed reluctance to “grasp the nettle” of disputes where corruption allegations emerged.

Significantly, the decisive case focusing on arbitral treatment of arbitrability and corruption allegations took place in 1963. This case was ICC Case No. 1110.¹⁹ The award rendered in this case was controversial due to the tribunal’s findings of non-arbitrability of corruption, raising the arbitrability question *ex officio* in the absence of a party allegation, and not recognizing the competence – competence doctrine. Unsurprisingly, the award was both supported and criticized.

Further adding to this case’s import was its full release to the public in 1993, thirty years after completion. The underlying reason of the publication was to shed light upon inaccurate reports and misguided comments founded on false assumptions relating to the proceedings and the content of the award by of scholars, judges, and arbitrators.²⁰

Once the case was public, it was seen that the subject matter of the case included bribery, lack of arbitral jurisdiction, non-arbitrability of disputes arising from a contract violating *bonos mores*, and international public policy. To understand what took place in ICC Case No.1110 and why such diversified opinion resulted from its award, it is helpful to delve into its facts.

Here, the claimant was an Argentinian engineer acting as agent for the respondent (British company) in Argentina during the Peron era. The British firm

¹⁹ See ICC Case No. 1110, 10(3) Arbitration International 277, 281.

²⁰ J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Lagergren’s 1963 Award in ICC Case No. 1110*, 10(3) Arbitration International 277, 277 (1994).

wished to enter into an agreement with the Argentinian government to sell electrical equipment for power plants in Buenos Aires. Both parties agreed to enter into an agreement whereby the claimant would act as the agent for the respondent during negotiations with the Argentinian Government.²¹ A series of brief letters showed that the respondent agreed to pay a total commission of 10 percent on the value of the order “(split 5 percent, 2.5 percent, and 2.5 percent and transferable to unnamed third parties).”²²

The claimant performed his duties until compelled to go to Germany for medical reasons.²³ In 1958, the respondent, through a partnership, sold almost £28 million worth of electrical equipment to the Government of Argentina.²⁴ However, in this transaction, the respondent hired another agent to assist in the transaction and that agent earned almost £1 million for his labor.

Following this transaction, the claimant discovered what took place under the 1958 contract. Subsequently, the claimant asked either for 10 percent of the total sale under the 1958 sales contract or £2.8 million based upon the commission agreement previously signed with the respondent. However, there was no agreement between the parties on paper. Despite this omission, there were a series of letters exchanged between the parties that materialized the agreement.²⁵ However, the letters failed to incorporate an arbitration clause. Therefore, when the dispute relating to payment of

²¹ A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, 1 (2) TRANSNAT'L DISP. MGMT. 1, 12 (2006), www.transnational-dispute-management.com/article.asp?key=88.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 60.

commissions erupted, both parties agreed to submit their dispute to the arbitral tribunal sitting in France. The arbitral clause stated:

“The Undersigned
[Claimant], an Argentinian citizen, domiciled in
_____ Buenos Aires and [Respondent], a company
constituted under English Law, having its place of
business in _____ London
Agree to finally adjudicate all claims that [Claimant]
has against [Respondent], and especially its request of
commission, which have been subject to an exchange of
correspondence between the undersigned since the 9th
of July 1958, in accordance with the Arbitration Rules
of the International Chamber of Commerce by one
arbitrator appointed in accordance with the said rules.
The Undersigned wish that arbitration takes place in
Paris.”²⁶

During the arbitral proceedings, the respondent alleged that the claimant was hired by virtue of his connections with decision-makers of the Argentinian Regime. However, there was no particular claim pertaining to nullity or illegitimacy of the agency contract. On the contrary, both parties accepted the binding effect of the contract and recognized the competence of the sole arbitrator, Judge Lagergren.

Judge Lagergren’s approach to arbitrability makes ICC Case No. 1110 imperative. After examining the pleadings and witness statements submitted by the parties, Judge Lagergren discovered an agreement between the parties bribing Argentinian officials for the purpose of receiving business from the Argentinian Government. Accordingly, Judge Lagergren questioned his own jurisdiction over the case in the absence of a challenge to it. Judge Lagergren denied his jurisdiction on the grounds of non-arbitrability.

²⁶ *Id.* at 60 (The text was translated by Sayed into English).

In the majority of cases, a party seeking court refuge raises the issue of non-arbitrability. There are, nevertheless, occasions where none of the parties invoke non-arbitrability, as seen in ICC Case No. 1110. The reasoning behind this omission is either that the parties may not be aware of the non-arbitrability or they may have an interest in the respective tribunal setting aside the issue of arbitrability. The inquiry, at this juncture, is whether arbitral tribunals can raise the issue of arbitrability *ex officio*?²⁷

Judge Lagergren answered this question by relying on the New York Convention Article V (2) (b). This Article embraces the authority of courts where recognition and enforcement is sought to overrule *ex officio* the recognition and enforcement of a foreign arbitral award on the basis of a public policy violation, such as corruption. In this regard, Judge Lagergren drew an analogy between a national judge and an arbitrator. Judge Lagergren opined that arbitrators might be classified as judges. As a result, they should be able to apply *ex officio* authority assigned to judges of the national courts where the enforcement and recognition of a foreign award is sought. Consequently, the conclusion Judge Lagergren drew was that arbitrators have authority to question their own jurisdiction in the presence of a salient public policy violation even if there is no objection raised by parties to the arbitrator's jurisdiction.²⁸

Judge Lagergren's conclusion catalyzed discussion. On the one hand, it may be argued that arbitrators do not perform judicial duties and are thus bound by the

²⁷ *Id.* at 34.

²⁸ *Id.* at 62.

parties' arbitration agreement. Therefore, by raising the issue of arbitrability *ex officio*, arbitrators exceed their authority and may even commit breach of contract. On the other hand, it may also be argued that an arbitral tribunal should take initiative and deny jurisdiction if the submitted dispute is not arbitrable due to illegalities engaged by parties.

The preferable view is the latter one. While arbitrators are bound by the arbitration agreement, they must also determine if they have jurisdiction to fulfill their duty of rendering an enforceable and recognizable award. Therefore, even if the parties discard arbitrability, to have an award enforced and recognized, arbitrators should, on their own initiative, question the jurisdiction of the arbitral tribunal within the context of an applicable national law. This view is also corroborated by the UNCITRAL Model Law Article 23 (1), not particularly within the context of arbitrability, but within the context of jurisdiction of the arbitral tribunal: "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." This provision should be construed in a way that encompasses existence, scope, and validity of the arbitration agreement (and any other aspects of the arbitration agreement).

Further encouraging this arbitrator-empowered initiative, arbitrators can protect the arbitral process from morphing into a cover for illegal engagements of parties who desire dispute resolution absent public authority involvement.

Judge Lagergren preferred to take this initiative and investigated whether the parties' agency contract, which was in clear violation of "public decency and moral[s]", was arbitrable.²⁹ While making this evaluation, he gave primary consideration to French law, which was the legal seat, and to the law of Argentina where the contract (s) was to be performed.³⁰ He concluded that French, Argentinian, or any other civilized nations' law would allow the current dispute to be arbitrated due to non-compliance with international public policy and *bonos mores*:

"It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators."³¹

Accordingly, from Judge Lagergren's point of view, party alliance with illegality forfeits any right to seek assistance from the "machinery of justice (national courts or arbitral tribunals) in settling their disputes"³² and "jurisdiction must be declined."³³

ICC Case No.1110 was the first arbitral decision that tackled the issue of corruption. Unsurprisingly, repercussions originated from this case due to Judge Lagergren's refusal to entertain jurisdiction on the basis of non-arbitrability of corruption. Thus, unlike Judge Lagergren's award and analysis in ICC Case No.

²⁹ *Id.*

³⁰ Martin, *supra* note 21, at 13.

³¹ BORN, *supra* note 7, at 804 n.1217.

³² *Id.* at 804.

³³ *Id.*

1110, more recent arbitral awards acknowledge an arbitrator's competence to deal with illegality allegations, including corruption.

For instance, ICC Case No. 3913 illustrates one example where the tribunal did not advocate Judge Lagergren's position.³⁴ In this case, a consultancy agreement was signed between the claimant, a British firm, and the defendant, a French firm. Under the agreement, the claimant assisted the defendant to win contracts with the respective African government. Under the agreement, the defendant promised to pay the claimant 8 percent of the amount of the contract in which the claimant assisted.

When the dispute fell before the arbitral tribunal, it came to light that the claimant was a financial intermediary who received money and distributed it to individuals who were effective in the decision-making process. In other words, the consultancy agreement was a cover for the parties' illicit ulterior motive.

The arbitral tribunal concluded that the agreement entered into by the parties was illegal under French law and under international public order. Therefore, the agreement was declared null and void and, accordingly, neither performance nor restitution was applicable.

The arbitral tribunal's decision in this case departed from the approach taken by Judge Lagergren. The arbitral tribunal in this case preferred to keep the case and declare itself competent to arbitrate the contract and relevant corruption contentions.³⁵

³⁴ Martin, *supra* note 21, at 14.

³⁵ *Id.* at 15.

Further, national courts encourage tribunals to arbitrate corruption claims.³⁶

Illustrating this, the Paris Cour d'appel held that claims of illegality and violations of public policy could be arbitrated. The court stated:

“In international arbitration, an arbitrator...is entitled to apply the principles and rules of public policy and to grant redress in the event that those principles and rules have been disregarded....[A]s a result, except in cases where the non-arbitrability is a consequence of the subject-matter – in that it implicates international public policy and absolutely excludes the jurisdiction of the arbitrators because the arbitration agreement is void – an international arbitrator, whose functions include ensuring that international public policy is complied with, is entitled to sanction conduct which is contrary to the good faith required in relations between partners in international trade.”³⁷

In addition to the Paris Cour d'appel, the English Court of Appeal also rendered a favorable judgment on the arbitrability of corruption. The judgment held “if arbitrators can decide that a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery.”³⁸

Undoubtedly, arbitrability of corruption is no longer an issue in major arbitration venues. Notwithstanding this, it is impossible to make similar inferences for less developed jurisdictions where Judge Lagergren's progeny reign supreme. These jurisdictions take a position favorable to Judge Lagergren due to either public policy concerns or judicial hostility arising from national sovereignty concerns. For example, this public policy oriented position manifested itself in *Hub Power*

³⁶ BORN, *supra* note 7, at 805 n.1222.

³⁷ *Id.* at 780 (citing Judgment of 29 March 1991, *Ganz v. Société Nationale des de Chemins de Fers Tunisiens*, 1991 Rev. Arb. 478 (Paris Cour d'appel)) (BORN VOL. I)

³⁸ *Id.* at 805 n.1223. Further information regarding the case will be provided under the Doctrine of Separability.

Company Limited (HUBCO) v Pakistan WAPDA and Federation of Pakistan.³⁹ In this case, the dispute arose from a contract based on the purchase of power from a plant that the claimant constructed and operated. When the dispute surfaced, the defendant State alleged that amendments to the original contract were tainted by fraud and bribery. While the Pakistani Court held that sole allegation of corruption was not adequate to declare the dispute not arbitrable, the Supreme Court held:

“The allegations of corruption in support of which the above mentioned circumstances do provide *prima facie* basis for further probe into matter judicially and, if proved, would render these documents [*i.e.* the amendments of the original contract] as void; therefore, we are of the considered view that according to the public policy such matters, which require finding about alleged criminality, are not referable to arbitration.”⁴⁰

When Judge Lagergren overruled the dispute before him due to non-arbitrability, arbitration was left between a rock and a hard place. Resultantly, arbitral tribunals and national courts would either follow Judge Lagergren’s approach and refuse the dispute due to lack of jurisdiction or they would put Judge Lagergren’s evaluations aside and rule themselves competent and confront corruption allegations. In analyzing these two approaches, the latter path embraces public policies in favor of

³⁹ Hub Power Company Limited (HUBCO) v. Pakistan WAPDA and Federation of Pakistan, Decision of the Supreme Court of Pakistan (20 June 2000).

⁴⁰ LEW, MISTELIS & KRÖLL, *supra* note 8, at 215; SAYED, *supra* note 28, at 73 (The minority does not concur with the majority’s judgment and states “Under English and Pakistan laws, Arbitration Clauses contained in contracts are treated as separate and self-contained contracts in that if it were not so, arbitrations clauses would, not at all survive an attack on the main contract which is known as the doctrine of separability. It would thus be seen that allegations of invalidity even serious allegations of its being *ab initio* void are perfectly capable of being referred to arbitration.”)

maintaining and extending the parties' arbitration agreement to all disputes, but the former path rests upon the apprehension to enforce illegal contracts.⁴¹

However, it is acknowledged that merely enforcing an arbitration agreement and allowing an arbitral tribunals to handle corruption allegations does not lead to the enforcement of illegal contracts because, in principle, an arbitration agreement is not tainted by the alleged corruption when that allegation solely targets the underlying contract.⁴²

Today, corruption's effect on international arbitral proceedings is of primary concern and continues to be discussed and debated. Nonetheless, it is well-accepted by leading scholars and practitioners in both national courts and arbitral tribunals, that public policy concerns should not deprive arbitral tribunals of jurisdiction due to non-arbitrability. It is undisputed that corruption allegations are arbitrable. Accordingly, arbitrators have jurisdiction to hear allegations of bribery and corruption raised by a party to an international arbitral proceeding before them.⁴³

2. The Doctrine of Separability

The previous title delved into arbitrability that opens the doors of arbitration to parties. This title takes a step forward and examines an arbitration agreement's dependency on an underlying contract within the context of validity, legality, and enforceability.

⁴¹ LEW, MISTELIS & KRÖLL, *supra* note 8, at 217.

⁴² *Id.*

⁴³ Duncan Speller & Kenneth Beale, *Arbitration and Bribery: Open Questions* (Jan. 30, 2012), <http://www.cdr-news.com/categories/expert-views/arbitration-and-bribery-open-questions>.

Commonly, arbitrators encounter corruption allegations in situations of agency (commission) agreements where the agreement might be exploited to conceal contracts of corruption or public procurement contracts that have been received in consequence of bribery, fraud, or forgery. These incidents of corruption will make dubious not only an agency and a public procurement contract's legality and enforceability, but also an arbitration agreement's legality and enforceability. Accordingly, arbitrator jurisdiction will be questioned. In this regard, this title will answer the question of whether nullity of the main contract leads to nullity of the arbitration agreement.

First, the principle of separability must be examined to help answer this inquiry. The principle of separability chiefly separates the fate of an arbitration agreement from the fate of the underlying contract. In other words, separability fortifies an arbitration agreement against invalidation when the underlying contract is deemed void.

a) The Doctrine of Separability

Although there are still ambiguities relating to the origins of this doctrine,⁴⁴ what is known is that in some legal systems an arbitration agreement used to be an integral part of the main contract in which it was placed.⁴⁵ However, this early approach was forsaken with the evolution of arbitration hostility to hospitality. This

⁴⁴ BORN, *supra* note 7, at 321 (“Roman law provided that the arbitration clause was a separate contract (“*promisum*”), which would only be made enforceable by combining it with another contract, being a penalty mechanism (to produce a “*com-promisum*”).

⁴⁵ *Id.* at 316 n.19 (Brown v. Gilligan, Will & Co., 287 F. Supp. 766, 769 (S.D.N.Y. 1968) (“since [the] arbitration provision is an integral part of the alleged contract, the issue as to whether the parties agreed to that provision requires [the court] to first determine if a contract exists.”))

evolution invigorated one of the cornerstone principles of arbitration: the essential doctrine of separability.

The separability doctrine rests upon distinguishing the exchange of promises to resolve disputes by international arbitration from the exchange of commercial promises in the parties' underlying contract. The arbitration clause is concerned with the 'separate' function that concludes the parties' disputes arising from the parties' commercial relations, rather than the contractual relationship regulating the parties' commercial bargain and its components.⁴⁶

This differentiation gave birth to the artificial separability doctrine that is a "legal shorthand for a group of rules which govern the circumstances in which the arbitration clause [or agreement] remains binding despite the invalidity, discharge, termination or rescission of the contract."⁴⁷

The separability doctrine stipulates that the validity of the arbitration agreement is not dependent upon the termination, suspension, or invalidity of the underlying contract. Indeed, under normal circumstances, if the main contract is invalid, so should all parts of the contract, including the arbitration agreement. However, the separability doctrine emboldens arbitration and, even if the underlying contract is nullified, the arbitration agreement may maintain its validity. As a result, the arbitration agreement is capable of granting jurisdiction to the arbitral tribunal to conclude not only the disputes arising from the principal contract, but also the ones germane to legality.

⁴⁶ BORN, *supra* note 7, at 350.

⁴⁷ SAYED, *supra* note 25, at 43 n.158.

Notably, the intent behind the separability doctrine is to promote arbitration and honor the parties' agreement to arbitrate. By agreeing to submit disputes to arbitration, parties willfully vest arbitrators with jurisdictional powers to resolve every dispute originating from the underlying contract. Further, the utility behind this principle establishes that the separability doctrine is desirable to maintain operational functions of arbitration by preventing recalcitrant parties from raising issues of nullity of the main contract with the intent of hindering arbitration.⁴⁸

Because elevating arbitration to better honor agreements to arbitrate is of critical import, the separability doctrine is an integral part of international, national, and institutional regulations. Even if there is no express or direct reference to the separability doctrine, the majority of regulations embody provisions that rest upon the notion that the arbitration agreement is presumptively separable from the underlying contract.⁴⁹ For instance, while Article 16 of the UNCITRAL Model Law does not explicitly mention the separability doctrine, it opines that:

“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, *an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.* A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

⁴⁸ *Id.* at 44.

⁴⁹ BORN, *supra* note 7, at 316.

Apart from international conventions, national arbitration regulations also note the beneficial, practical effects of the separability doctrine. For instance, Section 7 of the English Arbitration Act states:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”

Interestingly, unlike the English Arbitration Act, the Federal Arbitration Act of the United States (hereinafter the FAA), does not encapsulate a particular article pertaining to the separability doctrine, nor does it imply it. However, the separability doctrine gained a seat in U.S. arbitration law with the U.S. Supreme Court’s judgment in the *Prima Paint* case on June 12, 1967.⁵⁰ The Court held that:

“Arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.”⁵¹

It behooves to note that Professor Carbonneau, an internationally acclaimed expert in arbitration, accedes to the separability doctrine and in fact devotes an article to it in his new book, *“Toward a New Federal Law on Arbitration.”* According to Professor Carbonneau’s Section 8 of the Proposed Reformulation of the United States Arbitration Act:

⁵⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (U.S. 1967).

⁵¹ *Id.* at 402.

“The arbitral clause is a self-standing contract. Its alleged invalidity is not derivative, but results from deficiencies in its own content or the manner of its formation. Accordingly, a challenge to the enforceability of the main contract does not affect the agreement to arbitrate, unless the same impediments are alleged to exist independently in the arbitration agreement and the party challenges the agreement itself on that basis.”⁵²

Arbitral institutions also internalize the separability doctrine.⁵³ One of the first international arbitral institutions to acknowledge the separability doctrine was the International Chamber of Commerce (hereinafter the ICC)⁵⁴. Article 6 (9) of the ICC Arbitration Rules avers:

“Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties’ respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.”

⁵² THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW ON ARBITRATION 168 (2014).

⁵³ International Center for Dispute Resolution (ICDR) Arbitration Rules, Art. 15 (2) (“The tribunal shall have the power to determine the existence of validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that contract is null and void shall not for that reason alone render invalid the arbitration clause.”); London Court of International Arbitration Rules, Art. 23 (1) & (2) (“The arbitral tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.”)

⁵⁴ ICC Rules (1955 Version), Art. 13 (4): “Unless otherwise stipulated, the arbitrator shall not cease to have jurisdiction by reason of an allegation that the contract is null and void or non-existent. If he upholds the validity of the arbitration clause, he shall continue to have jurisdiction to determine the respective rights of the parties and to make declarations relative to their claims and pleas even though the contract should be null and void or non-existent.”

Notwithstanding the benefits of the separability doctrine, adopting this canon may result in significant consequences. Specifically, concerns include the arbitration agreement being subject to a different national law than the underlying contract, the arbitration agreement maintaining its validity despite the invalidity, nullification, or suspension of the underlying contract, and similarly, the underlying contract preserving its validity despite the invalidity, nullification, or suspension of the arbitration agreement. Further, some scholars propound that the separability doctrine is closely integrated with the competence-competence doctrine because “the separability of the arbitration clause enables an arbitral tribunal to consider the existence and scope of its own jurisdiction.”⁵⁵ Clearly, these are significant apprehensions for practitioners who consider the repercussions of separability.

However, there are rebuttals of these criticisms.⁵⁶ From BORN’s point of view, “an arbitral tribunal’s jurisdiction to consider its own jurisdiction cannot depend on the separability of the arbitration clause from the underlying contract.”⁵⁷ The doctrine of competence-competence provides arbitrators a solid ground to consider jurisdictional issues even if the arbitration agreement is challenged.⁵⁸ Therefore, although, both the doctrine of separability and the doctrine of competence-competence rest upon the same motives (*e.g.* promoting arbitration, refrain parties

⁵⁵ BORN, *supra* note 7, at 402.

⁵⁶ *Id.* at 402-403 (“...the separability presumption does not in fact explain the competence-competence doctrine. Although the competence-competence doctrine arises from the same basic objectives as the separability presumption... it is not logically dependent upon, nor explicable by reference to, the separability presumption. Rather, the competence-competence doctrine permits an arbitral tribunal to consider and decide upon its own jurisdiction even where the existence or validity of an arbitration agreement is disputed...”)

⁵⁷ *Id.* at 403.

⁵⁸ *Id.*

from raising issues to obstruct the arbitration process), it does not necessarily mean that these two doctrines are mutually dependent.

Although the separability doctrine plays a critical role in the promotion of arbitration and in arbitral tribunals' continued jurisdiction, under some circumstances, it may not be effective despite its vital role. The following illustrates when the doctrine of separability proves ineffective: (a) since arbitration derives its legitimacy from the parties' arbitration agreement, parties may opt-out of the doctrine of separability. In other words, parties may play over the doctrine of separability and its abovementioned consequences. Accordingly, they may declare that the "arbitration agreement is not separable from the underlying contract" or "the arbitration agreement will be subject to the same law with the underlying contract" etc.;⁵⁹ (b) aside from freedom of contract, the doctrine of separability may malfunction. For instance, if the underlying contract is never concluded or improperly formed, the parallel result would be that the arbitration agreement is nonexistent;⁶⁰ and (c) when corruption infects the underlying contract, the defects may prevail over the doctrine of separability.⁶¹

The following title explores to what extent corruption influences the applicability of the doctrine of separability and the fate of the arbitration agreement. Does an allegation of corruption bring the doctrine of separability down and as a result, kill both the arbitration clause and the arbitral tribunal's jurisdiction?

⁵⁹ *Id.* at 315.

⁶⁰ *Id.* at 358.

⁶¹ *Id.*

b) The Doctrine of Separability in the Face of Corruption Allegations

Indisputably, the most important aspect of the doctrine of separability is the insulation it provides to an arbitration agreement and correspondingly to arbitrator jurisdiction in the face of nullity directed at the underlying contract.

However, there are instances where it may prove challenging to insulate the arbitration agreement in the presence of surrounding nullity grounds. These circumstances largely rely upon the gravity of the public interest violation. The question now becomes whether corruption constitutes a ground offensive enough to block the operation of the separability doctrine.

There are two preceding inquiries requiring resolution before determining whether corruption indeed is a ground so offensive as to prevent application of the separability doctrine. First, is the underlying contract or the arbitration agreement accused of corruption's taint? And second, is corruption offensive enough to deny the separability doctrine from application and, resultantly, deprive arbitrators of jurisdiction?

i) Importance of the Challenged Contract

To begin, the questions needing answers here are, one, whether corruption in consent given to the underlying contract constitutes a ground to prevent the separability doctrine from applying and two, if not, whether the separability doctrine survives until the corruption in consent directly influences the arbitration agreement.

The answers to these questions depend upon which contract the corruption contentions are directed. Because of the separability doctrine's impact, a corruption challenge to the validity or legitimacy of an underlying contract does not go to the contract's roots that give life to the contract's provisions. Therefore, this kind of challenge will not necessarily influence the consent given to an arbitration agreement.

However, once an allegation targets an arbitration agreement, the table turns and the allegation represents a menace not only to the applicability of the separability doctrine, but also to the arbitral tribunal's jurisdiction. Thus, at this juncture, it is important to differentiate a corruption contention directed at the underlying contract from the one solely directed at the arbitration agreement.

Cases from both the United States and the United Kingdom evidence the bifurcating result between corruption contentions attacking the underlying contract versus corruption contentions attacking the arbitration agreement.⁶² For example, in the lower courts of the United States, when claims target the underlying contract or target both the contract and the arbitration clause together, assertions suggesting invalidity or illegality must specifically be referred to arbitration whose outcome is

⁶² *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402, 411 ("If this arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question before a stay can issue in a case of the type with which we are now dealing. It is not enough the there is substance to the charge that the contract to deliver merchandise of a certain quality was induced by fraud."); *Chastain v. Robinson-Humphrey Co.*, 957 F. 2d 851, 854 (11th Cir. Ga. 1992) (if a party challenges "the very existence of any agreement, including the existence of an agreement to arbitrate...there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration...before sending any such grievances to arbitration, the district court itself must first decide whether or not" an agreement exists); *Rush v. Oppenheimer & Co.*, 681 F. Supp. 1045, 1053 (S.D.N.Y. 1988) (court must resolve claims of fraud "that pertain to both the principal agreement as a whole and the arbitration agreement in particular"). Courts from Switzerland, Germany, and France have exercised the same approach with the USA and UK. In this regard, *see generally* BORN, *supra* note 7, at 385.

subject to subsequent judicial review.⁶³ This principle has become applicable in a variety of circumstances, including when charges fraud,⁶⁴ fraudulent inducement, and illegality are alleged.⁶⁵

However, when claims solely target the validity of the arbitration agreement, American courts find these challenges subject to interlocutory judicial solution.⁶⁶ In harmony with American courts, the English courts have also found that “an arbitral tribunal should decline jurisdiction if the nature of illegality impeaches the arbitration clause itself.”⁶⁷

An English case demonstrating how courts treat invalidity allegations of arbitration agreements is *Fiona Trust*.⁶⁸ Here, the claimant alleged that bribery

⁶³ BORN, *supra* note 7, at 365; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (U.S. 2006) (“...regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”); BORN, *supra* note 7, 365 n.285 (*Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 396-97 (2006) (“Where claims of error, fraud, or unconscionability do not specifically address the arbitration agreement itself, they are properly addressed by the arbitrators, not a federal court”)); *see also* *R.M. Perez & Assoc., Inc. v. Welch*, 960 F. 2d 534, 538 (5th Cir. 1992) (“Under *Prima Paint*...and its progeny, the central issue in a case like this is whether the plaintiffs’ claim of fraud relates to the making of the arbitration agreement itself or to the contract as a whole. If the fraud relates to the arbitration clause itself, the court should adjudicate the fraud claim. If it relates to the entire agreement, then the [FAA] requires that the fraud claim be decided by an arbitrator.”)

⁶⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (U.S. 1967) (“...except where the parties otherwise intend – arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded, and that where no claims is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.”); BORN, *supra* note 6, at 367 n.291 (*Jeske v. Brooks*, 875 F.2d 71, 75 (1989) (“We also reject [appellant’s] arguments that the arbitration clause must be declared invalid on grounds that the customer’s agreement as a whole is void due to ‘overreaching, unconscionability and fraud,’ ...Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution.”))

⁶⁵ BORN, *supra* note 7, at 368 n.293.

⁶⁶ *Id.* at 366 n.288.

⁶⁷ Audley Sheppard & Joachim Delaney, *Corruption and International Arbitration* 1, 2, *available at* <http://www.10iacc.org/content.phtml?documents=106&art=167> (citing *Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd* [1999] APP.L.R. 05/12).

⁶⁸ *Fiona Trust & Holding & Holding Corporation & 20 Ors v. Yuri Privalov & 17 Ors sub nom Premium Nafta Products Ltd. (20th defendant) & Ors v. Fili Shipping Co. Ltd. (14th claimant)*

contaminated the charter-parties and as a result, both the charter-parties and the arbitration agreements integrated into them were null and void. The Court of Appeal applied the separability doctrine and held that the arbitration agreement would survive unless specifically attacked. The House of Lords upheld the ruling and stated:

“ if there is a contest about whether an arbitration agreement had come into existence at all, the court would have a discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid e.g. for illegality, misrepresentation or bribery and the arbitration agreement is merely part of that overall contract.”⁶⁹

Next, a recent judgment from England reflects the robust posture that English courts maintain to preserve an arbitration agreement’s validity in the context of corruption allegations directed at the underlying contract. In *Honeywell v. Meydan Group LLC*,⁷⁰ the arbitral tribunal furnished an award approximating USD 20.4 million in favor of Honeywell. Following this award, the award-creditor Honeywell commenced a recognition and enforcement process before the English courts under the English Arbitration Act. However, Meydan raised numerous objections to the enforcement and recognition of the award on the ground of corruption. Justice Ramsey dismissed Meydan’s arguments. According to Justice Ramsey, no causative link existed between the alleged bribe and the contract between Honeywell and

& Ors [2007] UKHL 40, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/20.html>). While making this decision, the House of Lords rested upon another case, which is *Ahmd Al-Naimi v. Islamic Press Agency* [2000] 1 Lloyd’s Rep 552, where the court concluded the question related to the validity of the arbitration agreement since the question was based on the solely the arbitration agreement and its validity.

⁶⁹ *Id.*

⁷⁰ *Honeywell v. Meydan Group LLC* [2014] EWHC 1344 (TCC), available at <http://www.bailii.org/ew/cases/EWHC/TCC/2014/1344.html>.

Meydan. Further, even if there was a causative link, Meydan had to prove that the arbitration agreement incorporated within the underlying contract itself was procured by bribery.⁷¹ In this regard, the separability doctrine was applied under Article 6.1 of the Dubai International Arbitration Centre Rules, which states:

“Unless otherwise agreed by the parties, an Arbitration Agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and the Arbitration Agreement shall for that purpose be treated as a distinct agreement.”

Reflecting the *Honeywell* approach, the ICC Case No. 6474 also discussed the doctrine of separability. In this case, the arbitrator tackled a matter allegedly non-arbitrable because it arose from a public procurement contract tainted by corruption.⁷² While handling the jurisdictional defenses argued by the Defendant State, the arbitrator further elaborated circumstances warranting jurisdiction deprivation. The arbitrator relied upon the separability doctrine and did not deem that his jurisdiction could be denied by any *prima facie* proof of corruption relating to the main public procurement contract.⁷³ However, the arbitrator propounded that:

“[i]n any case, the defendant would have first to allege and then to show that the arbitration clause was entered into solely because of corruption and fraud. In the Arbitral Tribunal’s view, it has done neither of these two things.”⁷⁴

⁷¹ Mike McClure, *Dubai Awards Survives Bribery Challenge in England*, Kluwer Arbitration Blog, May 26th, 2014, <http://kluwerarbitrationblog.com/blog/2014/05/26/dubai-award-survives-bribery-challenge-in-england/>.

⁷² SAYED, *supra* note 25, at 74 (citing Partial Award in ICC Case No. 6474, XXV Y. B. Comm. Arb. 279 (2000)).

⁷³ *Id.* at 75.)

⁷⁴ *Id.* at 76.

In other words, the arbitrator was in fact prepared to relinquish jurisdiction to the courts if the defendant proved that the arbitration agreement had been the fruit of corruption “*directly*” tainting the free expression of consent to arbitration.

In yet another ICC case, No. 6401 (*Westinghouse Case*),⁷⁵ the arbitral tribunal encountered issues regarding the consent given by the defendants to the arbitration agreement, which was integrated into the underlying contract. From the defendant’s point of view, the consent given to the arbitration was defective because the claimant allegedly engaged in bribery while procuring the underlying contract (Public Procurement Contract). In other words, the illegality in the principal contract should infect the legality to arbitrate by virtue of the integration of the two contracts. Nonetheless, the outcome of the case was not clear enough to delineate the repercussions of the challenge directed at the arbitration agreement. The following paragraphs illustrate the complexities of the *Westinghouse* case.

In 1973, the Philippine Government announced plans to build the first nuclear power plant in the Philippines. The National Power Corporation (state-owned entity; hereinafter NPC) was tasked with planning and building the plant. Following this delegation, NPC sought an outside consultant with sufficient knowledge and background to design and construct a nuclear plant. The first contract (Consulting Contract) was signed with a U.S. Company (Burns & Roe), which would provide

⁷⁵ ICC Case No. 6401 (Westinghouse International Projects Company, Westinghouse Electric SA, Westinghouse Electric Corporation, and Burns & Roe Enterprises, Inc. v. National Power Corporation, The Republic of Philippines, Preliminary Award, December 19, 1991, in Mealey’s International Arbitration Report, Vol. 7, Issue 1, January 1992, Section B.)

engineering and consultancy services.⁷⁶ The second contract (Project Agreement), delegated to the Swiss-based Westinghouse Electric S.A., assigned parts of the agreement to the USA based Westinghouse International Projects Company and to Westinghouse Electric Corporation.⁷⁷ Both of the contracts contained arbitral clauses pursuant to the ICC Regulations.

In 1985, the construction of the nuclear plant was concluded. However, the Philippine Government did not accept it, nor did the plant become operational. Furthermore, President Marcos, who initiated the nuclear plant project, was ousted and the new President Corazon Aquino abandoned the nuclear plant project. Following this abandonment, Westinghouse filed a request for arbitration against NPC and the Philippines by virtue of unpaid items. Burns & Roe also initiated arbitration by citing the arbitral clause in the consultancy agreement.

The Defendant State alleged that the claimants engaged in bribery while procuring the contracts and, additionally, claimed that the nuclear power plant was not only defective but also forsaken before it was even complete. The crucial issue that the arbitral tribunal had to tackle was the attack directed at the validity of the arbitration agreements. The defendant claimed that both the consultancy contract and the project agreement were procured by bribing President Marcos via intermediaries. “It was specifically alleged that bribery was paid to President Marcos in exchange of his directing the National Power Corporation officials to conclude the Consulting and

⁷⁶ SAYED, *supra* note 25, at 77.

⁷⁷ *Id.*

Construction Contracts with Burns & Roe and Westinghouse respectively.”⁷⁸

Accordingly, the defendant alleged that since NPC was compelled to accept the contract and its terms as a result of bribery, the consent to the arbitration was defective and the tribunal lacked jurisdiction over the Philippines.

The first issue the arbitral tribunal reconciled was the objection directed at the arbitration agreement. This objection was tackled with caution because the resolution could result in robbing the tribunal of jurisdiction, as well as prevent the arbitral tribunal from delving into substantive issues.

Unsurprisingly, the arbitral tribunal discussed the applicability of “the doctrine of separability.” Although there was no question relating to the applicability of the doctrine of separability, there were questions relating to how it would apply. The parties diverged in how the doctrine should be employed. On one hand, the claimant contended that the doctrine could apply in any case, but on the other hand the defendant claimed that it would not apply if the main contract were obtained by bribery. The tribunal relied upon the evidence submitted by the defendant. According to the arbitral tribunal:

“As a matter of principle, the Tribunal would have been ready to accept that the doctrine of separability is not an absolute to be applied in all cases, as contended by the Claimants. There may be instances where a defect going to the root of an agreement between parties

⁷⁸ *Id.* at 78. See also Martin, *supra* note 21, at 30 (“Both Westinghouse and Burns & Roe retained a local agent or special sales representative (SSR) by the name of Herminio Disini. Westinghouse contracted with a Disini company called Herdis Management & Investment Corporation (Herdis) and Burns & Roe contracted with another Disini company called Technosphere Consultants Group, Inc. (Technosphere). Mr. Disini was a close personal friend and frequent golf companion of President Marcos. He came from the same province in the Philippines as the President and his wife was Imelda Marcos’ first cousin and personal physician.”)

affects both the main contract and the arbitration clause. An obvious example is a contract obtained by threat. With regard to the impact of bribery, it would remain to be seen whether bribery, if proved, affects both the main contract and the arbitration clause and renders both null and invalid. However, the Tribunal does not have to solve this delicate issue since it has found on the facts presented to it that the Defendants have failed to prove their allegations of bribery. Their contention of the invalidity of the main contracts having been rejected, see *infra* Section IV, there is no need to examine whether the arbitration clauses would have survived if the Tribunal had reached a contrary result.”⁷⁹

The tribunal’s method of handling allegations in light of specific challenges to an arbitration agreement is perplexing. The award says, concurrently, “something” and “nothing” on the topic of validity of the arbitration agreement within the context of bribery allegations. The award articulates “something” by touching upon the delicateness of the issue. However, it also says “nothing” by failing to express an opinion on bribery’s impact to the arbitration agreement. However, despite this perplexity, it is possible to draw some inferences from the tribunal’s assessment of the issue.

First, Sayed believes that, notwithstanding the facially confusing award rendered, the arbitral tribunal earnestly handled the bribery allegations. By considering bribery in relation to the arbitration agreement’s validity and following this by employing a comprehensive investigation in a preliminary award relating to the tribunal’s jurisdiction, the tribunal adhered to a proper scrutiny.⁸⁰ Because

⁷⁹ SAYED, *supra* note 25, at 79.

⁸⁰ *Id.*

examination of the issue occurred at the preliminary stage, the tribunal obviously believed that bribery could invalidate both the underlying contract and the arbitration agreement. If the tribunal contemplated that bribery would not upset the arbitration agreement and jurisdiction, the tribunal could have postponed investigation to when the substance of the case was addressed, rather than being a subject at the preliminary stage.⁸¹

In sum, as seen from both judicial decisions and arbitral awards, a challenged contract may become decisive in applying the separability doctrine. Where a party solely challenges the underlying contract, the claim will be sent to arbitration.⁸² In the absence of a challenge directed solely to the arbitration agreement, the separability doctrine will apply and will insulate the arbitration agreement from impeachment. As a result, there will be no basis to dismiss arbitration. However, these approaches are not the only ones available. For example, German courts exercise a moderately different approach to this issue by stating that defects to the underlying contract will also influence the arbitration agreement and will require interlocutory judicial resolution.⁸³

⁸¹ *Id.*

⁸² *Fiona Trust & Holding Corp. v Privalov* 1 All E.R. (Comm.) 891 (“Section 7 of the 1996 Act now provides: ‘Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.’ This statutory principle codifies the principle that an allegation of invalidity of a contract does not prevent the invalidity question being determined by an arbitration tribunal pursuant to the (separate) arbitration agreement. It is only if the arbitration agreement is itself directly impeached for some specific reason that the tribunal will be prevented from deciding the disputes that relate to the main contract.”)

⁸³ BORN, *supra* note 7, at 401 n.450.

When both the underlying contract and arbitration contract are challenged, jurisdictional questions are more concrete. In this case, it is important to examine carefully whether the challenge reaches the arbitration agreement because a challenge that fails to reach the arbitration agreement will be referred to arbitration. In this regard, the question that the tribunal must answer is whether the assertion of invalidity of the underlying contract also goes to question the validity of the arbitration clause.

When a challenge reaches the arbitration agreement or is particularly directed to the arbitration agreement itself, the separability doctrine will not apply. For instance, in the *Harbour v Kansa* case from the United Kingdom, the Court of Appeal stated:

“Once it became accepted that the arbitration clause is a separate agreement, ancillary to the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (e.g. by a *non est factum plea*), the arbitration agreement is as a matter of principled legal theory capable of surviving the invalidity of the contract.”⁸⁴

The same *modus operandi* was exercised in the *Fiona Trust* case. The House of Lords held “[i]t is only if the arbitration agreement itself *directly impeached for some specific reason* that the tribunal will be prevented from deciding the disputes that relate to the main contract.”⁸⁵

⁸⁴ *Harbour Assurance Co. Ltd. v Kansa General International Insurance Co. Ltd.*, [1992] 1 Lloyd's Rep 81.

⁸⁵ BORN, *supra* note 7, at 383 n.357.

Despite the historical denial of arbitral jurisdiction in the face of allegations targeted at arbitration agreements, an emerging view encourages that, notwithstanding allegations of corruption or unenforceability specifically directed at the arbitration agreement, the allegations should not automatically deprive an arbitral tribunal of jurisdiction, nor should it preclude referring parties to arbitration.⁸⁶ Fairness, efficiency, the credibility of the contending party, and timing of the allegation should also be factors taken into consideration. If the allegations arise prior to commencement of the arbitration, the judiciary should prevail over arbitration. If arbitrators are authorized to assess allegations at this stage, it may be a task requiring investigating substantive issues to better ascertain whether corruption impacted the transaction. Accordingly, if arbitrators conclude that corruption indeed occurred, they will be required to return to the point of departure and declare the arbitration contract invalid. Further, by diverting corruption allegations to litigation, arbitral awards will be better preserved and protected from attack during the enforcement process under the New York Convention, Article 5 (2).

However, once the arbitral process is initiated, for the sake of efficiency, trust should be placed in arbitrators, who are also guardians of universal values akin to judges. The arbitral tribunal should be able to examine allegations and make initial determination of challenges without court involvement. This approach will help avoid delays, expenses, and uncertainties that would unavoidably arise from litigation.

⁸⁶ *PacifiCare Health Sys. v. Book*, 538 U.S. 401, 407 (U.S. 2003) (“In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties’ agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are usually abstract. As in *Vimar*, the proper course is to compel arbitration.”)

ii) Offensiveness of Corruption Allegations

Should every corruption allegation, irrespective of its gravity, be able to upset the doctrine of separability? There are two divergent approaches to answer this question: (1) A zero tolerance policy asserting that it is undisputable that engagement in any type of corruption is a clear violation of public policy and is sufficient to impeach the doctrine of separability; (2) In contrast to the zero tolerance policy, the second train of thought asserts that not every violation of public policy should be capable of upsetting the doctrine of separability. For this second group, violation of public policy must be so egregious as to lead to an impeachment of the doctrine of separability. With the words of Sayed, “in the field of corruption and arbitration, the persistence of separability depends upon the measuring of the gravity of the offense that corruption carries against public policy. To what extent is corruption offensive in such a way as to render fragile the separability barrier?”⁸⁷ This second policy therefore requires investigation of the offense and measuring its relative transgression under the umbrella of the public policy.

The answer to Sayed’s critical question was given by the English courts⁸⁸ that carried out the vacatur process of an arbitral award rendered in the ICC Case No. 7047 (*the Westacre case*).⁸⁹ In this case, the dispute arose from a consultancy agreement (the agreement) signed by the Panamanian company Westacre Investment

⁸⁷ SAYED, *supra* note 25, at 47.

⁸⁸ *Id.* at 48 n.170 & 171 (The Commercial Court of the Queens Bench Division (*Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. and Others*, [1998] 2 Lloyd’s Law Reports 111); the Court of Appeals (*Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. and Others*, [1999] 2 Lloyd’s Law Reports 65))

⁸⁹ *Westacre v. Jugoimport*, ICC Case No. 7047 (1994), Award, 28 February 1994, *ASA Bulletin*, Vol. 13 (1995))

Inc. (hereinafter Westacre) and the Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia (hereinafter the Directorate). There was one more defendant in the case, who acted as guarantor for the consultancy fee, Udruzena Beogradska Banka DD (the Bank).⁹⁰ Under the agreement, Westacre was designated consultant by the Directorate and assisted the Directorate in its sale of M-84 tanks to the Kuwait Ministry of Defense (hereinafter MoD).⁹¹ In return, the Directorate was obliged to pay 15 percent of the orders placed by MoD. Further, the Directorate entered into a construction agreement worth US\$39.1 million for M-84 training facility and promised to pay 10 percent of the value of the training facility to Westacre.⁹²

Before the conclusion of the contracts with MoD, the MoD requested that, “contracts on the delivery of arms, ammunition, and spare parts be made directly with the MoD without the participation of an agent or intermediary.”⁹³ To comply with this request, not only did the Directorate terminate the agreement with Westacre, but it also refused to pay promised fees. Accordingly, Westacre enforced Article 9 of the contract⁹⁴ and commenced arbitration.

On the last day of arbitration, the defendant argued fresh claims citing illegitimacy of the underlying contract. The defendant argued that the object of the agreement was bribery. To address these claims, the tribunal prioritized

⁹⁰ SAYED, *supra* note 25, at 47.

⁹¹ *Id.* at 48.

⁹² Martin, *supra* note 21, at 40.

⁹³ *Id.*

⁹⁴ “The terms and provisions of this Agreement shall be governed and construed under the laws of Switzerland. Any dispute arising out of the present agreement shall be settled in accordance with the rules provided for in the Arbitration Rules of the International Chamber of Commerce...in Geneva.”

circumstantial evidence by assessing whether the consultancy fee was disproportionate, by investigating whether there was an offshore company used to cover illicit engagements, and by asking whether the consultancy agreement discharged the claimant from proving its contractual obligations.⁹⁵

The tribunal analyzed the facts and the parties' statements and because the defendant failed to go beyond a mere suspicion of corruption, the arbitral tribunal overruled the bribery allegations.⁹⁶ At the arbitral proceeding's conclusion, the tribunal rendered an award favoring Westacre. The Swiss Federal Tribunal, the commercial Court of Queen's Bench Division, and the Court of Appeals in the United Kingdom all upheld this award.

When the Commercial Court tackled the award, the Directorate and the Bank submitted new evidence to demonstrate that the motive of the underlying contract was bribery.⁹⁷ On the face of this contention, Westacre appealed to the doctrine of separability. Westacre sought to enforce "the separate agreement to arbitrate which involves both an express obligation to honour awards...and an implied underlying

⁹⁵ Martin, *supra* note 21, at 41.

⁹⁶ See *id.* at 42 ("If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere 'suspicion' by any member of the arbitral tribunal, communicated neither to the parties nor to the witnesses during the phase to establish the fact of the case, is entirely insufficient to form such a conviction of the arbitral tribunal.")

⁹⁷ See *id.* at 43 ("The defendant introduced new evidence in the English High Court proceedings by way of a sworn affidavit of the legal counsel to the Directorate, Miodrag Milosavljevic (M.M.) who was involved in the negotiations for the Consultancy Agreement and the M-84 Contract. In his affidavit, M.M. alleged that Mr. Al-Otaibi, the Secretary General of the Council of Ministers of Kuwait was the principal behind the Westacre. Mr. Al-Otaibi was involved in the deal from the beginning. Apparently, high placed Kuwaiti officials had stated to the Defendant that no contracts for military equipment would be placed with the Defendant unless a consultancy agreement was first entered into with a nominated consultant....the Consultancy Agreement was contract to pay Mr. Al-Otaibi a bribe through the vehicle of Westacre which was set up to maintain the anonymity of Mr. Al-Otaibi and his associates.")

contractual obligation to that effect.”⁹⁸ Through its reliance on the separability doctrine, Westacre sought to preserve the arbitration agreement’s validity and, consequently, maintain award enforceability, irrespective of the validity of the underlying contract. Westacre cited that public policy favors of the finality of arbitration:

“[i]f there is substantive agreement to commit a criminal offence, say an international contract for the sale and illegal importation of cocaine, which contains an ICC arbitration clause, an ICC award in favor of the seller in respect of the unpaid purchase price of the drugs must be treated as insulated from the substantive agreement for the purposes of the public policy exception to the enforcement of Convention awards and indeed at common law...the public policy in finality of an enforcement of an international arbitration agreement displaced any public policy against enforcement of the underlying substantive contract.”⁹⁹

While Westacre raised “the public policy in favor of finality of the arbitration”, the defendants countered with “the public policy in favor of legality.” The defendants asserted that the underlying contract was contrary to English public policy and therefore, enforcing the award, which was made in respect to the underlying contract, would similarly be contrary to English public policy.

The Court was clearly caught between a rock and a hard place. On the one hand, public policy favors the finality of arbitral awards, but on the other hand, public policy favors legality and opposition to enforce illegal contracts. To overcome this

⁹⁸ SAYED, *supra* note 25, at 49.

⁹⁹ *Id.* (citing *Westacre v. Jugoimport*, [1998] 2 Lloyd’s Rep. 111, 117.)

predicament, the Court strove to answer the question of whether the illegality in the underlying infected the arbitration agreement and the award.¹⁰⁰

To answer this question, the Court weighed the offensiveness of the illegality. From the Court's standpoint, if the underlying illegality were intolerable, both the arbitration agreement and the award would be questioned. However, if the illegality were tolerable, the doctrine of separability would survive and both the arbitration agreement and the award would be enforced. Therefore, the Court concluded:

“...No doubt, if it were proved that the underlying contract was, in spite of all outward appearances, one involving drug trafficking, the alleged offensiveness of the transaction would be such as to outweigh any countervailing consideration. Where, however, the degree of offensiveness is far down the scale as in the present case, I see no reason why the balance of public policy should be against enforcement.”¹⁰¹

In other words, the Court believed that corruption was not as offensive as drug trafficking. Therefore, the illegality in the underlying contract would not penetrate into the arbitration agreement or the award. Correspondingly, the Court held that:

“On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.”¹⁰²

Summarily, the Court's conclusion favored the claimant. This decision birthed the impression that the Court would turn a blind eye to corruption. To preclude this

¹⁰⁰ *Id.* at 50 (“It would therefore seem in principle that if the underlying contract were illegal and void at common law the question whether an arbitration agreement ancillary to it was also impeached by the illegality would have to be answered by reference to the policy of the Court in relation to the particular nature of the illegality involved.”)

¹⁰¹ Mourre, *supra* note 3, at 99 (citing [1998] 2 Lloyd's Rep. 111).

¹⁰² SAYED, *supra* note 25, at 53.

misperception, the Court found beneficial to point out the competence of the members of the arbitral tribunal by stating:

“That conclusion is not to be read as in any sense indicating that the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to *high caliber ICC arbitrators* and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement Court should be invited to retry that very issue in the context of a public policy submission.”¹⁰³

Subsequently, the case was brought before the Court of Appeal, where the Court dismissed the application. One member of the Court, Justice Waller, dissented from the majority. The main reason Waller voiced dissent was the balancing test applied by the majority of the Court. In his dissent, Justice Waller stated that the High Court judge insufficiently examined the defendant’s submitted affidavit.¹⁰⁴ From Waller’s perspective,

“...the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in MM’s affidavit are correct, is based on public policy of the greatest importance and almost certainly recognized in most jurisdictions throughout the world.”¹⁰⁵

Nonetheless, the Court of Appeal disregarded this dissenting opinion and dismissed the case.

¹⁰³ *Id.* at 54 (emphasis added).

¹⁰⁴ See Martin, *supra* note 21.

¹⁰⁵ Westacre Investments Inc. v. Jugoinport-SPDR Holding Company Ltd. [1999] APP. L.R. 05/12.

Westacre created controversy in the international arbitration arena by virtue of the elements on which the English Court based its judgment: (1) Tolerability; and (2) Arbitrator Quality.

“Tolerability”, stipulated by the English Court in the context of the separability doctrine, meant that the offensiveness of the alleged illegality should be tolerable in society. Thus, if it is found that the illegality in the underlying contract is not tolerable in society, the illegality hampers the separability doctrine and penetrates into the arbitration agreement.¹⁰⁶ Accordingly, it would be impossible to maintain the validity of the arbitration agreement and enforce the arbitral award.

The English Court’s “tolerability” approach is based on the gravity of the public policy violation. This is a subjective test encapsulating religion, morality, culture, traditions, and governmental policies.¹⁰⁷ Although it appears that the underlying motive of this approach promotes international arbitration, it actually inhibits arbitration’s long-term development due to blatant subjectivity of the elements. This unfortunately leaves room for courts to balk at enforcing arbitral awards and mask arbitral hostility.

The second element that the English Court based its judgment in *Westacre* was the quality of arbitrators.¹⁰⁸ From the English Court’s perspective, an intermediary contract premised on bribery was less “overtly” illegal than contracts based on drug trafficking. Consequently, the public policy favoring finality of

¹⁰⁶ SAYED, *supra* note 25, at 55.

¹⁰⁷ *Id.* at 56.

¹⁰⁸ *Id.* at 57.

international arbitral awards prevailed over the public policy against the enforcement of illegal contracts. At first blush, the impression left by the English Court's holding and reasoning in *Westacre* was an impression of blindness to corruption. To avoid this impression, the English Court dictated features of both the arbitrators and arbitral institutions.¹⁰⁹ The Court stated that it would be inappropriate within the context of the New York Convention to scrutinize an award rendered by highly qualified ICC arbitrators.¹¹⁰

In other words, from the English Court's point of view, the judicial scope of arbitral award examination should be narrowly tailored to investigate certain factors including the competence of arbitrators sitting on the tribunal, the fairness and efficiency of the arbitral process, the reasoning of the award, and the competence of the arbitral institution.¹¹¹ The respective court should thus weigh these factors and, if satisfied, should provide full faith and credit to both the arbitral tribunal and the award rendered by it.¹¹²

The separability doctrine is one backbone of international arbitration. It isolates the arbitration agreement from allegations directed at the validity of the underlying contract. Separability permits examination of jurisdictional challenges and empowers arbitrators to examine the existence, validity, and legality of the underlying contract. As opined by the minority opinion of the Pakistani Supreme Court in the *HUBCO* case:

¹⁰⁹ See *supra* pg. 134.

¹¹⁰ *Id.*

¹¹¹ SAYED, *supra* note 25, at 57.

¹¹² *Id.*

“...Arbitration clauses contained in contracts are treated as separate and self-contained contracts in that if it were not so, arbitrations clauses would, not at all survive an attack on the main contract.... It would thus be seen that allegations of invalidity even serious allegations of its being *ab initio* void are perfectly capable of being referred to arbitration.”¹¹³

These words successfully summarize the necessity of the separability doctrine and showcases why the doctrine demands respect of both the arbitral tribunal and the reviewing judiciary.

In sum, the outcome of the examined cases and awards exhibit that the doctrine of separability, notwithstanding corruption allegations, is steadily affirmed and applied by both courts and arbitral tribunals. Nevertheless, this observation does not lead to infer that the award will be enforced by simple application of the separability doctrine. Unless there is an applicable exception (express opt out, direct attacks to arbitration agreement, or the grave violation of public policy) to prevent the application of the separability doctrine, the tribunal will maintain jurisdiction and the tribunal member will be deemed sufficiently competent to find nullity.¹¹⁴

3. The Principle of Competence - Competence

Where the separability doctrine recognizes the validity of an arbitration agreement irrespective of the validity of the underlying contract, the competence-competence doctrine acknowledges an arbitral tribunal’s authority to make a decision pertaining to jurisdictional issues, such as disputes over the validity, legality, and

¹¹³ Hub Power Company Limited (HUBCO) v. Pakistan WAPDA and Federation of Pakistan, Decision of the Supreme Court of Pakistan (20 June 2000).

¹¹⁴ SAYED, *supra* note 25, at 58.

scope of the parties' arbitration agreement arising from challenges directed at the arbitration agreement.¹¹⁵

The principle of competence-competence is linked to the allocation of fitness between courts and arbitrators. Accordingly, key inquiries of competence-competence include whether an arbitral tribunal has jurisdiction over a dispute involving corruption allegations and whether a court or an arbitrator is better equipped with the authority to answer this puzzlement.

a) The Doctrine of Competence – Competence (Kompetenz - Kompetenz)

One central characteristic of arbitration is the authority to conclude disputes related to the arbitral tribunal's jurisdiction, including challenges directed at the legality, validity, and existence of the arbitration agreement. Naturally, the next confrontation is whether arbitrators should be permitted to exercise the authority to rule on their own jurisdiction?

Because modern policies favor arbitration, authority to rule on challenges relating to jurisdiction and the arbitration agreement vests within arbitral tribunals under the competence – competence doctrine.

The competence – competence doctrine rests upon allocating jurisdictional competence to consider and conclude jurisdictional disputes between arbitral tribunals and national courts.¹¹⁶ With this doctrinal innovation, international arbitral tribunals are equipped to render decisions relating to jurisdiction, including

¹¹⁵ BORN, *supra* note 7, at 873.

¹¹⁶ *Id.* at 852 n.5.

challenges directed at the arbitration agreement's existence, validity, legality, and scope, while courts are prevented from possessing the authority to examine a tribunal's jurisdiction.

The competence – competence doctrine is espoused by both national and international arbitral systems. Nevertheless, there is still considerable disagreement over the doctrine's application. As a result, the degree of priority and finality attached to a tribunal's exercise of its competence - competence varies from jurisdiction to jurisdiction.¹¹⁷ While some jurisdictions initially allow arbitrators to handle jurisdictional issues subject to subsequent judicial review, there are other jurisdictions where jurisdictional objections, at the beginning, are concluded by the judiciary. Clearly, the applicable law has an important effect upon the scope of the competence – competence doctrine. The laws that may be applicable to the doctrine are: the laws of the legal seat country, the laws of the country where enforcement and recognition is sought, and the laws governing the arbitration agreement.

Because arbitration rests upon the freedom of contract and, therefore, has a flexible structure, parties may incorporate a particular choice of law clause into their contract that will dictate issues arising from the competence – competence doctrine.

However, where there is no clause regulating arbitral jurisdictional issues in the parties' agreement, different laws may apply. For example, the legal seat country's law may become applicable. In ICC Case No. 9548, the *lex loci arbitri*'s law applied and the Swiss-seated arbitral tribunal appealed to the Swiss law when

¹¹⁷ *Id.* at 853-854.

rendering a decision relating to competence – competence.¹¹⁸ This is, however, not universal. For instance, Article 8 of the UNCITRAL Model Law¹¹⁹ (which involves the presumptive validity of the arbitration agreement) saves a right for national courts to determine that the agreement is null and void irrespective of the legal seat country.¹²⁰ In fact, the majority of national courts assume that the law of the enforcement forum governs issues related to the competence – competence doctrine.¹²¹

In sum, the competence – competence doctrine’s scope and its application vary according to the applicable law. Accordingly, it is unsurprising to see fractured application of the competence – competence doctrine in the context of corruption allegations.

b) The Competence – Competence Doctrine in the face of Corruption

Allegations

ICC Case No. 1110 is the pioneer case demonstrating corruption in arbitration.¹²² In this case, the sole arbitrator Judge Lagergren deprived himself of jurisdiction due to the contract’s violation of “public decency and morality.” From Judge Lagergren’s point of view, before tackling the question of jurisdiction, an

¹¹⁸ *Id.* at 987 n.686.

¹¹⁹ Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (“(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”)

¹²⁰ BORN, *supra* note 7, at 986-987.

¹²¹ *Id.* at 986.

¹²² *See supra* pp. 100-106.

arbitrator must assess whether a contract is at odds with morality and public policy. Judge Lagergren's decision faced much criticism and made an arbitrator's jurisdictional authority questionable within the context of illegality, particularly corruption.

As a general rule, arbitral tribunals can make decisions on jurisdiction. These decisions may include, "challenges to both the existence, validity, or effectiveness of the parties' underlying contract and to the existence, validity, or scope of their arbitration agreement itself"¹²³ through exercising the vested authority provided by the competence – competence doctrine. However, of primary concern is whether corruption allegations represent an exception to the rule and prevent arbitrators from exercising authority to render jurisdictional decisions. In other words, should the competence – competence doctrine survive and maintain to be a solid ground for arbitrators to conclude jurisdictional obstacles originating from corruption allegations?

Unfortunately, there is no consensus between legal systems as to the concept and scope of the competence – competence doctrine. The varying approaches employed by the judiciary are well illustrated when illegality and corruption allegations arise. Behind this fragmentation lies the power struggle between litigation and arbitration. Historically, legal systems have been hostile towards arbitration: arbitrators are regarded as servants of the parties by virtue of arbitration's contract based nature. Accordingly, national courts hostile to arbitration believe that

¹²³ BORN, *supra* note 7, at 877.

arbitrators are neither competent nor properly impartial to handle controversial issues like corruption.¹²⁴

However, recently, with the initiative of leading countries' policies favoring arbitration, such as the United States, the United Kingdom, France, and Switzerland, the current mainstream is in favor of trusting arbitrators and empowering them under the competence – competence doctrine irrespective of the content of the allegation.¹²⁵

Further, the favorable approach taken by international regulations helps the competence-competence doctrine develop roots in arbitration. Rules of leading arbitral institutions and intergovernmental organizations pronounce arbitral tribunals are indeed competent to rule on jurisdictional challenges. Article 16 of the UNCITRAL Model Law on International Commercial Arbitration states, “the arbitral tribunal may rule on its own jurisdiction, including *any objections with respect to the existence or validity of the arbitration agreement.*”¹²⁶

Next, another issue to be examined is the cooperation between two cornerstone principles of arbitration within the context of corruption. The

¹²⁴ William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, 13 ICCA Congress Series 55-153 n.95 (2007) (“Regulatory impulses also come into play, although usually only at the margins. Even if the parties to a dispute authorize adjudication through arbitration, courts will hesitate to enforce private decision-making that runs afoul of public policy, either by virtue of touching subjects too sensitive to be removed from government tribunals (e.g. claims of discrimination) or because the decision-making process is tainted with the bias or corruption.”)

¹²⁵ European Convention on International Commercial Arbitration, Article (v) (3) (“Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.”); Section 30 of English Arbitration Act (“Unless otherwise agreed by the parties, the arbitral tribunal may rule on substantive jurisdiction, that is, as to – (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted, and; (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.”); French Code of Civil Procedure, Article 1465 (“The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.”)

¹²⁶ Emphasize added.

UNCITRAL Model Law speaks to the role of the doctrine of separability under Article 16, entitled “*Competence of Arbitral Tribunal to Rule on Its Jurisdiction*”, which regulates the competence – competence doctrine. The Article states:

“...For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

The message Article 16 implicitly delivers is that the doctrine of separability bestows upon an arbitrator power to rule on jurisdictional disputes.¹²⁷ According to Article 16, the applicability of the doctrine of separability dictates whether or not the application of the competence – competence doctrine is appropriate. Specifically, when the separability doctrine applies, defects in the underlying contract will not control the fate of the arbitration agreement and the arbitral tribunal will retain jurisdiction to consider their authority. Therefore, in the presence of a challenge solely targeting the underlying contract, arbitrators do not need to engage in examination concerning their jurisdiction. In other words, unless impeachments specifically aim at the arbitration agreement, jurisdictional issues do not arise.

¹²⁷ BORN, *supra* note 7, at 873 (“...As with the Model Law, the clear implication is that the separability of the arbitration clause is the basis for the tribunal’s competence...It is conceptually wrong to explain the competence-competence doctrine by reference to the separability presumption. The separability presumption concerns the substantive validity of the arbitration agreement, while the competence-competence doctrine concerns a tribunal’s power to consider and decide jurisdictional issues when the arbitration agreement is challenged. There are circumstances where the two principles intersect, but they are analytically distinct concepts.”)

There are, nevertheless, instances where the doctrine of separability is inoperable.¹²⁸ Under these circumstances, the question becomes which approach to the operation of the competence – competence doctrine will be espoused in the absence of the separability doctrine’s assistance?

BORN clarified that:

“the competence – competence doctrine *also*... applies in cases where the existence, validity, legality, or effectiveness of the arbitration agreement (not the underlying contract) is challenged. In these cases, the separability of the arbitration clause does nothing at all to explain the arbitral tribunal’s power to consider challenges to its own jurisdiction...”¹²⁹

Arbitrators’ jurisdictional authority derives from applicable arbitration law.¹³⁰

Thus, according to BORN, even if the arbitration agreement’s validity, existence, or legality, is challenged, the arbitral tribunal has authority to make jurisdictional decisions, which will possibly be subject to subsequent judicial review.¹³¹

This approach is corroborated in the ICC Rules of Arbitration.¹³² Under these rules, jurisdictional issues arising from illegality are assigned to the tribunal following

¹²⁸ See *supra* pp. 117-137.

¹²⁹ BORN, *supra* note 7, at 874.

¹³⁰ *Id.* See generally BORN, *supra* note 7, at 874 n.122.

¹³¹ *Id.* at 875.

¹³² Article 6 (3) of the ICC Rules (“If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6 (4).”)

the ICC Court's *prima facie* "satisfaction" that an arbitration agreement under the ICC Rules exists.¹³³ To illustrate, Article 6 (4) of the ICC Arbitration Rules dictates:

"In all cases referred to the Court under Article 6 (3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist."

Under this rule, the ICC Court's¹³⁴ *prima facie* satisfaction determines the fate of the arbitral proceedings. If the ICC Court renders a decision in favor of arbitration, the arbitral tribunal may apply the competence-competence doctrine to conclude the illegality allegations. This jurisdiction that the tribunal possesses is termed as "instant jurisdiction", which provides grounds to the tribunal to furnish an award accounting for the illegality allegations.¹³⁵

The competence – competence doctrine has evolved significantly since Judge Lagergren's award. Where Judge Lagergren propounded that arbitrators do not have jurisdiction over contracts contrary to *bonos mores* or international public policy, today, arbitral tribunals may discuss their jurisdictional authority, including when claims of violation of good morals and public policy are alleged, and may declare that they indeed do have jurisdiction over these contentions.¹³⁶

¹³³ Article 6 (4) of the ICC Rules ("In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist..."). See generally RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENT 239 (2013).

¹³⁴ Article 1 (1) of ICC Rules gives defines the Court as "the independent arbitration body of the ICC."

¹³⁵ KREINDLER, *supra* note 133, at 239.

¹³⁶ Martin, *supra* note 21, at 28 (delineating the ICC Case No. 6248).

Unsurprisingly, the trend in international arbitration is to liberalize and encourage arbitrators to consider and decide jurisdictional challenges regardless of the gravity of the allegations and the validity of the arbitration agreement. The House of Lords in the *Fiona Trust* case explains the reasoning and importance behind this liberal trend. The case propounded:

“...It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen.”¹³⁷

Investment arbitration similarly employs this “one stop” approach. For example, ICSID Convention Article 41 (1) and (2) states that,

“the Tribunal shall be the judge of its own competence and any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal.”

In sum, even if corruption allegations are raised, the arbitral tribunal’s competence will not destabilize and consequently, it is possible to render “a negative decision against further competence” if the consent in the BIT is invalid.¹³⁸

4. Closing Remarks for Chapter-II

The award rendered by Judge Lagergren in ICC Case No. 1110 is profound in international arbitration as far as corruption is concerned. His decision highlighted

¹³⁷ *Fiona Trust & Holding & Holding Corporation & 20 Ors v. Yuri Privalov & 17 Ors sub nom Premium Nafta Products Ltd. (20th defendant) & Ors v. Fili Shipping Co. Ltd. (14th claimant) & Ors* [2007] UKHL 40, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/20.html>.

¹³⁸ KREINDLER, *supra* note 133, at 243.

issues of arbitrability, competence – competence, and the separability of the arbitration agreement when confronted with illegality, particularly corruption, allegations.

Following Judge Lørgren’s award, paradigm shifts in the doctrines of arbitrability, separability, and competence – competence occurred within the context of corruption. Various arbitral awards, court judgments,¹³⁹ and scholarly opinions opined multiple approaches to tackle corruption and illegality in an underlying contract that incorporates an arbitration agreement. The majority of these awards and judgments uphold arbitrability of corruption contentions as well as apply both the doctrine of separability and competence – competence.

Today, the majority of national courts espouse an expansive interpretation of arbitrability and have long since abandoned arbitral hostility. As a result, claims that were once “inadmissible” are now well within the purview of arbitrators. For example, arbitrators now have authority to hear antitrust violations, securities violations, employment disputes, and claims of corruption.¹⁴⁰

The modern trend favoring arbitration has led to similarly advantageous applications of the doctrines of separability and competence – competence.

Historically, the judiciary found that when parties challenged the legality of the underlying contract, the associated arbitration agreement would also fall suspect.

Accordingly, national courts addressed challenges to legality. Consequently, judicial

¹³⁹ See *National Power Corporation v. Westinghouse*, 2 September 1993, Case No. 4P.27/1992 (BGE 119 II 380).

¹⁴⁰ BORN, *supra* note 7, at 804 n.1220 (Partial Award on Jurisdiction and Admissibility in ICC Case No. 6474, XXV Y. B. Comm. Arb. 279 (2000) (dispute involving claims of corruption and illegality is arbitrable.))

resolution gained the upper hand to arbitration.¹⁴¹ Adding insult to injury and contributing to the supremacy of litigation over arbitration, the arbitral tribunals consistently balked at confronting allegations of corruption. This reluctance expanded judicial distrust of arbitration as a competent dispute resolution option.

However, recent arbitral awards reflect that the majority of arbitral tribunals no longer hesitate to tackle allegations of corruption. Accordingly, when either party contends that corruption taints the underlying contract, arbitrators prefer to handle the allegations by applying the doctrine of separability and competence –competence. This arbitrator empowerment illuminates a trend veering away from arbitrator dismissal upon jurisdictional grounds and rather encourages awards rendered on the merits.

Notwithstanding the gusto of both arbitrators and the arbitral tribunal, it is impossible to overstate the power of the judiciary's encouragement in fostering arbitration as a significant dispute resolution mechanism. The courts played a pivotal role in the evolution of arbitration by acting in conjunction with arbitral tribunals. The courts clarified that arbitral tribunals had the power to rule on corruption and bribery allegations. According to the recent decision of English Court of Appeal, "this was a logical corollary of the separability presumption."¹⁴² The Court stated, "if arbitrators can decide that a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery."¹⁴³ The Court's

¹⁴¹ *Id.* at 803-804.

¹⁴² *Id.* at 805 (citing *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All E.R. (Comm.) 891, 891).

¹⁴³ *Id.*

words successfully exhibit the global climate favoring an arbitrator's power to confront numerous conflicts with the aid of the doctrines of separability and competence – competence.

Next, chapter three observes the challenges that both the courts and arbitrators face when confronted with the insidious nature of corruption and how corruption may be proven when allegations are raised.

CHAPTER-III

EVIDENCE of CORRUPTION in INTERNATIONAL ARBITRATION

“You shall not give a false report; you shall not join hands with the wicked to be a malicious witness [promoting wrong and violence]. You shall not follow a crowd do [something] evil, nor shall you testify at a trial *or* in a dispute so as to side with a crowd in order to pervert *justice*; nor shall you favor or be partial to a poor man in his dispute.”¹

Corruption is no longer the sword of Damocles hanging over the jurisdiction of an arbitral tribunal. Now, when the tribunal encounters corruption allegations directed at an underlying contract, it may now apply the separability doctrine to separate the arbitration agreement from underlying contract. Following the application of the separability doctrine, the tribunal can determine the fate of its own jurisdiction by employing the competence-competence doctrine. Finally, once jurisdiction is asserted, the arbitral tribunal can initiate investigation of facts pertaining to the corruption allegations.

Because corruption is inherently difficult to prove and because arbitral tribunals lack power to compel the production of evidence, cases where corruption arises raise noteworthy questions such as: how to prove corruption; who carries the burden of proof; what is the level of the standard of proof; what kind of evidentiary materials are credible; what steps can be taken if parties are not able to render adequate evidence; and what role do arbitrators employ while handling corruption?

¹ *Exodus 23:1* (Amplified Bible).

This chapter seeks to answer these questions. First, the burden and standard of proof will be assessed under applicable laws and arbitral practice. Second, evidentiary materials will be examined in the context of their role in the face of corruption allegations.

1. Proving Corruption in International Arbitration

It is foreseeable that once claims of corruption are raised, evidence acquisition will prove troublesome for arbitral tribunals since corruption, by its nature, occurs in obscurity and concealment, and, accordingly, rarely leaves a trace. Consequently, issues generated from corruption allegations include choosing the party who will carry the “burden of proof”, as well as deciding what the “standard of proof” will be.

Unlike litigation, these two evidentiary concepts harbor ambiguity and confusion in the context of international arbitration practice. Under most developed national arbitration statutes, international arbitration’s internal procedures are not regulated with details, but, rather, are left to the parties’ contract and the arbitral tribunal’s discretion.² Therefore:

- First, there is no single theory or rule applicable regarding the burden of proof, nor, are there thresholds of evidence to guide arbitral tribunals and parties;³

² GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOLUME I 1241 (2009).

³ RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENT 252.

- Second, there is no unified application of the standard of proof. The standard of proof varies from preponderance of evidence to clear and convincing evidence;
- Third, there is no single approach to the purpose of the evidence: is it finding the truth or concluding the dispute in a way that is relatively fair?;⁴
- Fourth, the admissibility and relevance of the evidence is subject to various approaches by virtue of the discretion that is bestowed upon arbitral tribunals;
- Fifth, there is no unified alternative practice applicable when there is inadequate proof to sustain corruption allegations.

Due to these difficulties, it might be useful at the outset of the discussion to delineate the burden of proof and standard of proof and subsequently examine application of evidentiary standards in international arbitration in the context of corruption allegations.

A. General Information about the Burden of Proof and Standard of Proof

There are two fundamental obligations placed upon claimant/plaintiff and respondent/defendant. The first obligation is that each party has to prove the facts upon which they rely to corroborate their claim or defense. The second obligation is to reach the required level of persuasion determined by decision-makers. The satisfaction of this obligation determines the outcome. The first obligation that each

⁴ *Id.*

party carries is termed “burden of proof” while the required level that the disputing parties need to satisfy is termed “the standard of proof”.

The history of the burden of proof runs deep. In ancient Roman law, the principle of burden of proof manifested through a variety of names, such as *ei qui affirmat non ei qui negat incumbit probatio* (the onus of proof is the person who affirms and not on the one who denies); *actori incumbit probatio* (the claimant carries the burden of proof); *actore non probante reus absolvitur* (if the plaintiff cannot prove the case the defendant is absolved).⁵

The burden of proof consists of many components:

- First, it contains the “burden of production.”⁶ The burden of production signifies the party who must produce evidence to raise an issue.⁷
- The second component of the burden of proof is the “burden of persuasion.” The party who is under this duty must persuade the court or the tribunal that his/her claims on a contested issue should prevail. This duty typically rests upon the plaintiff, however, depending on the circumstances, it could also be on the defendant.⁸
- Third, the burden of proof is used in a way that covers the “standard of proof.” The standard of proof is counted as a component of the burden of proof because the party who carries the burden of proof is required to

⁵ JEFF WAICYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 763 (2012).

⁶ David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26(2) HARV. J.L. & TECH. 430, 433 (2013).

⁷ *Id.* at 433-34.

⁸ *Id.* at 434.

persuade the decision-maker that the claims raised are true. In other words, the burden of proof deals with the responsibility of proving the asserted fact while the standard of proof deals with “how much evidence is needed to establish either an individual issue or the party’s case as a whole.”⁹ With the words of the U.S. Supreme Court, the standard of proof means: “the degree of certainty by which the fact finder must be persuaded...to find in favor of the party bearing the burden of persuasion.”¹⁰ The question that the standard of proof raises is what level of evidence is required to establish either a fact or an entire case? This is obviously not an easy question to answer.

Under civil law (generally in both civil and criminal matters), the applicable standard of proof is the full conviction (*conviction intime or conviction raisonnée*)¹¹ of the decision-maker. The intent of this standard is to allow a judge to be able to justify his/her decision with acceptable arguments.¹² From the Swiss Federal Supreme Court point of view, “a court must be convinced of the truth of a factual allegation based on objective grounds. Absolute certainty is not required. It is sufficient if the court has no serious doubt or any remaining doubt appears insubstantial.”¹³

⁹ The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award of 29 April 2013, para. 178.

¹⁰ Schwartz & Seaman, *supra* note 6, at 433 (citing Microsoft Corp. v. i4i Ltd. P’ship, 131 S. Ct. 2238 (2011)).

¹¹ Mark Schweizer, *The Civil Standard of Proof – What is it, actually?*, PREPRINTS OF THE MAX PLANCK INSTITUTE FOR RESEARCH ON COLLECTIVE GOODS, 4 (July 2013), http://www.coll.mpg.de/pdf_dat/2013_12online.pdf.

¹² *Id.*

¹³ *Id.* (citing BGE 130 III 321 Sect. 3.2)

In contrast, under common law, the applicable standard of proof varies depending on whether applicable the law is criminal or civil. Further, there are different levels of the standard of proof including preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. The following definitions outline these standards of proof:

“Preponderance of the evidence” is the lowest level of the standard of proof and requires proving that a contested fact is more likely true than not true.

“Clear and convincing evidence” represents a level that is higher than preponderance of the evidence, but lower than beyond a reasonable doubt. Clear and convincing evidence applies when “the interests at stake...are deemed to be more substantial than mere loss of money.”¹⁴

The highest standard of proof is “Beyond a Reasonable Doubt”, which generally applies in criminal law cases. While a “reasonable” doubt requires reasons that are honest without speculation, “Beyond a Reasonable Doubt” requires the belief that the defendant is guilty.¹⁵

B. General Approach to the Burden of Proof and Standard of Proof in International Arbitration

As a general rule, the burden of proof in international arbitration operates similar to when applied in litigation. A party to an international arbitration has an obligation to prove the facts upon which he/she relies to support his/her claims. As

¹⁴ Schwartz & Seaman, *supra* note 6, at 437 (citing *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

¹⁵ *Jackson v. Virginia*, 443 U.S. 307, 315 (U.S. 1979) (“...by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard [of proof beyond a reasonable doubt]...”)

stated by the *Rompetrol* tribunal, it is “for the one party, or for the other, to establish a particular factual assertion, that will remain the position throughout the forensic process, starting from when the assertion is first put forward and all the way through to the end.”¹⁶ There are, however, times when the burden of proof shifts from the party who originally raised the allegations once a *prima facie* case is made.¹⁷ Shifting the burden of proof is a solution giving rise to debate because: (i) it means a departure from the general rule stated above and (ii) requiring *prima facie* evidence of corruption represents the lowest standard of proof and, accordingly, considerably relieves the alleging party of its evidentiary obligations.

However, shifting the burden of proof may play a determinative role in the hands of an arbitral inclined to maintain a robust stance against corruption. By placing the burden of proof upon the accused, it is possible to overcome many challenges in proving corruption. Because the accused party is in a better position to refute corruption allegations and prove not only its innocence, but also the legitimate

¹⁶ The *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award of 29 April 2013 para. 178. There are also other cases where tribunals disapproved of the idea of burden shifting. See Carolyn B. Lamm, Brody K. Greenwald & Kristen M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29(2) ICSID Review 328, 336 (2014) (citing Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award para. 147-8 (23 April 2012) (“[I]n the absence of applicable rules in the BIT, ‘[i]nternational arbitration is not an inquisitorial system where the Tribunal establishes the facts for a denouncing party, nor a system where it is sufficient to make a *prima facie* case relying on the opponent to rebut that case.’”))

¹⁷ ICC tribunals espoused a supportive approach in this regard. For instance, in ICC Case No. 6497, the tribunal has shifted the burden of proof to the other party as soon as *prima facie* case is established by the party raised corruption allegations. There are also ICSID tribunals that have approved the concept of burden shifting in numerous cases; however, there is no ICSID case yet where the burden shifted to the other party in face of alleged corruption. For some of ICSID cases where the burden shifted to the other party see Lamm, Greenwald & Young, *supra* note 16, at 335 (“... Tradex Hellas SA v. Republic Albania, Middle East Cement Shipping and Handling Co SA v. Arap Republic of Egypt, Marvin Roy Feldman Karpa v. The United Mexican States, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania, Alpha Projektholding GmbH v. Ukraine, and Señor Tza Yap Shum v. The Republic of Peru.”)

nature of the agreement by furnishing evidence such as personal qualifications, performance of contractual duties, and explanation as to why a large amount of commission may have been required for performance.

Although there is debate regarding shifting the burden of proof to the accused, there is no controversy in applying of the burden of proof in international arbitration.

However, it is impossible to reach the same conclusion for the standard of proof's application in international arbitration because the standard of proof has not yet evolved into a uniformly applied rule.

Unfortunately, international arbitration conventions, national arbitration laws, arbitration institutions' rules and decisions of arbitral tribunals all lack general rules or principles pertaining to the standard of proof. Therefore, when suspicion of corruption requires further inquiry, it is not clear what standard of proof arbitral tribunals should apply. On the one hand, this absence of regulation gives arbitral tribunals leeway when weighing submitted evidence, but on the other hand, it unfortunately brings both ambiguity and unpredictability.

This ambiguity manifests in modern cases where tribunals apply *their* standard of proof when corruption allegations arise. Approaches to the standard of proof vary, from one end of the spectrum: "preponderance of evidence," to the other end of the spectrum: "beyond a reasonable doubt," with "clear and convincing evidence" in between. Consequently, these shifting burdens detract from the critical goal of investigating corruption. Absent a universal guideline, arbitral tribunals will continue to traverse the standard of proof labyrinth.

a) Laws and Rules Applicable to the Burden of Proof and Standard of Proof

When an arbitral tribunal's suspicions justify further inquiry into corruption allegations, the first step is to determine which laws and rules are applicable to the burden of proof and the standard of proof.

While there is some guidance on how to apply the burden of proof,¹⁸ there is no regulation clarifying the standard of proof. One commentator noted that, “international arbitration conventions, national arbitration laws, *compromis*, arbitration rules and even the decisions of arbitral tribunals are almost uniformly silent on the subject of the standard of proof.”¹⁹ Furthermore, national court judgments and commentaries also fail to provide sufficient guidance.²⁰

When examining arbitral awards, it is clear that laws and rules applicable to the burden of proof and standard of proof are generally not at the center of attention. Precedent shows that where corruption allegations are absent, arbitrators rely on established facts, rather than the burden of proof and standard of proof. In other words, decisions are rendered without reference to rules of evidence. Rather, they are grounded upon evidence submitted by the parties. Therefore, the burden of proof and standard of proof are not often discussed.

However, corruption allegations make the burden of proof and the standard of proof focal by virtue of illegality impairing public interest. Notwithstanding this

¹⁸ Article 27 of the UNCITRAL Model Law (“Each party shall have the burden of proving the facts relied on to support its claims or defense.”);

¹⁹ Robert Pietrowski, *Evidence in International Arbitration*, 22(3) *Arbitration International* 373, 379 (2006).

²⁰ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* VOL. II 1857.

importance, there is complete silence on the law(s) applicable to the standard of proof. Nevertheless, there are proffered suggestions to aid arbitral tribunals decide several topics such as: (i) the parties' choice of law; (ii) The law of the *lex arbitri*; (iii) the law of the place of the enforcement; (iv) general principles of law; and (v) mandatory rules.

One view suggests that the burden of proof and standard of proof rules generally coincide with substantive legal rules.²¹ Accordingly, the standard of proof reflects the value of a claim. Therefore, the law applicable to the substance of the dispute should also apply to the burden of proof and the standard of proof. However, there are other scholars propound that applicable procedural rules and law should govern the standard of proof.²²

Further, BORN suggests that the arbitral tribunal ought to allocate the burden of proof and the standard of proof according to its assessment of the espoused applicable substantive law and procedures. Accordingly, the tribunal isolates itself from being required to apply the burden of proof and the standard of proof rules of any specific jurisdiction, and consequently, will be able to modify its own rules.²³

Although there is no specific regulation relating to the law applicable to the standard of proof, for cases involving sensitive allegations, such as corruption and its modalities (*e.g.* bribery, fraud), a higher standard of proof should apply by virtue of

²¹ *Id.* at 1858.

²² Florian Haugeneder & Christoph Liebscher, Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Arbitration Yearbook 2009*, (C. H. Beck, Stämpfli & Manz 2009) pp. 539, 547.

²³ BORN, *supra* note 20, at 1858.

the seriousness of the allegations.²⁴ This view is best summarized by Judge Higgins: “the graver the charge the more confidence must there be in the evidence relied on.”²⁵ However, this recommendation is mere persuasive and not binding. A unique feature of arbitration is that arbitral tribunals have inherited discretion and, accordingly, have freedom to determine which standard of proof is needed. Therefore, arbitral tribunals may develop their own rules with respect to the applicable standard of proof without referencing national law. Notwithstanding this freedom, arbitral tribunals must emphasize due process in their proceedings and parties must be treated fairly and equitably.

b) The Burden of Proof and Standard of Proof in International

Arbitration Practice

As far as laws applicable to the burden of proof and the standard of proof are concerned, there is no guidance conducting arbitral tribunals to the appropriate standard of proof to be applied when corruption allegations arise. Thus, arbitral tribunals use their discretion to determine this standard, unless the parties integrate a provision into their contract relating to the applicable standard of proof. However, it is uncommon for parties to incorporate an agreement as to the standard of proof in their contract.

²⁴ *Id.* (“In some national legal systems, certain allegations require more convincing evidence than others. For example, allegations of wrongdoing, particularly serious wrongdoing such as criminal acts, fraud, corruption and the like, require more convincing evidence than other facts.”)

²⁵ The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award of 29 April 2013 para. 182 (citing Separate Opinion of Judge Higgins in the Oil Platforms Case (Islamic Republic of Iran v. United States of America))

Arbitral precedent reflects a notable bifurcation amongst tribunals where corruption allegations are raised. Interestingly, this discrepancy is similarly seen in scholarly debate.

Some commentators propound that, because of the serious implications involving allegations of corruption and bribery, the burden of proof should be on the party raising the allegation. These same commentators also advocate that a heightened standard of proof should apply, such as “clear and convincing evidence” or “beyond a reasonable doubt.”²⁶

In contrast, other scholars propose that arbitral tribunals should require the claiming party to satisfy a lower standard of proof, or a “balance of probabilities” (“preponderance of the evidence”).²⁷

Notably, because corruption occur in obscurity and rarely leave clues, it might prove useful to espouse the Civil Law approach and appeal to the “conviction intimate (inner conviction)” standard. Accordingly, attention should be paid to “circumstantial evidence” that convincingly validates the existence of corruption without needing to engage in the debate regarding the applicable standard of proof.

Here, it is useful to assess each diverse trend autonomously within the context of relevant arbitral awards. Therefore, the next few sections are devoted to differentiate the “heightened standard of proof,” the “lower standard of proof,” and the “conviction intimate (inner conviction).”

²⁶ Duncan Speller & Kenneth Beale, *Arbitration and Bribery: Open Questions* 5 (Jan. 30, 2012), <http://www.cdr-news.com/categories/expert-views/arbitration-and-bribery-open-questions>.

²⁷ *Id.* at 6.

i) The Heightened Standard of Proof

The heightened standard of proof, also referenced as “clear and convincing” or “beyond a reasonable doubt,” is applicable when a rigorous standard of proof is needed to tackle the “more astonishing” party allegations. Thus, corruption, particularly bribery, is deemed as conduct *contra bonos mores* that requiring application of the heightened standard of proof.

Another reason arbitral tribunals appeal to the heightened standard of proof is deterrence. The heightened standard deters parties from arguing meritless claims of corruption allegations. The incentive behind raising such claims is to avoid contractual obligations and have the underlying contract declared null and void.²⁸ Particularly within the context of investment treaty arbitration, corruption allegations are an attractive pleading used by State parties as a complete defense.²⁹ However, this heightened standard dissuades parties from pleading foundationless claims due to the challenge of meeting its attached burden.

²⁸ ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 103 (2004).

²⁹ International Thunderbird Gaming Corporation v. The United Mexican States, NAFTA (UNCITRAL Rules), Separate Opinion of Thomas Wälde paras. 118 & 147 (1 December 2005) (“Insinuation without the readiness to come forward and have a substantiated allegation properly debated and tested before the tribunal is a poisonous way to conduct litigation. It has become more and more frequent in investment arbitration as both claimants and defendants raise such hints, without being ready to submit them to a full and fair trial. Tribunals should actively discourage this tactic and ensure it plays no role, directly or indirectly, in their deliberation...Otherwise, ..., a signal is sent out to respondent governments to insinuate corruption as a standard defense technique; it is persuasive and effective, without having to stand up to the proper scrutiny of a full and proper litigation debate.”)

One recent case where the tribunal applied the heightened standard of proof is *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13).³⁰ In this case, the investor raised corruption allegations. Unsurprisingly, these claims became the center of attention. The facts of this case are summarized below.

Incorporated in the United Kingdom and certified as a foreign investor in Romania, EDF acted as an investor. EDF's investment consisted of its participation in two joint venture companies with Romanian entities owned by the Government: E.D.F. ASRO S.R.L. (hereinafter ASRO) and SKY SERVICES (ROMANIA) S.R.L. (hereinafter SKY). The former was in charge of renting commercial and retail outlets for duty-free store operations,³¹ while the latter's objectives were to provide in-flight duty-free services on board, transportation services at the airport, and construction and operation of a transit hotel at the Otopeni Airport.³²

In 2002, a contract with one of ASRO's duty-free stores in Otopeni Airport, expired. Subsequently, EDF, as sole shareholder of ASRO, attempted to exercise its right to extend the duration of the ASRO's contract to maintain operations in Otopeni Airport. C.N. Bucurest Aeroport Otopeni (hereinafter AIBO) disputed ASRO's request for extension and the court upheld challenge.³³ When the lease agreement expired, ASRO was made to leave its premises at the Airport.

³⁰ *EDF Services Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009. The arbitral tribunal was composed of Professor Piero Bernardini (President), Mr. Arthur W. Rovine, and Mr. Yves Derains.

³¹ *Id.* at 11-12.

³² *Id.* at 13.

³³ *Id.* at 12.

Then, on September 5, 2002, the Romanian Government enacted Government Emergency Ordinance No. 104 (GEO 104) to regulate duty-free services within airports.³⁴ This effectively terminated ASRO's, particularly the sole shareholder EDF's, duty-free licenses. GEO 104 resulted in the closure of ASRO's duty-free operations in Constanta and Timisoara Airports and the discontinuance of the duty-free operations at the Otopeni Airport.³⁵

Next, EDF filed a request for arbitration to ICSID, contending that Romania had not complied with its obligations under the U.K.-Romania BIT. In terms of particular BIT violations, EDF stated that the bribe request from the officials of host-State Romania breached the fair and equitable treatment standard under the BIT and, additionally, other actions taken by the host-State constituted unreasonable and arbitrary measures.³⁶

In its submissions, EDF contended that the underlying reason Romania changed its policy regarding the duty-free businesses, particularly towards the investor itself, arose from the investor's non-compliance with bribery demands from senior Romanian Government officials.³⁷ Further, EDF mentioned an alleged meeting that took place between Mr. Henrique Weil, the chairman and Chief Executive Officer of EDF, and Mr. Sorin Tesu, Chief of Cabinet to Prime Minister Nastase, in

³⁴ *Id.* at 13.

³⁵ *Id.* at 13.

³⁶ *Id.* at 26-27.

³⁷ *Id.* at 16.

the parking lot of the Hilton Hotel. EDF claimed that the meeting ended after Mr. Weil refused to pay a bribe of US\$ 2.5 million.³⁸

EDF asserted that, on October 19, 2001, Mrs. Liana Iacob, State Secretary under Prime Minister Nastase, made a second bribery request on behalf of Prime Minister Nastase. The request was made during a private conversation in Bucharest to Mr. Marco Katz, the logistics and operational director of ASRO. When Mr. Katz briefed the CEO on the bribery request, he was told to refuse the request.³⁹ The alleged refusal of the bribery request was followed by “a concerted attack on EDF’s business in Romania[,] resulting in the total loss of its operation in the country.”⁴⁰

When the CEO of EDF learned these facts, and saw there was no chance to have the contract extension granted, he chose to make public the alleged bribe solicitation in the German newspaper *Die Welt*.

Naturally, Romania denied all allegations on the grounds of numerous decision makers’ involvement at various levels relating to the extension of the claimant’s contract and approval of the law GEO 104. From Romania’s point of view, EDF could not submit any reliable evidence that would prove that those persons “were aware of, let alone influenced by, alleged bribes solicited by the Prime Minister’s staff members.”⁴¹ Furthermore, Romania noted that after the publication of the article in the German newspaper, the Romanian Anti-Corruption Authority

³⁸ *Id.* at 17.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 37.

(hereinafter DNA) launched an investigation relating to the bribery allegations and found that there was insufficient evidence to substantiate the CEO's claims.

In the face of these corruption allegations, the arbitral tribunal placed the burden of proof upon the claimant investor under the general rule *actori incumbit probatio*, and required the claimant to bring "clear and convincing evidence" to substantiate corruption allegations:

*"Corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption."*⁴²

In case *sub judice*, the tribunal espoused a perplexing approach to handle the corruption allegations. In paragraph 221, the tribunal acknowledged the challenges of showing corruption, but the same tribunal brushed this acknowledgment aside by setting the level of the standard of proof high.

⁴² *Id* at 64 (emphasize added). A similar unsavory reasoning for the adoption of a high standard of proof can be seen in *Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan*, ICSID Case No. ARB/07/14, Award of 22 June 2010 paras. 422-424 ("Corruption, if found, would constitute a grave violation of the standard of fair and equitable treatment... The Tribunal emphasizes that corruption is a serious allegation, especially in the context of the judiciary. The Tribunal notes that both Parties agree that the standard of proof in this respect is a high one.... *The Tribunal is aware that it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. However, the Tribunal considers that this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption.... It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption.*") (Emphasis added).

To fulfill the standard of proof requirement, the claimant presented to the tribunal an array of evidence. There were two testimonies: one by Mr. Weil and the other by Mr. Marco Katz, who encountered the bribery solicitations in both a parking lot and a living room.

However, the tribunal discarded Mr. Katz's testimony. He initially denied having any knowledge of the person who solicited the bribe when questioned by the DNA in 2002. However, in 2006, he recanted this denial and stated that bribery solicitation did in fact occur according to the information shared with him by Mr. Weil.

Therefore, the tribunal found that Mr. Katz's testimony was not "clear and convincing." It constituted hearsay and, accordingly, was dubious. Additionally, although Mr. Katz claimed he wrote an email to Mr. Weil pertaining to the bribe solicitation made by Mrs. Iacob, he could not "confirm to the DNA whether he had actually written and sent the email in question".⁴³ Further, Romania presented an expert report finding the message to be manipulated.

In another attempt to substantiate the bribery allegations, the claimant submitted "an audio tape, with the relevant transcript, allegedly recording the conversation between Mr. Katz and Ms. Iacob during the meeting on October 19, 2001...in the course of which the bribe request was said to have been repeated by

⁴³ *EDF Services Limited, supra* note 30, at 66.

Mrs. Iacob”.⁴⁴ The tribunal declined to take the evidence into consideration due to a lack of authenticity.

Following the tribunal’s refusal to entertain the investor’s evidence, an inquisitive mind may wonder, “how the investor could have proved the bribery solicitations, particularly the conversations in a parking lot and a living room?”

Romania also proffered two witnesses to the tribunal: Mr. Tesu, who directed the bribe request to Mr. Weil in the parking lot and Mrs. Iacob, who asked Mr. Katz about the bribe in a living room. Ironically, the tribunal applied the same “clear and convincing evidence standard” to Romania. After both witnesses vehemently denied the bribery allegations, the tribunal stated: “Respondent’s witnesses’ denials were also not clear and convincing.”⁴⁵

Thus, the investor’s exhibition of corruption was more probable than not. In other words, the investor established a *prima facie* corruption case. Therefore, it was possible for the tribunal to shift the burden of proof to Romania and require the accused government officials to provide evidence to discredit the bribery allegations. Furthermore, the tribunal could have appealed to “drawing adverse inferences” in the presence of non-compliance, exercised by the accused government officials. However, the tribunal did not prefer (want) to follow the suggested solution and declared that the investor “ha[d] not shouldered its burden of proof with respect to its allegation of a bribery solicitation by Respondent”.⁴⁶

⁴⁴ *Id.* at 66.

⁴⁵ *Id.* at 67.

⁴⁶ *Id.* at 72.

Next, in addition to investment arbitration, the heightened standard of proof found its way into commercial arbitration. One cornerstone commercial arbitration case where the heightened standard of proof applied is the *Westinghouse* case.⁴⁷

In this case, the arbitral tribunal engaged in a comprehensive assessment relating to the applicable level of the standard of proof. The issue that the defendant host-State raised was whether bribery of President Marcos procured Consultancy and Project Contracts concluded between Burns & Roe and Westinghouse with the National Power Corporation of Philippines.

First, the tribunal had to determine the law that would control the level of the standard of proof. The tribunal delved into applicable law from both Pennsylvania and New Jersey in conjunction with the law of the Philippines as the place of performance. The tribunal's conclusion was that the rules of evidence under all the applicable laws stipulated essentially the same level of the standard of proof.⁴⁸

Under all three applicable laws, the general standard of proof for civil actions was “a preponderance of evidence.”⁴⁹ However, the tribunal concluded that a higher standard of proof should apply for bribery under both the United States' law and the Philippines' law. The tribunal stated:

“However, in the Philippines and in the United States, fraud in civil cases ‘must be proved to exist by clear

⁴⁷ ICC Case No. 6401 (Westinghouse International Projects Company, Westinghouse Electric SA, Westinghouse Electric Corporation, and Burns & Roe Enterprises, Inc. v. National Power Corporation, The Republic of Philippines, Preliminary Award, December 19, 1991, in Mealey's International Arbitration Report, Vol. 7, Issue 1, January 1992, Section B.)

⁴⁸ SAYED, *supra* note 28, at 103.

⁴⁹ *Id.* at 104 (“The party having the burden of persuasion must establish the facts on which it relies by ‘preponderance of evidence.’ In other words, it must have the ‘superior weight of evidence’ and establish that its version of the facts ‘is more likely true than not true.’”)

and convincing evidence amounting to more than mere preponderance, and cannot be justified by a mere speculation. This is because fraud is never lightly be presumed...’ Bribery is a form of fraud and must be established by ‘a clear preponderance of the evidence...’ Similarly, in Pennsylvania fraud must be proven by ‘clear, precise and convincing evidence.’”⁵⁰

Consequently, the tribunal required the Defendant State to introduce direct evidence to satisfy the clear and convincing evidence standard while subordinating circumstantial evidence despite having access to substantial amounts of documents. On closer inspection, these documents revealed Westinghouse’s awareness of the close relationship between Disini and President Marcos when Disini was appointed as an intermediary.⁵¹ However, the U.S. District Court for the District of New Jersey did not agree with the tribunal on the applicable standard of proof. From the Court’s point of view, the application of a higher standard of proof than one that would apply in the courts was not feasible despite the evidence being clear that the agent’s commission was likely used to bribe public officials.⁵²

⁵⁰ *Id.*

⁵¹ *Id.* at 115 n.352 (“In *Westinghouse* the arbitral Tribunal had access following discovery procedures performed in the US, to a considerable amount of evidence and materials, including contemporaneous Westinghouse’s internal notes and minutes of meetings in which Westinghouse officials were discussing the reasons for choosing to deal with the intermediary Disini. The documents also reflected the degree to which Westinghouse was knowledgeable about the close relation between Mr. Disini and President Marcos: ‘[W]estinghouse discovered that Disini and Marcos were close friends and frequent golf companions who came from the same province and that Disini’s wife was Imelda Marcos’ first cousin and personal physician.’”)

⁵² Vladimir Khvalei, *Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption*, 24 ICC Bulletin Tackling Corruption in Arbitration 15, 17 (2013).

Yet another commercial case illustrating the heightened standard of proof is often regarded as one of the most controversial arbitration cases ever reported.⁵³ Here, two separate tribunals rendered two distinct arbitral awards. However, both tribunals went one step further on the level of the standard of proof applicable to the bribery allegations and chose to apply a level parallel to the criminal level: “beyond a reasonable doubt.”

In ICC Case No. 5622, the defendant, Omnilun de Traitement et de Valorisation (hereinafter OTV), presented an offer to Algerian authorities inviting certain work. Then, the defendant entered into a contract with the claimant, Hilmarton Ltd., tasking them with “giving legal and fiscal advice to defendant and coordinate its subcontractors, thereby helping defendant obtain the contract with the Algerian authorities.”⁵⁴

The defendant contracted with the Algerian authorities and paid the claimant half of the agreed upon fee. However, the defendant declined to pay the balance due to alleged deficiencies in the claimant’s performance. Thereafter, the claimant commenced arbitration through the ICC arbitral clause in the contract.

The main question before both tribunals was whether “the conclusion of the contract between defendant and the Algerian authorities depended on bribes paid by the claimant.”⁵⁵ It is fair to say that the second arbitrator, who earned appointment

⁵³ Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A., ICC Case No. 5622 (1988). *See also* Broker v Contractor, Final Award, ICC Case No. 5622 (1988) in Albert Jan van den Berg (ed), 19 Yearbook Commercial Arbitration 105-123 (1994).

⁵⁴ *Id.* at 105.

⁵⁵ *Id.* at 111.

following resignation of the first arbitrator (who resigned due to the vacatur of his award), applied almost identical facts as the first arbitrator.

There were indeed facts fostering corruption suspicions. First, the consultant was unable to prove how the contractual duties were performed. In fact, one of the claimant's witnesses said that,

“when [the representatives of Algeria] were in France, ‘they were taken care of’, the correspondence between the former General Manager of defendant and claimant ambiguously mentions payments ‘which would have been made by defendant directly to local representatives’, payments which were to be deducted from claimant’s fee.”⁵⁶

Further, nurturing corruption suspicion was a high commission fee, which could have been treated as an indication of bribery.

Aside from these facts, there are some other interesting characteristics meriting notice include:

“Claimant’s file, which could have provided us with many interesting elements, has been stolen...and the people who played a key role within the defendant company have been dismissed. The parties have not called them as witness, which is, to say the least, strange. Apparently, one of the key witnesses was traumatized by his imprisonment in Algeria!”⁵⁷

However, from the first arbitrator’s point of view, this indirect evidence was insufficient to meet the threshold level of “beyond a reasonable doubt” even if the evidence could prove bribery.

⁵⁶ *Id.*

⁵⁷ José Rosell & Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof*, 15(4) *Arbitration International* 329, 343 (1999).

Interestingly, the claimant failed to prove how it performed its legal and fiscal advisor obligations generating from the contract. This fact was largely overlooked.

Following this *faux pas*, it is worth mentioning Yves Derains' belief that "the least dangerous, and perhaps the simplest way, for arbitrators to approach the problem is not to approach the problem from the point of view of illicitness but rather from the point of view of the performance of contractual obligations."⁵⁸ Summarily, in arbitrations involving corruption allegations, the initial burden of proof will fall upon the claimant who must show how he or she performed his or her contractual obligations. Then, the defendant has a duty to prove bribery allegations under a high standard of proof.

Clearly, where parties raise corruption allegations, arbitral tribunals seek certainty and thus solicit clear and convincing evidence in both international commercial arbitration and investment treaty arbitration. Therefore, the standard of proof is generally set high, as seen, not only in the aforementioned cases, but also in *Oil Fields of Texas, Inc v. Islamic Republic of Iran*;⁵⁹ *Dadras International v. Islamic Republic of Iran*;⁶⁰ *Westacre Investment Inc. v. Jugohimport-SDPR Holding Co. Ltd.*

⁵⁸ *Id.* at 334.

⁵⁹ Haugeneder & Liebscher, *supra* note 22, at 552 (citing *Oil Fields of Texas, Inc. v. Islamic Republic of Iran*, Case No. 43, Award of 8 October 1986 ("The burden is on NIOC to establish its defense of alleged bribery in connection with the Lease Agreement. If reasonable doubts remain, such an allegation cannot be deemed to be established. [...]The tribunal therefore concludes that there is not sufficient evidence of bribery in connection with the Lease Agreement[...]"). See *Oil Fields of Texas, Inc. v. The Government of the Islamic Republic of Iran, The National Iranian Company (NIOC) and others*, IUSCT Case No. 43 (258-43-1), Award of 8 October 1986, 12 Yearbook Commercial Arbitration 287-291 (1987).

⁶⁰ *Id.* (citing *Dadras International v. Islamic Republic of Iran*, Case Nos. 213/215, Award of 7 November 1995 ("The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as 'clear and convincing', although the Tribunal deems that precise terminology is less important than the enhanced proof requirement that is expressed."))

and Others;⁶¹ and in *African Holding Company of America, INC v. République Démocratique du Congo*;⁶² *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*;⁶³ *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*.⁶⁴

Importantly, in some cases where the tribunals applied the heightened standard of proof, there appears to be hesitance in their discussions on whether the heightened standard is in fact proper. To illustrate, in the *Himpurna* case,⁶⁵ the arbitral tribunal applied a heightened standard of proof by seeking clear and convincing evidence, while simultaneously noting:

“The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as

⁶¹ *Westacre v. Jugoimport*, ICC Case No. 7047 (1994), Award, 28 February 1994, *ASA Bulletin*, Vol. 13 (1995) (“If the claimant’s claim based on the contract is to be voided by the defense of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere ‘suspicion’ by any member of the arbitral tribunal [...] is entirely insufficient to form such a conviction of the arbitral tribunal.”)

⁶² ALOYSIUS P. LLAMZON, *CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION* 172 (2014) (“While the tribunal declared corruption a ‘very serious matter’, a finding of corruption required ‘strong evidence’, such as evidence resulting from criminal prosecution in States where corruption is a criminal offence.”). *See also African Holding Company of America v. La République Démocratique Du Congo*, ICSID Case No. ARB/05/21 para. 52, available at <http://www.trans-lex.org/382300/pdf/> (“Le Tribunal est disposé à considérer toute pratique de corruption comme une affaire très grave, mais exigerait une preuve irréfutable de cette pratique, telle que celles qui résulteraient de poursuites criminelles dans les pays où la corruption constitue une infraction pénale. En revanche, si PwC s’était rendue compte dans son examen des comptes que les contrats auraient pu avoir été accordés à SAFRICAS à des prix dépassent les prix du marché, il est fort probable que les montants déterminés comme étant dus par RDC auraient été réduits à due conséquence.”)

⁶³ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 709 (As to the substantiation of the alleged criminal conspiracy, the arbitral tribunal sought clear and convincing evidence.)

⁶⁴ *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para. 142 (The tribunal sought proof “sufficient to exclude any reasonable doubt” in order to evince bad faith, while preferring to bypass corruption allegations.)

⁶⁵ *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, Final Award of 4 May 1999 in Albert Jan van den Berg (ed), 25 *Yearbook Commercial Arbitration* 13-108 (2000). For other arbitral awards suffering from internal contradictions, *see also Liman Caspian Oil BV and NCL Dutch Investment BV v. Kazakhstan*, ICSID Case No. ARB/07/14, Award of 22 June 2010; *EDF Services Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009.

one which operates in a vacuum, divorced from reality. The arbitrators are well aware of the allegations that commitments by public sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption. But such grave accusations must be proven [by clear and convincing proof].”⁶⁶

As stated by the *Himpurna* tribunal, corruption greatly harms millions of people by retarding economies, undermining government services, and feeding inequality and injustice. Although it is possible to detect corruption’s repercussions, “it is notoriously difficult to prove it, since, typically, there is little or no physical evidence.”⁶⁷

When tribunals apply a higher standard of proof, arbitrators propound that there are reasons and factors encouraging arbitral tribunals to apply this heightened standard. These reasons and factors include: (i) the gravity of the corruption allegations; (ii) the ease in which to raise corruption allegations and consequently the arbitrating parties’ tendency to take advantage; (iii) the serious legal consequences of finding corruption;⁶⁸ and (iv) within the context of investment arbitration, diplomatic

⁶⁶ *Himpurna California Energy Ltd.*, *supra* note 65, at 43-44.

⁶⁷ *EDF Services Limited*, *supra* note 30, at 64.

⁶⁸ *LLAMZON*, *supra* note 62, at 236 (“Reading cases closely, it seems that adopting high standards of proof was motivated in part by the need to ensure that the serious consequences most commonly associated with corruption in international arbitration – contract invalidation, the unenforceability of the contract, the lack of jurisdiction, all acting to preclude any assessment of host State wrongdoing – would apply sparingly.”)

concerns of arbitrators may unfortunately be a reason to set the standard of proof level high.

Applying a heightened standard of proof is analogous to gambling. The tribunal wagers not only the legality of arbitration, but also the enforcement and recognition of the award through intent to avoid corruption allegations' malevolent uses. First, the heightened standard of proof may cause "judicialization" of arbitration. Setting the bar high for the standard of proof makes proving corruption almost impossible and further leaves no option but to dismiss the allegation due to a lack of sufficient evidence. As a result, the reviewing court may take it upon itself to scrutinize the evidence of corruption, notwithstanding the award's supposed finality and binding power intended to be free from judicial attack. This result is inevitable in jurisdictions where public policy principle is construed in a broader context and, consequently, courts have leeway to review probable errors regarding the illegality finding of the tribunal. In addition, in some jurisdictions, there are arbitration statutes that bestow reviewing courts with discretion to vacate an award in the presence of a mistake in the evidentiary ruling of the tribunal. For example, Section 10 (a) (3) of the U.S. Federal Arbitration Act states that, courts in the United States may make an order to vacate an award on the grounds of the tribunal's refusal to hear evidence deemed pertinent and material to the controversy.

Second, a high level standard may cause arbitration to become a venue where demands originating from illicit contracts are enforced. Arbitration is already susceptible to this kind of exploitation. Because arbitration has both a contract-based

structure (where a substantial amount of the arbitral proceeding's control to the parties is conveyed) and fails to provide arbitrators with proper investigative tools, arbitration is prone to abuse. Amalgamating this with the difficulties of proving corruption, arbitration may become a shelter for illicit contractual demands.

To avoid these results, “arbitrators need to emerge from their ivory towers, recognize how difficult an allegation of corruption can be to substantiate and show procedural flexibility to take these difficulties in proving corruption into account.”⁶⁹ However, this criticism does not mean that arbitrators have always failed to exercise a less rigid evidentiary method that recognizes the challenge in proving corruption. Notably, there are arbitral tribunals recognizing difficulties in evidencing corruption and, accordingly, deviating from the mainstream. Such tribunals do not establish the level of the standard of proof in accordance to the gravity of the misconduct. Unfortunately, by adopting deviating approaches to the standard of proof, arbitral tribunals risk divergence amongst tribunal members, as evidenced in the *Siag* case.⁷⁰ In this case, the Arab Republic of Egypt claimed fraud and the arbitral tribunal placed the heightened standard of proof upon the State party. Professor Francisco Orrego Vicuña dissented from the rest of the tribunal by stating:

“...arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized. The facts of this case,

⁶⁹ *Id.* at 236 n.58.

⁷⁰ Waguilh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15.

difficult as they are to establish with absolute certainty...”⁷¹

Showing yet another manner in which to apply the standard of proof, Lord Hoffmann, in *Re B (Children)*, propounded implementing a single standard of proof (*balance of probabilities*) in civil cases, particularly for those where the allegation has a criminal facet, such as fraud. According to Lord Hoffmann, “the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.”⁷²

Next, the House of Lords, in another case from England, elaborated this single standard of proof set forth by Lord Hoffmann. Pursuant to the House of Lords, the application of this standard should be founded upon flexibility, which lies “...in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”⁷³ Consequently, the specific circumstances dictating the required cogency of evidence include the seriousness of the allegation, the inherent likelihood of the allegation’s occurrence, and, if proven, the legal

⁷¹ Siag, Dissenting Opinion of Professor Francisco Orrego Vicuña 4.

⁷² In re B (Children) (FC), [2008] UKHL 35, para. 13.

⁷³ In Re CD (Original Respondent and Cross-Appellant) (Northern Ireland) [2008] UKHL 33 para. 27 (citing R (N) v. Mental Health Review Tribunal (Northern Region) [2006] QB 468, 497-8 para. 62 (“Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”))

repercussions that will emerge from the allegation.⁷⁴ The House of Lords specifically stated:

“[I]n some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann’s example of the animal seen in the Regent’s Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact.”⁷⁵

In sum, the House of Lords favors adopting a sole civil standard of proof on the balance of probabilities that is adaptable in its execution. The adaptability of this standard, however, does not purport to adjust the degree of probability in accordance to the seriousness of the allegation, but rather, mandates submission of more convincing evidence. In light of this standard, to conclude whether corruption is substantiated on a balance of probabilities, a court or tribunal needs to contemplate the submitted evidence and its cogency, in conjunction with the seriousness of corruption allegations, the repercussions of these allegations, the likelihood of the occurrence of corruption in the surrounding circumstances of the case, and the innate challenges in disclosing corruption.⁷⁶

⁷⁴ See also Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8(1) Asian International Arbitration Journal 1, 30 (2012); *In Re B (Children) (FC)*, *supra* note 72.

⁷⁵ *In Re CD*, *supra* note 73, at para. 28.

⁷⁶ Hwang & Lim, *supra* note 74, at 30 (citing Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25(1) ICSID Rev-FILJ 47, 53 (2010)).

In consonance with the House of Lords’ judgment, the arbitral tribunal in *Libananco*⁷⁷ departed from the “usual” approach and refused to amend the standard of proof in accordance to the seriousness of the claims. Here, the claimant requested that the tribunal heighten the standard of proof due to the respondent’s arguments resting upon the existence of “fraud or other serious wrongdoing.”⁷⁸ The tribunal did not honor the claimant’s demand because, from the tribunal’s point of view:

“In relation to the Claimant’s contention that there should be a heightened standard of proof for allegations of ‘fraud or other serious wrongdoing,’ the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that – the graver the charge, the more confidence there must be in the evidence relied on...this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has discharged.”⁷⁹

Undisputedly, corruption is a serious deviation from legality, and to correct this deviation, reliable and solid evidence is required. Further, applying the

⁷⁷ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award of 2 September 2011).

⁷⁸ *Id.* at 26.

⁷⁹ *Id.* at 29. In a similar vein, see also Jennifer M. Smith & Sara Nadeau-Séguin, *The Illusive Standard of Proof in International Commercial Arbitration* in *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series 134, 151 (2015) (citing Partial Award in the ICC Case No. 12732 (“[T]he standard of proof need not be, and should not be, weakened, nor that it need be or should be strengthened. The same standard of proof, namely one based upon the balance of probability, should be applied. That standard does not require ‘certainty’ or even ‘likelihood beyond a reasonable doubt.’ Nor does it require conclusive, direct evidence. It requires evidence, to be sure, but such evidence may be indirect or circumstantial, to the extent it is sufficient, in the context of the surrounding circumstances, to tip the balance of probability.”)); *X Firm v. Y Ltd.*, ICC Arbitration Preliminary Award of 9 October 2008, 29(4) ASA Bulletin 860, 866 (2011) (“Where a case involves an allegation of fraud, as in the present case, the more serious the allegation, the stronger the evidence must be that the fraud did occur before the Tribunal may establish, on the balance of probabilities, the occurrence of fraud.”)

heightened standard of proof may also be more convenient for arbitral tribunals to avoid undesirable repercussions, such as exploitation of corruption allegations, contract invalidation, unenforceability of the contract, and lack of jurisdiction.

However, it should be kept in mind that application of this standard may result in disregarding the hardships of proving corruption. Accordingly, not only could this leave room for corruption to take root in arbitration, but it could also result in arbitration developing “an unacceptable reputation for being ‘a soft touch’ on corruption and other forms of illegality.”⁸⁰

Therefore, in brief, even if there is an allegation of corruption, with concomitant serious legal repercussions, it does not necessarily mean that the level of the standard of proof should be high. Arbitrators must appeal to their wide discretion and investigate other alternatives, such as lowering the level of the standard of proof, gathering circumstantial evidence, and effectuating presumptions and inferences, rather than applying an arduous abstract standard.

ii) Lower Standard of Proof

When arbitrators apply varying standards of proof, the level applied commonly reflects that arbitrator’s own legal background, personal characteristics (such as experience, training, education), and of course applicable law (*e.g.*, law of *lex arbitri*, the law of an enforcement place, the law of the country where contract performance takes place). Based upon these experiences and characteristics, tribunals may prefer to reduce the level of the standard of proof. Further, some scholars believe

⁸⁰ LLAMZON, *supra* note 62, at 236 n.58.

that arbitral tribunals should stay connected to the balance of probabilities, or preponderance of the evidence, due to the challenges of proving corruption. There are some instances where the arbitral tribunal prefers to adhere to the “normal” standard of proof: the balance of probabilities or preponderance of the evidence, even when corruption allegations arise. However, these tribunals rely on particular circumstances to establish their awards.

First, ICC case of 1989 is an original illustration of a tribunal applying the “normal” standard of proof. Here, the dispute arose between an English offshore company (the claimant) and a Swiss company (the respondent). During the proceedings, the respondent alleged that the purpose of making the contract with the claimant was to bribe the respective state’s officials. The arbitrator, however, held that he could have invalidated the contract due to corruption if the respondent submitted “probative evidence of acts of corruption or of an intent to corrupt.”⁸¹

Another manifestation of a tribunal applying the “normal” standard of proof took place in the ICC Case No. 6497.⁸² The dispute erupted between a consultant from Liechtenstein and a contractor from Germany. Over a ten-year period, the consultant provided services to the contractor under “Basic Agreements” to obtain construction contracts in several countries, including one from the Middle East.⁸³

⁸¹ ICC Case of 1989, ICC DOSSIERS, ARBITRATION-MONEY LAUNDERING, CORRUPTION AND FRAUD 127.

⁸² ICC Case No. 6497, 24 Yearbook Commercial Arbitration 71-79 (1999).

⁸³ A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, 1 (2) TRANSNAT’L DISP. MGMT. 1, 34 (2006), www.transnational-dispute-management.com/article.asp?key=88.

Apart from “Basic Agreements,” the parties also entered into “Product Agreements” placing additional obligations and remuneration upon the consultant. Under one specific product agreement, the contractor promised to pay 33.33 percent commission. In this agreement, the services to be rendered by the consultant were specified.⁸⁴ When the contractor refused to make a payment in relation to one of the product agreements, the claimant initiated arbitration by virtue of the ICC arbitration clause integrated into the contract. Correspondingly, the contractor alleged that the underlying motive for making these contracts was to bribe officials.

Facing bribery allegations, the tribunal delineated the evidentiary process: the party alleging bribery had the burden of proof. If the evidence submitted by this party was not persuasive, the tribunal could place the burden of proof upon the other party under some circumstances. “If the other party does not bring such counter evidence, the arbitral tribunal may conclude that the facts alleged are proven (Article 8 of the Swiss Civil Code). However, such challenge in the burden of proof is only to be made in special circumstances and for very good reason.”⁸⁵

In this case, the tribunal ruled that, in light of the opposing party’s accusation of corruption and subsequent introduction of evidence relevant to the charge, the claimant might be required to bring evidence to counter that allegation. Thus, if the claimant failed to bring the evidence, the tribunal could rule exclusively by looking at the evidence it has and may declare that the motive under the contract was to bribe officials. It is evident that the tribunal did not favor the heightened standard of proof.

⁸⁴ *Id.* at 35.

⁸⁵ SAYED, *supra* note 28, at 105 (citing ICC Case No. 6497).

Another case where the lower standard of proof prevailed over the heightened standard of proof is the ICC Case No. 8891.⁸⁶ A consultancy agreement was made between a Swiss company (the claimant) and a French national (the respondent). Under the contract, the plaintiff was obligated to increase the price obtained by the defendant's two government contracts.⁸⁷ Classically, the classic circle came alive one more time. The defendant avoided making the payment and the plaintiff invoked the arbitration clause integrated into the contract. The defendant argued that the purpose of contract was corrupt.

Regarding the standard of proof, the tribunal followed a separate path from the tribunals that applied the heightened standard of proof. Not only did the tribunal acknowledge the difficulties of proving corruption, but it also took these difficulties into consideration while adopting the appropriate standard of proof. Accordingly, the tribunal prioritized clues, such as the agent's failure to submit proof of his activity, the short period of time of the consultancy contract (2.5 months), and a high contractual commission.⁸⁸ The tribunal specifically noted the agent's inability to document his activities and some witnesses' statements revealing that the claimant was responsible for ensuring money distribution.

In light of the totality of circumstances, the tribunal concluded that the object of the consultancy contract was, in fact, bribery. Thus, the consultancy contract was declared null and void.

⁸⁶ ICC Case No. 8891 (1998).

⁸⁷ Martin, *supra* note 83, at 49.

⁸⁸ *Id.* at 50.

This result is not to say that the high level standard of proof should never be used. However, these clues that the tribunal in the ICC Case No. 8891 reviewed proved helpful and resulted in lowering the standard of proof.⁸⁹ In conjunction with this case, it is also possible to see the adoption of this approach by the arbitral tribunal in the ICC Case No. 12990,⁹⁰ where the clues retained by the tribunal set the bar low for the proof of bribery.

This case involved an oil company (the claimant) and an African State (the respondent). The dispute arose from an agreement that was part of “a complex scheme of agreements governed by French law involving three oil companies (A, B and C) and an African State.”⁹¹

Here, the claimant sought payments per the agreement signed with the Defendant State government. However, the government that signed the agreement was overthrown at the end of a civil war and the subsequent government rejected the claimant’s demands and alleged that the agreement was void since it had been made under “abnormal circumstances to enrich corrupt government leader and was part of a set of specious contracts contrary to public policy.”⁹²

⁸⁹ Cecily Rose, *Questioning the Role of International Arbitration in the Fight against Corruption*, 31 (2) Journal of International Arbitration 183, 217.

⁹⁰ ICC Case 12990 Final Award of 2005, 24 ICC Bulletin Tackling Corruption in Arbitration 52-62 (2013) (The final award of the case was in both English and French. English version of the award can be found via the ICC Dispute Resolution Library at www.iccdrl.com)

⁹¹ *Id.* at 52.

⁹² *Id.*

The tribunal acknowledged that it is “extremely difficult, if not impossible, to prove the unlawful nature of a contract.”⁹³ Therefore, the level of the standard of proof was set low and the tribunal preferred to give primary consideration to existing clues. The indices taken into consideration were “lack of evidence, brevity of negotiations, unusual payment arrangements, disproportionately high remuneration, corruption endemic in country...”⁹⁴ These indices led the tribunal to reject the claimant’s claims since the underlying contract was declared null and void due to its illegal nature.

The lower standard of proof may help arbitral tribunals play an influential role in the fight against corruption because this level of standard of proof gives parties a better chance to substantiate their corruption allegations. Furthermore, with the application of the lower standard of proof, the tribunal solidifies the legitimacy of the award and award making-process and, accordingly, it minimizes the chance of judicial intervention. However, this level of standard of proof leads the corruption defense to be used in a cynical manner in both commercial and investment treaty arbitration and, therefore, poses a significant threat to the efficiency and effectiveness of the arbitral proceedings.

iii) Conviction Intimate (Inner Conviction)

Applying a heightened standard of proof inhibits proving corruption.

Commonly, arbitral tribunals conclude no corruption exists since the accusing party

⁹³ Christian Albanesi & Emmanuel Jolivet, *Dealing with Corruption in Arbitration: A Review of ICC Experience*, 24 ICC Bulletin Tackling Corruption in Arbitration 27, 33 (2013).

⁹⁴ *Id.* at 52.

could neither prove it “beyond a reasonable doubt” nor yield “clear and convincing evidence” displaying an act of corruption or corrupt intent. Unfortunately, the lower standard of proof also has limitations. A party seeking relief from contractual obligations can exploit the ease in which corruption may be invoked and impair the efficiency and effectiveness of arbitration.

Because of this perversion, it may be preferable to apply the European Continental tradition of “conviction intimate” or “inner conviction.” According to this tradition, the threshold standard is whether submitted evidence is sufficient to convince the judge or arbitrator of the existence of a fact. In other words, the inner conviction standard rests upon the answer to the question: was the evidence enough to persuade?

For instance, in the *Westacre* case,⁹⁵ the arbitral tribunal applied the inner conviction standard and held that,

“if the claimant’s claim is based on the contract is to be voided by the defense of bribery, the arbitral tribunal, as any state court, must be *convinced* that there is indeed a case of bribery. A mere suspicion by any member of the arbitral tribunal...is entirely insufficient to form such a conviction of the Arbitral Tribunal.”⁹⁶

Notably, the inner conviction standard is well rooted in sports arbitration. The Court of Arbitration for Sport (hereinafter CAS) jurisprudence shows that the CAS panels, regardless of the seriousness of the allegation to be proved, consistently invoke the inner conviction standard (or in the CAS version, “*personal conviction*” or

⁹⁵ *Westacre v. Jugoimport*, ICC Case No. 7047 (1994), Award, 28 February 1994, *ASA Bulletin*, Vol. 13 (1995)).

⁹⁶ *Martin*, *supra* note 83, at 42.

“*comfortable satisfaction*”). To illustrate, the CAS Panel in the *Bin Hammam* case relied upon the inner conviction standard in the face of bribery allegations raised by the Fédération Internationale de Football Association (hereinafter FIFA).⁹⁷

While determining the applicable standard of proof, the tribunal respected party autonomy and, accordingly, effectuated the parties’ agreement on the application of the FIFA Disciplinary Code (hereinafter FDC). Article 97 of the Code, entitled, “*Evaluation of Proof*,” dictates:

“(1) The bodies will have absolute discretion regarding proof. (2) They may, in particular, take account of the parties’ attitudes during proceedings, especially the manner in which they cooperate with the judicial bodies and the secretariat (cf. art. 110). (3) *They decide on the basis of the personal convictions.*”⁹⁸

By virtue of Article 97(3), the Panel proceeded to adopt the inner conviction standard. In particular, the Panel stated:

“Even if [Article 97] is not entitled “*standard of proof*”, its paragraph 3 contains, in the view of the Panel, a rule that plainly goes to the issue of standard of proof and which sets as the standard *the ‘personal conviction’ of the members of the Panel*. In this regard, the Panel notes that the consistent CAS jurisprudence has equated this standard to the standard of “*comfortable satisfaction*” standard in disciplinary proceedings...”⁹⁹

⁹⁷ CAS 2011/A/2625 Mohamed Bin Hammam v. Fédération Internationale de Football Association (19 July 2012).

⁹⁸ FIFA Disciplinary Code, available at <http://resources.fifa.com/mm/document/affederation/administration/50/02/75/discoinhalte.pdf> (2011) (emphasis added).

⁹⁹ *Mohamed Bin Hammam*, *supra* note 97, at 37 para. 153 (referring to CAS 2011/A/2426, Amos Adamu v. FIFA (“87. The Panel notes that, under Article 97 FDC, the Panel has a wide margin of appreciation and may freely form its opinion after examining all the available evidence. The applicable standard of proof is the ‘personal conviction’ of the Panel (in the French version ‘intime conviction’...). 88. The panel is of the view that, in practical terms, this standard of proof of personal conviction coincides with the ‘comfortable satisfaction’ standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish

CAS case law shows that the paramount factors motivating the Panels to employ the inner conviction standard are the challenges in proving corruption and confined powers of the investigating authorities of sports governing bodies. To exemplify, in the *Fenerbahçe Spor Kulübü v. UEFA* case, the CAS Panel particularly stated:

“...[T]he panel found that the application of the standard of comfortable satisfaction could also be justified because ‘*corruption is, by nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoing*’ ...”¹⁰⁰

As specifically indicated by the CAS Panels, the inner conviction standard has a potential to cope with obstacles originating from the concealed nature of corruption and limited investigative powers of the respective governing bodies. However, there is also a drawback accompanying this standard. It is unknown what precisely is necessary to convince or to reach the inner conviction. The foundation of the inner conviction is largely based on which approach the decision-maker will exercise when faced with the facts and submitted evidence under applicable law. By virtue of this

the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of ‘balance of probability’ but lower than the criminal standard of ‘proof beyond a reasonable doubt’... The Panel will thus give such a meaning to the applicable standard of proof personal conviction.”)

¹⁰⁰ CAS 2013/A/3256 *Fenerbahçe Spor Kulübü v. UEFA* para. 298 (11 April 2014) (citing CAS 2010/A/2172 *O. v. Union des Associations Européennes de Football (UEFA)* (18 January 2011)). See also CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec, Nikolec Zdraveski v. UEFA* para. 85 (15 April 2010) (“Taking into account the nature of the conduct in question and the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities, the Panel is of the opinion that cases of match fixing should be dealt in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, the UEFA must establish the relevant facts ‘to the comfortable satisfaction of the Court having in mind the seriousness of allegation which is made.’”)

subjectivity, there is no separate legal standard of proof for corruption.¹⁰¹ As a result, due to this subjectivity and lack of a “bright line” to employ, a heightened standard of proof may still determine the fate of corruption allegations.

Because the inner conviction standard seeks to persuade the fact-finder, circumstantial evidence, surrounding factors, and presumptions, all contribute to reaching the conviction intimate. In fact, circumstantial evidence and the inner conviction standard go hand-in-hand. In the absence of direct evidence, an arbitral tribunal may reach the conviction by collecting existing circumstantial evidence.¹⁰²

After considering the challenges inherent in gathering direct evidence of corruption, the inner conviction standard and the existing collaboration it has with circumstantial evidence, there appears an evident practicality in applying the inner conviction standard to better penetrate corruption in international arbitration. This is particularly relevant upon considering arbitral tribunals’ lack of authority to initiate a

¹⁰¹ Haugeneder & Liebscher, *supra* note 22, at 548.

¹⁰² See *Fenerbahçe Spor Kulübü*, *supra* note 100, para. 281 at 65 (“However, this being said, the Panel also notes that Swiss law is not blind vis-à-vis difficulties of proving [corruption] (“Beweisnotstand”). Instead, Swiss law knows a number of tools in order to ease the –sometimes-difficult– burden put on a party to prove certain facts. These tools range from a duty of the other party to cooperate in the process of fact finding, to a shifting of the burden of proof or to a reduction of the applicable standard of proof. The latter is the case, *if – from an objective standpoint – a party has no access to direct evidence (but only to circumstantial evidence) in order to prove a specific fact... In the case at hand, the Panel acknowledges that there is only circumstantial evidence available to UEFA to prove the facts it relies upon. In view of these difficulties of proving, the Panel is prepared to apply the standard of comfortable satisfaction to the case at hand.*”) (Emphasis added); Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award para. 303 (23 April 2012) (“For obvious reasons, it is generally difficult to bring positive proof of corruption. Yet, corruption can also be proven by circumstantial evidence.”); Aloysius Llamzon & Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in *Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series 451, 495 (2015) (“Several other tribunals have endorsed a flexible approach towards matters of evidence in cases where evidence is difficult to obtain, finding that indirect or circumstantial evidence may be sufficient for a party to discharge the applicable standard of proof. As one commentator has explained, ‘[i]nternational tribunals have, where a party has genuinely encountered problems beyond its control in securing evidenc, more frequently than not recognized its hardship.’”)

criminal investigation or to compel parties and the third parties to produce evidence.¹⁰³ Therefore, due to the powerful complement between the inner conviction standard and circumstantial evidence, this standard will be assessed in light of the cases where circumstantial evidence became determinative.

Critically, circumstantial evidence solely points out a particular fact to raise suspicion that the fact is more likely true than not. However, if additional circumstantial evidence is introduced, the arbitral tribunal will likely reach an inner conviction. Recently, cases showing the adoption of this method arise in both investment treaty and commercial arbitration. In these cases, tribunals rely on a collection of circumstantial evidence to determine the fate of corruption allegations.

First, the *Methanex* case's tribunal's approach exhibits a clear and enlightening example of reaching an inner conviction via circumstantial evidence. Methanex was a corporation formed under the laws of Alberta, Canada, that produced, transported, and marketed methanol,¹⁰⁴ a component of MBTE.

On March 25, 1999, Governor Gray Davis issued the 1999 Executive Order and prohibited the use of MBTE in the State of California by the end of 2002.¹⁰⁵

Following this prohibition, Methanex initiated the arbitration process against the

¹⁰³ It should be borne in mind that arbitrators are not equipped with the investigative tools that are used by courts and law enforcement forces. Public authorities can conduct researches, seize relevant evidence, question witnesses, require the third parties to submit evidence etc. On the other hand, arbitrators derive their authority from an arbitration agreement that is formed by the signatories. They do not have a power to compel a party to bring relevant evidence. Nor, they can appeal to force to recover documents or seize evidence. Furthermore, when arbitrators request evidence from third parties, third parties do not have to abide by the demand. However, they may ask state courts for assistance during the evidence gathering process.

¹⁰⁴ *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits dated 3 August 2005, available at <http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf>.

¹⁰⁵ *Id.* at Part III – Chapter A-10 paras. 21-22.

United States of America under Chapter 11 of the North American Free Trade Agreement (hereinafter NAFTA) and the UNCITRAL Arbitration Rules and sought US\$970 million plus interest and costs.¹⁰⁶

The claimant alleged that Canada produced 72 percent of the consumed methanol in that period and that the claimant was the largest supplier to the California methanol market.¹⁰⁷ Therefore, from the claimant's point of view, California's order was not only a discriminatory measure, but also tantamount to expropriation of its investment. In contrast, the United States argued that the ban upon MBTE was legitimate because of the environmental threat to both groundwater and drinking water.

Interestingly, the claimant alleged that Governor Davis's ban on MBTE was tainted by corruption because Archer-Daniels-Midland (hereinafter ADM), a United States producer of ethanol, improperly influenced the Governor through financial contributions made to his campaign.¹⁰⁸ Further, the claimant claimed that Governor Davis received US\$5,000 from ADM and subsequently, travelled to ADM's headquarters in Decatur, Illinois.¹⁰⁹

The tribunal took these allegations seriously and devoted the entirety of Part III – Chapter B to those claims in its final award. With instigation by the claimant's counsel, the tribunal espoused an innovative strategy relating to the standard of proof problem in the face of corruption allegations: “connect the dots (i.e., while individual

¹⁰⁶ *Id.* Part I – Preface.

¹⁰⁷ *Id.* Part II – Chapter D para. 3.

¹⁰⁸ *Id.* Part I – Preface – para. 5.

¹⁰⁹ *Id.*

pieces of evidence when viewed in isolation may appear to have no significance, when seen together, they provide the most compelling of possible explanations of events...”).¹¹⁰

The tribunal elaborated this innovative approach further by explaining how the dots would be processed:

“Connecting the dots is hardly a unique methodology; but when it is applied, it is critical, first, that *all* the relevant dots be assembled; and second, that each be examined, in its own context, for its own significance, before a possible pattern is essayed. Plainly, a self-serving selection of events and a self-serving interpretation of each of those selected may produce an account approximating verisimilitude, but it will not reflect what actually happened. Accordingly, the Tribunal will consider the various “dots” which Methanex has adduced –one-by-one and then together with certain key events (essentially additional, noteworthy dots) which Methanex does not adduce – in order to reach a conclusion about the factual assertions which Methanex has made...”¹¹¹

In this regard, the tribunal monitored the six dots brought to the table by Methanex. For instance, in the second dot, Methanex explained why the ban on MTBE was beneficial for the ethanol industry, particularly for ADM. In the third dot, Methanex argued that ADM corroborated the ban that resultantly impacted the decision-making process. To support this contention, Methanex raised the conviction of ADM officers, which included conviction of price-fixing in another industry, the

¹¹⁰ *Id.* Part III – Chapter B para. 2.

¹¹¹ *Id.* para. 3.

campaign contributions made to Governor Davis, and the suspicious meeting in which ADM hosted Governor Davis.¹¹²

The tribunal held that, in the United States, political candidates might rightly receive monetary contributions from corporations. Further, there was “no rule of international law was suggested as evidence that the USA and other nations which allow private financial contributions in electoral campaigns are thereby in violation of international law.”¹¹³ Next, concerning the dinner in which Governor Davis participated, the tribunal found it to be a meeting where a candidate and a voter interest group met, absent proof evidencing “a quid pro quo.”¹¹⁴

In the end, the tribunal concluded that there was no credible evidence showing Governor Davis’s decision as being motivated by corrupt intent. However, the approach applied by the tribunal is far more important than the conclusion reached by it. The *Methanex case* is the quintessential example of an arbitral tribunal encountering corruption allegations and not altering the standard of proof in accord with the seriousness of an allegation. Unlike other tribunals faced with corruption, the Methanex tribunal did not employ the heightened standard of proof and, accordingly,

¹¹² *Id.* para. 13.

¹¹³ *Id.* at para. 17.

¹¹⁴ *Id.* at paras. 36-37 (“In the absence of contrary evidence, one would assume that, in the US political context, this sort of encounter would allow a candidate to present himself or herself to potential contributors and contributors to present themselves to the candidate. The candidate would be seeking financial support for his or her election, while the putative contributor would be assessing whether the candidate, once in office, would be accessible to hear its views and concerns on matters of interest to it. The contributor would be looking for what Mr. Vind, Chairman and Chief Executive Officer of Regent International (an ethanol supplier) and a witness for the USA who acknowledged that he often had contributed to political campaigns, called ‘access.’”)

it did not seek clear and convincing evidence. Rather, the tribunal preferred to collect circumstantial evidence and allowed the judgment to be painted by such evidence.

The methodology espoused in the *Methanex* case reached far and later determined the outcome of *Metal Tech v. The Republic of Uzbekistan*, ICSID case of 2013.¹¹⁵ After assessing circumstantial evidence, the tribunal declared that there were enough indicators to establish corruption and therefore, it did not have jurisdiction over the case due to this illegality.

In this case, because of the significant increase in demand for molybdenum in the 1960s and 1970s, the Republic of Uzbekistan became an important player in the field and attracted foreign investment that would reinvigorate the industry.¹¹⁶ As a result, Metal-Tech, an Israeli publicly listed manufacturer of molybdenum products, and the Uzbek government negotiated a joint venture to operate a modern plant for molybdenum products. The joint venture included Metal-Tech, Uzbek Refractory and Resistant Metals Integrated Plant (“UzKTJM”), and Almalik Mining Metallurgy Combine (“AGMK”). Following negotiations, the Cabinet of Ministers issued Resolution No. 15 and Resolution No. 29-f, approving the creation of the joint venture Uzmetal Technology (hereinafter Uzmetal).¹¹⁷

Several years later, the Public Prosecutor’s Office for the Tashkent Region conducted a criminal investigation arising from alleged abuse of authority by officials

¹¹⁵ *Metal-Tech v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013. The tribunal was composed of Gabrielle Kaufmann-Kohler (President), John Townsend, and Claus von Wobeser.

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.* at 10.

of Uzmetal.¹¹⁸ This investigation was followed by Uzbekistan's Cabinet of Ministers' abrogation of Uzmetal's rights to buy raw materials and Metal-Tech's right to export the joint venture's products made of molybdenum.¹¹⁹ Two State-owned partners of Uzmetal revoked their contracts with Uzmetal in pursuit of the abrogation of the rights and UzKTJM asked for its share of dividends. However, Uzmetal failed to pay dividends and UzKTJM subsequently filed a request to the Economic Court of Tashkent Region to commence bankruptcy proceedings against Uzmetal on the grounds of Uzmetal's failure.¹²⁰ Metal-Tech submitted its claims in the bankruptcy proceedings; however, the temporary manager appointed by the respective court rejected these claims. Thereafter, Metal-Tech challenged the fairness and legality of the bankruptcy proceedings on the ground of non-conformity with Uzbekistan's Bankruptcy Law.¹²¹

Subsequently, Metal-Tech (claimant) filed a request for arbitration to the ICSID and alleged that the host State (defendant) failed to abide by obligations it received under the Israel-Uzbekistan BIT. Metal-Tech argued that the State-owned companies enter into a co-operation with the host-State government to deprive the claimant of its legal rights.¹²² To counter this claim, the Defendant State disputed the tribunal's jurisdiction because the claimant engaged in corruption and made fraudulent and material misrepresentations to have its investment approved.¹²³

¹¹⁸ *Id.* at 15.

¹¹⁹ *Id.* at 15-16.

¹²⁰ *Id.* at 17.

¹²¹ *Id.*

¹²² *Id.* at 29.

¹²³ *Id.* at 34.

Following the Defendant State's corruption allegations, the tribunal put the spotlight on the burden of proof and the standard of proof. Metal-Tech argued that the host-State should carry the burden of proof and must bring "clear and convincing" evidence due to the claim's gravity. On the other hand, the host-State advocated that the claimant should carry the burden of proving the facts that corroborated the tribunal's jurisdiction. As to the standard of proof, the host-State argued that proving allegations were "more likely than not to be true" was sufficient.¹²⁴

The tribunal disregarded the argument on the burden of proof and favored the well-recognized *actori incumbat probatio*: "each party has the burden of proving the facts on which it relies".¹²⁵

The tribunal found the debate about the standard of proof and presumptions interesting. However, the tribunal stated that, "it does not require the application of the rules on the burden of proof or presumptions to solve the present dispute"¹²⁶ because the facts emerged in the course of the arbitration gave rise to suspicions of corruption.¹²⁷ Emphasis was placed upon Mr. Rosenberg's (the claimant's CEO and Chairman) testimony where he admitted (i) that the sums of US\$ 4 million had been paid to the consultants, (ii) the 2005 consultancy agreement submitted to the tribunal was an amendment or replacement of the 1998 consultancy agreement, and (iii) the consultants were performing lobbyist activities.¹²⁸

¹²⁴ *Id.* at 78.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 78-79.

The facts gathered from the consultancy agreements became determinative indicators of corruption in the eyes of the arbitral tribunal:

(i) *Payment*:¹²⁹ The tribunal stated that the quantum of the payments made to the consultants was a striking fact within the context of the claimant's capital investment. The claimant paid US\$ 3.5 million to the consultants, which amounted to 20 percent of the entire project cost. This obviously was not proportional to the consultants' salaries.¹³⁰

(ii) *No proof of services*:¹³¹ The other fact that drew the tribunal's attention was that the claimant had to pay the consultants irrespective of services rendered. According to Mr. Rosenberg's testimony, the consultants did not have to provide any document relating to services rendered to seek payment. Even if the claimant established the link between services and payments, it was not satisfactory enough to legitimize the payments.

(iii) *Lack of Qualifications*:¹³² Another issue that the tribunal found suspicious was the lack of qualifications of the consultants. According to the consultancy agreements, the consultants were required to perform marketing investigations in Uzbekistan and perform negotiations with the Uzbek experts and different

¹²⁹ *Id.* at 63.

¹³⁰ *Id.* at 64 ("When assessing the amounts, one should further bear in mind that the Consultants were three Uzbek citizens allegedly hired to provide services 'on the ground' in Uzbekistan, where the cost of living is lower than in other countries. For instance, Mr. Rosenberg testified that Mr. Mikhailov's salary at Uzmetal was less than USD 100 per month. Mr. Mikhailov's employment contract with Sanavita GmbH, his full-time employer, similarly provided for a monthly salary of 4,500 Uzbek Soum. Yet, for services rendered to Metal-Tech, Mr. Mikhailov received a 'bonus' of USD 5,000 per month, fifty times his salary from Uzmetal. Similar 'bonus' payments were made to Messrs Chijenok.")

¹³¹ *Id.* at 65.

¹³² *Id.* at 67.

organizations. However, a review of the consultants' qualifications revealed that they did not have sufficient information to perform such duties. Furthermore, Mr. Mikhailov admitted that he was not qualified to render the abovementioned services, and yet, "he was paid USD 105,000 personally plus his shares in the USD 2,492,908 paid to the MPC Companies and the USD 774,781 paid to Lacey International (designated as payee by the Consultants under the consultancy agreement of 28 February 2005)." ¹³³

(iv) Lack of Transparency of Payee: ¹³⁴ Another fact that cast doubt upon the legality of the underlying contract was the lack of transparency of the consultants' payments. According to the payment schedules submitted to the tribunal, 8 percent of the payments were directly made to the consultants while more than 92 percent was paid to companies formed in Switzerland (MPC), Tashkent (MPC Tashkent), and the British Virgin Islands (Lacey International). ¹³⁵ Further, the claimant could not provide any feasible explanation why payments were made through a Swiss company where the consultants' ownership interests were concealed.

(v) Connections with Public Officials in Charge of Claimant's Investment: ¹³⁶ Next, the tribunal found that although the consultants lacked sufficient qualifications to provide the required services, two of them had important connections within the Uzbek Government. One of the consultants, Mr. Chijenok, worked in the Office of the President of Uzbekistan. Further, a second consultant, Mr. Sultanov, was the

¹³³ *Id.* at 68-69.

¹³⁴ *Id.* at 72.

¹³⁵ *Id.*

¹³⁶ *Id.* at 74.

brother of the Prime Minister of Uzbekistan, who had authority to monitor the claimant's investment.¹³⁷

After the legality of the underlying contract became dubious, the tribunal adopted an active role by appealing to its *ex officio* power under Article 43 of the ICSID Convention.¹³⁸ This authority permitted the tribunal to issue procedural orders and require further document production. Following this order, the facts were demonstrably connected. Therefore, the tribunal concluded that the consultancy agreements were a “sham” which impaired the legality of the underlying contract.

The *Methanex* and *Metal-Tech* tribunals' approach to the standard of proof further manifests in recent commercial arbitration cases. In commercial arbitration, disputes generally erupt between an investor and intermediary who are the signatories of a consultancy (intermediary) agreement. With the initiation of arbitration by an agent (intermediary), an investor challenges the legality of the consultancy agreement and commonly claims that the agreement was made to conceal a corrupt transaction. This is precisely what took place in the ICC Case No. 13914 and ICC Case No.12990.

In ICC Case No. 12990,¹³⁹ the arbitral tribunal concluded that the consultancy agreement was illegal due to the following:

- “The claimant was unable to produce evidence that it had performed any of its obligations in relation to the agreements between the parties.

¹³⁷ *Id.*

¹³⁸ “Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence, and (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.”

¹³⁹ *See supra* pages 195-197.

- The agreements were negotiated over a very short period of time and without any substantial documentation.
- The claimant received a commission of 15% of the purchase price, which was an excessively high rate of remuneration.
- A finding of corruption was consistent with conditions prevailing at the time in the state in question.”¹⁴⁰

More recently, the tribunal of the ICC Case No. 13914¹⁴¹ adopted a similar approach to that employed by the tribunals of the ICC Case No. 12990, the *Methanex*, and *Metal-Tech*, and also relied upon circumstantial evidence. In the ICC Case No. 13914, the respondent, a U.S. Company, entered into a consultancy agreement (plus other agreements) with the claimant to gain rights to conduct seismic surveys.¹⁴² According to the agreements, payments of commission derived from the sale of data procured through surveys conducted by the respondents.¹⁴³ The claimant commenced arbitration, citing breach of contract and allegedly unlawful deductions from the commission. During the arbitral proceedings, the respondent raised corruption allegations.

In the face of these serious allegations, the tribunal set the level of the standard of proof high and sought clear and convincing evidence. However, unlike other tribunals that applied the heightened standard of proof, the tribunal in this case reached the clear and convincing standard by collecting facts demonstrating existing

¹⁴⁰ Albanesi & Jolivet, *supra* note 93, at 34.

¹⁴¹ *Id.* at 32 (citing Final Award in ICC Case 13914).

¹⁴² ICC Case No. 13914 of 2008, 24 ICC Bulletin Tackling Corruption in Arbitration 77-83.

¹⁴³ *Id.*

circumstances. For example, the tribunal noted the claimant's refusal to comply with the tribunal's requirement of revealing tax and bank records, the claimant's implausible reasoning behind the non-compliance, and the claimant's inability to prove the legality of numerous wire transfers, high rate of commission fees, and lack of qualifications.¹⁴⁴ In addition to relying upon circumstantial evidence, the tribunal drew an adverse inference from the claimant's refusal to comply with document production and deduced this refusal to be an attempt to conceal information. Drawing adverse inferences may prove useful to overcome evidentiary barriers tribunals encounter, particularly in light of the lack of authority to compel document production.

As illustrated, surrounding circumstances of a case may play a pivotal role in the decision-making process relating to corruption allegations. Thus, arbitral tribunals should take an active role and not limit themselves with the plain wording of agreements,¹⁴⁵ or leave all burden of proving corruption upon a contending party. Rather, tribunals should be mindful of existing circumstances.

Therefore, guidelines prepared by arbitral institutions and governmental and non-governmental organizations that implore strategies to handle corruption suspicion may prove advantageous. For instance, according to the ICC Guidelines on Agents,

¹⁴⁴ Albanesi & Jolivet, *supra* note 93, at 32.

¹⁴⁵ ICC Case No. 6248, 19 Yearbook Commercial Arbitration 124, 127-128 (1994) ("The goal of interpretation is to ascertain the real intention of the parties beyond the words used in their agreement. With respect to this principle, all circumstances – prior and contemporary to the Agreement at issue as well as posterior to it – have to be taken into consideration as long as they are functionally connected with the object of interpretation.")

Intermediaries and Other Third Parties,¹⁴⁶ the examples of circumstances (in practice often referred as “red flags”) that raise suspicion and require greater attention are:

- “A reference check reveals the Third party’s flawed background or reputation, or the flawed background or reputation of an individual or enterprise represented by the Third party;
- The operation takes place in a country known for corrupt payments (e.g., the country received a low score on Transparency International’s Corruption Perceptions Index);
- The Third party is suggested a public official, particularly one with discretionary authority over the business at issue;
- The Third party objects to representations regarding compliance with anti-corruption or other applicable laws;
- The Third party has a close personal or family relationship, or business relationship, with a public official or relative of an official;
- The Third party does not reside or have a significant business presence in the country where the customer or project is located;
- Due diligence reveals that the Third party is a shell company or has some other non-transparent corporate structure (e.g. a trust without information about the economic beneficiary);
- The only qualification the Third party brings to the venture is influence over public officials, or the Third party claims that the can help secure a contract because he knows the right people;

¹⁴⁶ The ICC Guidelines on Agents, Intermediaries, and Other Third Parties, *available at* <http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2010/icc-guidelines-on-agents,-intermediaries-and-other-third-parties/>.

- The need for the Third party arises just before or after a contract is to be awarded;
- The Third party requires that his or her identity or, if the Third party is an enterprise, the identity of the enterprise's owners, principles or employees, not be disclosed;
- The Third party's commission or fee seems disproportionate in relation to the services to be rendered;
- The Third party requires payment of a commission, or a significant portion thereof, before or immediately upon the award of a contract;
- The Third party requests an increase in an agreed commission in order for the Third party to "take care" of some people or cut some red tape; or
- The Third party requests unusual contract term or payment arrangements that raise local law issues, payments in cash, advance payments, payment in another country's currency, payment to an individual or entity that is not the contracting individual/entity, payment to a numbered bank account or a bank account not held by the contracting individual/entity, or payment into a country that is not the contracting individual/entity's country of registration or the country where the services are performed."¹⁴⁷

Further, there is a trend in the international arena that seeks to identify potential indicators of corruption. Both the UNCAC Article 12 (3) and the OECD Convention Article 8 (1) list some acts that are carried out for the purposes of committing corruption. The following acts pointed out by the UNCAC and the OECD Convention can be taken into consideration by arbitral tribunals as indicia of corruption: (i) the establishment of off-the-books accounts; (ii) the making of off-the-

¹⁴⁷ *Id.*

books or inadequately identified transactions; (iii) the recording of non-existent expenditure; (iv) the entry of liabilities with incorrect identification of their objects; (v) the use of false documents; (vi) and the intentional destruction of bookkeeping documents earlier than demanded by law.

An additional applicable resource to identify when corruption may have occurred is, “A Resource Guide to the U.S. Foreign Corrupt Practices Act.”¹⁴⁸ Pursuant to the Guide, common red flags associating third parties with corruption include excessive commissions to agents or consultants, lack of transparency in expenses, the close relationship between a consultant and government officials, offshore bank account for consultancy payments, ambiguous terms in a consultancy agreement, an evident lack of qualification.

Adding to these “red flags,” is how an agent’s (intermediary’s) performance of contractual duties is recorded and how some performance may lead to inferences of corruption. The following actions by an agent should be investigated to determine the possibility of corrupt practice: (i) how fast the agent received the contract or extension from the government;¹⁴⁹ (ii) not disclosing government contacts notwithstanding an arbitral tribunal requirement;¹⁵⁰ and (iii) an intermediary’s ease in accessing government documents or having these documents in his or her

¹⁴⁸ A Resource Guide to the U.S. Foreign Corrupt Practices Act, *available at* <https://www.documentcloud.org/documents/515229-a-resource-guide-to-the-u-s-foreign-corrupt.html>

¹⁴⁹ SAYED, *supra* note 28, at 129. *See also* SAYED, *supra* note 28, at 129 n.398 (*See* ICC Case No. 3916 where the arbitral tribunal inferred corruption from the relatively high speed of obtaining a government order.)

¹⁵⁰ Arbitral tribunals should be careful while inferring corruption from this red flag, which needs to be interpreted within its own context. The non-disclosure of government contacts does not necessarily mean the respective party is trying to conceal corruption. For the sake of protecting privileged business secrets, parties may prefer not to leak names in governments.

possession.¹⁵¹ By investigating the actions of an agent, a tribunal can lay a foundation to establish corruption.

In sum, in light of precedent commercial and investment arbitration cases, arbitral tribunals should emphasize the challenges of proving corruption, rather than sole focus on the seriousness of the illegality allegations when determining the applicable standard of proof. In harmony with this, the inner conviction standard, supported by surrounding circumstantial evidence, should be favorably received. By adopting the inner conviction standard and prioritizing circumstantial evidence, tribunals eradicate the risks associated with both the higher and lower standards of proof.

C) Causation

Turning now to the element of causation, while not prevalent within the context of corruption, it may determine legal consequences, particularly in investment arbitration cases. In commercial arbitration, causation is not a main topic of discussion because corruption allegations arise upon ulterior motive (such as allegedly forming an illegal contract under shade of a legitimate transaction). For example, the contending party claims that the contract to which he or she is a signatory is a contract of corruption. Therefore, when the alleging party proves that allegation, the contract is invalidated.

In investment arbitration, however, there must be a nexus between the alleged corrupt conduct and the contract (or its terms) to have the contract declared null and

¹⁵¹ SAYED, *supra* note 28, at 135.

void. The alleging party must show either that the investor was rewarded with the public procurement contract by engaging in corrupt conducts or that the formation of the contract was impacted by the corrupt conducts.

To illustrate causation, in *Gustav F W v. Republic of Ghana*,¹⁵² the tribunal noted the causation element in its award. The dispute related to processing and trading cocoa beans in a joint venture between a German investor and a company formed under the laws of Ghana.¹⁵³ The Ghanaian company was obligated to supply cocoa beans to the joint venture company while the German partner would contribute to modernization of the facilities and purchase refined products.¹⁵⁴ However, a dispute erupted between the joint venture partners due to breach of the joint venture contract.

During the arbitral proceedings, the respondent objected to the tribunal's jurisdiction on the grounds of fraud tainting the investment. The tribunal held that there was no conclusive evidence proved that the alleged fraud decisively secured the parties' contract. Thus, the alleged fraud influenced neither the existence of the contract nor the investment.¹⁵⁵

¹⁵² *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010, *available at* <http://www.italaw.com/documents/Hamesterv.GhanaAward.pdf>. The tribunal was composed of Bernardo M. Cremades, Toby Landau Q.C., and Brigitte Stern.

¹⁵³ *Id.* at 1.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 40.

Next, another case where the causation element manifested is *Niko v. Bangladesh*.¹⁵⁶ Here, while examining the corruption allegations raised by the respondent, the tribunal briefly touched causation and held:

“The case of bribery which has been established in the present case did not procure the contracts on which the claims in this arbitration are based. The JVA had been concluded long before the acts of corruption. The Minister who received the benefit of the vehicle and the invitation to the United States was forced to resign quickly thereafter in June 2005. The GPSA was concluded only some 18 months later, in December 2006. Thus, there is no link of causation between the established acts of corruption and the conclusion of the agreements...”¹⁵⁷

In sum, the critical conclusion reached by both *Gustav F W* and *Niko* is that a party alleging corruption not only must substantiate the corrupt conduct, but also must establish the causal link between the act of corruption and resulting benefit or influence received by the accused party.¹⁵⁸ Notably, this additional requirement of evincing the link of causation is as difficult as substantiating corruption allegations and, accordingly, compromises the campaign against corruption.

However, there are jurisdictions where a mere occurrence of corruption is enough to deny the underlying contract’s validity. In these jurisdictions, if corruption occurs, legal repercussion is likely, irrespective of how corruption impacted the

¹⁵⁶ *Niko Resources (Bangladesh) Ltd v. People’s Republic of Bangladesh, BAPEX, and PETROBANGLA*, ICSID Case Nos. ARB/10/11 and ARB/10/18 (Decision on Jurisdiction date 19 August 2013).

¹⁵⁷ *Id.* at 123-124.

¹⁵⁸ SOPHIE NAPPERT, CHAPTER 12: RAISING CORRUPTION AS A DEFENSE IN INVESTMENT ARBITRATION IN ADDRESSING ISSUE OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION, DOSSIERS XIII OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 179 (2015).

procurement of the contract or its formation. For instance, in the South African case of *Mangold Brothers v. Minnaar & Minnaar*, the court held the mere payment of a bribe provides a sufficient ground to repudiate the contract regardless of its influence over the government agent.¹⁵⁹

Causation may principally be interpreted, as an ancillary element surfacing once there is actual proof of corruption.¹⁶⁰ The practice, nevertheless, reflects the importance of displaying the link between the alleged corrupt conduct and how it influenced the contract's procurement or its formation. Once it is evidenced that the corrupt conduct materially influenced the contract, the tribunal will examine the nullity of the agreement. However, even if the causation is not verified, arbitral tribunals may dismiss claims due to either lack of jurisdiction or inadmissibility by virtue of other principles, such as the "clean hands doctrine." The principle of clean hands is a well recognized doctrine in common law countries and it is interpreted, as "he who seeks equity must do equity."¹⁶¹ However, its applicability as a part of international law is controversial.¹⁶²

¹⁵⁹ JEAN-JACQUES ARNLDEZ, YVES DERAIS & DOMINIQUE HASCHER, ICC CASE NO. 11307 in COLLECTION OF ICC ARBITRAL AWARDS 2008-2011 / RECUEIL DES SENTENCES ARBITRALES DE LA CCI 2008-2011 14 (2013) (citing *Mangold Brothers v. Minnaar & Minnaar* 1936 TPD 48). See also *State-owned corporation X v. Corporation Y*, Final Award, ICC Case No. 11307, 33 Yearbook Commercial Arbitration 24-62 (2008).

¹⁶⁰ *State-owned Corporation X*, *supra* note 159, at 35 ("In *Plaaslike Boeredienste (Edms) Beperk v. Chemfos Beperk* 1986 (1) 819 (AD), the South African Appellate Division considered the fact that under English law *the mere payment of a bribe was enough to raise an irrebutable presumption that the agent was influenced by the bribe.*") (Emphasis added).

¹⁶¹ *Niko Resources*, *supra* note 156, at 129 (citing *Diversion of Water From the River Meuse* (Netherlands v. Belgium), 1937 P.C.I.J. (Series A/B) No. 70, p. 73).

¹⁶² See *Guyana v. Suriname*, Award, ICGJ 370 (PCA 2007), Permanent Court of Arbitration [PCA], available at <http://www.pcacases.com/web/view/9>. The tribunal was composed of HE Judge L. Dolliver M. Nelson (President), Thomas M. Franck (Claimant Appointment), Kamal Hossain, Ivan Shearer, Hans Smit (Respondent Appointment).

2. Evidence in International Arbitration in the Face of Corruption

Although facts may be stipulated, parties develop their own scenarios and each scenario may approach the same fact with different allegations and arguments. For instance, in *Lao Holding N.V. v. The Lao People's Democratic Republic*,¹⁶³ each party adopted a different approach to the attempted payment of US\$7 million to a former Prime Minister. Here, the Respondent State construed this to constitute attempted bribery to gain permission to open a casino in the capital city. However, the claimant opined that the payment's purpose was to meet "the standard requirement that proposed investors provide the government with evidence of sufficient financial strength to implement their development proposals."¹⁶⁴ This is just one example of when facts may appear as two sides of the same coin and reflects that the factual intent depends fully on the party's perspective.

In sum, not only is each party responsible for proving the facts upon which he or she relies, but also, he or she must satisfy the required standard of proof. It is important to note that the execution of the burden of proof and satisfaction of the required standard of proof are dependent upon the applicable law to the evidentiary issues and evidentiary materials presented by parties.

¹⁶³ The Lao Holdings N.V. v. The Lao People's Democratic Republic, Ruling on Motion to Amend the Provisional Measures Order, ICSID Case No. ARB (AF)/12/6, 12th May 2014, *available at* [http://opil.ouplaw.com/view/10.1093/law/iic/646-2014.case.1/IIC646\(2014\)D.pdf](http://opil.ouplaw.com/view/10.1093/law/iic/646-2014.case.1/IIC646(2014)D.pdf). The tribunal is composed of Ian Binnie (President), Bernard Hanotiau, Brigitte Stern.

¹⁶⁴ *Id.* at 6.

a) Applicable Rules of Evidence in International Arbitration

Once jurisdiction is obtained, the next step for the tribunal is to investigate facts and understand how the parties interpret these facts. Within the context of corruption, the party who allegedly engaged in corruption has the obligation to prove the legitimate nature of his or her transaction (or contract) while the alleging party must prove the allegations he or she raised. Although the responsibilities placed upon each party are different, performance of these responsibilities is the same. Both parties must submit relevant evidence to substantiate their respective positions. Thus, arbitral tribunals, like national courts, have procedural rules that regulate evidentiary issues, such as evidence gathering, admissibility, relevance, and how much weight to attribute to the submitted evidence.

The traditional approach opines that tribunals apply the rules of evidence of the country where the arbitration is being conducted. However, a modern approach bestows arbitrators with broad discretion. As a result, the tribunal can proceed in accordance with the evidentiary rules of that country or those of an arbitral institution, so long as the procedure is in compliance with the requirements of due process.¹⁶⁵ This discretion is recognized by national courts¹⁶⁶ and has been frequently emphasized by arbitrators:

“however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of

¹⁶⁵ SAYED, *supra* note 28, at 90.

¹⁶⁶ BORN, *supra* note 20, at 1854 n.583; Pietrowski, *supra* note 19, at 374 (“There are a number of principles and rules of evidence that are generally applicable to all international arbitrations irrespective of the nature of the parties and the law governing the conduct of the arbitration.”)

trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as ‘universal principles of law,’ or ‘the general theory of law,’ and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.”¹⁶⁷

Further, this independence of arbitrators plays a crucial role to avoid conflicts that may occur due to differences between common law and civil law systems. For instance, in common law, both expert and fact witnesses may be cross-examined by parties and parties’ counsel. In contrast, in civil law countries, judges and parties may question witnesses. Parties’ counsels direct their questions to the witness through the judge. Another important distinction between civil law and common law exists in the “discovery” stage. While discovery is an integral part of the common law procedure, it is not applicable in civil law systems and each party’s lawyer produces the evidence on which they rely.

At the end of the day, by virtue of the discretion incorporated within arbitration, arbitral tribunals are not obligated to apply any specific evidentiary rule procedure. Irrespective of whether it is investment arbitration or commercial

¹⁶⁷ BORN, *supra* note 20, 1853 (citing Parker v. United Mexican States, Award in U.S. and Mexico General Claims Commission (31 March 1926), IV R.I.A.A. 35, 39 (1952)).

arbitration, arbitral tribunals have the authority to apply the evidentiary rules suitable for the case at hand and appropriate for the parties' needs and expectations.

b) Evidentiary Materials

Parties who engage in corruption are exceedingly conscious of the steps required to conceal their illegitimacy. They will not memorialize their illicit scheme and they will not showcase it in front of others. As a result, it is difficult to prove corruption. However, it is not impossible if the tribunal plays an active role through the evidentiary process. Therefore, evidentiary elements submitted by the alleging party may determine the tribunal's role.

There are three different evidentiary materials that can be submitted to the tribunal: (a) Documents, (b) Fact witnesses, and (c) Expert witnesses.

i) Documentary Evidence

The tendency in international arbitration is to give priority to documentary evidence because of its written form. Scholars and decision makers often put the reasoning behind this superiority of the documentary evidence into words:

“ ‘Testimonial evidence’, it has been said, ‘due to the frailty of human contingencies is most liable to arouse distrust’. On the other hand, documentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free

from this distrust and considered of higher probative value.”¹⁶⁸

Documentary evidence includes:

“letters, faxes or emails exchanged between the parties, contractual instruments, protocols, minutes of meetings, record of discussions or phone calls, financial instruments, account records, warehouse records, dock receipts, bills of lading, certificates of quality, licenses.”¹⁶⁹

Notably, the classification of CD, audio, and visual recordings as documentary evidence is no longer disputed. According to the Preamble of the IBA Rules on the Taking of Evidence in International Arbitration (hereinafter IBA Rules on Evidence), a document is “a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means”. This clearly reflects the acceptance of a broad definition of documentary evidence.

Despite the common advocacy of the superiority of documentary evidence, this superiority may fade depending on the allegations. As far as corruption allegations are concerned, it is difficult for an alleging party to furnish documentary evidence that directly demonstrates corruption. However, it may be possible to find documentary evidence showing potential indicia of corruption (*e.g.* internal company memoranda, bank statements, accounting documents, correspondences etc.). For instance, in the *World Duty Free* case, an investor paid US\$2 million cash to the

¹⁶⁸ Pietrowski, *supra* note 19, at 391 (citing B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 318-319 (1953)).

¹⁶⁹ JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 564 (2003).

Kenyan Government as a personal donation made for the “public interest.” However, the case’s paper trail proved that the money went to a London bank account managed on behalf of the President of Kenya.

Next, in the ICC Case No. 15668 of 2011,¹⁷⁰ the tribunal took an active role after acquiring letters that led the tribunal to infer corruption. The letters, sent from an intermediary to the principle regarding delays in commission payments, included content stating that intermediary warned the principle: “if you don’t pay me, our friends will be unhappy” and “your payments are urgently needed to keep friends happy.”¹⁷¹ The tribunal attempted to determine whom the parties characterized as “friends.” In the end, the tribunal came to the conclusion that “friends” were local government officials.

Clearly, documents discovered may give rise to corruption suspicions while simultaneously unearthing corruption. However, there are two sides to this coin, the other side of which, unfortunately, is that the party encountering the allegations of corruption may hold and secret documents that could substantiate corruption. In this regard, “discovery” may prove pivotal role when accessing these documents.

Arbitrating parties produce documents on which they can rely. A party in arbitration is not obliged to produce any confidential document contrary to that party’s interests, notwithstanding the request filed by the other party. However, the tribunal can order document production against any party’s interests. For instance, the

¹⁷⁰ Antonio Crivellaro, *The Courses of Action Available to International Arbitrators to Address Issues of Bribery and Corruption*, 10 (3) TRANSNAT’L DISP. MGMT. 1, 16 (2013), www.transnational-dispute-management.com/article.asp?key=1956.

¹⁷¹ *Id.*

LCIA Arbitration Rules of 2014 confers this power to the arbitral tribunal. Under Article 22 (iv) of the Rules, the tribunal can “order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral tribunal, any other party, any expert to such party and any expert to the Tribunal.” Additionally, under Article 22 (v) of the Rules, the arbitral tribunal can “order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant.”

The ICSID Convention bestows authority akin to that of the LCIA Rules. According to Article 43 (i) of the ICSID Convention, “except as the parties otherwise agree, the Tribunal may, if it deems it necessary...call upon the parties to produce documents or other evidence.” Finally, under Article 25 (5) of the ICC Rules, “at any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.”

While ICSID, LCIA, and ICC regulate the authority of arbitral tribunals to request or require parties to produce documents or witnesses in relation to corruption, they do not provide proper tools to compel document production. That being said, tribunals may inevitably draw adverse inferences from non-compliance with the request.

For example, the ICC Case No. 6497¹⁷² represents a good illustration of how documentary evidence, discovery, and drawing adverse inferences can determine the

¹⁷² See pages 182-183 for details of the case.

fate of corruption allegations. In this case, the tribunal issued procedural orders requiring the claimant to produce documents relating to subcontracts under a particular agreement.¹⁷³ The claimant failed to comply with the document production request and did not cooperate with appointed experts tasked with examining bank records.¹⁷⁴ After the tribunal noted that the lack in cooperation would be taken into account when determining the final award, the claimant produced the documents and, contrary to the claimant's statements, it was seen that the documents were related to neither business secrets nor high bank balances. On these grounds, the tribunal held that there was a "high degree of probability" corruption existed.

ii) Fact Witnesses

Although the greatest emphasis is placed upon documentary evidence, fact witnesses also play crucial roles in revealing the truth. It is generally accepted that anyone may appear before an arbitral tribunal as a fact witness, including officers, employees, and shareholders.¹⁷⁵ This is consistent with the rules applied in the common law system. Yet there are some legal traditions, such as those found in Germany and France, which bar interested persons and/or officers from being fact witnesses.¹⁷⁶

¹⁷³ Rose, *supra* note 89, at 202.

¹⁷⁴ *Id.*

¹⁷⁵ Article 4 (2) of the IBA Rules on the Taking of Evidence in International Arbitration ("Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative."); Article 20 (6) of the LCIA Arbitration Rules ("Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party.")

¹⁷⁶ BORN, *supra* note 20, at 1839.

For the sake of time and cost efficiency, arbitral tribunals require the parties to submit a written witness statement in lieu of oral testimony by fact witnesses.¹⁷⁷ However, oral testimony has its own benefits and the tribunal has discretion to conduct oral hearings.

Unfortunately, skeptics distrust the credibility of fact witnesses. Because the human memory can be flawed and witnesses may sometimes err in their fact recollection,¹⁷⁸ testimony given by these witnesses is often “taken with a grain of salt.” Further, witnesses may intentionally distort the truth, depending on their personal interests in the outcome. For instance, the U.S. Justice Department’s report concerning the Siemens corruption probe¹⁷⁹ divulged that witness statements and pleadings were tampered with and resulted in the corrupt transactions of Siemens to drop off the tribunal’s radar. According to the indictment of the Justice Department, Siemens’ eight employees obstructed the arbitral tribunal’s investigation into corruption by “filling a claim and supporting evidence, including a witness statement from [Andres] Truppel [a former Siemens executive], which contained material misrepresentation and omissions.”¹⁸⁰ It is possible Siemens’ claims in the arbitral proceedings may have proven futile absent Mr. Truppel’s false witness testimony.

¹⁷⁷ Article 4 (4) of the IBA Rules on the Taking of Evidence in International Arbitration (“The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to other Parties Witness Statements by each witness on whose testimony it intends to rely...”)

¹⁷⁸ Pietrowski, *supra* note 19, at 391.

¹⁷⁹ *Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme*, JUSTICE.GOV, <http://www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe> (last visited Aug. 5, 2015). Further details related to Siemens A.G. v. The Argentine Republic will be shared under “Admissibility and Assessment of Evidence Obtained in Parallel Proceedings” title (pp. 236-239).

¹⁸⁰ *Former Siemens Chief Financial Officer Pleads Guilty In Manhattan Federal Court To \$100 Million Foreign Bribery Scheme*, JUSTICE.GOV, <http://www.justice.gov/usao-sdny/pr/former-siemens->

When corruption allegations are “on the table,” arbitrators must tread carefully because fact witness memory conveniently skew under feasible criminal prosecutions.¹⁸¹ Thus, while weighing the credibility of a witness statement, arbitrators should take the following factors into consideration: the character, independence, and personal interests of the witness.¹⁸² The witness testimony should also be corroborated with additional submitted evidence.

To aid the tribunal obtain truthful testimony, arbitrators can require witnesses to swear on oath if relevant rules¹⁸³ and arbitration laws grant this power to the tribunal. For example, according to Article 38 (5) of the English Arbitration Act of 1996, “the tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.” Further, in some jurisdictions, criminal sanctions are applicable when the witness, who is under oath, makes a statement he or she knows to be false. For instance, according to Section (1) (1) of England’s Perjury Act of 1911:

“if any person lawfully *sworn as a witness* ...in a judicial proceeding willfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury, and shall, on conviction thereof on indictment, be liable to penal servitude for a term not exceeding seven years, or to imprisonment...for a term not exceeding two years,

[chief-financial-officer-pleads-guilty-manhattan-federal-court-100](#) (last visited Jan. 28, 2016). According to the press release of the U.S. Attorney for the Southern District of New York on, Andres Trupple admitted his significant role in the Siemens bribery scheme in Argentine and pleaded guilty on September 30, 2015.

¹⁸¹ Khvalei, *supra* note 52, at 18 (In ICC Case No. 13384, the respondent’s executive director was prevented from participating in the hearing for examination by the respondent).

¹⁸² SAYED, *supra* note 28, at 96.

¹⁸³ Article 35 (2) & (3) of the ICSID Arbitration Rules.

or to be a fine or to both such penal servitude or imprisonment and fine.”

The term “judicial proceeding” extends to proceedings before arbitral tribunals. Notably, if false statements are made without taking the oath, criminal sanctions do not apply unless that person offers the statement under any public general Act of Parliament.¹⁸⁴

In Switzerland, however, the criminal code extends both the sworn and unsworn false testimony offences to arbitral proceedings. In cases of perjury, there is imprisonment ranging from six months up to five years.¹⁸⁵

Although concerns of witness credibility are legitimate, most parties who engage in illicit transactions leave no trace behind, besides the individuals who played a role throughout the transaction. Witness reliability is easily established through direct examination, cross-examination or inquiry from the tribunal. To illustrate, in the *Azpetrol v. Azerbaijan* case,¹⁸⁶ a key witness, offered by the claimant, played a key role in the disclosure of corruption by admitting allegations.

In *Azpetrol*, companies incorporated in the Netherlands commenced arbitration due to the host-State Azerbaijan’s alleged expropriation in violation of the Energy Charter Treaty. During the hearing, Mr. Peter Booster, a director of the claimant companies, testified.¹⁸⁷ During cross-examination, Mr. Booster admitted “he

¹⁸⁴ Section 5 (b) & (c) of the Perjury Act of 1911.

¹⁸⁵ Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings* in Albert Jan van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions*, 11 ICCA Congress Series 261, 284 (2003).

¹⁸⁶ *Azpetrol International Holdings B.V. et. al. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award of 8 September 2009, available at <http://www.italaw.com/cases/116>.

¹⁸⁷ *Id.* at 2.

had provided funds to bribe officials in Azerbaijan in early 2006. His evidence was that these bribes were paid in order to protect unnamed individuals in Azerbaijan.”¹⁸⁸ Following this testimony, the Respondent State sought dismissal of the case for lack of jurisdiction on the grounds of corruption. The tribunal preferred not to delve into corruption claims due to the submission of a binding settlement entered into by the parties to conclude the dispute.

Next, the ICC Case No. 15668 represents another illustration of finding corruption clues during cross-examination.¹⁸⁹ In this case, the term “authority” found in the parties’ agreement drew the tribunal’s attention. According to the contract,

“if the intervention of an *authority* was needed for acquiring a contract, the agent was entrusted to use part of his own fees to obtain intervention, or, if the necessary amount of money was extraordinary, the parties were to agree on and ad hoc supplementary investment in order to benefit of the *authority* intervention.”¹⁹⁰

After questioning the witnesses, the tribunal learned that the term “authority” was synonymous to the local State organ holding the authority to award the contract to the principal, while the term “intervention” translated to “a favorable decision by the State organ and the money involved was to be paid to the Same organ.”¹⁹¹ This secret vocabulary and its true meaning could not have been acquired without proper cross-examination of fact witnesses.

¹⁸⁸ *Id.*

¹⁸⁹ Crivellaro, *supra* note 170, at 15.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

Clearly, the aforementioned cases advocate the usefulness of fact witnesses when gathering corruption evidence. Even if the statement's credibility is disputed, arbitral tribunals have sufficient tools, such as cross-examination, direct examination or direct questions, to resolve ambiguities. Thus, the core issue here is whether the tribunal is sufficiently persistent during examination. To clarify this core issue: first, the tribunal may prefer easy persuasion and conclude examination following the initial denials of the witnesses, or second, the tribunal may be persistent and exercise an active role to find the truth. At the end of the day, persistency of the tribunal thus plays a vital role to penetrate corruption allegations.

iii) Expert Witnesses

An alluring feature of international arbitration is the expertise available to arbitrating parties. In numerous international arbitral tribunals, experts are appointed as arbitrators in accordance with the nature and complexity of the dispute. These experts provide noteworthy experience and knowledge to solve the current dispute.

Notwithstanding an expert arbitrator, it is also advantageous to hear expert witness testimony, particularly if the dispute is complex and controversial.¹⁹² More importantly, expert witnesses can conduct investigations and provide work-related documents not otherwise subject to disclosure due to their confidential nature.¹⁹³

Presenting expert testimony in an arbitral proceeding can vary, depending on the case and the parties' strategy. First, expert testimony may be presented directly by

¹⁹² BORN, *supra* note 20, at 1860.

¹⁹³ ARTHUR HARVERD, THE ROLE OF THE EXPERT IN ARBITRATION IN ICC DOSSIERS, ARBITRATION-MONEY LAUNDERING, CORRUPTION AND FRAUD 106 (2003).

experts designated by each party or possibly by both parties' mutual agreement.

Second, arbitral tribunals may call expert witnesses under the authority of major arbitration statutes¹⁹⁴ and institutional rules.¹⁹⁵ Obviously, this could be useful in the context of corruption allegations.

To accurately determine whether corruption allegations reflect truth, arbitral tribunals should examine records, such as accounting documents, correspondence, and contracts. Inherently problematic however is when the accused argues that these documents are confidential. Here, one solution is to appoint an expert witness following consultation with the parties. The appointed expert witness can examine the relevant records and report findings to the parties and tribunal. This was a solution transpired in the ICC Case No. 6497.¹⁹⁶ In this case, the Consultant raised a confidentiality objection to disclose when asked to reveal banking documents. These documents allegedly showed deposits into the Consultant's account, deductions from the account, and where money went. The Consultant balked to produce the documents since such "production would jeopardize... legitimate business secrets and possibly

¹⁹⁴ Article 26 (1) (a) of the UNCITRAL Model Law ("Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal."); Article 37 (1) (a) (i) of the English Arbitration Act of 1996 ("Unless otherwise agreed by the parties the tribunal may appoint experts or legal advisers to report to it and the parties.").

¹⁹⁵ Article 12 of the LCIA Arbitration Rules ("The Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal."); Article 6 (1) of the IBA Rules on the Taking of Evidence in International Arbitration ("The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal."); Article 25 (4) of the ICC Rules of Arbitration ("The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports.")

¹⁹⁶ See pages 193-194.

secrets of third parties.”¹⁹⁷ To overcome the confidentiality objection, the tribunal appointed an expert witness. Despite resistance, the Consultant ultimately submitted documents illuminating different facts than originally professed.

Other issues arise if parties remain stubborn to provide records. Should the accused refuse to provide such records to the expert witness, the tribunal may interpret this refusal as constituting circumstantial evidence inferring corruption. This is the scenario of the ICC Case 3916.¹⁹⁸ In this case, a Greek company (Respondent), and a director from the Department of the State of Iran (Claimant), contracted and tasked the director to assist in receiving contracts from Iran on the behalf of a “group.” However, following the 1979 Iranian Revolution, the respondent’s activities in Iran ended and the claimant could not receive full payment from the respondent. After the claimant initiated arbitration process, the tribunal required the claimant to provide information relating to his group structure and the nature his intervention.¹⁹⁹ The claimant did not fulfill this request. Resultantly, the tribunal concluded there was a contract of corruption.

Clearly, expert witnesses execute important duties during arbitration. Although conclusions reached by expert witnesses are not binding upon tribunals, reports prepared by them may influence the arbitral award, its enforcement and its recognition. Therefore, the impartiality and neutrality exercised by expert witnesses is vital. Any partiality exercised by the expert may be interpreted as corrupt and, under

¹⁹⁷ SAYED, *supra* note 28, at 118.

¹⁹⁸ See generally SIGVARD JARVIN & YVES DERAIS, ICC CASE NO. 3916 in COLLECTION OF ICC ARBITRAL AWARDS 1974-1985/RECUEIL DES SENTENCES ARBITRALES DE LA CCI 1974-1985 507-511 (1994).

¹⁹⁹ SAYED, *supra* note 28, at 145.

the New York Convention and the UNCITRAL Model Law, it could be a ground to challenge the enforcement and recognition of the arbitral award.²⁰⁰

Therefore, expert witnesses should be mindful of their duty to provide independent assistance to the tribunal by yielding unbiased opinions and further, that this duty surpasses any obligation to their financier.

c) Arbitrators' Discretionary Authority Regarding Admissibility and Assessment of Evidence

Following evidence submission, the tribunal must evaluate admissibility. Within this evaluation, the tribunal is tasked to assess the evidence's probative value and materiality.²⁰¹ This title will concentrate on the tribunals' role in this evaluation process.

i) Admissibility and Assessment of Evidence Submitted by the Parties

Subsequent to evidence submission, the question becomes how the tribunal weighs the submitted evidence. Today, the deregulated nature of international arbitration permits broad flexibility for tribunals to adopt convenient procedures.

²⁰⁰ See Alexandre Petsche & Alexandra Klausner, Chapter IV: Crime and Arbitration: Arbitration and Corruption, in Christian Klausegger, Peter Klein *et al.* (eds), *Austrian Yearbook on International Arbitration 2012*, Austrian Yearbook on International Arbitration, Volume 2012 (Manz'sche Verlags- und Universitätsbuchhandlung 2012) pp. 354-355.

²⁰¹ SAYED, *supra* note 28, at 93 ("In ascertaining a fact an Arbitrator looks at the probative value of evidence as well as its materiality. *Probative value* is the tendency of evidence to establish the proposition that it is offered to prove. The evidence has probative force when there is probability that a fact is as the party claims it to be with the evidence. The *materiality* of evidence is its capacity to establish the fact or parts thereof that the relevant substantive rule requires to be proved. Both probative force and materiality make the evidence relevant.")

Further, major arbitration laws extend this flexibility to evidence collection, admissibility analysis, and probative value evaluation.²⁰²

Thus, the tribunal is the sole authority that determines the materiality and the probative value of evidence presented by the parties. This allows for great efficiency and even permits the tribunal to forgo oral argument regarding evidence submission. Both arbitration and court judgments reflect this authority. For instance, Article 19 of the UNCITRAL Model Law states:

“(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

Under Article 34 of the ICSID Arbitration Rules, “the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.”

Similarly, Article 9 of the IBA Rules on Evidence states, “the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence”.

²⁰² Article 34 (1) & (2) of the English Arbitration Act of 1996 (“It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.”; “evidential matters” cover “whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion...”); French New Code of Civil Procedure, Article 1460 (“The arbitrators shall determine the arbitration procedure; they shall not bound by any rules applicable in court proceedings unless the parties have provided otherwise in the arbitration agreement.”); §599 of the Austrian Arbitration Act (“The arbitral tribunal is authorized to rule upon admissibility of the taking of evidence, to carry out such taking of evidence and to freely evaluate the result thereof.”)

Traditionally, the method of approach is consistent with regulations. Here, it is important to examine the International Court of Justice's (hereinafter ICJ) judgments, where the Court recognized the discretionary power of international tribunals.²⁰³ For instance, in the *South-West Africa* cases,²⁰⁴ when the claimant made speculations concerning the respondent's witness' testimony, the ICJ emphasized the discretionary authority:

“The evidence will be on the record; the Court is quite able to evaluate evidence, and if there is no value in the evidence, then there will be no value given to this part of the evidence... This Court is not bound by the strict rules of evidence applicable in municipal courts and if the evidence established by the witness does not sufficiently convey that the evidence is reliable in point of fact, then the Court, of course deals with it accordingly when it comes to deliberation.”²⁰⁵

Next, the ICJ noted the tribunal's discretionary power when challenge to an arbitral award rendered by the King of Spain arose.²⁰⁶ Nicaragua challenged the arbitral award on the grounds of “essential error.” From Nicaragua's standpoint, the arbitrator erred in evaluating the plans, maps, and other like documents. The Court disagreed with Nicaragua and stated,

²⁰³ Pietrowski, *supra* note 19, at 373 n.2 (“The Permanent Court of International Justice was a product of the arbitral process. Its statute and rules, like those of its successor, the International Court of Justice, were based largely on the work of the Hague Peace Conference of 1899 and 1907, which created the Permanent Court of Arbitration. As Reisman has observed, ‘All contemporary international judicial institutions, whether named courts, tribunals, panels or commissions are arbitral, in that at least the formal contingency for their authority in specific cases emanates from the joint will of the litigating parties.’”)

²⁰⁴ *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f2&case=46&code=esa&p3=92>.

²⁰⁵ Pietrowski, *supra* note 19, at 378 (citing *South-West African cases (Second Phase)*, [1966] ICJ Rep., Pleadings, Vol. 10, p.122; Vol. 11, p. 460).

²⁰⁶ *Case Concerning the Arbitral Award Made By the King of Spain on 23 December 1906*, Judgment Dated 18 November 1960, available at <http://www.dipublico.org/1833/arbitral-award-made-by-the-king-of-spain-on-23-december-1906-case-honduras-v-nicaragua/>.

“Nicaragua has brought to the notice of the Court amount to no more than evaluation of documents and of other evidence submitted to the arbitrator. The appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not opened to question.”²⁰⁷

Evidently, this holding encourages the tribunal’s broad discretion to evaluate evidence.

When tribunals face corruption allegations, the broad discretion bestowed upon them is critical. By this discretion, arbitral tribunals may weigh the evidence and determine its probative value. For instance in the ICC Case No. 8891,²⁰⁸ by virtue of its discretionary power, the arbitral tribunal chose to primarily consider circumstantial evidence. Resultantly, the consultancy contract was declared null and void due to the intermediary’s inability to prove services, explain high remuneration, and clarify the disproportion between the remuneration and the value of the contract awarded to the principal.²⁰⁹

While broad discretionary authority is advantageous, there is a necessity for some degree of standardization. Although discretionary authority gives arbitrators an ability to tailor the process in accordance with the parties’ demands and raised allegations, this authority may impair foreseeability. This is a disadvantage for parties who prefer some reliability in procedure and evidence submission. Therefore, for the sake of clarity and foreseeability, arbitral tribunals should initially either consult with

²⁰⁷ *Id.*

²⁰⁸ See page 194.

²⁰⁹ Hwang & Lim, *supra* note 74, at 32.

the parties or educate them of the evidentiary rules that may be followed throughout the life of the arbitral proceedings.

ii) Admissibility and Assessment of Evidence Obtained in Parallel Proceedings

The rule governing the evidentiary process can be condensed into one sentence: parties submit evidence and tribunals ascertain its admissibility. However, this statement is oversimplified due to evidence obscurity, especially when tackling corruption charges. Further, evidence that may lead to infer corruption could be in the accused party's possession and, accordingly, the alleging party may be at a disadvantage to obtain such evidence. Unfortunately (for the alleging party), arbitrators do not possess the same investigative tools that are at the disposal of courts and thus, evidence compulsion is not an option.²¹⁰

Because of this disadvantage, evidence obtained from other pending or concluded proceedings could be vital to the arbitral proceeding, where a party alleged corruption. Unsurprisingly, the degree of deference given to this evidence by the tribunal is in connection with the relevance and relatedness of the parallel proceedings, applicable law, and evidence materiality to the dispute before the tribunal.

Past cases illustrate the significance of a tribunal collecting and evaluating evidence obtained in parallel proceedings for international arbitration. First, in

²¹⁰ See *supra* n.103.

Siemens v. Argentina,²¹¹ Argentina called for bids for the provision of services to implement immigration control, personal identification, and electoral information system, including services relating to data processing, start-up, technical support, and maintenance.²¹² Siemens A.G. won the bid via its Argentinian subsidiary SITS. Subsequently, Argentina and SITS entered into contract for a six-year term and following this contract agreement, Argentina requested SITS to end the production of certain services just before elections.²¹³ Further, the new Argentinian Government suspended additional services. After the select service suspension, the Argentinian Government enacted a law entitling the President to renegotiate public sector contracts. This law earned legitimacy and enforceability two days before the Contract Restatement Proposal was sent to the respective Ministry and the Government proposed to include the Contract under the provisions of the 2000 Emergency Law.²¹⁴ After the enactment of the new law, SITS received a new Draft Proposal dissimilar from the Contract Restatement Proposal.²¹⁵ Then, SITS made comments on the new terms and requested exhibits to the proposal. Siemens was subsequently informed that contract was terminated because it was open to negotiation. Resultantly, Siemens A.G. filed a request for arbitration to the ICSID.

²¹¹ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award Dated 6 February 2007, available at <http://www.italaw.com/sites/default/files/case-documents/ita0790.pdf>. The tribunal was composed of Dr. Andrés Rigo Sureda, Judge Charles N. Brower, and Prof. Domingo Bello Janeiro.

²¹² *Id.* at 23.

²¹³ *Id.* at 24.

²¹⁴ *Id.* at 26.

²¹⁵ *Id.*

At the conclusion of the arbitral proceedings, the tribunal rendered an award in favor of Siemens for US\$218 million. Up to this stage of the proceedings, the issue of corruption was not seriously pled. However, while vacatur was pending, corruption allegations manifested. The U.S. Department of Justice exposed that “eight former executives and agents of Siemens AG and its subsidiaries have been charged for allegedly engaging in a decade-long scheme to bribe senior Argentine government officials to secure, implement and enforce a \$1 billion contract”²¹⁶ into which the parties entered to produce national identity cards. In other words, the contract, which was the subject of the arbitration, was tainted by corruption.

Following this insight, Argentina presented the issue to the annulment committee on the grounds that Argentina’s annulment application cited corruption as sufficient to void the award. Argentina argued that the original tribunal obstructed justice by rejecting evidence presented in the proceeding regarding the continuing investigation on corruption by Argentinian officials.²¹⁷ In addition, according to the reports, Argentina filed a request to question key witnesses on alleged corruption, but the tribunal rejected the request due to Argentina’s tardiness to raise the issue.²¹⁸

²¹⁶ *Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme*, JUSTICE.GOV, <http://www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe> (last visited August 5th, 2015). See also Grant McCool, *Siemens Executives Charged with Bribery*, Reuters, 13 December 2011, available at <http://www.reuters.com/article/2011/12/13/us-siemens-argentina-idUSTRE7BC18J20111213>.

²¹⁷ LLAMZON, *supra* 62, at 123. Pursuant to the award, Argentina filed a request to submit new documents to the tribunal; however, the tribunal rejected the request since the issue was known to Argentina since 1998 and had not been raised in a timely manner. See *Siemens A.G.*, *supra* note 197, para. 52 at 13-14.

²¹⁸ LLAMZON, *supra* 62, at 123.

Next, Argentina sought to introduce evidence from parallel proceedings and requested revision by virtue of Article 51 of the ICSID Convention which states,

“either party may request revision of the award...on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.”

After Siemens was found guilty of corruption, it waived its rights established under the prior arbitration, including the US\$ 218 million award. Correspondingly, neither party sought the revision of the award nor continued the annulment proceedings.²¹⁹

The *Siemens* case represents how parallel proceedings and evidence obtained from these proceedings may impact both an arbitral proceeding and award enforcement. In *Siemens*, Argentina introduced evidence of alleged corruption and ongoing corruption allegations. However, the tribunal did not consider the evidence because Argentina did not raise the allegations in a timely manner. Therefore, *Siemens* embodies one of the a few cases where “waiver” applied to the allegation of corruption, resulting in a noteworthy public concern.

Recently, in *BSG Resources v. Guinea*,²²⁰ evidence collected by American authorities established the corrupt practices of BSGR while procuring a mining concession.

²¹⁹ *Id.* at 124 (citing “Siemens Waives Rights Under Arbitral Award Against Argentina”, 2 (14) *Investment Arb. Rep.* (2 September 2009)).

²²⁰ *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22, *available at* <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/22&tab=P>

In this case, the Guinean government initiated an investigation by the Technical Committee for the 2008 iron mining concession award to BSG.²²¹ While the Technical Committee investigated, U.S. authorities conducted their own corruption probe into potential violations of the FCPA. During these investigations, Mamadi Toué, former wife of the Lasana Conte, the late president of Guinea, revealed information illustrating the wheels of a corrupt system in motion. Documents evidenced that officials of BSG visited the president and his wife several times and that they offered US\$12 million to be allocated amongst the government officials who influence the ultimate decision on allocating valuable mining rights.²²² Subsequent to these visits of BSG officials, BSG agreed to pay millions of dollars and transfer shares of a subsidiary, which once controlled mining operations of BSG, to Mamadi Toué's company. In return, Mamadi Toué would distribute money to the government officials after saving a portion of it.²²³

Next, throughout their investigation, U.S. authorities discovered evidence establishing corruption. Evidence included affidavits from the individuals involved in the corruption scheme, transcripts of conversations regarding document destruction to erase evidence of illicit payments and arrangements, and a contract made between BSG and Mamadi Toué to distribute money to the government players.

RO. The tribunal was composed of Gabrielle Kaufmann-Kohler, Albert Jan Van Der Berg, and Pierre Mayer.

²²¹ Philip Urofsky, Henry Weisburg & Zach Tores-Fowler, *A Bribe Is a Bribe: FCPA's Influence on International Arbitration*, NEW YORK LAW JOURNAL (Feb.9, 2015), <http://www.newyorklawjournal.com/id=1202717099538/A-Bribe-Is-a-Bribe-FCPAs-Influence-on-International-Arbitration?slreturn=20150511153750>.

²²² *Id.*

²²³ *Id.*

Subsequent to evidence disclosure, Guinean officials found that corruption was established with “precise and consistent evidence.”²²⁴ Consequently, President Condé terminated BSG’s mining licenses and a subsequent report prepared by the Technical Committee reflected this termination. This termination preceded BSG’s request for arbitration on the grounds of an unlawful taking and deprivation of mining rights.²²⁵

The demand for the commencement of arbitration proceedings was registered on 8 September 2014. Following the constitution of the arbitral tribunal, the first session was on 23 April 2015 in Geneva, Switzerland, and a procedural session was held on 5 February 2016. Notable is the proceedings change of location. As such, because the award has not been furnished yet, it is obscure how much deference shall be given to the evidence gathered by U.S. authorities in a parallel proceeding. Evidently, the discretionary authority of the tribunal will govern this deference. Under these circumstances, it should be noted that Rule 34 of the ICSID Convention does not limit tribunals to the evidence obtained by the respective arbitral tribunal, rather “the tribunal shall be the judge of the admissibility of *any evidence* adduced and its probative value.”²²⁶

Notably, if the tribunal disregarded the evidence obtained by U.S. authorities, annulment would ensue and, consequently, result in non-enforcement and non-recognition of the award. Obviously, that outcome would be contrary to the

²²⁴ *Id.*

²²⁵ BSG Resources Limited v. Republic of Guinea, ICSID Case No. ARB/14/22, Request for Arbitration 16-22, *available* at <http://www.bsgresources.com/assets/Request-for-Arbitration-BSG-Resources-Limited-v-Republic-of-Guinea-1-August-2014.PDF>.

²²⁶ Emphasize added.

arbitrator's greatest duty: to make every reasonable effort to render an award that is enforceable.

Theoretically, evidence obtained by U.S. authorities would be compiled by the tribunal and then, two possible options arise: either (i) the burden of proof shifts to the claimant BSG and it can be tasked with proving the legitimacy of the mining contracts or (ii) evidence at hand is found sufficient to establish corruption and corruption becomes the outcome determinative. Accordingly, the mining contract may be declared null and void and the investor denied relief.

Unfortunately, the number of corruption allegations arbitral tribunals encounter is escalating with greater frequency and arbitral tribunals are poorly equipped to collect the necessary evidence. This lack of apparatus is clearly the Achilles' heel of international arbitration. Parties wishing to avoid public authorities' involvement into their business exploit this deficit and take advantage of the arbitral tribunal's inability to gather sufficient evidence. Further, this defect undoubtedly lures mischief-makers to abuse arbitration as a veil under which illegal contracts are enforced. For instance, the United States Justice Department's release in the *Siemens* case proved that arbitration could be a venue to conceal corrupt payments.²²⁷ This is a deplorable use of the dispute-resolution system and tribunals must be wary of this possible exploitation.

²²⁷ *Eight Former Senior Executives and Agents of Siemens Charged in Alleged \$100 Million Foreign Bribe Scheme*, JUSTICE.GOV, <http://www.justice.gov/opa/pr/eight-former-senior-executives-and-agents-siemens-charged-alleged-100-million-foreign-bribe> (The intermediaries commenced arbitration process in Switzerland to enforce "a sham \$27 million contract from 2001" among Siemens Business Services and Mfast Consulting under which existing bribe commitments were consolidated. The arbitration process was concluded with settlement that required Siemens to pay \$8.8 million.)

In sum, cooperation between arbitration and parallel proceedings is vital not only to remedy arbitration's deficiency in evidence gathering, but also to deter parties from using arbitration to shroud illegitimate transactions. However, particularly within the context of investment treaty arbitration, while appealing to evidence gathered in parallel proceedings, an arbitral tribunal should be cognizant of possible abuse of state authority to the detriment of an investor.²²⁸ In this regard, the tribunal should use its discretionary authority efficaciously to eliminate evidence gathered by a state party in an abusive fashion and ensure the delivery of a fair arbitral process complying with the standards of due process.

3. Closing Remarks for Chapter-III

First, the greatest challenge arbitral tribunals encounter in the face of corruption allegations is to determine the applicable standard of proof that the party with the burden of proof must satisfy. International rules, national rules, and institutional rules fail to furnish guidance on this issue.

International arbitration is a dispute resolution system that relies on principles rather than statutes. Particularly regarding evidentiary rules, they are neither rigid nor technical.²²⁹ Consequently, arbitral tribunals are endowed with the authority to freely choose which evidence is admissible, which evidence should be excluded, and what weight should be given to the admitted evidence.

²²⁸ Michael A. Losco, *Charting A New Course: Metal-Tech v. Uzbekistan and The Treatment of Corruption in Investment Arbitration*, 64 DUKE L.J. 37-52 (2014).

²²⁹ The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award of 29 April 2013, para. 181.

Because of the discretionary authority of arbitral tribunals and the deregulated nature of the standard of proof, each tribunal espouses different approaches to determine the standard of proof when tackling corruption allegations. The arbitral precedent in this respect exhibits that the majority of arbitral awards advocate the heightened standard of proof due to the seriousness of the corruption allegations and its significant legal repercussions. In other words, tribunals give primary consideration to the solemnity of the allegation, rather than emphasizing the challenges of gathering the evidence and proving corruption. Under the heightened standard, duty to prove corruption is designated to the alleging party. The alleging party must submit clear and convincing evidence to establish corruption beyond a reasonable doubt. Should the alleging party fail in this endeavor, the contract will be enforced notwithstanding suspicions that corruption tainted the agreement.

In contrast to the majority view, the inner conviction standard (conviction intimate) of the European continental tradition, if applied, could avoid unjust consequences inherent in the application of the heightened standard of proof and the lower standard of proof. Here, the party invoking corruption defense would have neither an advantage nor a disadvantage *vis-à-vis* the claimant. The success of the inner conviction standard lies in the duty delegation between the accusing party and the tribunal. The accusing party must at least furnish indirect evidence indicating corruption. In addition to this provision, the tribunal should play a more active role and effectuate the tools that are available to it, such as requiring further document

production, developing presumptions, shifting the burden of proof, and drawing adverse inferences.

Indisputably, corruption is a crime with serious repercussions. Because of this solemnity, corruption should preferably be established by solid and consistent evidence. However, also indisputable is the difficulty to prove corruption due to its concealed nature, as well as the deficiency in an arbitrator's tool belt to investigate corruption allegations. In the face of these disadvantages, persistence and broad discretionary authority imbued to tribunals are indispensable allies of arbitrators. In sum, arbitrators should be more unrelenting when they confront illegality contentions. Rather than leaving all weight upon an alleging party, arbitrators should benefit from their broad discretionary authority and should give primary consideration to circumstantial evidence, inferences, indicators of possible corruption, and, parallel proceedings.

CHAPTER-IV

THE POWERS and DUTIES of ARBITRATORS

“Hate what is wrong, love what is right!
Promote justice at the city gate!”¹

When corruption is alleged, or suspicions of corruption arise, inquiry turns to consider what actually constitutes the arbitrator’s role. The respective tribunal’s subjectivity colors this role when there are voids in guidance from national laws and institutional rules.

Theories behind an arbitrator’s role revolve around the relationship that the arbitrator has with the parties. According to the contractual theory, arbitrators are the servants of the parties and derive their rights and duties from the parties’ contract. Thus, in theory, they should confine their analysis to contractual rights and duties of the parties, rather than penal law.²

In contrast to the contractual theory, the status theory confers quasi-judicial status upon arbitrators. Under this theory, an arbitrator’s rights and duties do not emanate from the contract entered into by the arbitrating parties. Rather applicable

¹ *Amos 5:15* (New English Translation).

² Richard Kreindler, *Aspects of Illegality in the Formation and Performance of Contracts*, 3 (2) TRANSNAT’L DISP. MGMT. 209, 276 (2006), www.transnational-dispute-management.com/article.asp?key=742.

national law defines their role. Therefore, arbitrators must assure that the values of the national laws are not violated when they perform their duties.³

In the context of corruption, there is no uniform definition of the arbitrator's role. Some tribunals adopt the first theory and show reluctance to tackle corruption on the grounds of their limited power, however, in contrast, tribunals that adhere to the second theory, "grasp the nettle" of both alleged and suspected corruption.

Below is an analysis of which theory is most effective for arbitrators to apply when accounting for their powers and duties in general, as well as in the specific context of corruption and its modalities.

1. General Powers and Duties of Arbitrators

Through contract, arbitrators receive reciprocal powers and duties. These powers and duties derive from a broad and complex spectrum of resources including the arbitrating parties, the law governing the arbitration agreement, the law of the *lex arbitri*, the rules furnished by arbitral institutions, and possibly the law of the location where enforcement and recognition is sought.

Notwithstanding this broad spectrum, these powers and duties are similar. As far as duties owed to the parties are concerned, arbitrators are obliged to resolve the dispute, comply with the arbitration agreement, respect to confidentiality, act fairly and impartially (*e.g.* treating the parties equally, provide each party with a reasonable opportunity to address the tribunal and present their case), disclose any arbitrator interest in the case's outcome (or previous/current relations that may cast doubt upon

³ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOLUME I 1598 (2009).

the arbitrator's partiality), adopt appropriate procedures and avoid delay, make every reasonable effort to render an enforceable award, and conduct an investigation of criminal law breaches under applicable jurisdictions (such as England).

Within these duties arbitrators owe to parties, there exists an implicit hierarchy. Occasionally, deviations from a duty can be overlooked for the sake of an award's enforcement and recognition. For instance, arbitrators are obliged to conduct the arbitral proceedings in accordance with the parties' agreed upon procedure. However, they may prefer not to enforce the parties' choice to ensure effective case management, or avoid unfair, or inappropriate procedure.⁴

On the other hand, there are essential duties of arbitrators that remain at the top of the hierarchy; two of which are the duties to act fair and impartial. These duties are inherent in arbitration and are core aspects of the adjudicatory role played by arbitrators. In this regard, arbitrators must treat all parties fairly, respect their right to be heard, and make appropriate level of self-disclosure (such as a personal friendship, and/or previous or present working relationships with either party).

These duties are expressly imposed upon arbitrators by national laws, international regulations, and institutional rules.⁵ For instance, Section 33 of the English Arbitration Act states:

“(1) The tribunal shall –

⁴ *Id.* at 1629-1630.

⁵ IBA Guidelines on Conflict of Interest in International Arbitration General Standard 1 (“Every arbitrator shall be impartial and independent of the parties...”); ABA Code of Ethics for Arbitrators in Commercial Disputes Canon V (“An arbitrator should make decisions in a just, independent, and deliberate manner.”);

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”

Article 18 of the UNCITRAL Model Law parallels the English Arbitration Act. According to the article, “the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

Next, an arbitrator’s independence, impartiality, and fairness are indivisible components of arbitration. Neither parties nor arbitrators derogate from these qualities. Therefore, an award that is the product of a proceeding breaching the duties to act impartially or fairly will be deemed contrary to public policy and will be challenged during the enforcement and recognition process under the New York Convention Article V (2) (b) and Article 5 (1) (b).⁶

In conjunction with an arbitrator’s duties, the powers of an arbitrator aid the tribunal to fulfill its obligation to render an enforceable award. The powers of an arbitrator include those conferred by the parties in accordance with applicable law and by national laws, international regulations, and institutional rules.

⁶ The New York Convention Article 5 (1) (b) (“Recognition and enforcement of the award may be refused, at the request of the party against whom it was invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case...”); the New York Convention Article 5 (2) (b) (“The recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country.”)

Common vested powers include: (i) determining applicable law and seat, (ii) determining the language of the arbitration, (iii) requiring parties to produce documents, (iv) appoint expert witnesses, (v) requiring physical presence of fact witnesses, (vi) issuing interim measures if required, (vii) seeking assistance from courts, (viii) requiring security for costs, and (ix) requiring the parties to submit documents or any other materials. These powers are widely accepted and consistently encouraged.

Notwithstanding this consensus on arbitral power, there is one authority to which different approaches are taken: the power to investigate *ex officio*. National arbitration laws diverge with respect to an arbitrator's power to investigate facts on his or her own initiative. There are, however, arbitration laws granting arbitrators this power by allowing them to gather evidence not been submitted by the parties. For instance, Article 184 of the Swiss Federal Statute on Private International Law states that, "the arbitral tribunal shall itself conduct the taking of evidence." Similarly, German Arbitration Law allows collecting evidence *ex officio* to establish facts.⁷

In addition to German Arbitration Law, Section 34 (1) of the English Arbitration Act states, "it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of parties to agree any matter" and Section 34 (2) provides that "Procedural and evidential matters include...(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law." Note that the English Arbitration Act regulates an arbitrator's power to

⁷ Vincent Fischer-Zernin & Abbo Junker, *Between Scylla and Charybdis: Fact Gathering in German Arbitration*, 4 (2) Journal of International Arbitration 9, 14 (1987).

investigate facts on his or her own initiative subject to the parties' agreement. In other words, parties arbitrating under English law have the option to "opt out" of the arbitrator's *ex officio* investigation.

Next, institutional rules also confer *ex officio* powers upon arbitrators.⁸

According to Article 22 of the LCIA Arbitration Rules, arbitral tribunals may conduct necessary inquiries, categorize relevant issues, assess relevant facts, and order any party to furnish additional evidence. However, these powers are conditioned on prior party consent, or, in the absence of such consent, consultation with the parties prior to taking such an action.⁹

Last, Articles 3 (10) & 4 (10) of the IBA Rules on Evidence empower arbitral tribunals to order any party to produce documents or yield witnesses for testimony, including those persons whose testimony has not yet been offered into evidence.

2. Arbitral Investigation of Corruption Allegations and Suspicions

During the application of the *ex officio* powers, arbitrators may come across evidence leading to infer either that the parties engaged in corrupt conduct or that the parties seized the arbitral process for criminal purposes. Then, questions become: (i) what is an arbitrator's role in arbitral proceedings?; (ii) do arbitrators have a duty or

⁸ Article 25 (5) of the ICC Arbitration Rules ("At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence."); Article 20 (4) of the AAA International Arbitration Rules ("At any time the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 21."); Article 24 (d) & (g) of the SIAC Rules ("In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to...(d) conduct such enquiries as may appear to the Tribunal to be necessary or expedient; (g) order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome...")

⁹ Article 22 (1) (iii) & (iv) of the LCIA Arbitration Rules.

right to probe into this matter *sua sponte*?; (iii) if they do, to what extent should arbitrators inquire?; (iv) which powers are at their disposal?; (v) do they have an authority or a duty to inform public authorities of corruption?; or (vi) should the confidentiality of the arbitral proceedings abstain arbitrators from reporting corrupt practice? The following sections will answer these complex inquiries with the aid of arbitral cases and scholarly opinion.

a) Arbitrators: Servant of the Parties vs. Servant of the Truth

First, arbitrators encounter severe challenges when delving into corruption allegations. Due to these challenges, arbitrators diverge between whether to employ an “eyes wide shut” method, or an “eyes wide open” method. The modus chosen by arbitrators will determine an arbitrator’s rights and duties when facing corruption allegations, suspicions, and findings.

The tribunals of *SPP v. Egypt*, *Azurix v. Argentina*, *African Holdings v. Congo*, and *EDF v. Romania* espoused the “eyes wide shut” method.¹⁰ However, there are cases, the most significant of which is the *World Duty Free v. Kenya* case, where the tribunals adopted the “eyes wide open” approach and delved into corruption allegations.

Within the context of the cases made available to the public, it may be observed that the majority of tribunals preferred to employ passivity and disregard

¹⁰ RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENT 317 (2013).

corruption allegations and suspicions. The justification behind this impassiveness may best be understood by exploring the role arbitrators designate to themselves.

According to one school of thought, unlike judges in national courts, arbitrators are party-appointed and exercise the authority conferred upon them by the parties' contract and relevant applicable law. The presumption here is that an arbitrator manifests party autonomy and his or her sole task is to fulfill contractual duties and address issues limited to those specified by the parties. Accordingly, this would eliminate corruption investigation absent party request. Thus, advocates of limiting arbitrators' *sua sponte* investigation propound that, if there is a dispute before the tribunal emanating from an intermediary agreement due to non-payment, the tribunal must confine its assessment solely to the contractual rights and obligations of the parties and avoid a prosecutorial role of investigating probable ulterior motives behind the contract. Illustrating this perspective, Alexis Mourre argues:

“Arbitrators should act with great caution when introducing in the arbitral debate elements which were not included in the parties' submissions. Although there is no doubt that arbitrators should be sensitive to states' legitimate interests, they should not turn themselves into investigators, policemen or prosecutors. As opposed to the state judges, the primary role of an arbitrator is to enforce the contract, and not to defend public policy. It is submitted, as a consequence, that an arbitrator has no duty to investigate possible breaches of criminal law of which there is no evidence at all and

which were not raised by the parties in their submissions.”¹¹

In support of MOURRE, REDFERN & HUNTER opine, “it is not the duty of an arbitral tribunal to assume an inquisitorial role and to search officiously for evidence of corruption when none is alleged.”¹² In a similar vein with MOURRE *et al.* BORN states, “the tribunal should not proceed as a sort of private attorney general or investigating magistrate to seek out evidence of wrong-doing, detached from the arbitrators’ original mandate.”¹³ In sum, this school of thought encourages limiting the arbitrator role solely to the duties outlined by party contract and strongly discourages any *sua sponte* investigation by the tribunal outside this designated duty.

In contrast, on the complete opposite side of the spectrum, lies a second school of thought. Members who belong to this alliance vehemently object to an arbitrator’s role being limited to party contract. Rather, they propound that an arbitrator’s mission is broad and that arbitrators have the duty to serve, not only the parties who call upon them, but also international rule of law. Lord Neuberger, the President of the U.K. Supreme Court, regards an arbitrator’s role to guard the rule of law as a responsibility emanating from the increase in freedom and power devoted to arbitrators. Particularly, Mr. Neuberger states:

¹¹ Alexis Mourre, *Part II Substantive Rules on Arbitrability, Chapter 11 – Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal*, in Loukas Mistelis and Stavros L. Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* 207, 229 (2009).

¹² Teresa Giovannini, *Chapter 8: Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?*, in Domitille Baizeau and Bernd Ehle (eds), *Stories from the Hearing Room: Experience from Arbitral Practice (Essay in Honour of Michael E. Schneider)* 59, 68 (2015) (citing ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* para. 3-28 (1999))

¹³ BORN, *supra* note 3, at 1626.

“Over the past forty years national legislation and international conventions have famously given arbitrators ever increasing freedom and power by restricting interference by the courts with arbitrators’ procedures and awards. Any increase in freedom or power carries a concomitant increase in responsibility, and an increase in arbitral powers must be accompanied by an increased responsibility to observe fundamental rights.”¹⁴

Important to Neuberger’s argument, is that, today arbitration is no longer perceived as a dubious system that is used to circumvent the protection of public interest. On the contrary, as stated by Lord Neuberger, arbitration and arbitrators are regarded as integral in guarding the public good and the rule of law.¹⁵ Thus, when public interests are at stake, arbitrators’ role should transcend the four corners of the agreement written by the arbitrating parties and approach to a *quasi-judicial* role for the sake of ensuring compliance with international legal order. In a similar vein,

CATHERINE A. ROGERS asserts that:

¹⁴ Lord Neuberger, Arbitration and Rule of Law, Address Before the Chartered Institute of Arbitrators Centenary Celebration (March 20, 2015).

¹⁵ World Duty Free Company Limited v the Republic of Kenya, ICSID Case No. ARB/00/7 (Award Date October 4, 2006) para.181 (“...the law protects not the litigating parties but the public; or in this case, the mass of tax-payers and other citizens making up one of the poorest countries in the world.”); Metal-Tech v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, para.389 (“...[T]he Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. *The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law...*”) (Emphasis added). In this respect, it is possible to say that when public interests are at stake, the role a judge and the role of an arbitrator should intertwine with each other for the sake of public good. In this respect, *see generally* Cécilia A.S. Nasarre, *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator*, 10(3) TRANSNAT’L DISP. MGMT. 1, 15 (2013), <http://www.transnational-dispute-management.com/article.asp?key=1965> (“Others, like Mayer, go further by generally stating: ‘it should not be difficult to admit that what a judge can do, an arbitrator can also do.’ Baron van den Brandon de Reek went even more further by writing: ‘In a word, judge’s mission, arbitrator’s mission, it is the same thing.’”)

“The modern international arbitrator is not simply an instrumentality of the parties’ collective will expressed through the arbitration agreement, but instead an integral part of a larger system that depends, in part, on them performing their role as responsible custodians of that system.”¹⁶

In harmony with this assertion, HWANG & LIM do not regard an arbitral tribunal as “solely a manifestation and instrumentalization of party autonomy”¹⁷ and, accordingly, they dissuade arbitral tribunals from being simply a bystander to illegal engagements of parties. Pursuant to Hwang & Lim:

“A tribunal is not ‘solely a manifestation and instrumentalization of party autonomy’ which can ignore ‘international goals of sanctioning illegality.’ Tribunals must remain vigilant and alert to the possibility of corrupt dealings being hidden by one or both parties, otherwise they may become unwitting accessories to heinous acts ‘more odious than theft.’”¹⁸

Clearly, ROGERS and other members of this philosophy submit that arbitrators should take a robust stance as guardians of a system larger than arbitration; thus, they should “straightaway and efficiently” tackle corruption carried out by parties. When required, they should not hesitate to “draw civil law consequences of a rule of criminal law in a business dispute.”¹⁹ Here, proponents find this duty to be necessary to shield the rendered award from attack. Accordingly, BORN maintains:

“...insofar as arbitrators are requested to make *a binding arbitral award* through an adjudicative process,

¹⁶ Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 Am. U. Int. L. Rev. 958, 963 (2005).

¹⁷ Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8(1) Asian International Arbitration Journal 1, 20 (2012).

¹⁸ *Id.*

¹⁹ Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 (1) Arbitration International 95, 101 (2006).

either awarding monetary sums or declaratory relief, it is a vital *precondition to the fulfillment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy.*”²⁰

Thankfully, the modern trend in arbitration reflects willingness to tackle corruption allegations and encourage arbitrators to confront these issues. Undeniably, arbitrators’ powers and duties largely derive from the contract; however, once an arbitrator is appointed, the parties should have no decisive control over the arbitrator. Arbitrators should pay as much attention to international public policy as they do to duties originating from the parties’ contract.

Although recent cases encourage limiting the arbitrator role to the text of the party contract, in *Jivraj v. Hashwani*,²¹ the United Kingdom Supreme Court uniquely combined the two schools of thought and furnished a milestone judgment affirming an arbitrator’s quasi-judicial role.

In *Jivraj*, Mr. Jivraj and Mr. Hashwani entered into a joint venture agreement incorporating an arbitration clause. The arbitration clause stipulated that, in the event of party dispute, the dispute would be submitted to a tribunal comprised of arbitrators

²⁰ GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOL. II 2183 (2009) (emphasis added). See also Aloysius Llamzon & Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct in Legitimacy: Myths, Realities, Challenges*, 18 ICCA Congress Series 451, 482 (2015) (citing Bernardo M. Cremades & David J. A. Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money-Laundering and Fraud in Arbitration: Money-Laundering, Corruption and Fraud* 65, 86 (“[t]he position today is that the international arbitrator has a clear duty to address issues of bribery, money laundering or serious fraud whenever they arise in the arbitration and whatever the wishes of the parties and to record its legal and factual conclusions in its award. This is the only course available to protect the enforceability of the award and the integrity of the institution of international commercial arbitration.”))

²¹ *Jivraj v. Hashwani*, [2011] UKSC 40 (July 27, 2011), available at <http://www.bailii.org/uk/cases/UKSC/2011/40.html>.

from a specific religious group. When the dispute erupted, Mr. Hashwani appointed Sir Anthony Colman as an arbitrator; however, Mr. Jivraj objected to this appointment on the grounds of the arbitral clause's violation and subsequently, initiated proceedings in the Commercial Court.²²

The Commercial Court found that the relationship between the arbitrators and the parties was a contractual one and therefore, arbitrators were employees of the parties for the purposes of the relevant Regulations. However, the Supreme Court denied the Commercial Court's approach. The Supreme Court appreciated the contractual nature of arbitration, but it denied finding that arbitrators were merely servants to the parties:

“The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce puts it, he must determine how to resolve their competing interests. He is no sense in a position of subordination to the parties; rather the contrary. He is in effect a ‘*quasi-judicial adjudicator*.’”²³

Thus, the Court's opinion unequivocally encourages arbitrators to take a more comprehensive role than bestowed upon them by contract when they face international public policy questions or criminal offences. Thus, the most efficient option is to combine the two schools of thought and permit arbitrators to use them interchangeably, rather than obligating arbitrators to choose between them.

²² *Id.*

²³ *Id.* (emphasis added).

Consequently, arbitrators may be bound, not only by the parties' contract, but also by the relevant mandatory law and international public policy.

b) The Arbitrator's Rights (Obligations) to Probe Into Corruption *Sua*

Sponte: Ultra Vires / Ultra Petita v. International Public Policy

Arbitrators are obligated to conclude all issues presented by the parties, but not other issues. Compliance with this commitment is a key factor that influences the fate of the enforcement demands filed by an award-creditor. When corruption or illegality issues are raised, arbitral tribunals must address these issues and rule upon them for the sake of making a binding and final arbitral award that decides parties' legal rights.²⁴

However, there may be cases when neither party alleges corruption or illegality due to either the challenges of gathering proof or because the party fears criminal prosecution. However, indicators, such as the evidence on record or the parties' testimony, may lead the tribunal to infer that parties engaged in corrupt activities. Under these circumstances, should (must) arbitrators inquire into the issue *sua sponte*?

The answer of this question remains murky. On the one hand, arbitrators may overlook the possibility of corruption and face allegations based on public policy violation, but on the other hand, they may conduct an investigation of corruption and invite challenges based upon *ultra petita* and/or *ultra vires*. Both negative and positive answers may cause the enforcement and recognition of the award to

²⁴ BORN, *supra* note 20, at 2183.

encounter obstacles that may lead to either annulment or refusal of the enforcement request.

The tribunal of the ICC Case No. 6497 gave a negative answer to this question and stated:

“the demonstration of the bribery nature of the agreement has to be made by the Party alleging the existence of bribes...A civil court, an in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth.”²⁵

Notwithstanding this discouragement, more often than not, the answer to whether the arbitrator should proceed *sua sponte* is “yes.” For example, in the ICC Case No. 1110, the sole arbitrator Judge Lagergren inquired into corruption on its own motion and maintained:

“In the presence, of a contract in dispute of the nature set out hereafter, condemned by public policy decency and morality, I cannot in the interest of due administration of justice avoid examining the question of jurisdiction on my own motion.”²⁶

However, when adhering to Judge Lagergren’s approach, arbitrators should practice caution because they may find themselves adrift in the *ultra vires/petita* mire. Resultantly, it is highly probable, in this circumstance, that parties will advance challenges against arbitrator jurisdiction and validity of the award will be questioned on the basis of *ultra vires/petita*.

²⁵ JEAN-JACQUES ARNLDEZ, YVES DERAIS & DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL AWARDS 1996-2000 / RECUEIL DES SENTENCES ARBITRALES DE LA CCI 1996-2000, 233 (2003).

²⁶ JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 220 (2003).

Arbitrators must heed public policy concerns and mandatory laws when rendering a final and binding award.²⁷ Particularly in investment arbitration, public international law, including anti-corruption regulations, naturally is part of the applicable law that arbitrators ought to consider. Accordingly, arbitrators should embrace an approach that abides by party autonomy, but concomitantly heeds mandatory laws of states and international public policy. In other words, arbitrators should take into account, not only parties' arbitration contract and their concerns, but also the concerns of states and their public.

Therefore, disregarding indicia of corruption on the basis that no allegation was raised, not only undermines award enforcement and recognition, but also entices national courts to invade arbitral proceedings and conduct *de novo* review. Courts would feel obligated to conduct this review because enforcing an award, originated from a contract tainted by corruption, would contradict national and international public policy (including other mandatory legal rules) and impair universal values. Thus, in the *Soleimany* case, the court set aside the award derived from an illicit contract and opined:

²⁷ In 1980, the ICC Commission on Law and Commercial Practices furnished suggestions for arbitrators regarding the applicability of public policy besides the law chosen by the parties. *See* Mohammad Reza Baniassadi, 10 (1) BERKELEY J. INT'L L. 59, 63-64 (1992) ("Alternative I: [E]ven when the arbitrator does not apply the law of a certain country as the law governing the contract he may nevertheless give effect to mandatory rules of the law of that country if the contract or the parties have a close contact to that country and if and in so far as under its law those rules must be applied whatever be the law applicable to the contract. On considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application; Alternative II: [E]ven when the arbitrator does not apply the law of a certain country as the law governing the contract he may nevertheless give effect to mandatory rules of the law of that country if the contract or the parties have a close contact to that country in question especially when the arbitral award is likely to be enforced there, and if and in so far as under the law of that country those rules must be applied whatever be the law applicable to the contract.")

“Where public policy is involved, the interposition of an arbitration award does not insulate the successful party’s claim from illegality which gave rise to it... The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.”²⁸

Under these circumstances, are arbitrators caught between a rock and a hard place? Unequivocally, the answer is yes, because the two dominate principles, *ultra vires* (and/or *ultra petita*) and *international public policy*, vie. This struggle exists because, on the one hand, arbitrators must solely tackle disputes defined by contract, but on the other hand, international public policy demands that arbitrators, as custodians of morality and international rule of law, abide by relevant mandatory rules.

By virtue of national and international public policy, arbitrators must be ready to raise the issue of corruption on their own. These *sua sponte* actions, however, may lead to the challenges not only under international regulations, such as Article V (1) (c) of the New York Convention and Article 34 (2) (iii) of the UNCITRAL Model Law, but also under national statutes, such as the FAA §10 (a) (4),²⁹ §103 (2) (d) of the U.K. Arbitration Act,³⁰ Article 190 (1) (c) of the Swiss Federal Statute on Private

²⁸ KREINDLER, *supra* note 10, at 454-455.

²⁹ “In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration... where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

³⁰ “Recognition and enforcement of the award may be refused if the person against whom it is invoked proves... that the award deals with the difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.”

International Law.³¹ Arbitrators must prepare for battle and defend allegations that their *sua sponte* actions are not defined by contract and that they are reaching beyond the scope of their duties to arbitrate select disputes.³² However, the spheres of these articles are confined to judicial tendency to construe them narrowly for the sake of promoting arbitration. For instance, in the *Island Creek v. City of Gainesville* case,³³ the court stated that the arbitration agreement “does not provide any specific limitations on the power of the arbitrators...and we are required to give deference to the arbitrators’ interpretation of the Rule and the Agreement unless they have clearly exceeded their authority.”³⁴ Further, in *Banco De Seguros Del Estado v. Mutual Marine Office*,³⁵ the court stated, “we[courts] have consistently accorded the narrowest of readings” to the FAA’s Section 10 (a) (4), which regulates vacatur of an arbitral award on the basis of excess of authority.³⁶

Finally, in the *Minmetals Germany GmbH v. Ferco Steel Ltd* case,³⁷ the respondent balked at the enforcement of the award on the grounds of excess of authority under the U.K. Arbitration Act of 1996 Article 103 (2) (d). The respondent

³¹ “The award may only be vacated...if the arbitral tribunal’s decision went beyond the claims submitted to it, or failed to decide one of the items of the claim.”

³² Article 5 (1) (c) of the New York Convention; Article 34 (2) (iii) of the UNCITRAL Model Law (“An arbitral award may be set aside by the court specified in article 6 only if ... (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to the arbitration, or contains decisions on matters beyond the scope of submission to the arbitration...”).

³³ *Island Creek Coal Sales Company v. City of Gainesville, Florida*, 729 F.2d 1046 (6th Cir. Ky. 1984).

³⁴ *Id.* at 1049.

³⁵ *Banco De Seguros Del Estado v. Mutual Marine Office, Inc.*, 344 F.3d. 255 (2d Cir. 2003); *Certain Underwriters at Lloyd’s, London v. BCS Ins. Co.*, 239 F.Supp. 2d 812 (N.D. III. 2003) (“We will not over-scrutinize the panel’s language and leap to the conclusion that it exceeded its power in formulating the award”); *Elite Inc. v. Texaco Panama Inc.*, 777 F.Supp. 289, 292 (S.D.N.Y. 1991). (“the ‘narrowest of reading’ to the ‘excess of powers’ provisions”); *Singer Co. v. Tappan Co.*, 593 F.2d 545 (3d Cir. 1979) (excess of authority is interpreted in a narrow way).

³⁶ *Banco De Seguros Del Estado*, 344 F.3d at 262.

³⁷ *Minmetals Germany GmbH v. Ferco Steel Ltd.* [1999] 1 All E.R. (Comm.) 315 (Q.B.)

alleged that the tribunal exceeded its authority by paying regard to findings of separate arbitration proceedings that were neither raised nor submitted as evidence by the arbitrating parties.³⁸ Justice Colman did not credit the allegations and dismissed the argument because the tribunal had acted within its mandate by basing its decision upon pertinent evidence submitted by the parties even if the parties had not raised such evidence.³⁹

*“Evidence derived from [the tribunal’s] own investigations... went to a central issue within the overall dispute referred to arbitration, namely what loss had been caused to [claimant] by [respondent’s] breaches of the contract... ‘the scope of submission’ [within the meaning of s 103(2)(d) of the UK Arbitration Act 1996]... falls to be defined by reference to the issues to be resolved by the arbitrators... [t]his head of objection to enforcement must therefore be rejected.”*⁴⁰

Notably, commentary takes a stance in consonant with case precedent on the issue of *ultra vires/petita*. On this subject, BORN opines:

*“An arbitral tribunal does not exceed its authority under Article 34 (2) (a) (iii) by relying on arguments or authorities not raised by the parties to support their claims. Doubts about the scope of the parties’ submissions are resolved in most legal systems in favor of encompassing matters decided by the arbitrators. Put differently, a considerable measure of judicial deference is accorded the arbitrators’ interpretation of the scope of their mandate under the parties.”*⁴¹

³⁸ Hwang & Kevin, *supra* note 17, at 16.

³⁹ *Id.*

⁴⁰ *Id.* at 16-17 (emphasis added).

⁴¹ BORN, *supra* note 20, at 2608-2609 (emphasis added).

The approach taken by GAILLARD & SAVAGE is similar to BORN. In this regard, GAILLARD & SAVAGE note that:

“The arbitrators will also fail to comply with their brief by ruling *ultra petita* or, in other terms, by ruling on claims not made by the parties...[However], the fact that arbitrators may have based their decision on allegations or arguments which were not put forward by the parties does not amount to a failure to comply with their brief. They only fail to comply with their brief where they grant one of the parties more than it actually sought in its claims.”⁴²

Furthermore, it should be noted that corruption is a defect that influences the validity of the underlying contract and unsurprisingly, endangers the fate of the arbitral proceeding and its outcome. Thus, an arbitrator’s *sua sponte* investigation into corruption may be considered within the context of the competence-competence principle according to which arbitrators are vested with the authority to consider and decide their own jurisdiction, in conjunction with the existence, legality, validity, and scope of the parties’ arbitration agreement.⁴³

Additionally, another facilitator of *sua sponte* investigations can be cited to the arbitral clause itself. If the arbitration agreement’s scope is sufficiently broad, arbitrators may furnish decisions on issues not raised by the parties, while simultaneously maintaining safe haven within the boundaries of the relevant agreement. In other words, when arbitrators focus on issues and evidence not introduced by the parties during the proceedings, this action does not necessarily

⁴² EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 941 (1999).

⁴³ BORN, *supra* note 3, at 851-852.

constitute non-compliance with the parties' desires unless the arbitrators grant one of the parties more than the party demanded in its claims.⁴⁴

Following the amalgamation of case law and commentary, the rule that emerges is that arbitrators are not bound by how parties structure their claims or allegations in the arbitration agreement. Thus, even if an award is founded on issues or evidence not raised by the parties, a vacation of the award on the grounds of *ultra vires/petita* is not probable and arbitrators will not be chastised to have exceeded their authority so long as (i) the award is based upon the facts and evidence relevant to the dispute submitted to the arbitration for determination⁴⁵ and (ii) the parties are given an opportunity to comment on any "surprise" steps taken by the tribunal.⁴⁶

Plainly, an arbitrator's decision to investigate and rule on corruption rarely amounts to *ultra petita/vires*; correspondingly, it does not represent a severe threat to the recognition and enforcement of the award. However, failure to engage in such self-inquiry may lead to: (i) transformation of arbitration into a safe haven for corrupt dealings hidden by both parties; (ii) accusations that arbitrators aid and abet contracts

⁴⁴ GAILLARD & SAVAGE, *supra* note 42, at 941 ("For example, the Paris Court of Appeals set aside part of an award in which the starting-point for the accrual of interest was fixed at a date earlier than the date requested by the plaintiff. In another example, it set aside an award where the arbitral tribunal reached a decision concerning the property rights of one of the parties, whereas that party's claim concerned only a company's by-laws. Similarly, it has been held in a case concerning a French domestic arbitration that arbitrators went beyond the terms of their brief in ruling on damages not claimed by the parties.")

⁴⁵ Hwang & Lim, *supra* note 17, at 16.

⁴⁶ *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All E.R. (Comm.) 315 (Q.B.) ("where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be avoid enforcement of an award based on findings of fact derived from such investigations if the enforcer has not been given any reasonable opportunity to present its case in relation to the results of such investigations.")

contradicting public morals; and (iii) issuance of an award in violation of public policy.

As a result, notwithstanding the absence of corruption allegations raised by the parties, arbitrators should not circumvent inquiry into corruption *sua sponte*. Not only will this investigation prevent negative end-results such as non-enforceability, but also the scrutiny fulfills the fundamental duty that the arbitral tribunal “shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat.”⁴⁷ This *sua sponte* analysis is truly the most effective option because, should an arbitrator fail to conduct such inquiry, especially when there exists corruption indicia, the enforcement and recognition of the award becomes precarious and vulnerable to attack based upon public policy violations.⁴⁸ Helpfully, there are jurisdictions favoring arbitration autonomy, such as the courts of Paris and London. These courts commonly encourage award conservation rather than award disturbance. Thus, every award rendered without conducting proper investigation into suspicions of corruption will abet the exploitation of pro-arbitration policies and aid parties to harvest benefits from their corrupt engagements.

At this point, there may be questions of how arbitrators investigate suspicions of corruption given that they lack the extensive powers available to national courts and regulatory authorities. Even if arbitrators do not hold such coercive authority to forcibly recover documents and seize other evidence, they do have sufficient tools to defeat evidentiary barriers and unearth the truth. Under the majority of international

⁴⁷ Article 32 (2) of the LCIA Rules; Article 41 of the ICC Rules.

⁴⁸ Article 34 (2) (b) (ii) of the UNCITRAL Model Law; Article 5 (2) (b) of the New York Convention.

arbitration institutional rules, arbitrators are equipped with authority to compel parties to disclose documents, issue *subpoena* for witnesses or documents, appoint expert witnesses, and ask for assistance from courts when gathering evidence.

Additionally, there are other potential solutions available to arbitrators, such as drawing adverse inferences, shifting the burden of proof, or relying on circumstantial evidence. Particularly, drawing adverse inference is a well-settled and viable solution, capable of overcoming difficulties originating from a party's reluctance to comply with disclosure requests. This tool is exceedingly useful in light of arbitrator inability to compel document production, especially when faced with party reluctance to obey an arbitral procedural order.

To illustrate the efficacy of drawing adverse inferences in arbitration, in the ICC Case No. 3916,⁴⁹ the arbitrator interpreted the widespread nature of corruption in Iran as circumstantial evidence casting doubt upon the legitimacy of the agency relationship between the parties.⁵⁰ Thus, the arbitrator required the agent (claimant) to adduce adequate evidence relating the licit nature of his or her intervention. When the claimant refused to provide the requested information, the arbitrator drew an adverse inference from this failure and declared that the purpose of the contract was to bribe public officials.

⁴⁹ See supra pg. 228 for the details of the case.

⁵⁰ Stephen Wilske & Todd J. Fox, *Corruption in International Arbitration and Problems With Standard of Proof*, 10 (3) TRANSNAT'L DISP. MGMT. 489, 501, <http://www.transnational-dispute-management.com/article.asp?key=1950>.

The notion of adverse inference is also well accepted in investment treaty arbitration. Rule 34(3) of the ICSID Arbitration Rules hints at this authority of an arbitral tribunal by stating that,

“the parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.”

In *Europe Cement v. Republic of Turkey* case,⁵¹ the tribunal exercised this authority against the claimant in connection with its alleged acquisition of shares in a Turkish entity in 2003.⁵² In response to this claim, the respondent put forward evidence, including expert testimony, that led the tribunal to infer that share transfer agreements furnished by the claimant “were not authentic and they had been backdated”⁵³ in order to give the impression that the claimant owned the shares in 2003. The tribunal credited the respondent’s evidence and indicated that there was “a strong inference that there was no transfer of shares...in 2003.”⁵⁴ When the claimant could not rebut this inference by advancing any document illustrating the authenticity of the share agreements, the tribunal made adverse inferences against the claimant.

The tribunal held that:

“...It [the claimant] could have produced the originals of the share agreements. It could have produced the

⁵¹ *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 (Award Date: August 13, 2009).

⁵² Carolyn B. Lamm, Hansel T. Pham & Rahim Moloo, *Fraud and Corruption in International Arbitration* in Miguel Ángel-Fernández-Ballesteros & David Arias (eds), in *Liber Amicorum Bernardo Cremades* 705 (2010).

⁵³ *Europe Cement Invesmtent*, *supra* note 51, at para. 133.

⁵⁴ *Id.* at para. 163.

share certificates that it claimed it owned...But, it never produced any documents. This contributes to the inference that the originals of the documents copied in its Memorial and on which its claim was based either were never in the Claimant's possession or would not stand forensic analysis, in which case the claim that Europe Cement had shares...at the relevant time was fraudulent.”⁵⁵

However, should arbitrators draw adverse inference, they must maintain fairness and should hear any reasoning provided in the event of noncompliance. For instance, Article 9 (5) of the IBA Rules confers this authority upon arbitrators and asserts:

*“If a party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”*⁵⁶

Because modernity generates fervent encouragement of arbitration while simultaneously eroding judicial hostility, arbitrators are more emboldened than ever to delve into suspicions of corruption. Unfortunately, there still remain certain approaches limiting an investigation of corruption to party allegations. For instance, the tribunal of the ICC Case No. 6497 held that

“ the demonstration of the bribery nature of the agreement has to be made by the Party alleging the existence of bribes...A civil court, and in particular an

⁵⁵ *Id.* at para. 164.

⁵⁶ Emphasis added; Article 9 (6) of the IBA Rules (“If a party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.”)

arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth...”⁵⁷

Further, the ICC Case No. 7047 (the *Westacre* case) sustained,

“the word ‘bribery’ is clear and unmistakable. [Thus,] [i]f the defendant does not [allege the bribery in his or her] presentation of facts, an arbitral tribunal [is not required] to investigate. [Consequently,] [i]t is exclusively the parties’ presentation of facts that decides in what direction the arbitral tribunal has to investigate...”⁵⁸

Today however, probing into suspicions of corruption *sua sponte* is considered part of the arbitrator’s mandate to determine parties’ claims and defenses. To illustrate, Richard Kreindler affirmed that, “illegality contentions going to the nullity of the main contract...even if initiated by the tribunal itself, should normally be deemed to ‘fall within the terms of the submission to arbitration’...”⁵⁹ However, arbitrators must not espouse an over-zealous attitude that could incite parties to use corruption allegations as a tactic to discredit the contract or to resist recognition and enforcement of the award before national courts.⁶⁰ In other words, arbitrators should adopt the role of watchdog, but not the role of bloodhound.⁶¹

⁵⁷ Hwang & Lim, *supra* note 17, at 18 n.60.

⁵⁸ *Id.* at 21 n.69.

⁵⁹ KREINDLER, *supra* note 2, at 252.

⁶⁰ It is possible to see this tactic in *Westacre v. Jugoimport* case where Jugoimport raised corruption allegations without submitting any evidence pointing out corruption or any other type of illegality.

⁶¹ Douglas Thomson, *Arbitrators and Corruption: Watchdogs or Bloodhounds*, GLOBAL ARBITRATION REVIEW (May 7th, 2014), <http://globalarbitrationreview.com/journal/article/32629/arbitrators-corruption-watchdogs-bloodhounds>.

In sum, when red flags insinuate corruption,⁶² (as listed by arbitral institutions and governmental authorities), arbitrators should seek explanation from the relevant party and if that further explanation is not satisfactory to eliminate corruption suspicions and exculpate the party, *sua sponte* actions should be taken by arbitrators to determine whether the underlying contract or the investment is infected by corruption.⁶³

c) Reporting Corruption to the Arbitral Institution and Public Authorities

Next, another issue spawning divergent opinion is *if* and *when* arbitrators must/should report manifest corruption to relevant public authorities or arbitral institutions. Here, the source of conflict is the dissonance between the arbitrator's two main duties: on the one side of the spectrum, there is a duty owed to the parties to maintain privacy and confidentiality of the proceedings, on the other side of the spectrum there is another duty owed to the public to take cogent steps to guard international public policy against corruption.

Confidentiality is perceived as an integral aspect of arbitration that encourages parties to submit their disputes to arbitration. Not only does confidentiality prevent third parties from interfering with arbitral proceedings, but it also assures both the

⁶² See pages 216-220 for the list of red flags

⁶³ BERNARDO M. CREMADES & DAVID J. CAIRNS, TRANSNATIONAL PUBLIC POLICY IN INTERNATIONAL ARBITRAL DECISION-MAKING: THE CASES OF BRIBERY, MONEY LAUNDERING AND FRAUD IN ICC DOSSIERS, ARBITRATION-MONEY LAUNDERING, CORRUPTION AND FRAUD 65, 82 (2003) ("A tribunal concerned for example, by the remuneration arrangements for a foreign agent can seek an explanation of those arrangements without suggesting they might have a corrupt purpose. A discreet request for further information, if properly used, should enable an arbitral tribunal to either eliminate a suspicion of illegal activity or to confirm the need for the possibility of bribery, money laundering or serious fraud to be raised explicitly with the parties.")

protection against public document disclosure (*e.g.* transcripts, parties' submissions, written pleadings), and exposé of evidence gathered during the proceedings. By virtue of these confidences, parties have a prerogative to avoid public scrutiny and maintain the secrecy of commercially sensitive information.

Interestingly, following the examination of the New York Convention, the European Convention, Inter-American Convention, the FAA and the English Arbitration Act, it appears that no article expressly addresses arbitral proceeding confidentiality. Therefore, the parties' arbitration agreement and relevant arbitral institution's rules will determine the scope of confidentiality. To illustrate, Article 30 of the LCIA Arbitration Rules state:

“[t]he parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority.”

Other institutional rules embody similar articles to the LCIA Arbitration Rules.⁶⁴ Undisputedly, the duty to maintain confidentiality is also imposed upon arbitrators. In fact, this confidentiality is expressly regulated by some institutions'

⁶⁴Article 44 of the Swiss Rules of International Arbitration (“Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings not already in the public domain, except and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a judicial authority...”); Article 46 of the Stockholm Chamber of Commerce Arbitration Rules (“Unless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.”)

arbitration rules, such as Article 44 (1) of the Swiss Rules of International Arbitration, which plainly states that the duty of confidentiality also applies “to the arbitrators, the tribunal-appointed experts, [and] the secretary of the arbitral tribunal.” Additionally, Article 37 (1) of the ICDR Arbitration Rules likewise and states that, “confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator.” Both institutional rules clearly propound the arbitrator’s duty of confidentiality is of utmost importance to the arbitral process.

However, when the issue becomes whether or not to report party corruption to arbitral institutions or public authorities, the parameters of the arbitrator’s duty of confidentiality is a topic of great debate. A commons-sense approach dictates that an arbitrator has an obligation and a duty to inform the relevant arbitral institution of corruption, particularly when the ICC administers the arbitration, this duty becomes transparent by virtue of its significant involvement in the award’s scrutiny.⁶⁵

According to Article 41 of the ICC Rules,

“in all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”

Conversely, according to Article 6 of the Rules,⁶⁶ if the existence of the arbitration agreement is in question, the ICC Court decides whether and to what

⁶⁵ KREINDLER, *supra* note 10, at 327.

⁶⁶ Article 6 (4) of the ICC Rules (“In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist...”)

extent arbitration shall proceed. When the ICC Court is *prima facie* satisfied that an arbitration agreement may exist, arbitration ensues. In light of the ICC Rules, it can be hypothesized that because this institution has the power and authority to determine the fate of arbitral proceedings when the existence of the ICC arbitration agreement is called into question, arguably, the ICC also has a right to be informed of an illegality by an arbitral tribunal.⁶⁷

In contrast, when considering informing the public authorities of corruption, some argue that obligating arbitrators to report is inconsistent with the private structure of arbitration and the contracting will of the parties. Illustrating this argument, a Working Group of the ICC concluded that it would be “contrary to the nature of arbitration, contrary in particular to the trust that the parties place in [the] arbitrator, for an arbitral tribunal to report to the authorities the offences found...”⁶⁸

Conversely, those propounding the opposite side to this coin could maintain that arbitrators “owe duties not only to the parties, but also to the international business community at large.”⁶⁹ Those in favor of reporting therefore postulate that arbitrators have a responsibility to uphold the international rule of law and they must

⁶⁷ KREINDLER, *supra* note 10, at 326-327.

⁶⁸ ALAN REDFERN, J. MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 340 (2009).

⁶⁹ S. Nadeau-Seguin, *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound By A Duty to Report Corrupt Practices?*, 10 (3) TRANSNAT'L DISP. MGMT. 1, 8 (2013), www.transnational-dispute-management.com/article.asp?key=1963 (citing Kenneth D. Beale & Paolo Esposito, *Emergent International Attitudes Towards Bribery, Corruption, and Money Laundering*, 75 Arbitration 360, 361 (2009))

be concerned, not only with the parties' dispute, but also with international public policy.⁷⁰

The main factor dictating the duty to report solely emerges from national legislation to which the arbitral tribunal is subject (*e.g.* the law of *lex arbitri*, the law of the country where enforcement is sought or where the corrupt conduct took place, or the law to which members of the tribunal are subject).⁷¹ National legislations, unfortunately, leave a lacuna as to an arbitrator's duty to report. For example, neither the FCPA from the U.S. nor the Bribery Act from the U.K. fashions any rule regarding an obligation to report corruption to relevant authorities. Thus, the next task is to determine whether there is an identifiable source that outlines an arbitrator's duty to report.

Although it seems like it is a far-fetched solution, an arbitrator's duty to report may arise from money-laundering legislation.⁷² There are various money laundering legislations imposing a duty to report on independent legal professionals (including lawyers, accountants, financial institutions) that may easily and harmoniously collaborate with anti-corruption laws. Consequently, for the sake of

⁷⁰ A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*, 1 (2) TRANSNAT'L DISP. MGMT. 1, 5 (2006), www.transnational-dispute-management.com/article.asp?key=88. ("The arbitrator may assume that he only needs to address the particular interests of the parties in the arbitration and need not be concerned with international public policy. That may no longer be the case in the area of corruption. Given the ratification of these corruption treaties, it is clearly the international rule of law that bribing government officials is illegal and those charges with the administration of justice, including international arbitrators, have the responsibility to ensure that such laws are applied properly.")

⁷¹ Hwang & Lim, *supra* note 17, at 69-71. *See also* CREMADES & CAIRNS, *supra* note 63, at 85 ("Such duty [of disclosure] could only arise from express legislation in a jurisdiction to which the arbitral tribunal, or some of its members, were subject.")

⁷² THOMAS K. SPRANGE, CHAPTER 8: SUA SPONTE INVESTIGATIONS – DUTY TO REPORT IN ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION, DOSSIERS XIII OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 138 (2015).

remedying the legislative void regulating this duty, a feasible option is to apply current national and international money-laundering regulations in a comprehensive way to incorporate arbitrators.⁷³

By adopting this method, an arbitrator's duty of confidentiality becomes subordinate to the duty to report. In other words, if there were a duty of disclosure arising from money-laundering legislations, such duty would prevail over an arbitrator's implicit or explicit confidentiality obligation and immunize them from liability ensuing from a breach of confidentiality.⁷⁴

For instance, Article 39 (1) of Singapore's "the Corruption, Drug Trafficking and Other Serious Crimes Act (Chapter 65A)"⁷⁵ places a duty to disclose on *a person* who knows or has reasonable grounds to suspect that property was either anticipated to be used or indeed used in connection with criminal conduct.⁷⁶ The Act, in Article 2 (1), defines property to include "money and all other property, movable or immovable, including things in action and other intangible or incorporeal property." Further, the Act regulates criminal conduct as offences that occur in Singapore or a

⁷³ *Id.*

⁷⁴ Hwang & Lim, *supra* note 17, at 69-70.

⁷⁵ "Where a person knows or has reasonable grounds to suspect that any property: (a) in whole or in part, directly or indirectly, represents the proceeds of; (b) was used in connection with; or (c) is intended to be used in connection with, any act which may constitute drug dealing or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicions Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention", available at <https://www.imolin.org/doc/amlid2/Sgp%20CD%20Act.pdf>. See generally Hwang & Lim, *supra* note 17, at 70-71.

⁷⁶ The English Proceeds of Crime Act (2002) Section 328 is in harmony with the Singaporean Act. Section 328 (1) states, "A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

foreign country. In the light of this approach, adopting an inclusive method would oblige arbitrators to report a party's corrupt engagements to relevant public authorities.

Within the context of international corruption regulations, it is possible to see that the gap left by national regulations regarding an arbitrator's duty to report is similarly bereft in international conventions. International corruption conventions *solely recommend* signatory countries to take measures to encourage their nationals and other persons to report corruption without imposing legally binding duty to take such measures.⁷⁷ In other words, these conventions mainly underline the need to facilitate the disclosure of corruption; however, they do not compel the party states to fashion an obligation to report.⁷⁸ Yet, it may be possible to redress this deficiency by extending the scope of money-laundering regulations to corruption by virtue of the ties existing between the two crimes⁷⁹ and the inherent harmony between money-laundering laws and corruption laws. With the application of this concept, in the absence of a national law prompting arbitrators to report corrupt engagements of

⁷⁷ The UNCAC Article 39 (2) ("Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention."); Articles III(iv) and IX(i) and (iii) of the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, *available at* <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.

⁷⁸ Nasarre, *supra* note 15, at 9.

⁷⁹ Hwang & Lim, *supra* note 17, at 69 n.302 ("Corruption and money laundering often occur together, with the presence of one reinforcing the other. Corruption generates billions of dollars of funds that will need to be concealed through the money laundering process. At the same time, corruption contributes to money laundering activity through payment of bribes to persons who are responsible for the operation of AML Systems. The close linkage between corruption and money laundering suggests that policies that are designated to combat both crimes will be more effective.")

parties, arbitrators will have a legal foundation in the international arena to do so without infringing confidentiality obligations.

For example, the EU Directives “2001/97/EC amending Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering” and “2005/60/EC on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing” could feasibly apply to arbitrators sitting in the European Union.⁸⁰ The Directive mainly furnishes an obligation for professions susceptible to corruption to report suspicious transactions and relevant information that may indicate money laundering. A possible application of this Directive to arbitrators is found in Article 2a.

According to this section, member states must impose a duty to report upon “credit institutions, financial institutions, auditors, external accountants, tax advisors, real estate agents, notaries, and finally, *other independent legal professions*”⁸¹ who assist in the planning of or execution of transactions for a client (or acting on behalf of and for a client) in any financial or real estate transaction.

Interestingly, the Directive does not define “independent legal professionals.” Unsurprisingly, this lack of definition spawns debate as to whether arbitrators fall within this group or even whether resolving a dispute may be construed as assisting a

⁸⁰ Directive 2001/97/EC amending Directive 91/308/EEC on Prevention of the Use of the Financial System for the Purpose of Money Laundering, *available at* http://eur-lex.europa.eu/resource.html?uri=cellar:57ce32a4-2d5b-48f6-adb0-c1c4c7f7a192.0004.02/DOC_1&format=PDF; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:en:PDF>.

⁸¹ Emphasis added.

client. Further adding complication is the Directive's exemption explicating, if the information is obtained before, during, or after legal proceedings, independent members of professions providing legal advice, such as lawyers, are not required to comply with the duty to report.⁸²

While many arbitrators are in the legal profession, some come from other professional backgrounds (*e.g.* tax advisors, accountants, engineers), and arbitration is a secondary profession for them. Therefore, an arbitrator's main occupation must initially be noted and, subsequently, he or she should be considered independent legal professionals within the context of the Directive.

However, the Directive's exemption applies to lawyers who discover evidence of money laundering before, during, or after *the legal advising or the representation of the client*. Thus, arbitrators are not subject to the exemption since they are tasked with solving the dispute by a final award (as opposed to providing legal advice).

Absent not being subject to the Directive's exemption, arbitrators acting within the European Union should nonetheless be obligated to report corruption without liability, simply for the sake of fighting corruption and other illegalities.

⁸² Directive 2001/97/EC, Para. 17 ("However, where independent members of professions providing legal advice which are legally recognized and controlled, such as lawyers, are ascertaining the legal position of a client or representing a client in legal proceedings, it would not be appropriate under the Directive to put these legal professionals in respect of these activities under an obligation to report suspicions of money laundering. There must be exemptions from any obligation to report information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client. Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counselor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.")

Notably, even absent a compulsory regulation to disclose corruption, other factors demand that arbitrators fulfill the duty to report. This requirement derives from the duty an arbitrator owes to the public interest and international public policy. Here, there are rules assessing the duty to report within the context of “the public interest” and establish an exception to the principle of confidentiality. For instance, Section 23G (1) of the Australian International Arbitration Act of 1974 states:

“ A court may make an order allowing *a party* to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings in circumstances other than those mentioned in section 23D if:

(a) the court satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in *the public interest* for the information to be disclosed...”⁸³

Additionally, Section 14(E) of the New Zealand Arbitration Act of 1996 parallels the Australian Arbitration Act regarding disclosure of confidential information:

“The High Court may make an order allowing *a party* to disclose any confidential information only if: (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed...”⁸⁴

⁸³ The Australian International Arbitration Act of 1974, *available at* <https://www.comlaw.gov.au/Details/C2011C00342> (emphasis added).

⁸⁴ The New Zealand Arbitration Act of 1996, *available at* <http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html> (emphasis added). For further information *see* Hwang & Lim, *supra* note 17, at 72 n.313.

In conjunction with confidentiality, there are other concerns when imposing a duty to report upon arbitrators. First, obligating arbitrators to report corrupt engagements to a national authority represents a threat to the arbitral process. It may be argued that obligating an arbitrator to report is not only inconsistent with “the private nature of their mission and the trust the parties have in them”, but also menaces the fundamental principles of arbitration, namely, mutual trust and cooperation.⁸⁵

Next, a duty to report may discourage truthful testimony by witnesses who testify before the arbitral tribunal. If witnesses believe that there is a possibility that the content of their testimony will be shared with public authorities, they will avoid telling the truth.⁸⁶

Last, in the context of the European Law, possible contravention of the European Convention of Human Rights is of great concern. For example, Article 6 of the Convention states, “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing...by an independent and impartial tribunal established by law.” In this regard, CREMADES & CAIRNS argue that,

“the imposition of an obligation on arbitrators to disclose possible bribery, money laundering or fraud that comes to their notice in the course of an arbitration might compromise the right to a fair and independent determination of civil rights...”⁸⁷

⁸⁵ Mourre, *supra* note 19, at 110.

⁸⁶ Nadeau-Séguin, *supra* note 69, at 12.

⁸⁷ CREMADES & CAIRNS, *supra* note 63, at 85.

Notably, leading international conventions require signatory states to establish measures and systems to facilitate reporting of corruption by public officials to appropriate authorities, when such acts come under their purview while performing their duties.⁸⁸ Thus, the majority of legal systems presently place a duty to report upon their officials, institutions, and bodies vested with public authority, notwithstanding the risks (*discussed supra*). For instance, in France, any judge who learns of criminal activity in the course of judicial proceedings must inform the Attorney General.⁸⁹ Therefore, to obligate public officials to report criminal activities to the relevant public authorities, while simultaneously excluding arbitrators from the same obligation, will only encourage corrupt parties to view arbitration as tool to successfully secrete their illicit actions and avoid prosecution. Effectively, in the long run, this discreet, tight-lipped, approach will cause arbitration to morph into a system where disputes arising from illegally procured contracts are resolved.

Indisputably, one of the greatest advantages of arbitration is its reputation of protecting confidentiality. It is probable that requiring arbitrators to alert public authorities of learned corruption will deter parties from arbitration. However, when balancing whether arbitrators should be obligated to report corruption or not, it is

⁸⁸ Article 8 of the UNCAC; Section IX (ii) of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles.”)

⁸⁹ Article 40 of the French Code of Criminal Procedure (“Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanor is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents.”)

helpful to note that, strict application of the confidentiality principle leads to greater instances of judicial involvement on the grounds of suspicions that parties erode the state's legitimate interests. Accordingly, arbitral awards will be scrutinized by reviewing national courts in such a pervasive manner that may bring about *de novo* review and deprive arbitration of its characteristic finality. Further, even if the reviewing or enforcing court commenced *de novo* review, it is likely that they do not have equal access to materials and evidence to that of the tribunal.⁹⁰

Therefore, while confidentiality must guard the legitimate interests of the parties, it must not be exploited to serve illegitimate objectives of the parties.⁹¹ Thus, arbitrators should not be absolved from responsibility to act against corruption and they should not be permitted to enjoy any privilege that national judges do not themselves enjoy. If courts are obliged to testify before the relevant public authorities or report criminal law violations, so too should arbitrators and tribunals.⁹²

3. Closing Remarks for Chapter-IV

Arbitrators are appointed by the parties to conclude contractual disputes. However, the increasing number of corruption allegations and suspicions in arbitration compels the arbitrators to depart from their routine role outlined by parties' and undertake a role dedicated to good morals and international public policy. The adoption of this new role converts arbitrators into servants of the truth and necessitates them not to confine themselves solely to the facts and materials

⁹⁰ KREINDLER, *supra* note 10, at 321.

⁹¹ Dragon Hiber & Vladimir Pavic, *Arbitration and Crime*, 25 (4) Journal of International Arbitration 461, 477 (2008).

⁹² *Id.* at 477.

submitted by the parties. Rather, arbitrators must examine all aspects of the case, including corruption.

However, numerous scholars and practitioners maintain that the investigation of corruption by arbitrators should only be triggered by a party allegation. In other words, arbitrators have no duty to probe into possible criminal law breaches unless parties raise them in their submissions,⁹³ or when arbitrators suspect that the arbitral proceeding is being used as a scam. However, the battle against corruption requires divergence from this approach. Investigation of corruption should not be conditioned upon the allegation made by a party because, if this is the rule, parties will continually attempt to “hijack arbitral proceedings”⁹⁴ for illicit purposes.

Therefore, arbitrators must not disregard a suspicion of corruption and should take action irrespective of whether a party alleged corruption or whether the arbitrator suspects that the arbitral proceedings are being exploited. Not only will arbitrator investigations protect international public policy, but they will also be more fair and effective. If investigation is left solely to public authority, prosecution of foreign investors will inevitably ensue and will further result in ineffective legal action against domestic officials and local elites. Invariably, this will result in vulnerability in the war against corruption.⁹⁵ Moreover, if there are findings of corruption, arbitrators should not balk to report this illegality to the relevant arbitral institution and the public authorities.

⁹³ Mourre, *supra* note 11, at 229

⁹⁴ This term was borrowed from Alan Redfern & J. Martin Hunter, *Chapter V: Powers, Duties, and Jurisdiction of An Arbitral Tribunal* in Redfern & Hunter on International Arbitration (2009).

⁹⁵ ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 303-304 (2014).

Overall, the approach taken by arbitrators towards corruption will determine the fate of the war against it. Inevitably, a proactive approach employed by arbitrators will instigate discussions within the context of *ultra petita* and/or *ultra vires*, violations of confidentiality, and competence-competence. However, if arbitrators wish to illustrate their adherence to international law and public policy while demonstrating the efficacy of international arbitration in the enforcement of the international legal framework swaying corruption, it is integral for them to take proactive role and reconcile their loyalty to the parties with their commitment to international legal order.⁹⁶

This reconciliation between loyalty and commitment along with arbitrators' proactive role will make noteworthy contributions to the survival of arbitration as a credible and enforceable dispute resolution venue, but it will also minimize judicial review and intervention in arbitration.⁹⁷

⁹⁶ The Honorable L. Yves Fortier, QC, *Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'*, 31(3) *Arbitration International* 367, 369 (2015).

⁹⁷ KREINDLER, *supra* note 10, at 351.

CHAPTER-V

CORRUPTION, PUBLIC POLICY and the STANDARD of JUDICIAL REVIEW

“But let justice run down like water,
And righteousness like an ever-flowing stream”¹

Acts of corruption are fundamental breaches of both public policy and mandatory rules. Therefore, manifestation of corruption allegations during arbitral proceedings and an arbitrator’s failure to entertain them often catalyzes suit.

If the alleging party feels disenchanted that his or her corruption allegation was improperly addressed by the tribunal, he or she may seek recourse, either in a secondary jurisdiction to resist award enforcement and recognition or in the primary jurisdiction to vacate the award by arguing that the tribunal inadequately dealt with corruption allegations and enforced a contract contravening public policy. Supporting this end, Article 5 (2) (b) of the New York Convention and Article 36 (b) (ii) of the UNCITRAL Model Law both preserve the forum’s public policy to refuse enforcement and recognition of an award, while Article 34 (2) (b) (ii) of UNCITRAL regards public policy violations as a motivation to set the award aside by a competent court.²

¹ *Amos 5:24* (New Revised Standard Version Catholic Edition).

² Article 34 (2) (b) (ii) of the UNCITRAL Model Law (“An arbitral award may be set aside by the court specified in article 6 only if...the court finds that the award is in conflict with the public policy of this State.”)

Captivatingly, commencement of a lawsuit marks the beginning of a long and controversial debate. This debate encapsulates the nexus between various public policy considerations, judicial interference with arbitration, and just how far-reaching this judicial interference may proceed. Undoubtedly, the issue obfuscating the debate, making it contentious, is the intrinsic tension between serving the interests of the arbitrating parties and serving the interests of the State. To analogize, picture Justice's scales: on one end, there is the balancing of a party's desire for an effective, inexpensive, and final conclusion of the dispute, but on the other end, the State party must ensure that the award is legitimate. Clearly, these interests must be equally balanced and a single grain in support of one sacrifices the other and may throw the scales off their equilibrium.

In this respect, this Chapter concentrates on the following two issues: first, comparisons are drawn between two competing public policies, specifically, the pro-enforcement policy (*public policy favoring finality*) and the public policy exception (*public policy favoring legality*). Second, the focus shifts to analyze various approaches adopted by varying jurisdictions on how they balance the two competing policies with the allowable scope of judicial interference with arbitrator conclusions.

1. The Competing Policies: Public Policy Exception vs. Pro-Enforcement Policy³

Award finality is a cornerstone principle of arbitration. It promotes arbitration's effectiveness and independence as a dispute resolution mechanism by leaving national courts out of the process. The finality of an arbitral award forecloses judges from replacing the award with their judgment, provides predictability, incentivizes submission of disputes to arbitration, and helps the principle of comity establish root in arbitration.⁴ Consistent with these goals, the finality of an award requires deference to party autonomy and minimizing judicial interference (hereinafter *pro-enforcement policy*). In major arbitration venues, courts principally respect the finality of an award largely because of the modern policy favoring

³ Public policy is predominantly divided into three categories: national public policy, international public policy, and transnational public policy. National public policy is premised upon a particular nation's fundamental values and policies; international public policy is defined as national public policy's imperative principles that are applicable not only to pure national matters, but also to matters with a foreign element; consequently, transnational public policy is a condensed term covers the principles which are common and applicable in all contemporary nations. Today there is a principle of law embraced by States that strongly condemns corruption and its forms in every arena. In this regard, anti-corruption rules fall into not only international and transnational public policy, but also domestic public policy. In other words, all three public policies refer to the same concept as far as corruption and its forms are concerned. Therefore, for the purposes of this Chapter and for the sake of clarity, international public policy will be used interchangeably with national and transnational public policy. In a similar vein, see Aloysius Llamzon & Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in Legitimacy: Myths, Realities, Challenges, 18 ICCA Congress Series 451, 519-520 (2015) ("Corruption of state officials is generally considered as incompatible with fundamental moral and social values and thus constitutes both a clear violation of 'international public policy' or 'transnational public policy' and also of the national public policy of most states. This has been recognized by a large number of judicial decisions and by international arbitrators alike in commercial arbitrations, applying numerous different national laws.")

⁴ Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8(1) Asian International Arbitration Journal 1, 74 (2012). See also Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 (2) Arbitration International 217, 229 (2003) (citing *Re an Arbitration between Hainan Machinery Import and Export Corporation and Donald & McCarthy Pte. Ltd.* [1996] 1 SLR 34 at 46 ("The principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist."))

arbitration. To encourage this policy, the European Court of Justice in *Eco Swiss*

China Time Ltd. v. Benetton Int'l NV propounded:

“It is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible in exceptional circumstances.”⁵

The finality of an award is one of the most salient features of arbitration.

There are, however, limited grounds to vacate or refuse the award's enforcement that are used to excuse conducting merit review by a national court. In this respect, the most critical ground, which predominantly intervenes in the finality of an award and causes either vacatur or refusal to enforce an award, is public policy (hereinafter the *public policy exception*).

Public policy limitations derive from a State's instinct to protect its interests and fundamental values. Because every arbitral award endorsement means integrating that arbitral award into a legal system and affording it legal repercussions, States must exercise due diligence to assure that the award is legitimate. Therefore, the majority of States prefer to judicially confirm that an arbitral award honors its public policy before bestowing confirmation upon it.⁶

Today, it is well recognized that a State has a right originating from its sovereignty to make the ultimate decision to give a *res judicata* effect to the award in the face of alleged public policy violations. The public policy ground is enshrined in

⁵ *Eco Swiss China Time Ltd v. Benetton International Arbitration NV*, C-126/97 [1999] E.C.R. I-3092, available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-126/97>.

⁶ ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 392 (2004).

Article 5 (2) (b) of the New York Convention, Articles 34 (2) (b) (ii) and 36 (1) (b) (ii) of the UNCITRAL Model Law, as well as in other contemporary arbitration laws.⁷ However, the majority of these national and international legislations neither define public policy, nor fashion a universal standard regarding its application.

Because of this deficiency, it is important to elaborate upon the term “public policy” to better understand how it operates and interacts with award finality in the context of international arbitration. It is, however, a troublesome task to give an exhaustive definition of the public policy theory, not only due to the blatant absence of guidance, but also due to an ambiguity embodied in the concept.⁸ This ambiguity arises from diverse understandings of the concept due to its subjectivity. Such subjectivity leaves room for courts to espouse distinct approaches to the public policy concept in accordance with its own legal culture, priorities, customs, morals, and, occasionally, religion. Clearly, the application of public policy varies in accordance with a reviewing court’s understanding of what constitutes public policy. Therefore, the public policy exception poses a great risk to the finality of an award when placed in the hands of a national court hostile to arbitration.

Notably, precedent evidences that, when courts apply the public policy exception, award finality usually “falls to the wayside.” Therefore, to prevent public

⁷ It is worth noting that Article 52 of the ICSID Convention does not list “public policy” as a ground for annulment. In this regard, it is stated by scholars that when the ICSID Annulment Committee encounters allegations on the basis of public policy violations, these allegations should be examined in the context of “manifest excess of powers” under Article 52(1)(b). Article 52(1)(b) states “either party may request annulment of the award by an application in writing addressed to the Secretary-General on the ground of that the Tribunal has manifestly exceeded its powers.”

⁸ Sheppard, *supra* note 4, at 218 (citing *Deutsche Schachtbau-und Tiefbohrsgesellschaft mbh v. Ras Al Khaimah National Oil Company* [1987] 2 Lloyd’s Rep. 246, 254 (“Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution...”))

policy from impairing award finality, courts situated in major arbitration jurisdictions exercise antagonism towards the public policy exception and construe it as narrowly as possible.

Courts in these jurisdictions prioritize universal values embraced by civilized nations and interpret “international public policy” in the context of these values.⁹ Therefore, they condition vacatur or award non-enforcement upon violations of international public policy, rather than violations of national interests (domestic public policy concerns).¹⁰

For instance, in *Hilmarton*, the English High Court enforced the second arbitral award that gave effect to an intermediary agreement, which was deemed illegal under the laws of the performance country (Algeria Law No.78-02). Here, the Court rationalized that, because the contract did not conflict with international public policy, it was enforceable.¹¹ Similarly, in *United Arab Emirates v. Westland Helicopters*, the Swiss Federal Tribunal paralleled the English High Court and constrained review of an arbitral award to “a limited number of transnational

⁹ *Tensaccia S.P.A v. Freyssinet Terra Armata R.L.*, 4p.278/2005 (March 8th, 2006) (“...essentially, it refers sometimes to a transnational or universal public policy with a view to sanctioning the incompatibility of the award with the ‘fundamental legal and moral principles recognized in all civilized states.’”)

¹⁰ This precedence of international public policy over domestic (national) public policy separates cases where a reviewing court should enforce the award, from cases where judicial intervention is required. See generally *Hwang & Lim*, *supra* note 4; *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. N.Y. 1974) (“The public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s [New York Convention] utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’ Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.”)

¹¹ *Omnium de Traitement et de Valorisation S.A. v. Hilmarton* [1999] 2 Lloyd’s Law Review 222, available at <http://www.simic.net.cn/upload/2010-06/20100621140518009.pdf>.

principles accepted not only by the forum, but by the international community at large.”¹² Consequently, according to the Italian Court of Cassation, international public policy is based “first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations.”¹³

Clearly, the international public policy is principally defined in the context of fundamental values concerning the entire international community. This statement finds support through examining frequent quotations by courts and scholars alike: “the forum state’s most basic notions of morality and justice;”¹⁴ “some moral, social, or economic principle so sacrosanct...as to require its maintenance at all costs and without exception;”¹⁵ and “the fundamental economic, legal, moral, political, religious, social standards of every state or extra-national community...those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.”¹⁶ These phrases, when taken collectively, highlight the judicial preference to protect the international community as a whole, not just a single State.

On the other hand, the International Law Association defines international public policy in a broader context. Pursuant to Recommendation 1 (c) of the

¹² Alexis Moure & Luca G. Radicati Di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 (2) *Journal of International Arbitration* 171, 175 (2006) (citing *United Arab Emirates v. Westland Helicopters*, Swiss Federal Tribunal, April 19th, 1994).

¹³ Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration in Comparative Arbitration Practice and Public Policy in Arbitration*, 3 ICCA Congress Series 258, 277 (1987) (citing *Alarcia Castells v. Hengstenberge* e Procuratore generale presso la Corte di appello di Milano, RDIPP XIX (1983)).

¹⁴ *Parsons & Whittemore Overseas Co.*, 508 F.2d at 974.

¹⁵ Sheppard, *supra* note 4, at 218 (citing *Cheshire and North*, *Private International Law* 123 (1999)).

¹⁶ JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 422 (2003).

International Law Association Final Report on “Public Policy as a Bar to Enforcement and Recognition of International Arbitral Awards (2002)” (hereinafter ILA Report), international public policy is:

“the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (*procedural international public policy*) or of its contents (*substantive international public policy*).”

Sequential recommendations of the ILA Report refine the definition by articulating the scope of international public policy. To prevent international public policy from defeating arbitral finality, Recommendation 1(d) of the ILA Report limits the scope of international public policy to values that are vital and well established by all nations. Pursuant to Recommendation 1(d) of the ILA Report, international public policy covers:

“(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “*lois de police*” or “public policy rules”; and (iii) the duty of the State to respect its obligations towards to other States or international organizations.”

The result of considering this recommendation in conjunction with Recommendation 1(e) is an enlightenment of which activities justify a reviewing

court to vacate or refuse award enforcement. Here, Recommendation 1(e)¹⁷ concentrates on conducts that are regarded *contra bones mores*. According to the commentary of the Recommendation, prime examples of *contra bones mores* include piracy, terrorism, genocide, slavery, smuggling, and corruption.

Convergence of national laws and international conventions, in conjunction with practitioner and scholarly opinion, led moral condemnation of corruption to evolve into a universally embraced rule of international policy against corruption. Today, corruption's prohibition constitutes an integral aspect of international public policy (*international public policy against corruption*). By the famous words of Pierre Lalive, "there does exist a principle of truly international or transnational public policy which sanctions corruption and bribery contracts."¹⁸

Unsurprisingly, international public policy against corruption penetrates into arbitration. It impacts not only the actions of parties, but also the conduct of arbitrators. For example, parties cannot seek enforcement and recognition of a contract that is *contra bones mores*.¹⁹ Should arbitrators enforce such a contract, they would violate international public policy. This violation would ultimately lead to direct challenge of the award on the grounds of international public policy circumvention.²⁰ Article 19 of the Australian International Arbitration Act of 1974

¹⁷ Recommendation 1 (e) of the ILA Report ("An example of a substantive fundamental principle is prohibition of abuse of rights. An example of procedural fundamental principles is the requirement that tribunals be impartial. An example of public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category.")

¹⁸ Lalive, *supra* note 13, at 276.

¹⁹ *Id.* at 313.

²⁰ *Id.*

illustrates this point by stating that an award is contrary to public policy if: “(a) the making of the award was induced or affected by fraud or corruption[,] or (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

However, arbitrators should exercise caution when classifying conduct as corrupt and, correspondingly, giving effect to international public policy against corruption. This may be a double-edged sword in international arbitration practice. On the one hand, the unjustifiable usage of the policy, in the absence of corruption allegations, may constitute failure to honor parties’ arbitration agreement and may lead to a lawsuit on the basis of excess of authority because the arbitrator ruled on an issue not submitted for arbitration;²¹ but on the other hand, avoiding to effectuate this policy can jeopardize award enforcement and recognition. In sum, there is a tension which could not only “damag[e] the fabric of international commerce and trade,”²² but could also encourage arbitrators to disregard their obligation to furnish an internationally enforceable award.

When corruption surfaced, some arbitral tribunals recognized and applied international public policy against corruption in their awards. For example, when Judge Lagergren encountered bribery, he pioneered the adoption of international public policy to battle corruption arising from an intermediary agreement (ICC Case No. 1110).²³ In this famous award, Judge Lagergren stated:

²¹ Article 34(2)(a)(iii) of the UNCITRAL Model Law (“An arbitral award may be set aside by the court specified in article 6 only if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration...”).

²² Lalive, *supra* note 13, at 314 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974)).

²³ See *supra* pg. 116-121 for the details of the case.

“Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. *Such corruption is... contrary to good morals and to international public policy common to the community of nations.*”²⁴

Judge Lagergren’s emphasis on international public policy violations echoed in the *World Duty Free* case. In *World Duty Free*, corruption was the outcome determinative. In this case, the tribunal proceeded with caution and extensively searched court judgments, arbitral awards, and regional and multilateral treaties against corruption, to confirm the actual existence of international public policy against corruption. Following this investigation, the tribunal declined to enforce the claims based on a contract obtained by corruption. The tribunal argued that:

“In the light of domestic laws and international conventions relating to corruption, and in light of the decision taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.”²⁵

In further support of international public policy being used when allegations of corruption arise is seen in the *Westacre v. Jugoimport* case.²⁶ In *Westacre*, the tribunal tackled whether it should enforce a consultancy agreement. Here, the arbitral

²⁴ Hwang & Lim, *supra* note 4, at 3 n.8 (emphasis added).

²⁵ *World Duty Free Company Limited v. the Republic of Kenya*, ICSID Case No. ARB/00/7 (Award Date October 4, 2006) para.157 at 48.

²⁶ See *supra* pg. 129-136 for the details of the *Westacre* case.

tribunal emphasized that arbitrating parties have the authority to choose the law to which their legal relationship would be subject, while similarly having the authority to opt out of the law that would otherwise apply. However, the arbitral tribunal noted that this opt-out authority did not extend to immunity from the mandatory rules of the excluded law and stated:

“...provisions of the law which is excluded can only be recognized within the chosen law to the extent that they are part of the *ordre public international*. Examples of this are provisions to fight *corruption* and *bribery*.”²⁷

Finally, in the *Himpurna* case, where the defendant alleged that the public procurement contract was illegal due to corrupt Indonesian officials, the arbitral tribunal held:

“[t]he members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view that the arbitral process as one which operates in a vacuum, divorced from reality. The arbitrators are well aware of the allegations that commitments by public-sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption. But such grave accusations must be proven. There is in fact no evidence of corruption in this case.”²⁸

²⁷ JEAN-JACQUES ARNLDEZ, YVES DERAIS & DOMINIQUE HASCHER, COLLECTION OF ICC ARBITRAL AWARDS 1996-2000 Vol. 4 / RECUEIL DES SENTENCES ARBITRALES DE LA CCI 1996-2000 42 (2003).

²⁸ *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, Final Award, 4 May 1999, 25 Yearbook Commercial Arbitration 11, 43-44 (2000).

The holding of the arbitral tribunal in *Himpurna* reflects the significance of tribunals adopting international public policy. By espousing this policy, arbitrators perform two important duties: (i) by considering this policy, arbitrators take an important step in the way of protecting rights of millions of people when those rights are abducted by corrupt officials; and (ii) arbitrators aid to preserve arbitration's legitimacy as a private dispute resolution system by disallowing use of the arbitral process to enforce illegal contracts.

In sum, arbitral awards reflect that the international public policy against corruption has been integrated into arbitration and may even take precedence over the parties' choices and agreements. However, this integration may be misleading, as it cannot be said that an arbitrator's eagerness to apply this international public policy is harmonized with an eagerness to adopt it. In fact, to avoid making positive findings of corruption, when arbitrators encounter corruption allegations, they may insist on applying either a heightened standard of proof,²⁹ or simply decline jurisdiction.³⁰ Resultantly, integration of the international public policy against corruption rarely became an outcome determinative and, unfortunately, could not go beyond a sole condemnation of corruption by arbitrators.

This arbitrator apathy often led to suits contesting awards on the grounds that arbitrators did not address (or incorrectly addressed) blatant corruption. When this

²⁹ The Honorable L. Yves Fortier, QC, *Arbitrators, Corruption, and the Poetic Experience: 'When Power Corrupts, Poetry Cleanses'*, 31(3) *Arbitration International* 367, 374 (2015).

³⁰ *Id.* at 375 ("In *International Systems & Controls Corp v. Industrial Development Organization of Iran et al*, the Iran-US Claims Tribunals, after allowing for the delayed submission of evidence of corruption, declined jurisdiction and did not rule on the evidence submitted. In strongly worded dissent, Judge Brower argued that the Tribunal's '[p]alpable reluctance to grasp the nettle of alleged Imperial corruption in Iran' had led it to choose a 'graceless jurisdictional exit.'")

occurs, the claimant alleges that the award is premised upon a contract procured by corruption and its enforcement violates international public policy. This public policy challenge leaves the reviewing court between a rock and a hard place. On the one hand, there is the pro-enforcement policy, fashioned by arbitration-friendly national courts, to ensure that the enforcement mechanism under the New York Convention is not interrupted, but on the other hand, there is the public policy exception viewed as a guardian of fundamental values, which are acknowledged by all civilized nations, and is thus tasked with preventing an award from contradicting those values.

While the tension between the pro-enforcement policy and the public policy exception is palpable, some scholars advocate that these two public policies actually collaborate.³¹ This theory proposes that the two public policies do not vie because they aim to “preven[t] and sanction... injustice in arbitration.”³² It is undisputable that the prevention of injustice is a crossroads where these two public policies intersect. However, the basic foundation of each policy distinguishes one from the other and situates them on opposite ends of the policy spectrum.

For example, the pro-enforcement policy seeks to minimize judicial interference in arbitral proceedings and promotes arbitration as an effective and efficient resolution of business disputes. In contrast, the public policy exception represents a serious impediment to the pro-enforcement policy. Evidently, the lack of guidance on the interpretation and application of the public policy exception causes

³¹ See generally Winnie (Jo-Mei) Ma, Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons For and From Australia (December 2005) (on file with author).

³² *Id.* at 27.

an exploitation of the term and facilitates conducting merit review for reviewing national courts. Further, the term, “public policy” is in a state of flux, making it easier for a reviewing court hostile to arbitration to fashion new exceptions to the enforcement and recognition of the award under the guise of public policy.³³ Clearly, absence of direction has led public policy to become “an unruly horse, and when once you get astride it, you never know where it will carry you...”³⁴

The inquiry now becomes, when there are two competing public policies, which public policy prevails? Interestingly, notwithstanding strong public condemnation of corruption, there is a lack of harmony amongst the jurisdictions when answering this question. Particularly, there is significant discrepancy between the English courts’ approach and the French courts’ approach as to which public policy interest should prevail.

With regard to the stance of the English courts, the *Westacre* case is lodestar by virtue of discussions concerning the public policy exception and the pro-enforcement policy. Justice Colman, of the Queen’s Bench Division, initially considered if the alleged illegality justified further court scrutiny. Justice Colman sought to answer this question through facts, not placed before the tribunal, but facts later presented to the reviewing court. Justice Colman dictated the following in his judgment:

³³ *Id.* at 161.

³⁴ *Richardson v. Mellish*, 2 Bing. 229 (1824), available at <http://www.uniset.ca/other/css/130ER294.html> (“[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.”)

“If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the Arbitrators, the contract was indeed illegal, the enforcement Court would have to consider whether public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular...”³⁵

*“On the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading...In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices...However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking. On balance I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international corruption.”*³⁶

Clearly, Justice Colman cast his vote in favor of award finality and the pro-enforcement public policy. Justice Colman based his reasoning upon an intangible and subjective scale of condemnation (disgrace meter), where corruption purportedly stood at a level lower than drug trafficking. This level was inadequate to upset the pro-enforcement policy despite strong judicial and governmental disapproval. It is thus possible to speculate that Justice Colman did not give corruption enough credit for being a part of international public policy.

³⁵ SAYED, *supra* note 6, at 413-414.

³⁶ Hwang & Lim, *supra* note 4, at 96.

Following Justice Colman’s judgment, award enforcement was appealed to the Court of Appeal where the remarks made by Justice Colman regarding corruption divided the Court. Lord Justice Waller dissented from the other two members of the Court who upheld Justice Colman’s judgment and reasoning. Justice Waller prioritized the international public policy against corruption and stated:

“...public policy of the greatest importance and almost certainly recognized in most jurisdictions throughout the world. I believe it important that the English court is not seen to be turning a blind eye to corruption on this scale.”³⁷

Notwithstanding Justice Waller’s conclusions, in their concurring opinions, Sir David Hirst and Lord Justice Mantell sympathized with Justice Colman and his remarks on corruption’s place upon the scale of opprobrium. From their point of view, the seriousness of the alleged illegality serves as a litmus paper giving indicia as to which public policy should outweigh: the public policy exception or the pro-enforcement policy. On this subject, Sir David Hirst stated:

“Here, in my judgment, Mr. Justice Colman struck the correct balance, and, in doing so...gave ample weight to the opprobrium attaching to commercial corruption.”³⁸

Further, Lord Justice Mantell, also aligned with Justice Colman and Sir David Hirst, maintained:

“The seriousness of the alleged illegality is not...a factor to be considered at the stage of deciding whether or not to mount a full scale of inquiry. It is something to be taken into account as part of the balancing exercise

³⁷ *Id.*

³⁸ SAYED, *supra* note 6, at 418-419.

between the competing public policy considerations of finality and illegality which can only be performed in response to the second question, if it arises, namely, should the award be enforced?...I would dismiss the appeal.”³⁹

Evidently, both statements by Mr. Hirst and Mr. Mantell aver that corruption did not infringe upon international public policy. This gives autonomy to infer that an award may still be enforceable even if the Court conducts an in-depth examination of the arbitrator’s findings and finds that the intermediary agreement to be tainted by corruption (or any other illegality).⁴⁰

According to the message delivered by Justice Colman and the Court of Appeal majority in *Westacre*, corruption is insufficient to upset the pro-enforcement policy. Thus, the pro-enforcement policy should outweigh the public policy exception, so long as high-caliber arbitrators diligently conclude corruption allegations. Notably, the English courts exercised different approaches to this message. Some courts embraced the message as it was and held on to it (as illustrated *R v. V* case), while other courts altered the message to better focus on the level of corruption propounded by Justice Colman’s scale of opprobrium (evident in the *Hilmarton* case).

One year after *Westacre*, the *Hilmarton* case reached the Queen’s Bench Division.⁴¹ In this case, the award was challenged on the grounds that an intermediary agreement deemed illegal in the location of performance (Algeria), was nonetheless

³⁹ RICHARD KREINDLER, COMPETENCE-COMPETENCE IN THE FACE OF ILLEGALITY IN CONTRACTS AND ARBITRATION AGREEMENT 443 (2013).

⁴⁰ Hwang & Lim, *supra* note 4, at 102.

⁴¹ *Omnium de Traitement et de Valorisation S.A. v. Hilmarton* [1999] 2 Lloyd’s Law Review 222, available at <http://www.simic.net.cn/upload/2010-06/20100621140518009.pdf>.

upheld. The arbitral tribunal acknowledged the illegality of the intermediary agreement under the Algerian decrees. Nevertheless, the tribunal concluded that contract was not tainted by illegality under Swiss law.⁴² Following the tribunal's findings, the English court consented to award enforcement.

Justice Walker's ruling in this case evidences his belief that any attempt to go beyond the explicit and vital finding of fact would be immoral unless there was "a finding of fact of corrupt practices which would give rise to obvious public policy considerations."⁴³ In other words, unlike Justice Colman, Justice Walker opined that corruption was sufficiently offensive to effectuate the public policy exception and refuse award enforcement in England (but a contract for influence peddling was not).⁴⁴

In contrast, Justice Lord David Steel remained faithful to the *Westacre* judgment in the *R v. V* case.⁴⁵ Recently decided in 2008, this case reflects relatively a modern approach employed by the English courts regarding the rivalry between the public policy exception and the pro-enforcement policy.

The facts of *R v. V* bear resemblance to those of the *Westacre* case. The dispute arose from an intermediary agreement where V promised to assist R to secure

⁴² KREINDLER, *supra* note 39, at 449.

⁴³ SAYED, *supra* note 6, at 419.

⁴⁴ With in the context of the influence peddling, it should be briefly noted that although there is the diversity in jurisdictions' approach to influence peddling's illegality, a consensus among international anti-corruption conventions and the UK Bribery Act's strict stance on bribery suffice to say that the opprobrium attached corruption should be attached to influence peddling in the present day and it should be considered as a corrupt conduct contravening international public policy.

⁴⁵ *R v. V* [2008] EWHC 1531, available at <http://www.bailii.org/ew/cases/EWHC/Comm/2008/1531.html>.

approvals from the national oil corporation of Libya.⁴⁶ Although R made two payments to V in the past, R refused to make a third payment and V initiated arbitration in London.⁴⁷ During the arbitral proceedings, R alleged that the intermediary agreement was illegal and contrary to English public policy. R, however, lost on this ground and the arbitral tribunal rendered the final award in favor of V. Subsequently, R challenged the award, citing to Section 68 (2) (g) of the English Arbitration Act of 1996, which states, “the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy.”

In the judgment, Justice Steel found himself bound to comply with the majority of *Westacre* in the absence of material, factual distinctions between the cases.⁴⁸ Accordingly, he espoused the level of opprobrium attached to corruption by Justice Colman in *Westacre* and did not embark upon a probe into allegations of corruption. As a result, Justice Steel found that R failed to substantiate corruption allegations, and accordingly, could not establish an alleged public policy violation. Resultantly, the pro-enforcement policy prevailed over the public policy exception.

Then, in 2014, in the most recent case concluded by the High Court in London, the Court confirmed that English courts preserve support of the pro-enforcement policy, while narrowly applying the public policy exception. Here, in

⁴⁶ *Id.* (R v. V case)

⁴⁷ Jacob Grierson, Commentary, *Court Review Of Awards On Public Policy Grounds: A Recent Decision Of The English Commercial Court Throws Light On The Position Under The English Arbitration Act 1996*, 24 (1) MEALEY’S International Arbitration Report 28 (2009).

⁴⁸ *R*, *supra* note 44, paras. 32&34 (“...it is to be noted that the majority in *Westacre* accepted that Colman J had accorded ‘an appropriate level of opprobrium’ at which to place commercial corruption if such it was...In the result, by reason of the decision in *Westacre* which is binding on me and in respect of which there is no material factual distinction from the present case, I concluded that R has failed to establish that the award or its enforcement can be challenged on public policy ground...”)

Honeywell v. Meydan Group LLC,⁴⁹ Honeywell sought to enforce an award previously furnished under the rules of the Dubai International Arbitration Centre (DIAC) in England. However, Meydan opposed award enforcement on various grounds under the New York Convention Article 5 and English Arbitration Act Section 103(2)(b), both of which state that the court *may* refuse to enforce a foreign arbitral award if the arbitration agreement is not valid under the law to which the parties subjected it. In this regard, Meydan asserted that the award was unenforceable under UAE law because Honeywell procured it through bribery. Meydan further asserted that the enforcement of the award would be contrary to English public policy because the award was the fruit of unlawful conduct engaged by the claimant, Honeywell.

However, Justice Ramsey dismissed the arguments based upon bribery and English public policy violation. In his judgment, Justice Ramsey confirmed that English courts continue their robust stance in support of the pro-enforcement policy, while simultaneously acknowledging the existing, but subservient, public policy exception. Further, Mr. Ramsey echoed judgments of previous English courts as to the circumstances where the pro-enforcement public policy may be suspended. Mr. Ramsey stated that suspension of the pro- enforcement public policy is possible under Section 103 of the English Arbitration Act only in the presence of a clear case where “the harm to the public is substantial, incontestable, and does not depend on the

⁴⁹ *Honeywell International Middle East Limited v. Meydan Group LLC (Formerly Known As Meydan LLC)* [2014] EWHC 1344 (2014).

idiosyncratic inferences of a few judicial minds.”⁵⁰ Accordingly, Justice Ramsey differentiated actions to enforce an award based upon a contract of corruption from actions to enforce an award based upon a contract obtained by corruption. Justice Ramsey averred:

“...whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as matter of English public policy, contracts which have been procured by bribes are not unenforceable...”⁵¹

By these words, Justice Ramsey fashioned a new criterion to use when applying the public policy exception to discourage corruption. Resultantly, he confined the application of the public policy exception to awards emanating from contracts to commit corruption. Justice Ramsey’s this policy harmonizes with Justice Waller’s judgment in the *Soleimany* case,⁵² where the award founded upon a contract to smuggle Persian carpets was declared unenforceable. The rationale behind Justice Waller’s judgment was to avoid providing legal assistance to parties who attempt to enforce an illegal contract by procuring arbitration concealment.⁵³

In his judgment, Justice Ramsey also advocated that the procurement of a contract via corruption did not fall within the boundaries of the public policy exception, and therefore, even if it is found that corruption occurred during the contract procurement process, there is still insufficient reason to give the public policy exception precedence over the pro-enforcement policy.

⁵⁰ *Id.* para. 181 (citing Lord Atkin in *Fender v. St John-Mildmay* [1938] AC 1 at 12).

⁵¹ *Id.* para. 185.

⁵² *Soleimany v. Soleimany* [1998] 3 WLR 811.

⁵³ KREINDLER, *supra* note 39, at 446 (citing *Soleimany v. Soleimany* [1998] 3 WLR 811, 824 (“The court declines to enforce an illegal contract...The parties cannot...by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract.”))

These cornerstone English case law precedents illustrate that the English courts defer to the arbitral proceedings' autonomy and, accordingly, are hesitant to interrupt the pro-enforcement policy unless the arbitral process is being exploited to conceal illegality and enforce illegal contracts. Nonetheless, within the context of published arbitration cases and national case law,⁵⁴ there are rendered awards and judgments reflecting a paradigm shift to apply the public policy exception. For instance, in the *Westman* case, the Paris Court of Appeal held that corruption did not occur. Nonetheless, following admission of new evidence substantiating fraud in the arbitral proceedings committed by Westman, the court partially vacated the arbitral award. In its ruling, the Court stressed the supremacy of both French public policy and international public policy.

From the judiciary's standpoint, a contract motivated by influence peddling or bribery contravenes both French international public policy and the international business ethics embraced by the largest segment of the international community.⁵⁵ Thus, the Court indicated that an arbitral award giving effect to these kinds of illicit

⁵⁴ See generally Noradèle Radjai, *Where There is Smoke, There is Fire? Proving Illegality in International Arbitration*, Arbitration Newsletter 139, 142 n.10 (Swiss Supreme Court, *Jugoimport-SDPR Holding Company Ltd & Beogradska Banka v. Westacre Investments Inc.*, case no 4P.115/1994, [1995] ASA Bull 711; *Westacre v. Jugoimport*, ICC Case No. 7047 (1994); *World Duty Free Compnay Limited v. Republic of Kenya* (ICSID Case No. ARB/00/7); ICC Case No. 3916 (1983); *Oscanyan v. Arms Co.*, 103 U.S. 261, 277 (U.S. 1881); *A. GmbH. (Germany) v. B. (Iranian Nationals)*, the Oberlandesgericht Hamm, 29 Sch 1/05, Judgment of 27 September 2005, 24 ASA Bull 153-166 (2006); Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings in International Commercial Arbitration: Important and Contemporary Questions*, 11 ICCA Congress Series 261-287 (2003).

⁵⁵ *European Gas Turbines SA v. Westman International Ltd.*, Cour d'Appel, Paris (30 September 1993) in 20 Yearbook Commercial Arbitration 198, 202 (1995) ("A contract having as its aim and objects a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.")

contracts would not be enforced due to violation of French public policy and international public policy.⁵⁶

Clearly, every award challenged on the basis of corruption generates debate on how to strike an appropriate balance between the international public policy against corruption and the pro-enforcement policy. Unfortunately, there is no bright-line rule to guide national courts. Resultantly, the balancing process varies based upon the reviewing court's background, expectations, and more importantly, priorities. Therefore, striking equilibrium between the policies is a procedure that is driven by the following vying concerns: (a) the pro-enforcement policy for the benefit of finality, as well as respecting the arbitral process, or (b) the international public policy against corruption to benefit legality, discourage corruption, and honor fundamental values.

It is uncontested that award finality is a core principle of international arbitration. This principle makes arbitration a desirable venue for dispute resolution. However, this does not mean that the pro-enforcement policy will always be adhered to at the expense of the international public policy against corruption.⁵⁷ In other words, finality should not become a goal to be pursued unconditionally, simply for the sake of award enforcement.⁵⁸ Conversely, a disappointed party should not be encouraged to apply the public policy exception in a way that opens an emergency exit door to the judiciary.

⁵⁶ *Id.* at 201.

⁵⁷ KREINDLER, *supra* note 39, at 465.

⁵⁸ Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80(2) COLUM. L. REV. 267, 283 (1980).

In this respect, it is absolutely necessary for the reviewing court to note decisive factors when striking a balance between the policies without sacrificing one for the other. Some such factors include: (1) an arbitrator's competence; (2) seriousness of the alleged illegality; (3) the proportionality of the seriousness of the illegality compared to vacatur or non-enforcement;⁵⁹ (4) the tribunal's appreciation of the evidence;⁶⁰ (5) "the compatibility between the evidence and the decision,"⁶¹ and (6) the submission of new evidence.

After cumulative consideration of all necessary factors, the prevailing public policy will determine the level of the judicial review to which the award is subject.

2. The Standard of the Judicial Review

Simply stating in an award that the alleging party failed to substantiate corruption does not necessarily end the scuffle between corruption and public policy. Unless the final award is voluntarily executed, the issuance of a final award, which denies corruption transpired, deems the arbitral tribunal *functus officio*⁶² and marks the commencement of judicial process initiated by the losing party. The losing party will either seek to have the award vacated or have the award declared unenforceable on

⁵⁹ (Jo-Mei) Wa, *supra* note 31, at 172.

⁶⁰ SAYED, *supra* note 6, at 392.

⁶¹ *Id.* at 393.

⁶² GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION VOL. II 2513 (2009) ("It was historically the case, under many national legal systems, that an arbitral tribunal lost its capacity to act – including its power to reconsider correct, interpret, or supplement an award it had made – after the arbitrators had rendered their final award. In the phrase used in common law jurisdictions, the tribunal became "*functus officio*." In one court's words: "The term [*functus officio*] is Latin for 'office performed' and in the law of arbitration means that once an arbitrator has issued his final award he may not reverse it.""). The term principally marks the end of an arbitral tribunal's mandate over the case once the tribunal furnishes the award with res judicata effect.

the grounds that the award enforces a contract contravening the public policy discouraging corruption.

The invocation of an allegation premised upon a public policy violation yields tension between the pro-enforcement policy and the international public policy against corruption. Consequently, the policy to which the reviewing court pays deference adjusts the volume of the judicial review.

In cases where the public policy exception is invoked, postulates that there exists coherence among jurisdictions with respect to the degrees of the judicial review, which range from minimum to maximum judicial review of the merits, irrespective of the nature of the public policy violation.⁶³ There is also a third variant called contextual judicial review, neatly situated between the minimum and the maximum judicial reviews. The contextual judicial review dictates the reviewing court to adjust the level of scrutiny in accordance with the nature of the alleged public policy violation.

a) Minimum Judicial Review

This section will initially examine the attitudes of reviewing courts in the United States and Switzerland when they encounter corruption allegations (i). The focus will then shift to identify the circumstances under which a reviewing court may embark upon merit review notwithstanding adopting minimum judicial review (ii).

⁶³ SAYED, *supra* note 6, at 392.

i) Minimum Judicial Review in Switzerland and the United States

The two major arbitration jurisdictions where minimum judicial review is dominantly executed are Switzerland and the United States. Thus, this title is split into two sections to better illustrate each respective country's approach.

(aa) Minimum Judicial Review in Switzerland

Minimum judicial review reflects a liberal approach towards international arbitration. This liberality holds the intent to arbitrate in the highest regard. Accordingly, a reviewing court espousing minimum judicial review is expected to prioritize the pro-enforcement policy and bestow great deference upon the findings of the tribunal and the award.

The Swiss judiciary exemplifies minimum judicial review. For instance, in Switzerland, there is only one level of judicial review. The Swiss Supreme Court (*Swiss Tribunal fédéral*) is vested with sole authority to make final holdings regarding the award. Furthermore, Section 12 Article 192 of the Swiss Private International Law ("PILA") allows parties to waive their rights to challenge the award if neither party is domiciled in Switzerland.⁶⁴ Notably, in addition to the Swiss courts, there are cases from France reflecting the French application of minimum judicial review.⁶⁵

⁶⁴ International Arbitration and Related Proceedings in Switzerland, *available at* <http://cdn2.winston.com/images/content/7/8/v2/784.pdf> (April, 2011); Article 192 of the PILA ("If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).")

⁶⁵ *SA Thales Air Defense v. GIE Euromissile*, CA Paris, November 18, 2004, N. 2002/19606; *SNF SAS v. Cytec Industries BV*, Cass. Civ. 1, June 4, 2008, N. 06-15320; *M Schneider Schaltgeratebau and Elektroinstallationen GMBH v. CPL Industries*, Paris CA, 10 September 2009 and Cour de Cassation, 1er Ch. Civ., 12 February 2014.

However, recently, French courts appear to be departing from minimum judicial review and are gravitating towards maximum judicial review, which is the subject of the next topic.

Under minimum judicial review, even if the award is challenged on public policy grounds, neither the award nor the steps taken by arbitrators are placed in the spotlight by the reviewing court. In this regard, clear violations of law, incorrect tribunal findings, and the manner in which the tribunal weighed the evidence all fail to trigger in-depth judicial review. To illustrate, the Swiss court in *N., J., Y., W. v. FINA* held:

“even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings.”⁶⁶

Next, in 2009, the Swiss Federal Tribunal stood its ground and stated: “The Swiss Federal Tribunal does not review whether the arbitration court applied the law, upon which it based its decision, correctly.”⁶⁷

The Swiss judiciary maintains that the public policy exception should be narrowly applied to avoid interfering with the arbitral process. However, the question becomes whether it is possible to apply this minimalist review attitude to allegations

⁶⁶ Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 (1) PEPP. DISP. RESOL. L.J. 51, 58-59 (2010).

⁶⁷ X. v. International Hockey Federation, 4A_424/2008 (2009) at 6 (“Das Bundesgericht überprüft nicht, ob das Schiedsgericht das Recht, auf das es seine Entscheidung stützt, richtig angewendet hat...”), available at http://relevancy.bger.ch/php/aza/http/index.php?lang=de&zoom=&type=show_document&highlight_d ocid=aza%3A%2F%2F22-01-2009-4A_424-2008.

revolving around corruption. In another words, may corruption be an exception to the prevailing attitude of avoiding merit review?

There are Swiss cases where the courts respected the tribunal's findings and the application of the law, notwithstanding allegations based on corruption. The first case reflecting the Swiss Federal Court's desire to apply minimum judicial review in the face of corruption allegations was the *Westinghouse* case.⁶⁸ After the tribunal rendered an award in favor of Westinghouse, the Philippine party challenged the award before the Swiss Federal Tribunal on the grounds that the tribunal violated public policy when it rendered an award premised upon contracts procured by corruption of President Marcos of the Philippines.⁶⁹

The Swiss Federal Tribunal refused to credit the corruption allegations and, resultantly, refused to conduct merit review. In its decision, the Tribunal noted legislative motive to restrict the scope of Article 190 of the Swiss Private International Law Act and Article 136 of the Intercantonal Concordat on Arbitration. According to the Court, neither of these articles could be invoked with the purpose of upsetting the efficacy of arbitration. Therefore, the Philippine party's efforts to seek an extended judicial review was overruled:

“The legislator has intentionally limited, in article 190 par. 2 of the Swiss Private International Law Act (hereinafter “SPILA”), grounds of the challenge that can be invoked, when compared with those of article 136 of the Intercantonal Concordat on Arbitration, in order to reduce the possibilities of slowing the procedure and also in order to increase the effectiveness

⁶⁸ See *supra* page 122-125 for the details of the case.

⁶⁹ SAYED, *supra* note 6, at 397.

of the arbitral jurisdiction... This objective would be compromised if the full power of review enjoyed by the federal Tribunal to consider the grounds of challenge on the basis of article 190 par. 2 SPILA was to be understood to mean that it would allow this Tribunal to freely review the factual findings of the arbitral Tribunal, as it would be done by an appellate court.”⁷⁰

By not engaging in an intrusive enquiry and maintaining minimum judicial review, the Court evidently discouraged party challenges with the purpose of obtaining extensive judicial review. The Court vehemently refused to accept the role of an appellate court and act as the sword of Damocles which hangs over arbitrators and their factual findings when the challenges are “...solely based on the challenging party’s own reading of the presented evidence.”⁷¹ By this remark, the Court indicated that it would only deviate from its position when presented with facts substantiating corruption allegations.

Four year later, the *Thomson* case reached the Swiss Federal Tribunal. Like the Philippine Party of the *Westinghouse* case, Thomson, the defendant party in this arbitration, sought extended judicial review by the Swiss Court. To achieve this, the defendant overlooked, not only the confined scope of Article 190 of the SPILA, but also the Swiss Court’s judgment in the *Westinghouse* case. Thomson challenged the

⁷⁰ SAYED, *supra* note 6, at 397-398. See National Power Corporation (Phippines) v. Westinghouse (USA), federal, Ist Court Civil Court, Not Indicated, 2 September 1993, 12 ASA Bulletin 244, 245 ((Swiss Arbitration Association, Kluwer Law International 1994) (original in French: “Le législatuer a intentionnellement limité, à l’art 190 al. 2 LDIP les griefs qui peuvent être invoqués par rapport à ceux de l’art 36 CIA [Concordat Intercantonal sur l’arbitrage] – afin de réduire les possibilités de ralentir la procédure et afin d’augmenter l’efficacité de la juridiction arbitrale... Cet objectif serait fortement compromis si le plein pouvoir d’examen don’t le Tribunal fédéral dispose pour connaître des griefs fondés sur l’article 190 al. 2 LDIP devait être compris en ce sens qu’il permettrait à cette autorité de revoir librement les constatations de faits du Tribunal arbitral, comme le ferait une juridiction d’appel.”)).

⁷¹ *Id.* at 98.

arbitral award rendered in ICC Case No. 7664, where the arbitral tribunal granted commission payments to Frontier emanated from an intermediary agreement. According to the intermediary agreement governed by French law, Frontier was to assist Thomson to procure a Taiwanese frigate warship contract, worth nearly US\$ 2.5 billion.⁷² Thomson felt compelled to enter into this contract because of the political hostility between China and Taiwan. This tension fostered reluctance by France to authorize the transaction.⁷³

However, in 1991, Chinese objection to selling frigates to Taiwan abated and French authorization of the transaction transpired. Execution of the contract between Thomson and Taiwanese government occurred, but Thomson failed to pay the commission to Frontier. This failure by Thomson catalyzed arbitration in Switzerland.⁷⁴ During the proceedings, Thomson demanded that the tribunal declare the intermediary agreement null and void through his implicit allegation that the underlying motive of the intermediary agreement was to bribe French officials to loosen their reluctance to authorize the contract.⁷⁵ In response to this claim, Frontier asserted that the agreement merely sought to defeat Chinese political objections to contract by using local connections in China. In the end, the arbitral tribunal satisfied with Frontier's reasoning that the purpose of the agreement was to overcome Chinese objections and that the activities did not rise to the level of "corrupt influence

⁷² Hwang & Lim, *supra* note 4, at 76.

⁷³ SAYED, *supra* note 6, at 120.

⁷⁴ Hwang & Lim, *supra* note 4, at 76-77.

⁷⁵ SAYED, *supra* note 6, at 121.

peddling.”⁷⁶ The tribunal thus rendered an award approving Frontier’s commission request.

Thomson retaliated by seeking vacatur before the Swiss Federal Tribunal. Thomson invoked Article 190 (2) (e) of the SPILA and alleged that the arbitral tribunal failed to act in accordance with public policy because it relied upon nonexistent evidence and misapplied Article 178 of the French Penal Code.

Thomson invoked the nonexistent evidence allegation to challenge the tribunal’s findings, which were founded upon testimony. According to Thomson, the tribunal interpreted testimony delivered by one of its officials as a statement that acknowledged the remuneration made by Thomson for services devoted to relaxing Chinese political objections to the frigate deal with Taiwan.⁷⁷ Thomson challenged the testimony in the record. The Swiss Federal Court did not value this allegation and it regarded it as a complaint originating from a discrepancy between the arbitral tribunal’s appreciation of the evidence and Thomson’s own perspective of the evidence. The Swiss Court thus maintained its approach of *Westinghouse* and employed minimum judicial review; ergo, it refused to undertake an appellate body role on the basis of lack of authority. At the end of the day, the Court concluded the case by denying scrutiny of the facts of the case and the manner in which the arbitral tribunal weighed the evidence.⁷⁸ On this, the Court stated:

“The reproach made against the arbitral Tribunal that it based its decision on a non-existent evidence

⁷⁶ Hwang & Lim, *supra* note 4, at 77.

⁷⁷ SAYED, *supra* note 6, at 399.

⁷⁸ *Id.*

constitutes a critique on the appreciation of evidence. This challenge is alien to the whole problem of conformity with procedural public policy. It is a critique of purely appellate nature, that could not be admitted under a public law challenge on the basis of article 4 Cdt.”⁷⁹

Similarly, by applying minimum judicial review, the Court imposed similar sentences to other challenges alleging misapplication of Article 178 of the old French Penal Code. According to Thomson’s reading of Article 178, the article outlawed, not only agreements to influence French public officials, but also outlawed agreements for the influence of all public officials.⁸⁰ Correspondingly, by recognizing the validity of this agreement remunerating services provided to persuade Chinese public officials, the award legitimized influence peddling and contravened international public policy. The Court interpreted the scope of the international public policy narrowly and found the allegation to be inadmissible. The Court stated:

“One can only speak of violation of public policy, if, by its interpretation, the arbitral Tribunal transgresses a fundamental principle that ought to have been observed. But if one refers to the facts retained by the challenged award, one perceives that there is no violation of any fundamental principle.”⁸¹

⁷⁹ *Id.* n.1179 (*See* Thomson CSF (France) v. Frontier Bern AG (Germany), Brunner Sociedade Civil Administracao Limitada (Portugal), Federal Court, Civil Court Ist, Not Indicated, 28 January 1997, 16 ASA Bulletin 118, 130 (1998) (Original in French: “Le reproche fait au Tribunal arbitral de s’être fondé sur une preuve inexistante constitue une critique de l’appréciation des preuves. Un tel moyen est tout à fait étranger à la problématique de la conformité avec l’ordre public procedural. Il s’agit d’une critique purement appellatoire, qui ne serait même pas recevable dans un recours de droit public fondé sur la violation de l’art. 4 Cdt.”))

⁸⁰ Hwang & Lim, *supra* note 4, at 77.

⁸¹ SAYED, *supra* note 6, at 400. For original in French, *see* SAYED, *supra* note 5, at 401 n.1182 (“On pourrait uniquement parler de violation de l’ordre public si, par son interprétation, le Tribunal arbitral transgressait un principe fondamental à observer. Or, si l’on se réfère aux faits retenus dans la sentence attaquée, on ne perçoit aucune violation d’un quelconque principe fondamental...”)

By employing this approach, the Swiss Court avoided interfering with the arbitral proceedings and paid deference to the arbitral tribunal's interpretation of Article 178. The Court particularly explained:

“The critique that is based on an alleged violation of article 178 of the old French penal code is not more admissible. It is a challenge according to which the arbitral authority has badly applied the law on the substance (“error in judicando”). But this challenge, even if it is founded (which is not the case in the present matter), would not justify the setting aside of the award... so long as there does not exist in international arbitration a revision on the substance.”⁸²

Notably, sixteen years subsequent to *Thomson*, a judgment issued by the Swiss Federal Tribunal in 2013 illustrates that the *status quo* of minimum judicial review remains intact in the face of corruption allegations. In this modern case, the arbitral award concluded allegations premised upon a breach of the UN sanctions and corruption. Importantly, a State's obligations arising from international regulations are considered a part of international public policy and take precedence over national law, so long as the regulations are ratified by the respective State. Here, the UN's sanctions molded international public policy and became binding upon the arbitral tribunal because the parties' designated law (Swiss) implemented such restrictions.⁸³

⁸² SAYED, *supra* note 6, at 400. For original in French, see SAYED, *supra* note 5, at 400 n.1181 (“La critique fondée sur une prétendue violation de l’art.178 de l’ancien Code pénal français n’est pas davantage recevable. Il s’agit d’un grief selon lequel l’autorité arbitrale aurait mal appliqué le droit de fond (“error in judicando”). Or, un tel grief, même fondé (ce qui n’est au reste pas le cas en l’espèce), ne saurait justifier l’annulation de la sentence (ATF 117 II 604), du moment qu’il n’existe pas en matière d’arbitrage international de révision au fond.”)

⁸³ Matthias Scherer, *Corruption, Embargos, and Sanctions as a Bar to the Enforcement of Contracts in International Arbitration. A Note on the Decision of the Swiss Federal Supreme Court 4A_538/2012 dated 17 January 2013* (13 November 2014) 65, available at http://www.lalive.ch/data/publications/MSC_-_IJAA_2_-_Vol_6_-_2014.pdf.

In this case, a French company (the Principal) and an Iraqi company (the Agent) entered into an agency agreement. Under the agreement, the Agent was tasked with the sale of diesel engines for electrical power plants in Iraq, while the Principal promised to pay an 8.5 percent commission to the Agent based upon completed transactions.⁸⁴ The Principal made a sales contract under the terms of ten diesel engines for the price of EUR 161 million.⁸⁵ Subsequently, the Agent learned that the price of the sale included EUR 6 million, which the Principal agreed to pay, in addition to the 8.5 percent commission on the sale.⁸⁶ This issue led to arbitration commenced by the Agent.

During the arbitral proceedings, the Principal raised two major claims to convince the tribunal to declare the agency contract null and void. First, the Principal claimed that there existed a violation of international public policy on the basis of the United Nations Resolution No. 661. This resolution, resulting from the invasion of Kuwait by Iraqi forces, prohibited entire commercial engagements and activities contributing to commercial exchanges to and from Kuwait and Iraq.⁸⁷ Notably, this embargo was later lifted. Next, the second allegation focused on the commission of EUR 6 million in addition to the 8.5 percent. The Principal contended that enforcing the agency agreement for the additional commission would finance terrorism. Further,

⁸⁴ *Id.* at 66.

⁸⁵ X. v. Y, 4A_538/2012, at 1 (January 17th, 2013), *available at* <http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue?search=January+17%2C+2013>. The decision in original language is *available at* <http://www.bger.ch/>.

⁸⁶ *Id.* at 1.

⁸⁷ Scherer, *supra* note 83, at 65.

the Principal asserted that the sale of EUR 161 million worth of diesel engines was procured by bribery.

The arbitral tribunal furnished an award in favor of the Agent. The tribunal was evidently unimpressed by the allegation premised upon UN sanctions. According to the arbitral tribunal, the Agency agreement itself depended upon the abolishment of sanctions by virtue of the clause in the agreement.⁸⁸ Therefore, the tribunal classified the contract as a conditional agreement under relevant Swiss law and it focused upon the condition of lifting sanctions.⁸⁹ In this respect, when the sanctions were lifted in 2003, the conditional factor upon which the agency contract depended was satisfied. Additionally, the arbitral tribunal noted that the delivery of goods occurred after the sanctions. Thus, the Agency contract was neither in breach of UN regulations, nor contrary to international public policy.

Further, the arbitral tribunal declined to entertain the allegations of corruption and financing terrorism due to a lack of evidence. The Principal thus filed a lawsuit in the Swiss Federal Tribunal to set aside the award.

The Swiss Court was also unimpressed by the Principal's allegations founded upon corruption and financing terrorism. Referencing its case law precedent, the Court stated that contracts entered into with the purpose of bribery are void under Swiss law and are in breach of public policy. The Swiss Court outlined the conditions that could lead to award vacatur: first, the alleging party must substantiate the

⁸⁸ *Id.* at 68 (“The agent shall ensure that all acts accomplished in the Contractual Territory by [xxx] or for the account of [xxx] are administratively and legally valid and enforceable.”)

⁸⁹ *Id.*

allegations of bribery before the arbitral tribunal *and* second, the arbitral tribunal must have refused to take it into consideration when rendering the award.⁹⁰ Here, it may be speculated that the Swiss court defers to the arbitral award and will not conduct merit review unless the arbitral tribunal fails to take corruption into account in its award despite the alleging party's substantiation. In sum, this case illustrates the Swiss Federal Tribunal's robust devotion to both the finality of arbitral awards and, accordingly, minimum judicial review.

As a result, the Swiss Court found nothing in the award evidencing that the arbitral tribunal confirmed the occurrence of bribery. The Court also noted in its judgment that the legal reasoning employed by the arbitral tribunal was beyond the scope of their Swiss Court's review. On this point, the Court particularly propounded:

“Whatever the pertinence of this legal reasoning, *which is beyond the review of the Federal Tribunal*, one cannot conclude that the Arbitrators considered the constitutive elements of corruption established.”⁹¹

Major judgments of the Swiss Federal Tribunal demonstrate that it is not willing to play an appellate body role to review findings of an arbitral tribunal. This reflects a strong judicial stance encouraging arbitral award finality. Summarily, the Court privileges minimum judicial review and will not interfere with arbitral proceedings and a tribunal's findings unless (i) the alleging party establishes corruption and (ii) the arbitral tribunal refused to take notice of it in its rendered award.

⁹⁰ X. v. Y, 4A_538/2012, para. 6.1.

⁹¹ *Id.* para. 6.2 (emphasis added)

(bb) Minimum Judicial Review in the United States

For both domestic and international arbitral awards, the courts of the United States embrace hospitality similar to that employed by the Swiss courts. Indeed, American precedent postulates that judicial scrutiny of arbitral awards is not well received.⁹² In fact, even if a tribunal significantly errs in the application of relevant law to fact, annulment is rare. Dating back to 1855, the U.S. Supreme Court elucidated the reasoning behind this great deference to arbitral awards:

“If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. *A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties*, and would make an award the commencement, not the end, of litigation.”⁹³

The Court’s stance clinched with the enactment of the Federal Arbitration Act from which “the federal policy favoring arbitration” arose. This policy discouraged intrusion by U.S. courts into the arbitral tribunal’s findings and, accordingly, led to the adoption of minimum judicial review. In this context, the landmark case that successfully set the tone of minimum judicial review in the United States was the *Mitsubishi Motors* case⁹⁴ where the Supreme Court affirmed that:

“Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the

⁹² GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: INTERNATIONAL AND USA SPECTSCOMMENTARY AND MATERIALS 797 (2001).

⁹³ *Id.* (citing *Burchel v. Marsh*, 58 U.S. 344 (1855)).

⁹⁴ *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc.*, 473 U.S. 614 (U.S. 1985).

antitrust laws has been addressed. The convention reserves to each signatory country the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to the public policy of that country. While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain *minimal*, it would not require intrusive inquiry to ascertain that the Tribunal took cognizance of the antitrust claims and actually decided.”⁹⁵

Importantly, *Mitsubishi Motors* catalyzed the “second look doctrine.” This “safety valve”⁹⁶ doctrine authorizes a judge to review an arbitral award on whether the tribunal considered the legitimate interests of the United States when crafting the award. Only when this question is affirmatively answered will a judge enforce the award. However, the Court also added protective padding to this doctrine by instructing a reviewing judge to employ a review that is both *minimal* and *non-intrusive*.

Naturally, the inquiry turns to whether U.S. courts will maintain deference to arbitral awards for the sake of finality when confronted with corruption allegations or do they deviate from minimum judicial review and leave judicial deference to the wayside? This question found an answer in a landmark case concluded by United States Court of Appeal for the Ninth Circuit: *Northrop v. Triad*.⁹⁷

In *Northrop*, a dispute originating from a “marketing agreement” formed in 1970 between Northrop, a U.S. based company located in Los Angeles, and Triad

⁹⁵ *Mitsubishi Motors Corp.*, 473 U.S. at 638 (emphasis added).

⁹⁶ The term “safety valve” has been adopted from William Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT’L L., 629, 642 (1986).

⁹⁷ *Northrop Corp v. Triad International Marketing S.A.*, 811 F.2d. 1265 (9th Cir. Cal. 1987).

International Marketing, a Liechtenstein company (hereinafter Triad). Northrop designated Triad as an exclusive representative to aid Northrop acquire contracts for the sale of aircraft and other equipment and services (e.g. such as training and support services) in the Kingdom of Saudi Arabia.⁹⁸

Northrop made significant sales in the Gulf country and remunerated Triad for services rendered. However, in 1975, the Council of Ministers of Saudi Arabia enacted Decree No. 1275 that prohibited the payment of commissions in connection with military equipment procurement in order to uproot bribery attempts.⁹⁹ Subsequently, Northrop did not require service from Triad, and, accordingly, ceased making commission payments. In response, Triad effectuated the arbitral clause integrated into the marketing agreement and demanded payment of commissions emanating from sales entered into prior to the Decree, as well as other commissions arose from sales occurred after the Decree came into effect.¹⁰⁰ During arbitration, Northrop defended its actions by claiming that any payment to Triad would breach the FCPA and lead to prosecution by virtue of the Saudi Decree outlawing commission payments.¹⁰¹

⁹⁸ *Northrop*, 811 F.2d. at 1266.

⁹⁹ *Id.* The Saudi Decree No. 1275 issued on September 17, 1975 states: “First: No company under the contract with the Saudi Arabian Government for the supply of arms or related equipment shall pay an amount as commission to any middleman, sales agent, representative, or broker irrespective of their nationality, and whether the contract was concluded directly between the Saudi Arabian Government and the company or through another state. Any commission arrangement already concluded by any of these companies with any other party shall be considered void and not binding for the Saudi Arabian Government; Second: If any of the foreign companies described in Article 1 (one) were found to have been under obligation for the payment of commission, payment of such commission shall be suspended after notifying the concerned companies of this decision. Relevant commission shall be deducted from the total amount of the contract for the account of the Saudi Arabian Government.”

¹⁰⁰ SAYED, *supra* note 6, at 248.

¹⁰¹ *Northrop Corp. v. Triad Financial Establishment*, 593 F.Supp. 928, 933 (C.D. Cal. 1984).

The arbitral tribunal, unimpressed with Northrop's assertions, furnished an award in favor of Triad. The tribunal justified its conclusion by classifying Triad as a "service agent" and therefore, Northrop could pay commission in exchange for Triad's services.¹⁰²

Predictably, Northrop was not satisfied with the award and challenged it before a U.S. District Court on the grounds of legality and public policy, which would allegedly be contravened by the enforcement of the award.

The U.S. federal courts that assessed the award's conformity with law and public policy followed various paths to decide the appropriate level of judicial review. First, the District Court for the Central District of California assessed the award. Here, the District Court fashioned an exception to minimum judicial review followed by U.S. courts mainly within the context of the "federal policy favoring arbitration." According to the District Court, if the allegations at hand are germane to law and public policy, it was not obliged to adhere to minimum judicial review and the deferential standard developed by the U.S. Supreme Court in the *Enterprise Wheel* case.¹⁰³ Because the deferential standard expects a reviewing court to tolerate

¹⁰² *Id.* at 937 ("It may be that promulgation of Decree 1275 created problems for Northrop and Triad in that they possibly would have some difficulties with the government of Saudi Arabia as a result of not complying with Decree 1275. However, that decree did not make performance of the Marketing Agreement impossible. It still was perfectly possible for Northrop to make payments of compensation to Triad pursuant to the contract [sic]. It also would have been possible for Triad to give advice to Northrop...and to do the other services called for by the Marketing Agreement. We cannot look at Decree 1275 and on its face find resulting impossibility of performance...The decree did not produce impossibility of performance...")

¹⁰³ *Northrop*, 593 F. Supp. at 936 (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (U.S. 1960)).

even the most “erroneousness of any factual findings or legal conclusions,”¹⁰⁴ the court was hesitant to employ such a standard to serious corruption allegations “simply” for the sake of the finality principle.

By considering itself not bound by the deferential standard, the District Court opened the way to conduct merit review and have the final say on the merits. In particular, the court stated:

“...it has repeatedly been recognized that a court may not enforce an award which is contrary to law and public policy...In determining whether an arbitrator’s award is contrary to law and public policy, the Court is not constrained by the traditional deferential standard set forth in *Enterprise Wheel*...the Ninth Circuit held that deference is unwarranted where an Arbitrator’s decision is challenged as violative of Supreme Court precedent...Judicial deference is similarly unwarranted where, as here, the public policy in question involves DOD (Department of Defense) regulations, a foreign government’s decree, and a federal statute (the FCPA). Thus, I examine *de novo* the arbitrator’s decision with respect to the alleged unenforceability of the Agreement on public policy grounds.”¹⁰⁵

However, notably, the court did not scrutinize all the findings of the arbitral tribunal. Rather, it engaged in a partial *de novo* review focusing on the portion of the award which was allegedly in conflict with law and public policy.¹⁰⁶ Therefore, the court gave precedence to Saudi Arabia’s public policy because of its materially greater interest in the enforcement of Triad’s claims, which would obviously violate

¹⁰⁴ *Id.* (citing *George Day Constr. Co. v. United Bhd. of Carpenters & Joiners, Local 354*, 722 F.2d 1471, 1477).

¹⁰⁵ *Northrop*, 593 F. Supp. at 936.

¹⁰⁶ *Northrop*, 593 F. Supp. n.14.

Decree 1275.¹⁰⁷ The Court consequently vacated that part of the award including commission accrued after the Decree took effect.

Comparatively, unlike Switzerland, a U.S court reviewing an arbitral award is not vested with sole authority to make an ultimate decision about the fate of an arbitral award. Rather, in the United States, it is possible to appeal the judgment of the reviewing court. Here, the judgment of the District Court prompted Triad to appeal. On further review, the Court of Appeal for the Ninth Circuit did not concur with the remarks made by the District Court and therefore, the Appellate Court reversed the portions of the District Court's judgment altering the award.

Here, the Higher Court disapproved of the lower court's departure from the deferential standard and conducting a *de novo* review. Pursuant to the Court's understanding, an arbitral award involving contractual interpretation ought to be deferred to "even in the face of 'erroneous findings of fact or misinterpretations of law.'"¹⁰⁸ However, the reasoning behind the lower court's *de novo* review was to investigate the arbitral tribunal's contract interpretation regarding the choice of law provision integrated into the Marketing Agreement.¹⁰⁹ In response to this reasoning of

¹⁰⁷ *Northrop*, 593 F. Supp. n.23.

¹⁰⁸ *Northrop*, 811 F.2d. at 1269.

¹⁰⁹ According to the choice of law clause placed into the marketing agreement, claims arising from the Agreement would be settled by arbitration in compliance with California law. Section 1511 of the California Civil Code states "the performance of obligation...is excused by the operation of law..." In this regard, the issue that needed to be concluded by arbitrators was to determine the Saudi Decree No. 1275's influence over the parties' responsibilities under the Marketing Agreement. The resolution was conditional upon the interpretation of the agreement. The arbitral tribunal held that the existence of the decree was not an obstacle blocking the performance of the agreement in the meaning of Section 1511 of the California law. The District Court and the Court of Appeal separated from each other upon this interpretation of the arbitral tribunal: The lower court dissented from the tribunal while the Higher Court upheld the award.

the lower court's merit review, the Appellate Court replied within the context of the arbitration agreement and the finality principle:

“The arbitrators’ conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the arbitrators; the arbitrators carefully considered and decided them in a lengthy written opinion. To now subject these decisions to *de novo* review would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid... ‘the interpretation of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.’”¹¹⁰

Further, the Court added that, “mere error in interpretation of California law would not be enough to justify refusal to enforce the arbitrators’ decision. Moreover, it is far from evident that the arbitrators misread California law.” Once again, the deference to arbitration and its finality won the day.

ii) Exceptions to the Application of Minimum Judicial Review

Clearly, the cases from Switzerland and the United States illustrate that a reviewing court from either of these jurisdictions usually places its full faith in an arbitral tribunal and, accordingly, bestows great deference to the finality of arbitral awards. Thus, a reviewing court traditionally does not embark on an in-depth merit review and respects the arbitral tribunal’s findings even if the allegations are founded upon corruption and public policy.

¹¹⁰ *Northrop*, 811 F.2d. at 1269.

However, minimum judicial review is a double-edged sword: on the one hand, it refrains parties from exploiting corruption allegations to slow the arbitral process and assists States to develop a respected reputation in international arbitration by virtue of the respect devoted to arbitrating parties' contract and the finality principle. However, on the other hand, minimum judicial review may facilitate legitimizing corrupt contracts by leaving some disputed facts out of the scope of the review.¹¹¹

To minimize negative repercussions of minimum judicial review, the reviewing court may "re-visit" both corruption allegations and the arbitral tribunal's relevant findings and subsequent award. There are three grounds where a reviewing court may engage in more comprehensive review: (i) fresh evidence; (ii) an error in the recognition or the application of the forum's public policy; (iii) vitiating factors that tainted the arbitral award.

First, a reviewing court may conduct a deeper judicial review and "re-visit" the findings of an arbitral tribunal upon submission of *fresh evidence* substantiating the challenging party's corruption allegations. It is thus important to differentiate *fresh evidence* from *new evidence*. New evidence is a term used for evidence that could have been acquired and introduced to the arbitral tribunal throughout the life of the arbitral proceeding, but was not done so.¹¹² Fresh evidence, in contrast, is

¹¹¹ SAYED, *supra* note 6, at 404.

¹¹² Hwang & Lim, *supra* note 4, at 79.

evidence that “was not available or reasonably obtainable either.”¹¹³ The former evidence does not trigger a reviewing court to conduct merit review, but the latter may tip the scales in favor of the public policy exception and eventuate in the review of the arbitral tribunal’s findings and denial of award enforcement. For instance, in the *Westacre* case, when award enforcement was challenged, Lord Justice Mantell of the English Court of Appeal credited this repercussion to fresh evidence and held that:

“[t]he allegation [of bribery] was made, entertained and rejected [by the tribunal]...*in those circumstances and without fresh evidence* I would have thought that there could be no justification for refusing to enforce the award.”¹¹⁴

Clearly, the introduction of fresh evidence is an open invitation to challenge an award by a disappointed party. Fresh evidence, unfortunately, may be exploited and employed as a Trojan Horse to undermine the arbitral tribunal’s findings and invite a reviewing court to re-open the findings of the tribunal.¹¹⁵

Therefore, a reviewing court favoring the finality principle will likely reflect antagonism to the introduction of fresh evidence and will subject this submission to

¹¹³ *Westacre Investments Inc. v. Jugoinport-SPDR Holding Company Ltd.* [1999] APP.L.R. 05/12 para. 47.

¹¹⁴ Hwang & Lim, *supra* note 4, at 80 (citing Nelson Enonchong, “The Enforcement of Foreign Arbitral Awards Based on Illegal Contracts” [2000] LMCLQ 495 at 510) (emphasis added).

¹¹⁵ *Westacre Investments v. Jugoinport-SPDR Holding Co Ltd and others* [1998] 4 All ER 603 (In *Westacre* case, when Jugoinport attempted to present the affidavit to in order to substantiate perjury allegedly occurred during the arbitral proceedings, Justice Colman objected to this attempt and stated: “... defendants in effect, invite the enforcement court to retry issues of fact which the arbitrators had before them and which they had to, and did, determine. If the public policy defence under art V of the New York Convention and under s 5(3) of the 1975 Act extended to this ground, it would present an open invitation to disappointed parties to relitigate their disputes by alleging perjury and a major in-road would be made in to the finality of convention awards.”)

certain standards. Justice Colman's judgment in *Westacre* set the tone for these standards. Mr. Colman stipulated a two-fold requirement to approve fresh evidence:

“The introduction of fresh evidence in order to disturb an English award is subject to requirements similar to those relating to the introduction of fresh evidence to challenge an English judgment...In particular, *the fresh evidence must be of sufficient cogency and weight to be likely to have influenced the arbitrator's conclusion and the evidence must not have been available or reasonably obtainable at the time of the hearing.*”¹¹⁶

Parties seeking to avoid award enforcement may use fresh evidence of corruption as a tactical maneuver. Therefore, by disallowing the introduction of fresh evidence, parties may be dissuaded from impugning the award's finality. However, courts should not always veer away from fresh evidence simply for the sake of the finality principle. Rather, courts should balance the challenges of proving corruption when debating whether evidence may be considered fresh and whether its belated disclosure is excusable. Because finality is not a goal to be achieved at the expense of justice, if there is evidence insinuating corruption, the balance should be struck in favor of the public policy favoring legality and the reviewing court should employ a lenient approach towards the introduction of fresh evidence.

Next, the second issue justifying a reviewing court's departure from minimum judicial review and intrusion of an arbitral tribunal's findings is the presence of an

¹¹⁶ *Westacre Investments v. Jugimport-SPDR Holding Co Ltd and others* [1998] 4 All ER 606 (emphasis added).

error in interpretation or application of the forum's public policy. The Singapore courts' approach to the *AJU v. AJT* case illustrates this second exception.¹¹⁷

In this case, a Thai company (AJU) and a British Virgin Island company (AJT) entered into an agreement according to which AJU was enabled to stage an annual tennis tournament in Bangkok for five years. Due to contractual disputes, AJT enforced the arbitral clause and commenced arbitral proceedings against AJU. During the course of arbitral proceedings, AJU filed a complaint against the sole director and shareholder of AJT and AJT-related companies to the Special Prosecutor's Office of Thailand.¹¹⁸ According to the allegations of AJU, AJT forged a document illustrating rights germane to organizing the tennis tournament as assigned to an AJT-related company.¹¹⁹ Following AJU's complaints, the Thai police conducted an investigation into allegations of fraud, forgery, and use of forged documents.

During the investigation, the parties agreed to settle their dispute and entered into a "Concluding Agreement" governed by Singapore law. Under this agreement, AJT vowed to terminate the arbitration when the criminal proceedings retracted, terminated, or discontinued. In addition, AJU was to pay US\$470,000 to AJT as a final settlement of the arbitration.¹²⁰ Subsequently, AJU executed its contractual obligations emanating from the Concluding Agreement. Not only did AJU retract its complaints, but it also paid the settlement sum. Accordingly, the Thai authorities ceased their criminal proceedings on the charges of fraud and a non-prosecution order

¹¹⁷ *AJU v. AJT* [2011] SGCA 41, *avialbale at* <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/14661-aju-v-ajt-2011-sgca-41>.

¹¹⁸ Hwang & Lim, *supra* note 4, at 81.

¹¹⁹ *Id.*

¹²⁰ *Id.*

was fashioned for the forgery charges on the basis of insufficient evidence.¹²¹ AJT, however, did not terminate the arbitration on the grounds that AJU allegedly failed to adhere to the Concluding Agreement.

AJT essayed to justify its non-compliance on the basis that criminal proceedings could possibly be reinstated on the charge of forgery in the event that fresh evidence was introduced. The foundation of this presumption was that, under Thai law, offences were divided into two groups: compoundable offences and non-compoundable offences. If there is a compoundable offence, such as fraud, criminal proceedings can be concluded by party compromise, however, regarding non-compoundable offences, such as forgery, or the use of forged documents, the fate of the criminal proceedings rests in the hands of the Thai public authorities.¹²² In this context, from AJT's point of view, AJU's withdrawal of complaints relating to forgery did not fulfill the promises under the Concluding Agreement due to possible reinvigoration of forgery investigations by the Thai authorities.

AJU applied to the arbitral tribunal to have the arbitration terminated, but AJT challenged AJU's demand by disputing the legality of the Concluding Agreement. Specifically, AJT advocated two arguments based upon legality: first, AJT argued that the motive to enter into the Concluding Agreement was to stifle prosecution of the alleged forgery in Thailand and second, AJT contended that the non-prosecution order on the charge of forgery was procured by AJU through bribery and

¹²¹ *Id.*

¹²² *Id.*

corruption.¹²³ Following its examination, the arbitral tribunal rendered an interim award in favor of AJU. The tribunal deemed the Concluding Agreement valid and held that AJU did not engage in bribery or corruption while procuring the non-prosecution order. Resultantly, the tribunal put the Agreement into force and terminated the arbitration.

Subsequently, AJT challenged the award before the national courts in Singapore on the same illegality allegations presented to the arbitral tribunal. The High Court was not impressed with the allegation of corruption vitiating the procurement of the non-prosecution order; however, it did entertain the challenge of legality alleged against the Concluding Agreement.¹²⁴ Accordingly, the High Court deviated from the standards of minimum judicial review and retried facts that the arbitrators had before them and upon which they made a decision. Consequently, the conclusion reached by the High Court was that the Concluding Agreement under both the Thai law (the law of the place of performance) and the Singapore law (the law of the legal seat country) was illegal.¹²⁵

Predictably, AJU appealed the judgment of the High Court and the Court of Appeal overturned the judgment on the basis of an error in re-litigating facts already determined by the arbitrators. The Court of Appeal distilled its judgment from two divergent approaches exercised by the English Justices: first, the Court looked to Justice Colman's approach and that of the majority of the English Court of Appeal, in

¹²³ *Id.*

¹²⁴ *Id.* at 82.

¹²⁵ *Id.*

their advocating of less interference with the arbitral proceedings, and second, the Court analyzed Justice Waller’s “interventionist” approach, evidenced in his dissent of *Westacre* and judgment in *Soleimany*.¹²⁶ Consequently, the approach taken by the majority in *Westacre* significantly colored the Court of Appeal’s judgment by virtue of its consonance with “legislative policy...giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards.”¹²⁷

In its holding, the Court of Appeal noted how the High Court and the arbitral tribunal diverged in their factual understanding. Here, the Court of Appeal distinguished “errors of law within the context of the forum’s public policy” from “errors of fact” with respect to influencing the fate of the arbitral award.¹²⁸ Then, the Court granted privilege to the autonomy of arbitral proceedings and touched upon legislative policy aiming to confine the circumstances under which the court intervention may occur. In this regard, the Court referred to passage 57 of the judgment rendered in *PT Asuransi Jasa Indonesia v. Dexia Bank SA*:

“[T]he [IAA] [International Arbitration Act]...gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under [IAA] is to minimize curial intervention in international arbitrations. *Errors of law or fact made in arbitral decision, per se, are final and binding on the parties and may not be appealed against or set aside by a court...*”¹²⁹

¹²⁶ *AJU v. AJT* [2011] 4 SLR para. 58.

¹²⁷ *AJU v. AJT* [2011] 4 SLR para. 60.

¹²⁸ Hwang & Lim, *supra* note 4, at 83.

¹²⁹ *AJU v. AJT* [2011] 4 SLR para. 66 (citing *PT Asuransi Jasa Indonesia v. Dexia Bank SA* [2007] 1 SLR(R) 597).

As seen from this judgment, errors made by arbitrators in the identification or the application of the law or facts does not amount to a public policy violation, and, accordingly, these errors do not justify opening issues of fact already determined by arbitrators. By the words of the Singapore Court of Appeal:

“[u]nless its decision or decision-making process is tainted by fraud, breach of natural justice or any other vitiating factor, any errors made by an arbitral tribunal are not *per se* contrary to public policy.”¹³⁰

Nevertheless, the same Court of Appeal stated that it was possible to vacate an award in the presence of an “error in the recognition or application of the forum’s public policy.” With respect to this issue, the Court held that:

“the law [governing the Concluding Agreement] applied by the Tribunal was Singapore law...the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn whether or not the Concluding Agreement is illegal...the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality...

It is question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of law in this regard... Thus, in the present case, if the Concluding had been governed by Thai law instead of Singapore law, and if the Tribunal had held that the agreement was indeed illegal under Thai law (as [AJT] alleged) but could nonetheless be enforced in Singapore because it was not contrary to Singapore’s public policy, this finding – viz, that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law – would be a finding of law

¹³⁰ AJU v. AJT [2011] 4 SLR para. 66.

*which, if it were erroneous, could be set aside under Art 34(2)(b)(ii) of the Model Law...*¹³¹

Importantly, the public policy referred to by the Court should be perceived as international public policy because the Court opined in favor of narrow interpretation of the public policy ground:

“The prevailing approach of our courts is that where enforcement of a foreign arbitral award is resisted on public policy grounds, the public policy objection in question must involve either ‘exceptional circumstances...which would justify the court in refusing to enforce the award’... or a violation of ‘the most basic notions of morality and justice...’”¹³²

Finally, the last exception to minimum judicial review, justifying a reviewing court’s decision to “re-open” the facts previously determined by arbitrators is when “vitiating factors taint[ed] the arbitral award.” Although it did not exist in the *AJU v. AJT* case, the Singapore Court of Appeal still listed this exception among the issues contrary to public policy. One example of a “vitiating factor tainting the arbitral award” is when fraud plays a part in evidence introduction and subsequently, impacts award adjudication. Almost thirteen years after the judgment of *Thomson-CSF v. Frontier AG*, where the Swiss Federal Tribunal overruled Thomson’s request for award vacatur, this exception guided the Swiss Federal Tribunal to deviate from its stance on the request for the annulment of the award and revise its judgment.

In the *Thomson* case, the criminal investigations conducted by French authorities unveiled that Frontier-AG engaged in a fraudulent scheme to conceal the

¹³¹ Hwang & Lim, *supra* note 4, at 83. See also *AJU v. AJT* [2011] 4 SLR paras. 62 & 67.

¹³² *AJU v. AJT* [2011] 4 SLR para. 38.

intermediary agreement's corrupt purposes from the arbitral tribunal.¹³³ Evidence gathered during the criminal investigation revealed that the fraudulent actions committed by individuals affiliated with Frontier-AG's misled the arbitral tribunal and materially affected the outcome of the arbitral proceedings.¹³⁴ Thus, when the Swiss Federal Tribunal received Thomson's request for revision, the Court effectuated Article 123 of the Federal Statute on the Federal Tribunal, which gives allowance to revision if "criminal proceedings establish that the decision was influenced to the detriment of the moving party by a felony or a crime, even if no conviction ensued."¹³⁵

As a result of the investigation, the Swiss Federal Tribunal vacated the arbitral award and remanded the case for reconsideration to either the original tribunal or a new tribunal formed under the ICC Arbitration Rules.

Here, analogizing the revision judgment of the Swiss Federal Tribunal to a child's cry of "the emperor has no clothes!" appears appropriate. Minimum judicial review receives a warm welcome in arbitration by virtue of the primacy it gives to the autonomy of arbitral proceedings, but the judgment, rendered almost thirteen years later, reflects the inherent jeopardy of minimum judicial review. Thus, while taking the tribunal's findings at face value plays a significant role in promoting arbitration, it may also induce doubts about the legitimacy of the arbitral proceeding's and its outcome.

¹³³ Hwang & Lim, *supra* note 4, at 84.

¹³⁴ *Id.*

¹³⁵ Georg von Segesser, *Federal Tribunal Revises Award Influenced by Fraud*, Kluwer Arbitration Blog (October 23rd, 2009), <http://kluwerarbitrationblog.com/2009/10/23/piercing-the-corporate-veil-effect-on-the-arbitration-clause-and-jurisdiction/>.

For instance, the application of minimum judicial review in the *Thomson-CSF* case unfortunately legitimized and enforced an illegal contract for thirteen years. To prevent this outcome, under certain delicate circumstances (such as those involving corruption and other forms of illegality), the scope of the judicial review may be broadened in favor of legality. Moreover, developing harmonious cooperation among arbitral tribunals and public authorities, particularly in jurisdictions where minimum judicial review is applied, can be a plausible and highly beneficial approach to avoid repercussions that bring the arbitral system's legitimacy into question.

b) Maximum Judicial Review

Next, the judicial review situated on the opposite end of the spectrum from minimum review is maximum review. Courts usually apply maximum judicial review when primary concern revolves around preserving national values and interests, rather than party autonomy and the autonomy of arbitration. Maximum judicial review can thus be viewed as “total scrutiny of the award both as a matter of fact and law.”¹³⁶

Clearly, the notable feature of maximum judicial review is the broad authority bestowed upon a reviewing court. Challenges raised on the basis of public policy make it possible for a reviewing court to effectuate this authority and seize the dispute as if it was submitted to litigation rather than arbitration.¹³⁷ The approach exercised by French courts exemplifies this maximum interference.

¹³⁶ SAYED, *supra* note 6, at 406.

¹³⁷ *Id.*

Indeed there are rulings of the *French Cour de Cassation* exhibiting the Court's favorable approach to a comprehensive re-examination of the award on *de novo* grounds in the face of public policy challenges. In this context, observation of the French judges' application of maximum judicial review postulates that a reviewing French court may embark upon a critique similar to an appellate review and proceed in the following manner:

“(i) review the facts of the case; (ii) appreciate the manner in which is evidence weighed; (iii) propose [an] independent reading of the available evidence; (iv) admit new evidence as well, so long as arguments of public policy are raised even for the first time during the annulment proceedings; and (v) suspend consideration of the facts, until final determination by penal jurisdictions, provided that (a) the criminal investigation pertains to facts that are material to the challenge against the award and that (b) the request to suspend the challenge proceedings are presented in good faith.”¹³⁸

A French landmark judgment, which set the tone in applying maximum judicial review, was rendered by the Paris Court of Appeal in *European Gas Turbines SA v. Westman International Ltd.*¹³⁹ In this case, Alsthom Turbines (the predecessor of European Gas Turbines), and Westman International Ltd. entered into an intermediary agreement under which Westman was tasked with two duties: *first*, to elevate Alsthom's gas turbines and resultantly, make Alsthom eligible to obtain “pre-qualification” bestowed by the National Petrochemical Company of Iran (hereinafter NPC), and *second*, in the instance Alsthom received pre-qualification, Westman

¹³⁸ *Id.* at 407.

¹³⁹ *European Gas Turbines SA v. Westman International Ltd.*, Cour d'Appel, Paris, 30 September 1993, 20 Yearbook of Commercial Arbitration 198-207 (1995).

would assist to procure a contract for the supply of gas turbines under optimum terms by furnishing all information and advice.¹⁴⁰ In return, Alsthom vowed to pay a commission fee including “the expenses of all nature borne by Westman in order to perform its task.”¹⁴¹ The amount of this commission would be finalized by mutual agreement.

Alsthom consequently gained not only pre-qualification, but also the supply contract from NPC. However, when Westman requested Alsthom to make the payment of the commission, it failed to do so. Accordingly, Westman filed a request to initiate arbitral proceedings in Paris.

Following arbitration, the arbitral tribunal rendered an award in favor of Westman. Subsequently, Alsthom challenged the award’s validity before the Paris Court of Appeal on two grounds: *first*, that the award enforced a contract formed with the object of influence peddling and bribery and *second*, that the award was premised upon a fraudulent expense report.¹⁴² The Paris Court of Appeal was not impressed by the first challenge in the absence of evidence substantiating the allegation. However, the Court gave credence to the second challenge in the light of newly furnished document proving Westman’s perjury. In light of this evidence, the court concluded that the award consecrated a fraud and thus, was set aside.

The Paris Court of Appeal’s judgment in *Westman* laid out the motive behind the broad authority bestowed upon French courts encountering public policy

¹⁴⁰ *Id.* at 198.

¹⁴¹ *Id.*

¹⁴² *Id.* at 200.

challenges. Evidently, the Court perceives national courts to be guardians of the French international public policy whose protection is one of the reasons behind the national courts' existence. In line with this perception, the Court corroborates "total control of the award" when faced with public policy challenges and views this control as integral to the national courts' efficacy.¹⁴³ According to the Court:

"This review [a review of the award by the annulment court] concerns all legal and factual elements justifying (or not) the application of the international public policy rule, and in former case, the evaluation of the validity of the contract according to this rule. A different conclusion would deprive the courts' control of all efficacy and, therefore, of its *raison d'être*."¹⁴⁴

The Court clearly took significant steps that called into question the finality of arbitral awards in France. These steps prove that the Court may engage in extensive award scrutiny and that such scrutiny amalgamates the investigation with the evaluation of all evidence independent from the arbitral tribunal's enquiry and weighing.¹⁴⁵ In this case, the Court approved the submission of "new evidence," showing that Westman engaged in fraud. Here, it is critical to note that the foundation of the rendered judgment lay upon evidence that could have been obtained and introduced to the arbitral tribunal throughout the life of the arbitral proceedings.

In *Westman*, the Paris Court of Appeal did not distinguish fresh evidence from new evidence and gathered both under the same umbrella. With this approach, the Court differentiated itself from Justice Colman's *Westacre* judgment with which the

¹⁴³ The term "total (complete) control" was borrowed by Sayed from Pierre Mayer's "La sentence contraire à l'ordre public au fond", *Revue de l'arbitrage* 631 para. 19 (1994). See SAYED, *supra* note 6, at 408.

¹⁴⁴ *European Gas Turbines*, *supra* note 139, at 203.

¹⁴⁵ SAYED, *supra* note 6, at 409.

majority of the English Court of Appeal concurred. Justice Colman, in his judgment, considered additional evidence as a tool employed by the challenging party seeking to reach the public policy doctrine to spark retrial. Therefore, Mr. Colman conditioned the introduction of additional (or fresh) evidence upon the fulfillment of certain requirements (*previously addressed in* “Fresh Evidence exception of Minimum Judicial Review”).¹⁴⁶

The Paris Court of Appeal gave an additional illustration of maximum judicial review in the *Thomson-CSF* case.¹⁴⁷ Thomson challenged the enforcement of the award on the basis of public policy in France after the Swiss Federal Tribunal declined to vacate the award. In conjunction with the lawsuit in France, Thomson submitted a criminal complaint, asserting corruption and fraudulent presentation of evidence that materially influenced the arbitral award. Subsequently, the Paris Attorney General requested the commencement of a criminal investigation. During the investigation, Thomson filed a request for a transmission of some documents from the criminal investigation file to the Paris Court of Appeal and, furthermore, a suspension of the ongoing proceedings in the Paris Court of Appeal until the criminal investigation was concluded.¹⁴⁸

The Paris Court of Appeal granted both requests. In its judgment rendered on September 10, 1998, the Court espoused an approach similar to one it employed in the *Westman* case. The Court emphasized total control of the award and underlined its

¹⁴⁶ See *supra* pages 310-312.

¹⁴⁷ A.Thomson CSF v. Société Brunner Sociedade Civil de Administração Limitada & Société Frontier AG Bern, Judgment of Paris Court of Appeal, 10 September 1998.

¹⁴⁸ SAYED, *supra* note 6, at 410.

necessity in the face of public policy challenges in parallel language to the *Westman* case.¹⁴⁹ Specifically, the Court argued:

“The power recognized to the arbitrator in international arbitration to appreciate the legality of a contract under rules of international public policy and to sanction illegality by pronouncing nullity, requires, in the framework of the control exercised by the annulment or the *exequatur* judge, on the ground of public policy violation of the recognition and enforcement of the arbitral award, the ability to appreciate all elements of facts and law allowing notably to justify the application of the rule of international public policy, and, in the affirmative, to measure the legality of the contract, based on this rule.”¹⁵⁰

Then, in its second judgment rendered on September 7, 1999, the Court approved Thomson’s other request and suspended its proceedings pending the ongoing criminal investigation. In the light of the *Westman* case and the Court’s judgments in *Thomson*, approving both the transmission of the relevant documents from the criminal investigation file to the enforcement proceedings and the suspension of the case until the conclusion of the criminal investigation, it is feasible to speculate that where an arbitral award is challenged on the basis of corruption (or any other form of illegality), the reviewing French court may tend to expand the sphere of the judicial control over the award at the expense of the finality of arbitral awards.

However, this propensity to expand the sphere of judicial control over arbitral awards was put on hold by the French courts in three cases, which are chronologically

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Thales Air Defense (2004), *Cytec Industries* (2008), and *Schneider* (2009). In these cases, the French judicial approach underwent a paradigm shift and deviated from its usual mode of judicial review (*the total control policy under maximum judicial review*). In the judgments of these cases, the Paris Court of Appeal and the Cour de Cassation tasked the reviewing court with taking the award at face value and discouraged from conducting in-depth review absent a “manifest, actual, and specific [flagrant, actual, and concrete]” violation of public policy.¹⁵¹

By seeking these specific features in the alleged public policy violation, the French high courts relinquished maximum judicial review and, furthermore, required the reviewing national court to avoid re-visiting facts already determined by an arbitral tribunal absent a “*manifest, actual, and specific [flagrant, actual, and concrete]*” violation of public policy. This terminology, however, was not explicated despite its determinative role in the process of choosing the appropriate level of the judicial review.¹⁵² The vital word obstructing initiation of an in-depth judicial review and begs explanation is “manifest (“flagrant”).” A manifest or flagrant violation requires that an alleged public policy violation to be indisputable and unquestionable. To clarify the ambiguity inherent in this term, external factors such as substantive evidence submitted by the alleging party, arguments made before the arbitral tribunal, red flags, and evidence gathered by public authorities, may prove significant. For instance, in the *Thomson* case, where the French criminal investigation exposed that fraud tainted the award-making process, the evidence gathered during the criminal

¹⁵¹ See generally Hwang & Lim, *supra* note 4, at 88-89.

¹⁵² *Id.* at 89.

investigation evinced the violation of public policy and, therefore, culminated in a re-examination of the facts by the Paris Court of Appeal.

Next, the judgment of the Paris Court of Appeal in *SA Thales Air Defense v. GIE Euromissile* marked the first departure from maximum judicial review.¹⁵³ In this case, Thales challenged the arbitral award favoring Euromissile on the grounds of international public policy. In response, Euromissile cited a French Cour de Cassation's unpublished judgment dated March 21, 2000.¹⁵⁴ In this judgment, the Court stipulated that the in-depth review of an arbitral award on the basis of a public policy challenge would be judicious in the presence of a "manifest, actual, and specific (flagrante, effective et concrète)" violation of international public policy.¹⁵⁵

Parallel to the dictation of the Cour de Cassation, the Paris Court of Appeal in *Thales* stated that, "the violation of international public policy...must be manifest, actual and specific [flagrante, effective et concrète]."¹⁵⁶ Accordingly, in this case, the Court refused to set the award aside based upon public policy violations. By requiring the public policy violation to be "manifest, actual, and specific," the Paris Court of Appeal loosened its grip on total scrutiny of arbitral awards in the context of public policy challenges and extended its primary policy favoring arbitration to challenges grounded upon public policy violations. Notably, the Court did not forgo reviewing the award as a matter of fact and law in cases where a public policy violation was

¹⁵³ *SA Thales Air Defense v. GIE Euromissile*, CA Paris, November 18, 2004, N. 2002/19606.

¹⁵⁴ Emmanuel Gaillard, *Extent of Court Review of Public Policy*, 237 N.Y.L.J. 1, 3 (2007), http://www.shearman.com/~media/Files/NewsInsights/Publications/2007/04/Extent-of-Court-Review-of-Public-Policy/Files/IA_NYLJ-Extent-of-Court-Review_040308_16/FileAttachment/IA_NYLJ-Extent-of-Court-Review_040308_16.pdf.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

addressed earlier by the arbitral tribunal.¹⁵⁷ In conjunction, the Court refused to trespass upon the arbitral tribunal's jurisdiction and decide issues not previously argued before the arbitral tribunal.¹⁵⁸

Next, in the wake of *Thales*, the French Cour de Cassation furnished a judgment in *SNF SAS v. Cytec* case,¹⁵⁹ where the Court espoused an identical approach to that exercised by the Paris Court of Appeal in the *Thales* case. In its judgment, the Court particularly opined that:

“Since this is a violation of international public policy, the annulment court considers only the compatibility of the effect of the award's recognition and enforcement with international public policy; the examination is limited to *flagrant, effective and concrete nature of the alleged violation*.”¹⁶⁰

The paradigm shift that the Paris Court of Appeal and the Cour de Cassation underwent as to the review of public policy challenges could be explained by contrasting the content of the public policy challenges. In the *Westman* case, the public policy challenges embodied bribery, fraud and influence peddling. In *Thales*

¹⁵⁷ *Id.*

¹⁵⁸ STEFAN KRÖLL, *Chapter 7: The Public Policy Defence in the Model Law Jurisprudence: The ILA Report Revisited* IN THE UNCITRAL MODEL LAW AFTER TWENTY-FIVE YEARS: GLOBAL PERSPECTIVE ON INTERNATIONAL COMMERCIAL ARBITRATION 162 (2013) (“...the court stated that, while it may – at the annulment stage – be in a position to evaluate whether there is such a blatant breach of public policy in cases where the issue has been addressed in the award, it was not in the position to decide a complex competition law issue that had not been pleaded before.”); Gaillard, *supra* note 146 (“The court concluded that ‘the violation of international public policy within the meaning of Article 1502, 5°, of the New Code of Civil Procedure must be manifest, actual and specific [flagrante, effective, et concrète],’ and that, although it could, within its powers, make a determination in fact and in law, it could not determine the merits of a complex dispute regarding the possible illegality of contractual arrangements that had never been argued by the parties and never assessed by the arbitrators...”)

¹⁵⁹ *SNF SAS v. Cytec Industries BV*, Cass. Civ. 1, June 4, 2008, N. 06-15320.

¹⁶⁰ DOMINIQUE HASCHER & BÉATRICE CASTELLANE, FRENCH CASE LAW ANNUAL REPORT 1023 (2010), available at <http://www.cabinet-castellane-avocats.fr/pdf/2010-04-01-french-case-law-annual-report.pdf>.

and *Cytec*, however, the public policy allegations were premised upon a violation of European Competition Law. This variance in the content of public policy challenges allows for reasonable speculation that awards challenged on the basis of corruption (or any other type of illegality) would be subjected to a more comprehensive scrutiny than awards resisted on the grounds of violations of law.

However, the judgment of *Schneider v. CPL Industries*,¹⁶¹ rendered by the Paris Court of Appeal in 2009 (and upheld by the Cour de Cassation in 2014), demonstrates that minimum judicial review also applies to public policy challenges grounded on corruption. In the *Schneider* case, the parties formed a contract whereby CPL and other Nigerian companies agreed to assist M. Schneider in negotiation and execution of a public tender contract in Nigeria.¹⁶² The contract further tasked CPL Industries with providing M. Schneider with access to “the wide connections of the eminent members of CPL Industries’ board of directors in Nigeria.”¹⁶³ Moreover, the daughter of the president of Nigeria, a public servant, was among the signatories of the contract. However, she falsified her name when signing the contract.¹⁶⁴

In *Schneider*, corruption allegations arose during the arbitral proceedings. However, the sole arbitrator did not find the submitted evidence sufficient to substantiate corruption allegations and structured the award accordingly. Naturally, M. Schneider contested the award before the Paris Court of Appeal. The appellant

¹⁶¹ M. Schneider Schaltegerätebau und Elektroinstallationen GmbH [Austria] v. Sté CPL Industries Limited [Nigeria], Paris CA, 10 September 2009; Cour de Cassation, 1er Ch. Civ., 12 February 2014.

¹⁶² Denis Bensaude & Jennifer Kirby, *A View from Paris – December 2009*, 24(12) Mealey’s Int’l Arb Rep 1, 8 (2009), <http://webcache.googleusercontent.com/search?q=cache:0nHnraIE5VUJ:bensaude-paris.com/app/download/5779407908/091222ViewfromParis.pdf+&cd=2&hl=en&ct=clnk&gl=us>

¹⁶³ *Id.*

¹⁶⁴ *Id.*

specifically contended that the award conflicted with international public policy because: (i) the arbitrator failed to draw appropriate conclusions arising from its findings of misrepresentation (*fraud*); (ii) the arbitrator enforced contracts contradicting the Nigerian Anti-Bribery Statute (*bribery*).¹⁶⁵

The Court dismissed M. Schneider's public policy challenges of fraud and bribery. The Court construed the corruption allegations as an attempt to have the court conduct merit review, which ought not to happen in the presence of an arbitrator's detailed examination of the facts both determining that there was inadequate evidence of corruption and alluding to the absence of blatant, actual, and concrete violation of public policy.¹⁶⁶ As to the allegations of fraud, the Court refused to review these allegations because M. Schneider was cognizant of them during the arbitral proceedings, but failed to raise and discuss them before the tribunal. Thus, fraud was an inadmissible ground to set the award aside.¹⁶⁷ The Cour de Cassation upheld this judgment on February 12, 2014.¹⁶⁸

Here, once again, the Paris Court of Appeal reiterated that it was not appropriate to re-examine or alter the award. However, here, unlike in *Thales* and *Cytec*, this acknowledgment was made *vis-à-vis* corruption allegations. In other words, the Paris Court of Appeal situated itself on the opposite end of the judicial

¹⁶⁵ JEAN-DOMINIQUE TOURAILLE, ERIC BORYSEWICZ & KARIM BOULMELH, *THE BAKER & MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK* (2014-2015) 122 (2015).

¹⁶⁶ Hwang & Lim, *supra* note 4, at 90.

¹⁶⁷ *Id.*

¹⁶⁸ Patricia Peterson, *The French Law Standard of Review for Conformity of Awards with International Public Policy Where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?*, Kluwer Arbitration Blog (December 10th, 2014), <http://kluwerarbitrationblog.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/>.

review seen in the *Westman* case, where the Court considered the scrutiny of the award (as a matter of law and fact), as the essence of the French national courts' efficacy. Notably, here, the Court gave primacy to the autonomy of the arbitral proceedings and preferred to avoid interference. Consequently, the Court limited its role to review whether enforcement or recognition of the award would contradict French international public policy and, further, that the contradiction would be "blatant, actual, and concrete."

In sum, in departure from maximum judicial review, French courts enforce a policy requiring the reviewing court to avoid re-visiting facts already determined by an arbitral tribunal without a "manifest, actual, and specific [flagrant, actual, and concrete]" violation of public policy. Moreover, the Cour de Cassation supports this role and policy of a reviewing court. In the wake of the recent holding of the Cour de Cassation in *Schneider*, it appears that minimum judicial review also applies to challenges based upon corruption.

Notwithstanding the outcomes of the abovementioned cases, three recent cases adjudicated by the Paris Court of Appeal postulate that, at least in cases of corruption, there is a tendency to apply maximum judicial review and scrutinize the arbitral award.

First, just a month after the Cour de Cassation's judgment in *Schneider*, a markedly different holding was rendered in the *Sté Gulf Leaders v. SA Crédit* case on

March 4, 2014.¹⁶⁹ Here, Gulf Leaders challenged the award before the Paris Court of Appeal and alleged that the arbitral tribunal's award enforced a contract procured by corruption. However, here, the Court considered the scrutiny of the award as a necessary step in rendering a determination as to whether enforcement of the award contradicted the international public policy. The Court specifically stated:

“Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings, seized of an application based upon article 1520-5° of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy *in an actual or concrete manner*.”¹⁷⁰

Here, notably, the Court omitted to include the word “flagrant” in its judgment, and instead, preserved the words “actual and concrete.” By not requiring that the public policy violation be “flagrant” and instead demanding that the public policy violation be either “actual” *or* “concrete,” the Court made it easier to conduct re-adjudication of the merits. Summarily, the Court dismissed Gulf Leaders’ corruption allegations *only after* conducting its own comprehensive review of the facts.

Next, on October 14, 2014, in *Congo v. SA Commissions Import Export* (hereinafter *Commisimpex*),¹⁷¹ the Paris Court of Appeal rendered another judgment where maximum judicial review standard manifested. In this case, parties contracted

¹⁶⁹ Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France, the Paris Court of Appeal, March 4, 2014.

¹⁷⁰ Peterson, *supra* note 168 (emphasis added).

¹⁷¹ La République du Congo v. S.A. Commissions Import Export, Cour d’appel, Paris, Pôle 1, chambre 1, 14 October 2014, n° 13/03410.

to schedule repayment of debts owed by Congo to Commisimpex.¹⁷² When Congo failed to make the promised payments as they came due, S.A. Commissions effectuated the arbitral clause integrated into the agreement. During arbitration, Commisimpex also sought an additional debt from a separate, older agreement dated 2003. Commisimpex tried to substantiate its assertion with a letter allegedly demonstrating an agreement made at prior meetings.¹⁷³ This letter's authenticity was questioned by Congo. Moreover, Congo alleged that their 2003 agreement was the fruit of "a general climate of corruption," which Commisimpex used to acquire the contract and therefore, the agreement was null and void.¹⁷⁴ Finally, the last challenge advanced by Congo questioned the requisite powers of the 2003 agreement's signatories. At the conclusion, the majority of the arbitral tribunal did not credit Congo's allegations and thus, furnished an award favorable to Commisimpex.

Subsequently, Congo challenged the award before the Paris Court of Appeal and asked for vacatur on the same grounds brought before the arbitral tribunal. In its judgment, the Court employed maximum judicial review in conjunction with minimum judicial review. As to the allegations directed at the requisite powers of the signatories and the evidentiary basis of the debt, the Court applied minimum judicial review and refused to scrutinize the award.

However, when the Court tackled Congo's corruption allegations, it applied maximum judicial review. The Court evaluated the arbitral tribunal's reasoning and

¹⁷² Peterson, *supra* note 168.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

delved into all relevant facts and legal elements upon which the award was founded.

At the end, the Court concluded that Congo could not substantiate the veracity of the illegality claims targeting the 2003 agreement. The Court particularly stated:

“When it is alleged that an award gives effect to a contract procured through corruption, the court, seized of an annulment action pursuant to Article 1520-5 of the Code of Civil Procedure, *must* investigate all the legal and factual elements that are relevant to deciding the alleged illegality and to determine whether the recognition or enforcement of the award *effectively and concretely* violates international public order.”¹⁷⁵

Next, the most recent case where the Paris Court of Appeal flexed its muscle when confronting corruption allegations is *SAS Man Diesel & Turbo France v. Sté Al Maimana General Training Company Ltd.*¹⁷⁶ Here, the Court again applied an identical standard of review with respect to the challenge of the arbitral award on the basis of corruption. The applicant argued that the award rendered in Switzerland legitimized a contract acquired through corruption; therefore, the enforcement of the award was contrary to French international public policy. The Court regarded the investigation of all legal and factual elements as a requisite to assure a healthy judgment concluding whether recognition and enforcement of the award would violate international public policy in an “effective and concrete” manner.¹⁷⁷

Importantly, these judgments have not been presented to the Cour de Cassation as of this date. Hence, there is a lack of clarity as to whether the Cour de

¹⁷⁵ Memorandum from Charles Nairac on Public Policy and French Law of International Arbitration 7 (October 17th, 2014; updated March 31st, 2015) (emphasis added).

¹⁷⁶ *SAS Man Diesel & Turbo France v. Sté Al Maimana General Training Company Ltd*, Cour d’appel, Paris, Pôle 1, 1er Ch., 4 November 2014.

¹⁷⁷ Nairac, *supra* note 175, at 20.

Cassation will embrace this abrupt paradigm shift exercised by the Paris Court of Appeal. The Cour de Cassation's reasoning in *Schneider*, however, hints that it might not validate this deviation from the "flagrant, actual, and concrete" formula. To support this prediction, in the *Schneider* case, when the Court endorsed the lower court's judgment to enforce the award, it founded its decision upon the duties designated to the reviewing court. According to the Court, the charge of "the annulment judge is to decide whether or not an arbitral award is to be inserted into the French legal order, not to judge anew the merits of the dispute."¹⁷⁸ In light of this, it is reasonable to state that the Paris Court of Appeal's comprehensive reviews in these recent cases will not receive the Higher Court's approbation.

However, the Paris Court of Appeal's recent holding trilogy leads to infer that the Court is prone to resuscitate maximum judicial review in the face of corruption allegations. The aftermath of this trilogy further corroborates this inference. In this regard, it can reasonably be deduced that the Court's policy, at least for now, is to subject arbitral awards *challenged on the basis of corruption* to maximum judicial review, while simultaneously applying the "flagrant, actual, and concrete" formula to other international public policy challenges emanating from any violation besides illegality. For instance, in a 2015 judgment (February 24th, 2015), when the applicant challenged the award on the basis of international public policy,¹⁷⁹ the Court

¹⁷⁸ *Id.* at 18.

¹⁷⁹ *Id.* at 21 (citing Arab Potash Company, CA Paris, 24 February 2015) ("The applicant argued that the recognition of the award was contrary to international public policy for three reasons: (i) the respondent had allegedly waived its right to rely on the award by starting ICSID arbitration proceedings after annulment of the award at the seat of arbitration; (ii) the respondent's contradictory

dismissed the claim and enforced the award by stating: “the recognition of the award could not be likely...to violate international public policy in a ‘*manifest, effective, and concrete*’ manner.”¹⁸⁰

Next, akin to French judicial review, Australia’s judicial precedent is unsettled with respect to the standard of judicial review in the face of corruption allegations. The Australian courts’ approaches to the standard of judicial review diversify in accord to how the reviewing court prefers to exercise its discretion in the face of corruption challenges.

One of a handful of Australian judgments exploring the appropriate level of the judicial review was furnished by New South Wales Supreme Court in *Corvetina v. Clough Engineering Ltd.* case on August 17, 2004.¹⁸¹ In this case, Corvetina and Clough entered into an agreement where Corvetina promised to perform certain activities in Pakistan.¹⁸² In the wake of a dispute arising from the contract, arbitration was initiated. During the arbitral proceedings, Clough argued that the contracts and their execution by Corvetina contradicted England’s public policy (the governing law of the contract) and Pakistan (the place of performance).¹⁸³ The arbitrators dismissed the allegations and subsequently rendered an award favorable to Corvetina.

behavior amounted to estoppel, and (iii) the second ICSID award had a *res judicata* effect and was incompatible with the award at hand.”)

¹⁸⁰ *Id.* (emphasis added)

¹⁸¹ *Corvetina Technology Ltd. v. Clough Engineering Ltd.* [2004] NSWSC 700 (August 17th, 2004).

¹⁸² *Corvetina Technology Limited v. Clough Engineering Limited*, Supreme Court of New South Wales, 50029/04, in Albert Jan van den Berg, 30 *Yearbook of Commercial Arbitration* 409, 409 (2005).

¹⁸³ *Id.* at 409.

During enforcement stage, Clough resisted on the grounds that the award enforced an illegal contract, and accordingly, contravened both Australian and Pakistani public policy. In response, Corvetina requested the Supreme Court of New South Wales to declare that Clough could not raise public policy challenges in the enforcement stage because the arbitral tribunal already tackled and settled the issue.¹⁸⁴ Critically, the answer to this motion determined the level of judicial review.

Here, Justice McDougall assessed the motion to reopen the arbitrators' finding on illegality. He performed this evaluation in the context of the opinions conveyed in the *Soleimany* and *Westacre* cases. Taking these precedents into account, Mr. McDougall declared:

“It seems to be clear, from what the Court of Appeal said in *Soleimany* as to the sixth proposition of Colman J in *Westacre* at first instance, that it is open in principle to a defendant...to seek to rely on illegality, pursuant to s 8(7)b [of the Australian International Arbitration Act of 1974], or its equivalent, even if the illegality was raised before and decided by the arbitrator. I do not see anything in the decision of Mantell J in *Westacre* to the contrary.”¹⁸⁵

Justice McDougall's assessment appeared to overlook Justice Colman's judgment and Justice Mantell's concurring opinion regarding the sixth proposition relating to reopening an arbitrator's findings. This proposition permits and justifies reopening findings by the reviewing court if the party against whom the award was made challenges the award on the basis of facts not placed before the arbitrators. The proposition specifically states:

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 413.

“(vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds of that, *on the basis of facts not placed before the arbitrators, the contract was indeed illegal*, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.”¹⁸⁶

In his judgment, McDougall recognized the delicate balance that he had to strike between the New York Convention’s objective to facilitate enforcement of the foreign award and the reviewing court’s right to preserve and apply its own public policy. However, McDougall’s concerns over public policy outweighed the New York Convention’s objective. Thus, he preferred to employ maximum judicial review and favored an in-depth examination of the facts. Justice McDougall found that:

“The very point of provisions such as provisions such as s 8(7)(b) [of the Australian International Arbitration Act of 1974] is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion... There is, as the cases have recognized, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of its own processes and to apply its own public policy.”¹⁸⁷

¹⁸⁶ Emphasis added.

¹⁸⁷ *Corvetina Technology Limited*, *supra* note 182, at 414.

However, recently, amendments to the Australian International Arbitration Act by the Australian Parliament in 2010 have cast doubt upon the application of maximum judicial review. The 2010 modifications to the Australian International Arbitration Act of 1974 aimed to elevate the status of international arbitration in the country.¹⁸⁸ Through these amendments, Parliament adopted an arbitration policy favoring the finality principle.¹⁸⁹ Consequently, the grounds on which to challenge enforcement of the foreign were restricted. Conversely, lawmakers also deferred to emerging concerns of corruption. To quell these concerns, Section 8 of the International Arbitration Act of 1974 effectively declared corruption as a ground to deny award enforcement.

Evidently, Parliament's amendments aimed to promote international arbitration while refusing to sacrifice strength to tackle illegalities such as corruption (particularly fraud). Unfortunately, waters are murky when the issue comes to judicial review of an arbitral award by the Australian courts in the face of corruption contentions. There is an ambiguity as to whether such allegations raised before a reviewing court should encourage that court to deviate from the policy favoring arbitration and award finality. In other words, when confronting corruption or any other illegality allegations, should a reviewing court call the substance of the award into question, impugn its validity, and proceed to scrutinize it?

¹⁸⁸ Mark Gillard, *Resistance is Futile – Uganda Telecom and the Grounds for Resisting Enforcement of Foreign Awards*, available at http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20110630/resistance_is_futile-uganda_telecom_and_the_grounds_for_resisting_enforcement_of_foreign_awards.page.

¹⁸⁹ *Id.*

In the aftermath of the amendment legislation, there is no judgment thus far exhibiting the Australian courts' right to delve into the arbitral tribunal's findings when faced with corruption allegations. There are, however, cases where the courts touched upon the principles that require enforcement when confronting issues germane to public policy. For example, the Federal Court of Australia's judgment in *Uganda Telecom Ltd. v. Hi-Tech Telecom Pty Ltd* (February 22nd, 2011)¹⁹⁰ represents one such case.

In case *sub judice*, Hi-Tech challenged the award before the Federal Court on public policy grounds arising from alleged errors of fact and law in the award making process. Justice Foster did not classify "erroneous legal reasoning or misapplication of law" as a public policy violation and dismissed the challenge. To clarify, Mr. Foster explained that:

*"The time for [the challenging party] to have addressed this matter was during the arbitration proceedings in accordance with the timetable laid down by the arbitrator. It chose not to do so at that time. It cannot do so now... Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention."*¹⁹¹

Justice Foster rendered this decision after engaging in a "summary examination,"¹⁹² where he particularly criticized the *Corvetina* judgment on the basis of the court applying broad discretion. Justice Foster specifically stated that following

¹⁹⁰ Australia No. 36, *Uganda Telecom Limited v. Hi-Tech Telecom Pty Ltd*, [2011] FCA 131 (February 22nd, 2011) in Albert Jan van den Berg, 36 *Yearbook Commercial Arbitration* 252-255 (2011).

¹⁹¹ Hwang & Lim, *supra* note 4, at 93 (emphasis added).

¹⁹² This term has been adopted from Sayed's book, "Corruption in International Trade and Commercial Arbitration." See *general* SAYED, *supra* note 6, at 394.

the 2010 amendments, there was no more a general discretion available to a reviewing court to refuse award enforcement. In this respect, Foster J encouraged a narrow interpretation of the public policy ground in Section 8(7)b of the Australian International Arbitration Act in order to prevent this ground from being used as a steppingstone to reach a general discretion by a reviewing court. Specifically, Foster J stated:

“In the United States... *it* [public policy ground] *has not been seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of ‘foreign arbitral award’ under the New York Convention...* Other courts in the United States have held that there is a pro-enforcement bias informing the Convention... A more conservative approach has sometimes been taken in Australia [citing *Corvetina Technology Ltd. v. Clough Engineering Ltd.*]... *Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award which was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Sect. 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in Sect. 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him...*”¹⁹³

Here, the Federal Court of Australia did not designate a particular judicial review standard in the face of public policy challenges. However, Justice Foster’s refusal to assess the arguments of fact and law not previously addressed before the

¹⁹³ *Uganda Telecom Limited*, *supra* note 190, paras. 99, 100, 101&103. *See also* Hwang & Lim, *supra* note 4, at 93.

arbitrators, his emphasis on a narrow interpretation of the public policy ground, and his explicit disagreement with the *Corvetina* case's judgment reflect the Federal Court's propensity for "minimum judicial review."

The Federal Court of Australia's approach in *TCL Air Conditioner v. Castel Electronics*¹⁹⁴ better illustrates the Court's favorable stance towards minimum judicial review. Here, TCL and Castel entered into an exclusive distribution agreement where the former granted the latter the exclusive right to sell air conditioners manufactured by TCL in Australia. In 2008, Castel filed a request for arbitration, claiming TCL violated Castel's exclusivity of rights by selling air conditioning units produced by TCL, though not bearing the TCL brand.¹⁹⁵ The arbitral tribunal rendered an award in favor of Castel in December 2010. When Castel filed a request to have the award enforced, TCL resisted on the basis of a public policy violation based upon the alleged breach of natural justice by the arbitral tribunal.¹⁹⁶ The Federal Court of Australia dismissed this public policy challenge premised upon the breach of natural justice.

The Court held that an international arbitration award would not be set aside or refused recognition and enforcement on the basis of public policy unless a real unfairness or practical injustice is exhibited with clarity. The Court stated:

¹⁹⁴ *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty Ltd.*, Federal Court of Australia, Victoria District Registry, VID 1042 of 2012, VID 1043 of 2012, and VID 1044 of 2012, 26 November 2013, in Albert Jan van den Berg, 39 *Yearbook Commercial Arbitration* 673-676 (2014). The judgment is available at, <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2014/83.html>.

¹⁹⁵ *Id.* at 674.

¹⁹⁶ *Id.*

“An international commercial arbitration award will not be set aside or denied recognition or enforcement under Arts 34 [on vacatur] and 36 [on recognition and enforcement] of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved...*The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and expedition...*”¹⁹⁷

The Court also clarified:

“If the rules of natural justice encompass requirements such as the requirement of probative evidence for the findings of facts or the need for logical reasoning to factual conclusions, there is a grave danger that the international commercial arbitral system will be undermined by judicial review in which factual findings of a tribunal are re-agitated and gone over in the name of natural justice, in circumstances where the hearing or reference has been conducted regularly and fairly.”¹⁹⁸

In this judgment, the Federal Court of Australia recognized the threat posed to international arbitration by judicial review of the findings of an arbitral tribunal. To eliminate this threat, the Court took a pro-arbitration stance and gave primacy to the finality principle *vis-à-vis* public policy challenges. The evaluation of the Federal Court’s approach in both the *TCL* and the *Uganda* cases postulates a tendency to apply minimum judicial review. Therefore, it is feasible to speculate, at least for now, that the Court will maintain minimum judicial review for the sake of preserving the international arbitration system even if the public policy allegations are premised upon corruption.

¹⁹⁷ *TCL Air Conditioner*, *supra* note 194, para. 55 (emphasis added).

¹⁹⁸ *Id.* at para. 54.

Plainly, when tackling corruption, the courts of France and Australia, particularly the French courts, alternate between minimum judicial review and maximum judicial review. This absence of consistency may be excused due to the challenges in striking equilibrium between a State's interests in preserving certain national values and parties' interests in the enforcement of arbitral awards without judicial intrusion. Interestingly, despite the prevailing desire to end corruption, the balance is not yet struck in favor of the national values. Within the current judicial climate that is favorable to international arbitration, reviewing courts give deference to award finality and avoid disturbing the findings of arbitral tribunals absent a clear public policy violation. In France, however, there clearly appears to be willingness by reviewing courts to employ an in-depth judicial review, notwithstanding the costs to award finality.

c) Contextual Judicial Review

The third and final judicial approach towards an award review is contextual judicial review. Contextual judicial review rests between minimum and maximum review on the judicial review spectrum. Unlike minimum and maximum judicial reviews, under contextual judicial review, the scope of review is contingent on the nature of the public policy violation. In this respect, contextual judicial review provides the reviewing court with a noteworthy flexibility that alleviates the difficulties in striking a balance between the interests in the finality of arbitration proceedings (*pro-enforcement policy*) and the interests in public policy relating to corruption (*public policy exception*), which attracts judicial intervention.

Contextual judicial review was fashioned by Justice Waller in the *Soleimany* case and elucidated in his dissenting opinion in the *Westacre* case. First, in *Soleimany*,¹⁹⁹ action was taken to enforce an arbitral award furnished by the Beth Din (*Court of Chief Rabbi* – a Jewish religious arbitral tribunal). Here, via contract, the son sought to free “a consignment of carpets that had been seized by the Iranian customs authorities”²⁰⁰ and arranged for the export of carpets from Iran by eliminating obstacles arising from the Iranian Revenue laws and export controls.²⁰¹ The arbitral tribunal concluded that the contract between father and son was made with the purpose of smuggling Persian carpets out of Iran. This was accomplished through bribing diplomats whose diplomatic immunity was exploited to transport the carpets through customs and out of the country.²⁰²

The Beth Din recognized the illegality in the underlying contract. However, it overlooked this illegality by virtue of the applicable Jewish law according to which “any purported illegality would have no effect on the rights of the parties.”²⁰³ When the award reached the Court of Appeal, the Court held the award unenforceable due to the illegality of the underlying contract that contravened the public policy of the *lex fori* (England). The Court did not re-visit the findings of the arbitral tribunal to unveil the illegality upon which the court’s refusal of the enforcement was founded because

¹⁹⁹ *Soleimany v. Soleimany* [1998] APP.L.R. 02/19, available at <http://www.nadr.co.uk/articles/published/ZzzzarbitrationLawReports/Soleimany%20v%20Soleimany%201998.pdf>.

²⁰⁰ *Id.* at para. 1.

²⁰¹ *Id.*

²⁰² Hwang & Lim, *supra* note 4, at 94.

²⁰³ *Soleimany*, *supra* note 199, para. 27.

the illegality of the underlying contract was previously acknowledged and enunciated by the arbitral tribunal.

Nonetheless, Lord Justice Waller, who authored the opinion of the Court, began the judgment by exploring the judicial review conundrum that a reviewing court would encounter when an arbitral award was rendered *vis-à-vis* an illegality contention. In this respect, Waller LJ drew attention to tension between “the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced.”²⁰⁴ Subsequently, for the sake of public interest, Mr. Waller sought answers to the questions regarding the enforcement court’s entitlement to review the facts of a case and the scope of the review when an illegality impacts an award.

According to Mr. Waller’s judgment, the steps that ought to be followed by a reviewing court upon encountering illegality are as follows:

“In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an enquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in International trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of these matters in the first instance. That would create the

²⁰⁴ *Id.* para. 50.

mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate enquiry into the issue of illegality."²⁰⁵

Here, Mr. Waller propounded a workable two-stage test that a reviewing court may employ before deciding whether the findings of the arbitral tribunal should be scrutinized when confronting illegality contentions. Pursuant to this two-stage test, the first step is taken if there is *prima facie* evidence insinuating illegality. The existence of such evidence prompts a preliminary investigation, the findings of which determine whether a more comprehensive inquiry is appropriate. During the preliminary inquiry, the pivotal elements requiring satisfaction include:²⁰⁶ (i) evidence of legality and illegality; (ii) how the arbitrator(s) determined the legality or illegality; (iii) the competence of the arbitrator(s) in tackling illegality, and (iv) the existence of factors vitiating the award or award making process.

Evident from Waller's first stage, he argues that a reviewing court should not solely be concerned with award enforcement, but should further assess how arbitrators tackled illegality allegations and the reasoning behind their determinations.²⁰⁷ In this regard, Waller favored extending the scope of the court's review to include issues of fact already determined by the arbitrators. He differentiated his approach from Justice Colman's in *Westacre* (first instance judgment), where Justice Colman held:

²⁰⁵ *Id.* para. 51.

²⁰⁶ SAYED, *supra* note 6, at 415.

²⁰⁷ *Soleimany*, *supra* note 199, para. 54.

“...by the award the arbitrators determined that it [underlying contract] was not illegal, *prima facie* the court would enforce the resulting award. (vi) if the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, *on the basis of facts not placed before the arbitrators*, the contract was indeed illegal, the enforcement court would have to consider whether public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.”²⁰⁸

In contrast, Waller explicitly disagreed with Justice Colman in his judgment and, in response to Colman’s *dicta*, Waller argued:

“Colman J holds that *prima facie* the court could enforce the resulting award...But, in an appropriate case it may enquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J, who limited his sixth proposition [see above] to cases where there were relevant facts not put before the arbitrator.”²⁰⁹

In the context of judicial review over an arbitrator’s findings, the judgment of *Soleimany* bears a resemblance to the cases, such as *Westman*, where maximum judicial review applied to illegality challenges. However, notably, while comprehensive review of an arbitrator’s findings is principal under maximum judicial review (*full-scale enquiry*), in contextual judicial review, such review is an ancillary

²⁰⁸ *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd. and others* [1998] 4 ALL ER 570, 593.

²⁰⁹ *Soleimany*, *supra* note 199, para. 61.

mechanism whose operation is contingent upon the outcome of preliminary enquiry.²¹⁰

Soon after the *Soleimany* case, the *Westacre* appeal reached the Court of Appeal. Lord Justice Waller delivered the Court of Appeal's opinion where he engaged in a lengthy discussion devoted to answering the question of whether the Court should allow a reviewing court to re-open facts already determined by arbitrators.²¹¹

Waller began his opinion by differentiating his stance from Justice Colman's within the scope of issue estoppel. On this point, Mr. Waller concurred with Justice Colman that a party initiating action against an award should be prevented from obtaining a review of the issues on which the decision was already made. However, Waller recognized that exceptional circumstances exist under which a reviewing court should not rely on estoppel and should review the facts. From Waller's perspective, the issue of illegality represents one such circumstance where estoppel should not apply. Thus, notwithstanding the previous determination of illegality allegations rendered by the arbitral tribunal, a reviewing court should not effectuate issue estoppel. Specifically, Waller stated:

“What I believe we, and indeed Colman J, were recognizing was that although normally at the enforcement stage a party who brings an action on the award will be estopped from attempting to re-argue the points on which he has lost the arbitration... there are

²¹⁰ Hwang & Lim, *supra* note 4, at 95.

²¹¹ *Westacre Investments Inc. v. Jugoinport-SPDR Holding Company Ltd.* [1999] APP.L.R. 05/12 at para. 52.

exceptional circumstances where the court will not allow reliance on an estoppel.”²¹²

Waller later provided justification of his departure from Colman on issue estoppel. Waller brought forth the following argument:

“It thus support the view that was being expressed obiter in *Soleimany* that there will be circumstances in which, despite the prima facie position of an award preventing a party re-opening matters either decided by the arbitrators or which the party had every opportunity of raising before the arbitrators, the English court will allow a re-opening. The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused. It is for those reasons that the nature of illegality is a factor, the strength of case that there was illegality also is a factor, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal is a factor.”²¹³

Waller’s *dictum* shows his cognizance of the tension between the competing public policies of finality and illegality. Clearly, Waller’s particular reference to his judgment in *Soleimany* illustrates that he opines that the preliminary inquiry would be determinative in respect to striking a balance in favor of either finality or illegality.²¹⁴ Waller also carried the scope of preliminary enquiry further and defined the “nature of illegality” to be one factor requiring consideration during the preliminary enquiry.

²¹² *Id.* at para. 55.

²¹³ *Westacre Investments Inc. v. Jugoimport-SPDR Holding Company Ltd.* [1999] APP.L.R. 05/12 at para. 62.

²¹⁴ SAYED, *supra* note 6, at 417.

In this respect, the “nature of illegality,” as a new member of the preliminary enquiry, may be regarded as the primary cause of conflict between Colman and Waller. In their opinions, both judges designate differing levels of opprobrium to corruption. Accordingly, they arrive at distinct conclusions of when issue estoppel becomes applicable, how to balance various factors between the vying public policies (finality and legality), and last, which judicial review scope is appropriate. In his judgment at first instance, Colman specifically opined:

“In substance, they [defendants] seek to use the public policy doctrine to conduct a retrial on the basis of additional evidence of illegality when it was open to them to adduce that evidence before the arbitrators. *Such an exercise would appear to be clearly in conflict with the principles of issue estoppel...* However, in deciding whether to permit enforcement of the award, the court has to consider whether the public interest in preventing the enforcement of corrupt transactions outweighs the public interest in sustaining the principle of *nemo debet bis vexari* which underlies the issue estoppel. This involves essentially the kind of public policy balancing exercise...

On the one hand, there is the public policy of sustaining the finality of awards in international arbitration and on the other hand, the public policy of discouraging corrupt trading...In the case of a drug trafficking contract where a foreign judgment was sought to be enforced, the English court would go behind the judgment in the interests of public policy. However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug trafficking. On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this

*case outweighs the public policy in discouraging international commercial corruption.”*²¹⁵

In his response to Justice Colman’s assessment, Lord Justice Waller conveyed his disagreement concerning the appropriate level of opprobrium to which commercial corruption should be set. In this respect, Waller deemed commercial corruption as akin to drug-trafficking and accordingly, warranted further consideration, resulting in discarded award finality:

“The Judge performed the balancing exercise and narrowly came down on the side of upholding the finality of the award. It would seem that if the case had concerned a drug trafficking contract he might well have taken a different view but he placed ‘commercial corruption’ at a different level of opprobrium from drug trafficking...I have reached a different conclusion to that of the judge. I disagree with him as to the appropriate level of opprobrium at which to place commercial corruption. It seems to me that the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in M.M.’s affidavit are correct, is within that bracket recognized ...as being based on public policy of the greatest importance and almost certainly recognized in most jurisdictions throughout the world.”²¹⁶

Notwithstanding Waller’s in-depth evaluation, the Court majority did not embrace his findings and preferred to emulate Colman’s judgment. The point that caused a lack of consensus was Waller’s two-stage test. However, in spite of the disagreement with Waller’s test, Lord Justice Mantell and Sir David Hirst surprisingly preferred to apply it and embarked upon a preliminary enquiry before

²¹⁵ Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd. and others [1998] 4 ALL ER 570, 596, 597 & 598 (emphasis added).

²¹⁶ Westacre Investments Inc. v. Jugoimport-SPDR Holding Company Ltd. [1999] APP.L.R. 05/12 at paras. 63 & 64.

reaching a conclusion. This approach exercised by the Court majority may be perceived as either a courtesy to Mr. Waller or as a step taken to exhibit a robust stance on the finality of arbitral awards. In this regard, Mantell held:

“For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to re-open the facts should be rebuffed. I so conclude by reference to the criteria given by way of example in *Soleimany* itself. *First*, there was evidence before the Tribunal that this was a straightforward, commercial contract. *Secondly*, the arbitrators specifically found that the underlying contract was not illegal. *Thirdly*, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award.”²¹⁷

Mantell did not verbalize the reasoning behind his concerns of whether or not to apply Waller’s concept; however, Justice Steel, in *R v. V*,²¹⁸ briefly touched upon a drawback of the concept in his judgment while espousing the judgment of the Court of Appeal in the *Westacre* case. According to Steel, questions posed in the preliminary enquiry are not exhaustive. Hence, it is unclear how far the first stage enquiry ought to reach.²¹⁹

²¹⁷ *Id.* at para. 71.

²¹⁸ *R v. V* [2008] EWHC 1531 at para. 30 & 31 (“The difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go. This must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference)...In short, it is correct in my judgment to accord the award full faith and credit, even if it were appropriate to embark on any form of preliminary inquiry. In doing so I recognize that the questions posed in *Soleimany* are unlikely to be exhaustive.”)

²¹⁹ See Hwang & Lim, *supra* note 4, at 97.

Next, the other point where the Court majority deviated from Waller was the nature of illegality. Waller opined that the nature of illegality was an issue that had to be considered in Stage 1. However, Mantell argued that the nature of illegality was a factor that belonged in Stage 2, where it would decide the outcome of “the balancing exercise between the competing public policy considerations of finality and illegality which can only be performed in response to the second question...namely, should the award be enforced.”²²⁰

The other member of the Court, Sir David Hirst, aligned himself with Mantell and Colman. Hirst found no necessity to conduct full-scale enquiry even if the two-stage test applied. In his brief opinion, Hirst clearly supported Colman on the appropriate level of opprobrium at which corruption would sit:

“...In my judgment, Colman J struck the correct balance, and in doing so (contrary to Waller LJ’s view) gave ample weight to the opprobrium attaching to commercial corruption.”²²¹

Now, *OTV v. Hilmarton* is another English case where the court briefly addressed the review of the facts issue in its judgment. The approach adopted in the *Hilmarton* case by Justice Timothy Walker was consonant with the *Westacre* majority. Mr. Walker deferred to the findings of the arbitral tribunal in the context of corruption and accordingly, he found that any attempt to go behind the finding of fact

²²⁰ *Westacre Investments Inc. v. Jugoinport-SPDR Holding Company Ltd.* [1999] APP.L.R. 05/12 at para. 71.

²²¹ *Id.* at para. 74.

was wrong.²²² Moreover, while Walker sought to answer the dilemma of re-opening the facts of the case, he cited *Westacre* and emphasized the distinction between enforcement of an award and enforcement of an underlying contract. In this respect, the conclusion Walker came to was:

“In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point...If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced.”²²³

Overall, when reading *Westacre* and *Hilmarton* together, it can reasonably be deduced that the English courts’ decisions, as to the scope of the review of the award, hinge upon the reviewing court’s appreciation of the nature of illegality and the level of opprobrium concomitant with such illegality.²²⁴ In this respect, the English judiciary perspective opines that corruption is not grievous enough to be placed at a high level on scale of opprobrium to embark on the re-argument of the factual findings of an arbitral tribunal. Accordingly, the reviewing courts bestow appreciable deference upon the factual findings of an arbitral tribunal when corruption allegations arise.²²⁵

²²² *Omnium de Traitement et de Valorisation v. Hilmarton Ltd.* 2 Lloyd’s Rep. 222, 224 (“It would of course be quite wrong for this Court to entertain any attempt to go behind this explicit and vital finding of fact.”)

²²³ *Id.* at 224.

²²⁴ SAYED, *supra* note 6, at 419.

²²⁵ Arthur E. Appleton, *Note – 24 May 1999 – High Court of Justice, Queen’s Bench Division (Commercial Court)*, 17(3) ASA Bulletin 377, 380 (1999).

The leniency exercised by the English courts to corruption may be perceived as a noteworthy step to elevate the finality of arbitral awards. However, this clemency may result in party exploitation of the English judicial system in order to acquire court enforcement of an award tainted by corruption. Therefore, it is important for the English legal system to develop a safety valve to pre-empt the enforcement of an award tainted by corruption and prevent abuse of the judicial system.

In this respect, Waller's two-stage test may be a plausible solution to inhibit abuse of a reviewing court's executive power by the participants of corruption. However, this test faces criticism on the basis of lacking clarity in the scope of the preliminary enquiry and considering the nature of illegality in Stage 1. Nonetheless, the test affords a reviewing court leeway to tailor the scope to the facts of every specific case. Thus, it is possible to cure severe criticism raised above by appealing to the adjustable nature of the system. Consequently, contextual review is the sole judicial approach capable of striking the proper balance between the public policy favoring the finality of arbitral awards and the public policy discouraging corruption.

3. Closing Remarks for Chapter-V

By the words of Professor Thomas Carbonneau, an arbitral award without enforcement is nothing more than a piece of paper. Yet, when an award is challenged on the basis of a public policy violation premised upon illegality, enforcement and recognition of an arbitral award becomes traumatic and necessitates further review by the respective reviewing court. However, jurisdictions diverge from each other on the

scope of the further review. This lack of judicial consistency begs the question of whether previously addressed corruption findings by an arbitral tribunal should be deferred to or whether a reviewing national court should probe into such findings.

Principally, judicial review varies with the public policy that is favored by the reviewing court. In this respect, some courts defer to the finality principle and take an arbitral tribunal's factual findings at a face value, while other courts conduct in-depth review in conformity with the public policy against corruption.

There are three standards of review that a reviewing court may employ when facing corruption allegations directed at an arbitral award. The first is minimum judicial review, where a reviewing court gives primacy to the finality principle, and accordingly, avoids comprehensive review. This review does not acknowledge the content of the public policy allegation and therefore, applies the same regardless of whether the allegation is one of corruption or is a different public policy violation.

Second, resting on the opposite spectrum from minimum judicial review is maximum judicial review. Under maximum judicial review, when an award is challenged on the basis of corruption before a reviewing court, the arbitral award is scrutinized from every aspect, as a matter of law and of fact.

Third and last, contextual judicial review, involves altering the scope of review in accord with the nature of the illegality. This review developed in England where a tribunal's factual findings are respected even if an award is challenged on the grounds of corruption.

In sum, a reviewing court should exercise caution when applying either minimum or maximum judicial review. The application of minimum judicial review, without reasonable care, may cause corrupt relations to go unnoticed and accordingly, result in legitimizing such illicit relations with the help of the executive power of a reviewing court. Conversely, when a court employs maximum judicial review, the sphere of the public policy ground expands to the detriment of arbitral award finality. Accordingly, finality of arbitral awards becomes the exception, whilst the non-conformity with public policy becomes the “norm.”²²⁶ To conclude, it is clear that depriving arbitration of the finality principle will cause arbitration to be judicialized and inevitably result in arbitration’s regression to its dark ages.

The reasoning lying behind these undesirable repercussions, inherent in both minimum and maximum judicial review, is a tendency to apply each review at the expense of one public policy over the other. Therefore, for the sake of maintaining both legitimacy and the development of arbitration system, it is vital to strike the “best” balance between the competing public policies of finality and legality. To strike this equilibrium, contextual judicial review is clearly the sole option with the potential to find the right balance between these policies without bestowing preferential treatment to either.

²²⁶ SAYED, *supra* note 6, at 408.

CONCLUSION

To conclude, this study sought to explore how corruption should be addressed in international arbitration. Theoretically, the condemnation of corruption has been consistent since Judge Lagergren's award in ICC Case No. 1110. In practice, however, such denunciation has not always been as powerful as verbal condemnation. Arbitral precedents illustrate that every corruption allegation guides arbitrators to a crossroads that fork between their commitments to the arbitrating parties and international legal order. Upon facing with this dilemma, arbitrators vary in their chosen path and, resultantly, tribunals diverge on their approaches to issue of corruption.

Issues of corruption may arise at the arbitral stage (before the award is rendered) or before a reviewing national court (at the enforcement and recognition stage) in order to have the court either vacate the award or deny enforcement and recognition requests. Precedents demonstrate that arbitral tribunals, when tackling corruption allegations, principally diverge on the following: what constitutes corruption and is it arbitrable, what is the proper burden of proof and standard of proof, and how far the powers and duties of arbitral tribunals extend. As to enforcement and recognition, reviewing national courts are split on the appropriate level of judicial review.

All these issues contributing to a lack of concurrence between arbitral tribunals and reviewing national courts in matters of corruption were addressed in-depth throughout this study within the context of arbitral awards, court judgments, and related national, international, and institutional regulations. Succeeding this in-depth consideration, the following points represent recommendations that should be implemented to make the arbitral system more ethical, stronger, efficient, and effective in its task to tackle corruption:

(1) In the international arena, there is a propensity to define corruption in the context of abuse of public power for private gain. However, this portrayal of corruption is structured upon only one modality of corruption: bribery. The reasoning behind this definition is the practicality of equating corruption with bribery. Notably, corruption is not an offense *per se*, but rather, is a category encompassing an assortment of offenses, such as “bribery, embezzlement, theft and fraud, extortion, influence peddling, favoritism, nepotism and clientelism, creating or exploiting conflicting interests, improper political contributions, and money laundering.”¹ Clearly, limiting corruption solely to abuse of public office will only eventuate in an ineffective campaign against corruption. Therefore, the following is a recommendation to advance a definition capable of keeping pace with the metamorphic nature of corruption:

“a violation of, or distortion of, fundamental rules,
laws, policies, or exploitation of trust to provide illegal

¹ United Nations Office for Drug Control and Crime Prevention, *The Global Program Against Corruption: UN Anti-Corruption Toolkit*, Chapter I, available at http://www.unrol.org/files/UN_Anti%20Corruption_Toolkit.pdf.

or unauthorized privileges and undue advantages, in exchange for either personal or third party gain, but to the detriment of public interest.”

(2) Indisputably, arbitration once held title as a dispute resolution system devoted to serving the interests of the privileged. Naturally, this perception radiated doubt upon an arbitrator’s motives and ability to enforce the public interest. This doubt led to resistance to recognize arbitration as a proper venue where corruption and other illegality allegations could be adjudicated. Thus, initially, those distrustful of arbitration supported the tribunal in deeming it to lack jurisdiction over disputes involving corruption. Recently, however, particularly after Judge Lagergren’s award in ICC Case No. 1110, the concept of arbitrability experienced a paradigm shift and the arbitrability of corruption issues earned acceptance. Today, paralleling this shift, it is well established that, challenges directed at the legality of the parties’ underlying contract does not implicate the validity of the accompanying arbitration agreement (*the doctrine of separability*). Thus, the arbitral tribunal may address corruption allegations and determine the fate of its own jurisdiction within the context of the existence, validity, or enforceability of both the parties’ underlying contract and the arbitration agreement itself (*the doctrine of competence-competence*).

(3) Once jurisdictional issues are determined, the arbitral tribunal then initiates the process devoted to exploring accuracies (or fallacies) of the corruption concerns. Unfortunately, this process is often riddled with intricacies such as evidentiary questions regarding the burden of proof and the standard of proof. As to the applicable burden of proof and standard of proof, arbitral tribunals vary in whom

they task with carrying the burden of proof and the appropriate level of the standard of proof that party must exhaust to establish corruption. With respect to the burden of proof, traditionally accepted is that each party is under the obligation to prove the facts upon which he or she relies. The same principle should apply in terms of corruption issues. Thus, the party raising the allegations of corruption should be tasked with substantiating these allegations. However, this clarity does not exist when the issue comes down to the applicable standard of proof. When arbitral tribunals encounter allegations of corruption, they prefer to employ either a “lower standard of proof” at the expense of efficiency and efficacy of arbitral proceedings, or a “heightened standard of proof,” by disregarding the concealed nature of corruption. However, the standard commonly applied is the “heightened standard of proof” due to the seriousness of the allegations.

In this respect, deviation from these two opposing trends is recommended. Rather than applying a standard at the expense of the other, the “inner conviction standard (conviction intimate)” should apply. By employing the inner conviction standard, it is possible to avoid unjust consequences inherent in both the heightened and lower standard of proof. Here, the party who invokes the corruption defense will have neither an advantage nor a disadvantage. However, simply adopting the inner conviction standard will not suffice to detect corrupt engagements of the parties absent the arbitral tribunal’s assistance. Therefore, the arbitral tribunal and the alleging party should collaborate. Arbitral tribunals should employ a more active role with tools at their disposal (*e.g.* further document production, presumptions, shifting

the burden of proof, drawing adverse inferences) and should be more receptive to accept indirect evidence hinting at illegality due to the inherent challenges of proving corruption.

Indisputably, arbitral tribunals are ill equipped to gather the necessary evidence when corruption allegations arise. This lack of apparatus is the Achilles' heel of international arbitration and susceptible to exploitation by participants of corruption. To rectify this weakness, arbitral tribunals should consider evidence gathered in parallel proceedings. Further, arbitral tribunals should not disregard the option of seeking assistance from public authorities. By asking public authorities to aid in evidence gathering, tribunals can remedy, not only arbitral system's inherent deficiency in evidence gathering, but also its lack of authority to compel evidence requests.

Moreover, it is highly recommended to uniform the arbitral approach to both the burden of proof and the standard of proof *vis-à-vis* corruption allegations. In this regard, arbitral institutions should draft guidelines to introduce both an appropriate standard of proof applicable to corruption issues and circumstances that will warrant arbitral tribunals' more active role. Issuance of guidelines shall help arbitral tribunals avoid ill-founded corruption contentions and sustain the legitimacy of arbitral system.

(4) Because there is no guidance from national or international law, the role that is devoted an arbitrator in the campaign against corruption remains murky. Here, an arbitrator's role will undoubtedly be colored by the theory that is espoused while delineating the relationship between an arbitrator and the arbitrating parties. One

theory propounds that this relationship is given life by a private contract, but a separate theory demarcates this relationship in the context of international legal order to which the arbitrator owes duties.

Best, however, is to embrace an approach comprising both theories. Therefore, it is recommended that an arbitrator should pay as much regard to duties originating from international public policy as to duties originating from the parties' contract. In other words, the arbitrator should be bound, not only by the parties' contract, but also by relevant mandatory law and international public policy.

Therefore, arbitrators should investigate into issue of corruption, regardless of whether a party raises such issue. However, should the arbitrator adopt this method, the award may face challenge(s) on the basis of *ultra vires* and/or *ultra petita*. Conversely, failure to engage in such role may lead to accusations that the arbitrator aided and abetted the corrupt engagements and rendered an award contravening international public policy. This tension should be resolved in favor of international public order. Such an outcome is consonant with the arbitrator responsibility to make every effort to furnish a legally enforceable award. Reaching a contrary conclusion will not only transform arbitration into a safe haven where corrupt dealings are enforced, but also incentivize a reviewing national court to conduct *de novo* review and interfere with the finality principle.

In this vein, it is recommended to bear in mind that an arbitrator is generally more familiar with complicated business transactions and accordingly more capable of examining them than civil court judges. Here, the option to hire a practiced

professional to render a decision obviously makes arbitration more effective than national courts in the fight against corruption. Therefore, if international public policy or criminal law issues are at stake, an arbitrator's role should reflect a quasi-judicial duty, on their own initiative, to conduct inquiries as soon as they suspect corruption or other modality of illegality.

(5) If the arbitral tribunal identifies corruption, the contract, which is either a “contract of corruption” or a “contract procured by corruption,” will be sanctioned by nullity due to its contravention of law and public policy. However, if corruption is unascertainable, the arbitral tribunal may issue an award finding that corruption was not substantiated, that the conduct was not deemed illegal under applicable law, or that the arbitral tribunal prefers not to touch upon corruption in the award absent any allegation raised by either party. Once an award is rendered, the disfavored party may file a request before a national court to set the award aside or exercise resistance to enforcement.

Request for judicial review begs the inquiry of how far the judicial review scope may extend when analyzing the arbitral tribunal's conclusions. There is divergence among national courts on the answer to this question and when a court chooses the scope of review, it often reflects that respective court's international arbitration policies. For instance, in “arbitration friendly” systems, primacy is bestowed upon the autonomy of arbitral proceedings. Accordingly, the balance between the competing public policies of finality and legality is struck in favor of finality. This tendency reflects judicial deference to the arbitral tribunal's findings.

Resultantly, the court evaluates the award at face value, rather than conducting an in-depth review. Conversely, under systems skeptical to international arbitration's ability to effectively cope with corruption and other public policy issues, balance is struck in favor of legality and a reviewing national court comprehensively reviews an arbitral award as a matter of law and fact.

When setting the standard of judicial review, the most delicate and challenging issue is to avoid impairing the efficiency and efficacy of arbitration, while simultaneously disallowing corruption to lie "under the radar." Clearly, it is vital to strike a fair and reasonable equilibrium between the public policies of finality and legality. Unfortunately, these policies often battle for supremacy due to an apparent inability to collaborate. However, under the contextual approach of judicial review, there is a greater chance for a court to find a fair and equitable balance between finality and legality without sacrificing one for the other.

(6) Next, one of the factors inhibiting an arbitral tribunal's ability to effectively tackle corruption is the lack of transparency in the international arbitration system. Recently, the confidentiality of arbitral proceedings, particularly in commercial arbitration, is a default rule, which is discerned as a key feature by commercial parties. The confidential structure of arbitral proceedings deprives public scrutiny over corruption allegations and their adjudication.² Moreover, this structure of arbitration may, on occasion, incentivize parties to submit their dispute to arbitration to avoid public scrutiny.

² See generally Cecily Rose, *Questioning the Role of International Arbitration in the Fight against Corruption*, 31 (2) Journal of International Arbitration 183 (2014).

However, with emerging policies devoted to promote transparency in arbitration, the lack of transparency, particularly in investment arbitration, is shifting. For example, “United Nations Commission on International Trade Law (UNCITRAL)” introduced the “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration” (the Rules on Transparency) in 2014.³ These rules attempt to minimize the opaqueness inherent in arbitration to better serve both the parties and the public. Notwithstanding UNCITRAL’s rule promulgation, the Rules on Transparency are inapplicable absent party agreement adopting them. This exception serves as yet another reminder of arbitration’s critical freedom of contract principle.

Unequivocally, public involvement in arbitration conflicts with its non-transparency structure. However, with the promotion of arbitral translucence, it may be possible to distill essential principles from various approaches arbitral tribunals exercise upon facing corruption allegations. These principles emanating from arbitral practice will provide necessary guidance and will undoubtedly foster international arbitration’s role in the fight against corruption, in conjunction with its reliability in the public eye.

In conclusion, the rising numbers of corruption allegations confirms that international arbitrators will continue to deal with the issues of corruption and the

³ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html. There are also other developments germane to transparency in investor-state arbitration, such as the 2006 Transparency Related Amendments to the ICSID Rules and Regulations, the European Union’s “Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement in the Transatlantic Trade and Investment Partnership Agreement (TTIP). *See generally* Stephan Schill, *Transparency as a Global Norm in International Investment Law*, Kluwer Arbitration Blog (September 15, 2014), <http://kluwerarbitrationblog.com/2014/09/15/transparency-as-a-global-norm-in-international-investment-law/>.

problems generated by it. Thus, arbitrators must give primary concern to “what is right rather than what is acceptable”⁴ and should not hesitate to espouse a more proactive role in the fight against corruption.

⁴ Franz Kafka (3 July 1883 – 3 June 1924).

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