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# Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication

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**CORRUPTION IN INTERNATIONAL COMMERCIAL  
ARBITRATION: ARBITRABILITY, ADMISSIBILITY &  
ADJUDICATION**

*Deeksha Malik & Geetanjali Kamat*

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**INTRODUCTION: CORRUPTION AND ITS CONDEMNATION**

In an era which is audience to the burgeoning increase in the utilization of international commercial arbitration, questions that affect the legality of the proceeding itself need to be microscopically examined. Although matters such as breach of warranty and *force majeure* are globally recognized concepts that are legally enforceable by parties, issues of corruption are yet to be conclusively and statutorily prohibited in the field of international commercial arbitration. Allegations of bribery by one party upon another have several adverse consequences; as it may not only

impede the performance of the contract itself, but also may result in impairing friendly relations between countries in the international matrix of trade and commerce. Though there are neither any particular set of restrictions that have been expressly laid down with respect to such allegations nor the pronouncement of any rules that strictly condemn the same, the global aversion to such misconduct is palpable. Thus, international concern in this regard has morphed into the current *vox populi*, through the ratification of various international conventions that prohibit corruption in international commercial arbitration. As a result thereof, this only makes the case stronger to have instances of corruption prohibited in a more vociferous manner unlike the lukewarm response it has been receiving from the international actors so far.

The fundamental existence of law requires it to be in tune with the spirit of the society that it seeks to protect and must accordingly amend itself periodically. The modern trend with respect to international commercial arbitration has moved towards “zero tolerance” of corruption, which arbitrators have become compelled to address.<sup>1</sup> For instance, the 1977 US Foreign Corrupt Practice Act, and the 2010 UK Bribery Act incorporate obligations upon state parties that have an extra-jurisdictional reach up to a certain extent. This implies that arbitrators who act outside the domestic jurisdiction in such countries may need to take into account the criminal offenses that have been stated under such legislation. The US Foreign Corrupt Practice Act strictly prohibits anyone acting within the territorial limits of the United States from ‘making or even offering to make corrupt payments to a foreign public official’ in order to secure an improper advantage.<sup>2</sup>

In the year 1989, the Organization for Economic Cooperation and Development (“OECD”) began deliberating and discussing the issue of combating illicit payments in international business

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<sup>1</sup> See 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, 138, 140 (James D. Wolfensohn ed., 2005).

<sup>2</sup> CRIMINAL DIV. U.S. DEP’T JUSTICE & ENFORCEMENT DIV. U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (November 2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

transactions.<sup>3</sup> In order to fulfill this objective, various OECD committees were assigned the task of studying multiple facets of corruption. Consequently, in 1994, the OECD adopted ‘Recommendations on Bribery in International Business Transactions’, which directed member countries to take effective measures to deter, prevent, and combat the bribery of foreign public officials in connection with international business transactions.<sup>4</sup> In 1996, the OECD Committee on International Investment and Multinational Enterprises reported to the Council of Ministers the mechanism through which member countries can be encouraged to criminalize bribery of foreign public officials.<sup>5</sup> However, even amidst such progress, these recommendations mainly went to the extent of advising countries to adopt measures by way of domestic legislations in order to monitor their progress on fulfillment of the OECD Recommendations. Unfortunately, while the US vehemently voiced their support for a “full-scale binding treaty” in order to have a statutorily binding force upon the countries, European countries preferred non-binding recommendations that did not have any adverse legal consequences for any failure to adhere to these recommendations.<sup>6</sup> Ultimately, it was in the year 1997 that the ‘OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’ came into the limelight. Although this convention declares bribery of foreign officials as illegal in its preamble, it clearly binds countries to “enact appropriate legislation”, thereby keeping in line with the essence of

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<sup>3</sup> See Mark Pieth, *International Cooperation to Combat Corruption*, in PETERSON INST. FOR INT’L ECON., CORRUPTION AND THE GLOBAL ECONOMY, 119, 122–23 (Kimberly Ann Elliott ed., 1997).

<sup>4</sup> See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT’L L. & BUS. 457, 483–84 (1997).

<sup>5</sup> COMM. ON INT’L INV. & MULTINATIONAL ENTERS., ORG. FOR ECON. CO-OPERATION & DEV., REVIEW OF THE 1994 RECOMMENDATION ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, INCLUDING PROPOSALS TO FACILITATE THE CRIMINALISATION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS, 3 (1997), available at

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(97\)131&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(97)131&docLanguage=En).

<sup>6</sup> *Id.* at 195.

the treaty itself.<sup>7</sup> The truth of the matter is that corruption involves matters of general interest to society at large. There have been several instances of arbitration proceedings that have emphasized good morals and ethics of international trade and transnational public policy.<sup>8</sup>

This paper seeks to examine the perplexing issues that arise within the context of international commercial arbitrations involving allegations of corruption. Part I begins with a discussion on the issue of whether it is within the capacity of an arbitrator to deal with a claim of corruption, especially when there is a trend of growing acceptance towards the recognition of corruption as a matter of public policy. Part II then delves into the various aspects that concern the adjudication of corruption by an arbitrator. Finally, Part C considers the legal consequences that follow from a finding of corruption by an arbitrator.

## **I. Arbitrability of Corruption in International Commercial Arbitration**

The moot point in this section is whether allegations of corruption are capable of being referred to and settled by an arbitrator. Arbitrability as a concept is often at loggerheads with the parties' freedom to decide what should and should not be adjudicated by the tribunal. The matter becomes more complex when juxtaposed with concerns of public policy. This is the case with corruption, as we shall see.

### **A. Party Autonomy Vis-A-Vis Arbitrability**

One of the significant principles that arbitration espouses is that of party autonomy, which essentially connotes the freedom of the parties to decide how their disputes are to be resolved. Both national laws and international arbitral institutions and organizations endorse

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<sup>7</sup> See *id.* at 215.

<sup>8</sup> See *id.* at 213.

this principle without any significant opposition.<sup>9</sup> This doctrine is often confronted by the notion of arbitrability, or more specifically ‘objective arbitrability,’ which raises the question as to whether a particular type of issue is amenable to resolution by arbitration.<sup>10</sup>

Each State determines the categories of cases which are to be kept out of the jurisdiction of an arbitral tribunal in accordance with its own political, social, and economic policies.<sup>11</sup> Some commentators hold the view that there is no internationally accepted opinion as to what matters are arbitrable, as each country has its own perspectives on legality and illegality.<sup>12</sup> For instance, within the EU, “disputes directly affecting the existence or validity of a registered intellectual property right are considered non-arbitrable.”<sup>13</sup> This is so despite the fact that intellectual property rights are regarded as freely disposable by the owner. The rationale behind this rule is difficult to be laid down in exact terms; some suggest that the State would naturally want to exercise control over the granting of IP rights, as these constitute national assets and contribute significantly to economic growth.<sup>14</sup> Some countries, such as Brazil, accord different treatment to infringement and validity issues.<sup>15</sup> Therefore, while issues such as patent licensing, franchising agreements, trademark assignments and the like are capable of settlement by arbitration, disputes relating to validity raise public order issues, which render them inarbitrable.<sup>16</sup> Similar concerns have been raised in respect to disputes involving competition and anti-trust questions.

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<sup>9</sup> See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 315 (4th ed. 2004).

<sup>10</sup> See Ilias Bantekas, *The Foundations of Arbitrability in International Commercial Arbitration*, 27 *AUSTRALIAN Y.B. INT’L L.* 193, 193 (2008).

<sup>11</sup> See NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 124 (5th ed. 2009).

<sup>12</sup> See ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE* §4.23 (2007).

<sup>13</sup> JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 209 (2003).

<sup>14</sup> See Bantekas, *supra* note 10, at 213.

<sup>15</sup> William Grantham, *The Arbitrability of International Intellectual Property Disputes*, 14 *BERKELEY J. INT’L L.* 173, 216–217 (1996).

<sup>16</sup> *Id.*

Before 1985, for example, the position in the United States was that “the pervasive public interest in the enforcement of the anti-trust laws and the nature of the claims that arise in such case, combine to make anti-trust claims inappropriate for arbitration.”<sup>17</sup> The position somewhat changed after the US Supreme Court decision in the case of *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc.*,<sup>18</sup> wherein the Court purported to establish a pro-arbitration atmosphere by holding that the mere existence of an anti-trust issue does not *per se* lead to invalidation of the selected forum.<sup>19</sup> The Court opined:

“...concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.”<sup>20</sup>

In conclusion, the differences among national legal systems in respect to some issues of arbitrability can be contrasted to arbitral disputes involving allegations of bribery (or corruption), as this is an issue that perturbs almost every jurisdiction.

## **B. Arbitrability & Public Policy**

Public policy is one term that is notoriously difficult to define. In 1853, the House of Lords observed that public policy is “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or public good.”<sup>21</sup> Others have variously defined the term as the forum state’s most

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<sup>17</sup> *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827–28 (2d Cir. 1968).

<sup>18</sup> 473 U.S. 614, 629 (1985).

<sup>19</sup> *Id.* at 615.

<sup>20</sup> *Id.* at 629 (noting that the reasoning adopted by the Supreme Court compels one to question whether the decision would have been the same had the facts of the case been purely in the domestic context).

<sup>21</sup> *Egerton v. Lord Brownlow*, [1853] 4 H.L. 1, 196.

basic notions of morality and justice,<sup>22</sup> or a rule which reflects the fundamental economic, legal, moral, political, religious, and social standards of every State or extra-national community,<sup>23</sup> something which must be upheld without exception.

The discourse on public policy brings to light the distinction between international and transnational public policy. International public policy (which is considered to be narrower than domestic public policy) is State-specific, meaning that its content and application depends on the State where it is being used. For example, it has been noted in respect of the French legislation that “the international public policy to which Article 1502.5 refers can only mean the French conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the French legal order, even in international cases.”<sup>24</sup> Transnational public policy, on the other hand, relates to rules which are universally recognized as being most basic. In other words, it comprises “fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as civili[z]ed nations.” The scope of this concept is certainly narrower than that of international public policy, for very few norms are of such nature that their breach would shock the conscience of most, if not all, the civilized nations. The difficulty in identifying such norms is one crucial factor which leads courts and arbitral tribunals to apply the concept of international public policy as conceived by a particular State, which is, more often than not, the seat of the arbitral tribunal (*lex loci arbitri*) in matters of arbitrability.<sup>25</sup>

Arbitrability and public policy have a close connection. The relation is founded on the premise that public policy refers to imperative rules of a State or transnational community and the issues related thereto have a significant bearing on the public at large. The

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<sup>22</sup> See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d. Cir. 1974).

<sup>23</sup> See LEW, MISTELIS & KROLL, *supra* note 13, at 422.

<sup>24</sup> FOUCHARD GALLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION §1648 (Emmanuel Gaillard & John Savage eds., 1999).

<sup>25</sup> Loukas A. Mistelis, *Is Arbitrability a National or an International Law Issue?*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 1, 13 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).



element of public interest makes such issues incapable of reference to a private settlement process.<sup>26</sup>

The case of *Silica Investors Ltd. v. Tomolugen Holdings Ltd.*,<sup>27</sup> decided by the High Court of Singapore, is particularly relevant at this juncture. Parties entered into a share sale agreement which, *inter alia*, had an arbitration clause. The plaintiff brought a minority oppression claim against the defendants, seeking relief in the nature of a buyout order and an order for winding up of the company. The defendants applied for a stay of the proceedings, which was denied by the court, and the defendants proceeded to appeal. One of the issues at hand was whether the plaintiff's claim was arbitrable. The High Court found that the claim certainly fell within the scope of the terms of the arbitration clause, namely, "arising out of or in connection with this Agreement." However, this should not mean that the matter was necessarily arbitrable.

The Court analyzed the position of law in England (where a minority oppression claim is arbitrable, though the scope of the relief sought would be limited in cases where the interests of the other shareholders would be affected), Australia (where the said claim is arbitrable in so far as the remedies sought are *inter partes* and not *in rem*), and Canada (where the issue is unsettled). Thereafter, it observed with respect to the law in Singapore that no general conclusion could be reached. However-

"...many if not most of the minority oppression claims under s. 216 of the CA [Companies Act], claims will be non-arbitrable. This will often be in cases where, e.g., there are other shareholders who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one that an arbitral tribunal is unable to make."<sup>28</sup>

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<sup>26</sup> See James D. Fry, *Désordre Public International Under the New York Convention: Wither Truly International Public Policy*, CHINESE J. INT'L L., 81, 85 (2009).

<sup>27</sup> See generally *Silica Investors Ltd. v. Tomolugen Holdings Ltd.*, [2014]SGHC 101 (Sing.).

<sup>28</sup> Companies Act 2006, §142 (Eng.).

The above illustration shows that courts would refuse to uphold arbitrability in a matter that has ramifications on the interests of the parties, such that the dispute would no longer remain a private one.

There may, however, be situations where arbitrability and public policy do not overlap, as can be understood from the instances mentioned in the previous section. Thus, disputes relating to intellectual property rights might be regarded by a State to be within exclusive judicial jurisdiction, though such disputes may not have any impact whatsoever on the public interest. This distinction can be clearly seen in the New York Convention.<sup>29</sup> Article V lists out the grounds upon which the recognition and enforcement of an arbitral award may be refused. The second part of this Article provides for two grounds which, if found by the Court upon an application of a party or otherwise, the award could be set aside. These are (a) the subject-matter of the dispute in question is non-arbitrable, or (b) the recognition or enforcement of the award is contrary to public policy.<sup>30</sup> Therefore, laws restricting arbitrability may not form part of the mandatory rules of public policy.

The following section discusses how the public policy exception to arbitrability is applied to cases pertaining to corruption.

### **C. Corruption And The Exception of Public Policy to Arbitrability**

Anyone engaged in cross-border or international commercial transactions would acknowledge that corruption and bribery are worldwide problems that plague good governance and seriously impede performance of commercial agreements.<sup>31</sup> An estimate by the World Economic Forum shows that the cost of corruption comes to more than 5% of the global GDP (around US\$ 2.6 trillion), thereby escalating the cost of doing business by nearly 10%

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<sup>29</sup> See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

<sup>30</sup> See *id.* art. V(2).

<sup>31</sup> William Fox, *Adjudicating Bribery and Corruption Issues in International Commercial Arbitration*, 27 J. ENERGY & NAT. RESOURCES L. 487, 487 (2009).

globally.<sup>32</sup> In the public sector, funds contributed by the people end up in private pockets and thereby adversely affecting growth, infrastructure, and public services. It is precisely because of these reasons why corruption is forbidden by a number of international conventions, especially the United Nations Convention against Corruption<sup>33</sup> and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>34</sup>

Arbitration law has witnessed a head on collision between corruption and public policy. One instance is the famous 1963 ICC Award<sup>35</sup> authored by Judge Lagergren. The case concerned a public works contract, wherein an Argentinean agent was supposed to receive a “commission” from the Respondent (a company that was competing for a certain contract), in return for his exertion of influence on Argentinean government officials at that point in time. The company refused to pay, thereby triggering a dispute between the parties. The learned Judge observed that although the relevant documents bore semblance to an ordinary legal commercial agreement, the evidence revealed that a substantial part of the commission was to be used for bribes. Accordingly, the arbitrator had no jurisdiction with respect to the matter, as contracts which seriously violate *bonos mores* or international public policy are unenforceable to say the least, and as such, cannot be sanctioned by courts or arbitrators. Therefore, it was held:

“Whether one is taking the point of view of good government 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

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<sup>32</sup> Global Agenda Council, *Anti-Corruption*, WORLD ECONOMIC FORUM, <http://reports.weforum.org/global-agenda-council-2012/councils/anti-corruption/>, (2012–2013).

<sup>33</sup> G. A. Res. 58/4, United Nations Convention Against Corruption, (Oct. 31, 2003). (As of July 2010, there are 146 parties to this Convention).

<sup>34</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS : AND RELATED DOCUMENTS (OECD) (1998).

<sup>35</sup> See generally Case No. 1110 of 1963, 10 Arb. Int'l 282 (ICC Int'l Ct. Arb.).

business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.”<sup>36</sup>

This principle was reiterated in the *World Duty Free* case,<sup>37</sup> wherein the Tribunal noted that bribery is contrary to the international public policy of most, if not all, States.

Over the years, however, owing to the doctrine of separability, there has been general acceptance, both nationally and internationally, that an allegation of bribery does not itself deprive the arbitrator of jurisdiction over the dispute.<sup>38</sup> In one case, it was noted that even though the arbitrators were well aware of the allegations that commitments made by public-sector entities in respect to certain major projects were devoid of economic contribution to public welfare, such allegations are required to be proven, which in this case, was not done.<sup>39</sup> Recent case law is in tune with this precedent, allowing an arbitrator to rule on illegality for bribery. Once bribery is proven, the tribunal declares the contract unenforceable. One author has stated:

“If an allegation of corruption is made in plain language in the course of arbitration proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proved...A failure to address the existence of such illegality may threaten the enforceability of the award, and thus may sit uncomfortably with an arbitral tribunal’s duty to under some modern rules of arbitration to use its best endeavors to ensure that it’s award is enforceable.”<sup>40</sup>

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<sup>36</sup> *Id.* at 20.

<sup>37</sup> *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (October 4, 2006).

<sup>38</sup> See ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 143 (2004).

<sup>39</sup> Final Award of 4 May 1999, *Himpurna California Energy Ltd. v. Perusahaan Listrik Negara*, 25 ICCA Y.B. Comm.l Arb., 13, 44 (ICC Int’l Ct. Arb.).

<sup>40</sup> REDFERN, HUNTER, BLACKABY & PARTASIDES, *supra* note 38, at 144.

The rationale behind this approach is simple: when parties choose to refer their disputes to an arbitral tribunal, they cannot be presumed to intend that the issue of validity be decided by a court. The House of Lords held in *Fiona* that “very clear language” would need to be found before deciding that the parties had such an intention.<sup>41</sup> “If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure.”<sup>42</sup>

Many contemporary thinkers are of the view that arbitration is a normal forum, if not the *juge naturel*, as far as cross-border transactions are concerned.<sup>43</sup> In such a scenario, it is inappropriate to hold that arbitrators are incapable of dealing with issues where public interest or protection of weaker parties<sup>44</sup> is involved, or that arbitrators are insensitive to considerations of equity.<sup>45</sup>

## II. Adjudicating Bribery in International Commercial Arbitration

On an international level, the mere allegation of corruption made by one party against the other bears immense gravity as it is likely to have an adverse effect on the reputation of a State party. This nuanced situation becomes more pronounced when understood within the context of international commercial arbitration.

When it comes to scrutinizing evidence with respect to issues of corruption in the field of international commercial arbitration, three points of consideration need to be taken into account. First, there exists the possibility of an adverse effect on the rule of burden of proof. Second, indirect evidence needs to be

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<sup>41</sup> See *Fiona Trust Holding Corp v. Privalov*, [2007] 4 All ER 951 (HL) (Eng.).

<sup>42</sup> *Id.*

<sup>43</sup> See Yves Derains, *Chroniques de Sentences Arbitrales*, 105 JOURNAL DU DROIT INTERNATIONAL (CLUNET), 976 (1978).

<sup>44</sup> See *Fulham Football Club (1987) Ltd v. Richards*, [2011] EWCA (Civ) 855, [333] (Eng.) (stating that in England, for instance, issues pertaining to rights of minority shareholders can be dealt with by an arbitrator).

<sup>45</sup> See Pierre Mayer, *La règle morale dans l'arbitrage international*, in PIERRE BELLET, *ETUDES OFFERTES À PIERRE BELLET* (1991).

critically evaluated and thereafter, permitted to be brought before the tribunal. Third, there is an urgent need to strengthen the standard of proof in cases of serious allegations, especially where concerns of public policy, fraud, or corruption are at issue.

Thus, it is not without reason that there has been considerable debate on the issue of evidence brought forth by parties before the tribunal. In circumstances when there is a *prima facie* suggestion of corruption and neither party brings forth any allegations of such wrongdoing, the question remains whether tribunals are legally empowered to inquire into issues of corruption *sua sponte*. Moreover, the requisite standard of proof that needs to be discharged, in order to successfully prove a case of corruption, needs to be conclusively determined, as the integrity and fairness of the arbitral process are regarded as paramount.

With this background, this article will now examine the various evidentiary issues pertaining to both international commercial arbitration, and arbitration in general.

### A. Evidence-Taking Mechanisms in Arbitration

The procedure for submitting and disclosing evidentiary materials plays an essential role in international commercial arbitration, as “fact-finding” is one of the primary functions of arbitral tribunals. While courts in most civil law jurisdictions do not provide for party-initiated disclosure of evidence, common law jurisdictions derive their genesis from the adversarial system of justice and strictly adhere to the party-initiated disclosure process.<sup>46</sup>

At the international level, certain rules have been developed to address the evidence-taking mechanism irrespective of the legal system. Article 20 of the ICC arbitration rules provides that the tribunal shall proceed within as short a time as possible in order to establish the facts of the case by “all appropriate means.”<sup>47</sup> The term “all appropriate means” implies that the tribunal is endowed with

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<sup>46</sup> Claudia T. Salomon & Sandra Friedrich, *Obtaining and Submitting Evidence in International Arbitration in the United States*, 24 AM. REV. INT’L ARB. 549, 550 (2013).

<sup>47</sup> THE CHAMBER OF ARBITRATION OF MILAN RULES: A COMMENTARY 546 (Ugo Draetta & Riccardo Luzzatto eds., 2012).

flexibility in taking evidence from concerned parties. However, even the slightest possibility of misinterpreting such ambiguity can adversely impact the judicious nature of arbitration proceedings itself. Meanwhile, the UNCITRAL Arbitration Rules provide that at any time during the arbitral proceedings, the tribunal may require the parties to produce documents, exhibits or other evidence within a definite period of time that shall be determined at the discretion of the tribunal.<sup>48</sup>

The International Bar Association has also placed an emphasis upon the quality of evidence that ought to be presented by the parties and has implemented Rules on the Taking of Evidence in International Commercial Arbitration which, *inter alia*, state that every Party is entitled to know, reasonably in advance, of the evidence upon which the other Parties rely.<sup>49</sup> This permits the other Party to prepare his defense and expedites the entire proceeding in a fair and transparent manner. While Article 3 of the IBA Rules provides for the discovery and production of documents, Article 4 permits a party to obtain the testimony of voluntary witnesses or persons who will not appear voluntarily.

Though these rules are not precise in a ‘mandatory’ sense for any particular international arbitration institution to follow, it is ultimately up to the will of the parties to incorporate the rules in the arbitration clause that governs their commercial relationship.

## **B. Rules Governing Adjudication of Bribery**

Though the “choice of law” provision is still made available to the parties, the risk associated with such liberty is that it gives them the autonomy to choose a law that may not be as stringent with certain forms of bribery in international commercial arbitration as it ought to be. As a form of practice, the arbitral tribunal does observe the mandatory rules of the country where the contract between the two parties is performed. However, those rules that specifically seek to protect legitimate goals will be placed on a higher pedestal than

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<sup>48</sup> CHRISTOPHER DUGAN DON WALLACE, NOAH RUBINS & BORZU SABAH, INVESTOR-STATE ARBITRATION 161 (2011).

<sup>49</sup> Anna Magdalena Kubalczyk, *Evidentiary Rules in International Arbitration: A Comparative Analysis of Approaches and the Need for Regulation*, 3 GRONINGEN J. INT’L L. 85, 107 (2015).

other rules. For instance, a provision of *lex loci solutionis*, which seeks to impose an indiscriminate ban upon intermediaries, is less likely to be enforced in the field of international commercial arbitration than an internationally condemned act such as private bribery. This proposition follows from the fact that as a matter of practice and principle, transnational beliefs that find support from a majority of countries ought to be given much more importance than domestic beliefs in order to accommodate an ‘international’ stance within the system of commercial arbitration itself. Another aspect that is worthy of attention is the fact that there needs to be a sufficient nexus between *lex arbitri* and the case itself; this implies that the concerned case must *expressly* affect public interest in a *manifest manner*.<sup>50</sup>

### C. Burden and Standard of Proof

Commentators belonging to various jurisdictions have different views as to which law should be applied to determine the standard of proof related to proving corruption. While some argue that the substantive law chosen by the parties should govern the same,<sup>51</sup> others suggest that the applicable procedural rules are more appropriate.<sup>52</sup> There are, however, various rules that have a general application irrespective of the governing law. Evaluation of evidence is done on the basis of these rules as per the discretion of the arbitrator.

Very few rules deal with the issue of burden and standard of proof in international arbitration. One of them is the 2013 UNCITRAL Arbitration Rules, wherein it is provided that each party shall have the burden of proving the facts relied upon to support its claim or defense.<sup>53</sup> However, a vexing factor in proving

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<sup>50</sup> Vladimir Pavic, *Bribery and International Commercial Arbitration: The Role of Mandatory Rules and Public Policy*, 43 VICTORIA U. WELLINGTON L. REV. 661, 676 (2012).

<sup>51</sup> KLAUS PETER BERGER, INTERNATIONAL ECONOMIC ARBITRATION 444–50 (1993).

<sup>52</sup> Haugeneder & Liebscher, *Chapter V: Investment Arbitration: Corruption and Investment Arbitration: Substantive Standards and Proof*, in AUSTRIAN ARBITRATION YEARBOOK 2009 539, 545 (Christian Klausegger, et al. eds., 2009).

<sup>53</sup> G.A. Res. 68/109, art. 27 (December 16, 2013).



corruption is that, like most crimes and cases of grave or fraudulent misconduct, corruption is specifically designed not to be detected.<sup>54</sup> Various arbitral tribunals have expressed the view that it is “notoriously difficult” to prove corruption, for there is little or no physical evidence in relation thereto.<sup>55</sup> In such a situation, placing the burden of proof on the party alleging so might be too onerous. At the same time, the rule that a party must prove the facts upon which it bases its claim is regarded as a rule of natural justice and due process.<sup>56</sup> Indeed, the existence of this principle is necessary to negate the possibility of parties making groundless allegations against each other, particularly when the party seeks to prove a startling proposition, such as corruption.<sup>57</sup>

The problem with corruption is that even if the circumstances are suspicious, it is difficult to meet a high standard of proof. In a majority of cases, it has been propounded that the usual standard of “preponderance of probabilities” is sufficient in circumstances of corruption.<sup>58</sup> On the other hand, the principle of “clear and convincing evidence” has been proposed in adjudication of corruption, as demonstrated in the case of *Dadras v. Iran*, where the arbitral tribunal opined that the applicability of this principle finds support in both American and English law, according to which cases of fraudulent behavior mandate a higher standard of proof.<sup>59</sup> In similar terms, the arbitral tribunal in the famous *Westinghouse* case noted that matters like fraud must be proven to exist by clear and

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<sup>54</sup> Karen Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitrations Relating Thereto*, in 11 ICCA CONGRESS SERIES 288, 295 (2003).

<sup>55</sup> EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, 64 §221 (8 October 2009).

<sup>56</sup> *Summary of the Chatham House International Law Discussion Group Meeting on 28 March 2007*, CHATHAM HOUSE (Mar. 28, 2007), <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280307.pdf>.

<sup>57</sup> J. Martin Hunter, *Modern Trends in the Presentation of Evidence in International Commercial Arbitration*, 3 AM. REV. INT’L ARB. 204, 211 (1992).

<sup>58</sup> Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25 ICSID Rev. Foreign Investment L.J. 47, §22 (2010).

<sup>59</sup> *Dadras International v. Islamic Republic of Iran*, Case Nos. 213 & 215, 31 Iran-USCTR 127, 135—36, Award (1995).

convincing evidence, and cannot be justified by mere speculation because of the seriousness of the allegations.<sup>60</sup> The bar was raised in the *Hilmarton* case, where the tribunal reasoned that it was necessary for the party to prove bribery beyond doubt, although it could be done by indirect evidence.<sup>61</sup> One might argue that such standard of proof is required only in criminal cases because they entail penal consequences, something which an arbitrator cannot sanction, and therefore, applying such a standard in arbitration is unwarranted. Constantine Partasides has argued that arbitral tribunals should ordinarily adopt a balanced approach, neither relaxing the standard of proof nor making it severe for a party to discharge the burden.<sup>62</sup>

A significant aspect in this discourse is the circumstance of the case. If the arbitrator notices, on the basis of the facts presented before them, that there are some “red flags” pointing towards to the existence of corruption, it may call upon the other party to explain them, and on its failure to do so, draw an adverse inference against the other party.<sup>63</sup> The Resource Guide to the 1977 US Foreign Corrupt Practices Act has provided illustrations of “red flags,” some of them being unusual payment patterns, history of corruption in the country, lack of transparency in books of accounts, lack of qualifications on the part of the service-provider, and so on.<sup>64</sup>

Such a situation took place in the case of *Metal-Tech Ltd. v. Republic of Uzbekistan*.<sup>65</sup> The facts of the case brought to light

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<sup>60</sup> *Westinghouse and Burns & Roe v. National Power Company*, Case No. 621 of 1991, 7 Mealey’s Int’l. Arb. Rep., 31 (ICC Int’l Ct. Arb.).

<sup>61</sup> ICC Case No. 5622 of 1988, in 19 Y.B, Comm. Arb., 105, 111 (ICC Int’l Ct. Arb.).

<sup>62</sup> Kyriaki Karadelis, *Corruption and the Standard of Proof*, Global Arbitration Review (July 26, 2010), <http://globalarbitrationreview.com/article/1029476/corruption-and-the-standard-of-proof>.

<sup>63</sup> Even the International Bar Association [IBA] Rules on the Taking of Evidence in International Arbitration provide that an arbitral tribunal may draw adverse inferences if a party fails, without satisfactory explanation, to make available relevant evidence.

<sup>64</sup> CRIMINAL DIV. U.S. DEP’T JUSTICE & ENFORCEMENT DIV. U.S. SEC. & EXCH. COMM’N, *supra* note 2.

<sup>65</sup> *Metal-Tech Ltd v. Republic of Uzbekistan*, ICSID Case No. ARB/10/03, Award (October 4, 2013).

certain “red flags” such as lack of requisite qualifications of the consultants, exorbitant “remuneration” paid to such consultants, and close relations with high level government officials, including the President and the Prime Minister of Uzbekistan. Moreover, the party against whom corruption was alleged did not offer any explanation on how exactly the consultants provided support to Metal-Tech’s investment.<sup>66</sup> Accordingly, the tribunal held that though there was no direct proof, the unexplained circumstances were such that they led to the conclusion that bribery had actually been committed.<sup>67</sup>

In light of the foregoing discussion, the authors submit that the burden of proof must lie with the person alleging that the contract in question is tainted with bribery, as is the case with other forms of illegality. The authors also believe that there must certainly be a higher standard of proof than a mere preponderance of probabilities in regards to a sensitive issue like corruption. However, such standard should not be as high as “beyond doubt” for the simple reason that this would allow the wrongdoers to escape the clutches of the law, considering the paucity of evidence that exists in such cases. It must, therefore, lie somewhere between the two.<sup>68</sup>

#### **D. Sua Sponte Investigation of Bribery by Arbitration**

Another issue that has been in controversy is whether an arbitrator can initiate, *sua sponte*, an investigation of bribery. It is not always the case that one of the parties comes forward with a specific allegation of corruption against the other. There could be a situation where suspicious circumstances come to the attention of the arbitral tribunal as the arbitration proceedings progress. Thus, the question to be addressed at this juncture is whether it is possible for an arbitral tribunal to investigate possible bribery on its own accord, without there being any such specific allegation from either party? On the one hand, it is argued that the essence of arbitration is the will of the parties to refer specific issues to such private adjudication, and therefore, an arbitrator cannot stray into an *ultra*

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<sup>66</sup> *Id.* at §217.

<sup>67</sup> *Id.* at §243.

<sup>68</sup> *Waguieh Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009).

*petita* area<sup>69</sup> and impose his own will onto proceedings by inquiring into a matter not brought before the tribunal. If the arbitrator does so, the award passed by him may be set aside<sup>70</sup> or refused recognition and enforcement<sup>71</sup> on the grounds that the tribunal exceeded its authority.

On the other hand, if arbitral awards are as binding as a decision rendered by a court,<sup>72</sup> it is imperative that the arbitral tribunal treats such matters in the same manner as a court, and its failure to do so would be tantamount to endorsing bribery.<sup>73</sup> The argument that an arbitrator would exceed his mandate by ruling upon the existence and consequences of corruption is also challenged by some who contend that a suspected or manifest illegality, which is relevant to the claims or defenses cannot be isolated. It was observed by the Singapore Court of Appeal in the case of *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* that in determining whether an arbitrator has exceeded his authority in considering and deciding a particular matter, its relevance to the issues submitted by the parties to the tribunal for resolution is a crucial factor to be considered.<sup>74</sup>

The authors agree with the latter approach. Even though arbitration is a creature of contract, an arbitral tribunal cannot ignore international condemnation of bribery. It is difficult to ignore the tribunal's comment in *Himpurna California Energy Ltd. v. PLN*,

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<sup>69</sup> BLACKABY, PARTASIDES, REDFERN & HUNTER, *supra* note 11, §2.140.

<sup>70</sup> Report of UNCITRAL on the Work of its Eighteenth Session, U.N. Doc. A/40/17 (1985) (as amended in 2006), art. 34(2)(a)(iii) [hereinafter UNCITRAL Model Law] (“34[...] (2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: [...] (iii) 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.”).

<sup>71</sup> Article 36(1)(a)(iii) of the UNCITRAL Model Law and Article V(1)(c) of the New York Convention provide for refusal of enforcement of an award on the same basis as setting aside an award under Article 34(2)(a)(iii) of the UNCITRAL Model Law. *See id.* art. 36(1)(a)(iii); New York Convention *supra* note 29, art. V(1)(c).

<sup>72</sup> UNCITRAL Model Law, *supra* note 70, art. 35(1).

<sup>73</sup> Nick Neocleous, *Arbitrators' Investigative Rights and Duties*, Kiev Arbitration Days (2014), available at [http://uba.ua/documents/doc/nick\\_neocleous.pdf](http://uba.ua/documents/doc/nick_neocleous.pdf), at 14.

<sup>74</sup> [2011] SGCA 33 (Sing.).

that the members of an arbitral tribunal do not live in an ivory tower, and that the arbitral process cannot be divorced from reality.<sup>75</sup> A tribunal must remain vigilant and check for the possibility of corrupt dealings by one or both parties to arbitration. Any failure or laxity in this regard may open the arbitral award to annulment or non-recognition,<sup>76</sup> or may hold the arbitrator liable for failure to act.<sup>77</sup> Therefore, it should be within an arbitrator's mandate to make investigation *sua sponte* if he or she is of the opinion that some corrupt activities are afoot, provided such activities have nexus with the matters which have been referred to arbitration.

### III. Consequences of a Finding of Corruption

The dilemma of an arbitrator does not end at the issues of arbitrability and standard of proof required in the case of corruption. Once a finding of corruption has been reached, either upon the evidence led by the alleging party or upon a *sua sponte* investigation, the arbitrator also has to decide the consequences of such finding on the contract itself, and ultimately, on the respective claims of the parties.

Most domestic legal systems recognize a distinction between contracts aimed at corruption (either expressly or impliedly) and ones procured by corruption. In the former case, there is unanimity among various jurisdictions that the contract must be declared null and void.<sup>78</sup> Such a consequence is not only contemplated by national

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<sup>75</sup> REDFERN, HUNTER, BLACKABY & PARTASIDES, *supra* note 38, at 43.

<sup>76</sup> Under Articles 34(2)(b)(ii) and 36 of the UNCITRAL Model Law and Article V(2)(b) of the New York Convention, an award may be set aside or refused enforcement on public policy grounds. UNCITRAL Model Law, *supra* note 70, art. 34(2)(b)(ii), 36; New York Convention *supra* note 29, art. V(2)(b).

<sup>77</sup> Douglas Thomson, *Arbitrators and Corruption: Watchdogs or Bloodhounds?*, GLOB. ARBITRATION REV. (May 7, 2014), <http://globalarbitrationreview.com/article/1033374/arbitrators-and-corruption-watchdogs-or-bloodhounds>.

<sup>78</sup> See OBLIGATIONRECHT [OR] [THE CODE OF OBLIGATIONS] (Switz.) Art. 20, translation at <https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf>; see also BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 134, translation at [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html) (Ger.); see generally COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE CIVIL LAW CONVENTION ON

laws and international conventions, but it is also regarded as a matter of transnational policy.<sup>79</sup> On the other hand, a contract procured by corruption remains valid until the aggrieved party takes steps towards its annulment.<sup>80</sup> In *World Duty Free v. Kenya*, the investor invoked ICSID arbitration wherein they admitted to have paid \$2 million as a “donation” to the President of Kenya in order to do business with the Kenyan Government.<sup>81</sup> The arbitrator, relying on English law, which was the governing law of the contract, held that the contract was voidable at the option of Kenya, as it was procured through corruption of its agent.

It is submitted that since a contract providing for corruption is completely ineffectual, neither party can claim any remedy, contractual or restitutionary, in respect of the same. This proposition is backed by the doctrine of clean hands, or *ex turpi causa non oritur actio*, and therefore, “claims tainted by wrongdoing will not succeed, and the loss lies where it falls.”<sup>82</sup> The idea is simple: a person cannot expect the court to come to his rescue when his own conduct is bereft of good faith and righteousness. But what would be the fate of the claims where the contract is procured by corruption? One option could be that such contract must suffer from the same consequences, for the idea is not to protect the parties but to secure public interest in detection and prevention of corruption in all its forms. The authors consider this to be too harsh for the innocent party. After rescission of the contract, the innocent party may claim *restitutio in integrum*, so that it is restored to the position it would have occupied if the contract had not been performed.<sup>83</sup> The

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CORRUPTION ¶ 63 (1999) (“[I]n most European countries, the contract the cause of which is illegal is null and void.”).

<sup>79</sup> See Center of Transnational Law, No. IV.7.2(a) Invalidation of Contract Due to Bribery, <https://www.trans-lex.org/938000> (noting that contracts based on or involving the payment or transfer of bribes (“corruption money,” “secret commissions,” “pots-de-vin,” “kickbacks”) are void).

<sup>80</sup> *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1957] 1 QB 267, 283 (Eng.); see also *Genovese v. York Lambton Corp.*, [1969], 1 OR 427 (Can.).

<sup>81</sup> ICSID Case No. ARB/00/7, *supra* note 37, at ¶ 66.

<sup>82</sup> Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in BETWEEN EAST AND WEST: ESSAYS IN HONOUR OF ULF FRANKE 309, 319 (Kaj Hobér, Annette Magnusson & Marie Öhrström eds., 2010).

<sup>83</sup> ICSID Case No. ARB/00/7, *supra* note 37, at ¶ 164.

2010 UNIDROIT Principles of International Commercial Contracts also lend support to this view.<sup>84</sup> However, care should be taken that such party is not left overcompensated, for it would mean taking advantage of the illegality of the contract.

## CONCLUSION

The foregoing discussion brought to light that the issue of corruption is marred by complexity as it raises tensions between public policy matters in respect to which it is difficult to strike a balance. The authors proposed that even though corruption is subject to significant condemnation and abhorrence, it should be within an arbitrator's authority to adjudicate upon such allegations. Indeed, cross-border business transactions would suffer a setback if such issues are kept out of the scope of arbitration. We also examined the problems that arise with respect to both burden of proof and standard of proof, as it is difficult to uncover and establish corruption because of the systematic manner in which it is carried out in most cases. An attempt was made to show that it is within the power of an arbitrator to initiate a *sua sponte* investigation to unravel corruption when circumstances so warrant, for an arbitrator cannot be expected to remain a silent spectator to unscrupulous dealings. Further, we explored the consequences that a finding of corruption would bring, by making a distinction between contracts aimed at corruption and ones obtained by corruption, and arguing that in the latter case, since one of the parties is innocent, restitution may be granted if it is reasonable under the circumstances.

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<sup>84</sup> INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (3d ed., 2010). Article 3.3.2(1) of the PIIC provides: "Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances."