CORRUPTION IN INTERNATIONAL ARBITRATION:

EVIDENTIARY CHALLENGES

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I. Introduction

The word *corruption* derives from the latin word "*corrumpere*" meaning mar, bribe or destroy.[3] While there does not appear to be a universal accepted definition of corruption, there is a general understanding in the international arbitration community that providing a public official with money or other benefits in return for favorable treatment contravenes public policy regardless of the applicable law. Transparency International[4] has generally defined corruption as "the abuse of entrusted power for private gain."[5] The UN Convention Against Corruption provides a more nuanced definition focusing on the act of bribery, which it describes, in part, as "the promise, offering, or giving, to a public official, directly or indirectly, of an undue advantage for the official

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[3] Lexico, Oxford Dictionary Online, *available at* https://www.lexico.com/en/definition/corruption

[4] Transparency International is a non-profit, non-governmental organization dedicated to fighting corruption, and is best known for its Corruption Perceptions Index which is publishes annually.

[5] https://www.transparency.org/what-is-corruption#define

himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."[6]

While there appears to be generally accepted notions of corruption, there are some differences (some quite significant) between the various international and national legal regimes in what conduct constitutes "corruption." For example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions does not specifically prohibit facilitation payments (i.e. grease payments), yet these types of payments are prohibited in certain domestic jurisdictions.[7]

Despite the various laws in place, the prevalence of corruption in international business has not slowed down.[8] The Corruption Perceptions Index of 2018, which scores each country using a

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[6] UN Convention Against Corruption, Chapter III, Article 15, *available at* https://www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html

[7] *See, e.g.*, UK Bribery Act 2010. *But see* other domestic jurisdiction which allow for grease payments (U.S under the Foreign Corrupt Practices Act., Canada, etc.).

[8] According to the 2009 Global Corruption Report, published by Transparency International, "Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10 per cent. One in five claimed to have lost business because of bribes by a competitor. More than a third felt that corruption is getting worse. *See* Executive Summary, p. XXV, *available at* https://www.transparency.org/whatwedo/publication/global_corruption_report_2009; *see also*, Matthew L. Rea, Curbing Bribery and Corruption in International Arbitration, LAW360, October 2, 2016, https://www.law360.com/articles/839534/curbing-bribery-and-corruption-in-international-arbitration; Corruption in International Arbitration: Challenges and Consequences, GAR, Aug. 29, 2017, *available at* https://globalarbitrationreview.com/print_article/gar/chapter/1146893/corruption-in-international-arbitration-challenges-and-consequences?print=true. In the US, "[i] was business as usual for FCPA enforcement in 2018. The U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") collected a total of $1 billion from seventeen corporate defendants, including through their share of two high-value, multi-jurisdictional enforcement actions. DOJ also announced thirteen new FCPA prosecutions against individuals and used the money laundering and wire fraud statutes to pursue cases against foreign officials and others implicated in cross-border corruption schemes." *See* Covington's 2018 Year in Review: Top Anti-Corruption Enforcement Trends and Developments, *available at https://www.cov.com/-/media/files/corporate/publications/2019/02/2018_year_in_review_top_anticorruption_enforcement_trends_and_developments.pdf*

scale of 0 to 100, where 0 is highly corrupt, reported that two thirds of the countries scored below 50. While some advances have been made, there is still an uphill battle to combat and prevent corruption in the world. On a positive note, new countries are continuously added to the list of countries that have either enacted new anti-corruption laws or have amended their laws to be more effective.[9]

Historically, corruption had been treated as a domestic issue, generally addressed through the local criminal prosecution of public officials. But in recent years, corruption in international arbitration has been a topic of much discussion. With the growth and prevalence of international transactions governed by arbitration clauses, corruption has become more of a transnational issue. This increased awareness has led to the ratification by a significant number of countries of major treaties addressing corruption, including the passing of the United Nations Convention Against Corruption in 2005 by the United Nations (the "UN Convention").[10] The UN Convention reflects the international community's shared pursuit of greater enforcement. For example, the UN Convention's text expressly provides that corruption issues may be considered 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."[11]

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[9] Anti-Corruption Regulation Survey of 41 countries (2017-2018), Jones Day, *available at* *https://www.jonesday.com/files/Publication/c491d4aa-6bb5-4f4b-95fd-1f852dec1537/Presentation/PublicationAttachment/31ecbb8a-64c8-49f4-b1f4-22b794dd5cf2/Jones%20Day%20Anti-Corruption%20Regulation%20Survey%20of%2041%20Countries%202017-2018%20Edit.pdf*

("A number of countries made significant changes to their anti-corruption regulations in 2017 and 2018 to date, including, among others, Argentina, China, Italy, Mexico, Saudi Arabia, the United Arab Emirates and the United States. Furthermore, since the beginning of 2017, there have been other significant developments in several countries related to anti-corruption, especially with respect to enforcement, such as in Brazil, Hong Kong, Japan, the Philippines, Saudi Arabia and South Africa").

[10] https://www.unodc.org/unodc/en/treaties/CAC/

[11] UN Convention Against Corruption, Article 34.

In international arbitral disputes, corruption or illegality has arisen primarily in two distinct scenarios. First, is the occurrence of corruption in the conduct of the proceedings, which at times may involve the arbitral tribunal.[12] The second type of corruption involves corruption that occurred in the underlying transaction that is the subject of the dispute. In international arbitrations, corruption issues usually arise in agency agreements, whereby foreign investors rely on agents or intermediaries familiar with local laws and customs to facilitate government approvals, permits, etc. This article will largely focus on the latter scenario, although many of the same general challenges with regards to burden of proof may be relevant in the context of proving corruption during the course of the proceedings, especially if it involves a member or members of an arbitral tribunal.

A recent article in Law360 has cited an increase in the "corruption defense" especially in investor-state arbitration.[13] Although its presence is less advertised and discussed in commercial arbitration, there have been many significant cases that have had to address corruption in the underlying transaction, many times at the stage of enforcement of the award. In the course of the proceedings, corruption issues, however, have generally been received with reluctance by arbitral tribunals, partly because the adjudication of such issues touches on public interest and policy issues generally outside the scope of matters ordinarily dealt with by tribunals. These cases highlight the challenges faced by parties and tribunals, particularly as it relates to issues of standard of proof.

[12] *See, e.g.*, Tapie Case, summary available at http://arbitrationblog.kluwerarbitration.com/2016/09/01/the-tapie-saga-paris-successfully-passed-the-test/ (Although the case did not involve bribery, but rather fraud, it is illustrative for the purposes of showing the type of challenges that may arise involving one or more of the arbitral tribunal members).

[13] Caroline Simson, *Corruption Defense in Int'l Arbitration Could Backfire on Nation,* May 31, 2019, available at https://www.law360.com/internationalarbitration/articles/1164538/corruption-defense-in-int-l-arbitration-could-backfire-on-nation?nl_pk=112aed0d-486b-4d47-9e05-1e08bce3c4ef&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration

This article will explore some of those cases and the challenges facing parties and tribunals particularly as it relates to evidentiary matters.

II. General evidentiary challenges: Standard of Proof for adjudicating corruption claims before arbitral tribunals

As a starting point, it has been universally recognized that corruption is inherently difficult to prove.[14] The illegality of the act means that by its nature it is disguised, cloaked in some level of secrecy with little to no documentation available, making the unmasking of proof a challenging task for any party. To add to matters, arbitral tribunals are generally unable to compel production of evidence, especially from third parties.[15] This limitation compounds the evidentiary issues parties face in proving their allegations. These issues have caused some to question whether arbitral tribunals are the most appropriate forum for adjudicating such claims. Allegations involving public officials and the general public interest drawn to these issues are generally at odds with the largely confidential and closed private world of commercial arbitration proceedings.

The other difficulty lies in the lack of clear guidance for parties due to the diversity of approaches adopted by arbitral tribunals in addressing issues of corruption. When it comes to evidentiary standards, cases show that the varying use of standards of proof, including balance of the probabilities, preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt. There is also a lack of publicly available information when dealing with commercial arbitration disputes, which also make it difficult for the tribunal and the parties to find or assist in the development of uniform standards for the treatment of corruption allegations.

[14] *See, e.g., EDF v. Romania*, ICSID Case No. ARB/05/13, Award dated Oct. 8, 2009, ¶ 221 (corruption is "notoriously difficult to prove since, typically, there is little or no physical evidence").

[15] *F-W Oil Interests, Inc. v. Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award of 3 Mar. 2006., ¶ 211.

Similarly, most rules and institutions do not provide guidance on evidentiary issues, with the exception of a few, including the UNCITRAL Arbitration Rules which expressly state that "each party shall have the burden of proving facts relied on to support its claim or defense."[16] But even in cases where there is some mention of the burden of proof,[17] arbitration rules are largely silent on the standard of proof to be applied.[18] The ICC Rules only state that "[t]he arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."[19] Standard of proof issues are therefore largely left to the discretion of the tribunals, as further discussed below.

A. Standard of Proof applied

Finding a uniform standard of proof in international arbitration is also challenged by the fact that arbitrators often may be unable to reach an agreement on a given standard as a result of their own diverse legal backgrounds (i.e. civil law v. common law). In civil law, the standard of

[16] UNCITRAL Arbitration Rules, Art. 27(1).

[17] There appears to be a general consensus that the burden of proof lies on the party making the claim, but some tribunals have suggested that a shifting of the burden of proof could occur in the event that the contrary party was unable to produce counter-evidence with respect to the allegations of corruptions against it. *See, e.g.,* ICC Case No. 6497 (1994), Yearbook Comm. Arb. XXIV (1999).

[18] The difference between burden of proof and standard of proof that often is misunderstood or overlooked, partially because standard of proof in civil countries is less of a defined concept. Burden of proof refers generally to which party must bear the burden to prove the facts it alleges, whereas standard of proof in common law jurisdiction generally refers to the degree of confidence that the adjudicator should have in reaching factual conclusions. *See, e.g., In re Winship*, 397 U. S. 358, (1970) (Harlan, J., concurring). The function of the standard of proof under U.S. law is to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication". *See also, The Rompetrol Group N.V. v. Romania*. ICSID Case No. ARB/06/3, Award dated May 6, 2013, ¶178 (finding that "the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole"). For further discussion on these issues *see also,* Evidence, ICCA Miami 2014, Standard of Proof: A plea ofr precision or an unnecessary Remedy, *available at* http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-standard-of-proof-a-plea-for-precision-or-an-unnecessary-remedy/

[19] ICC Arbitration Rules, Art. 25(1).

proof does not necessarily have to be expressly stated, relying instead on the inner conviction of the decision-maker.

In those cases that are publicly available, it can be observed that international arbitration tribunals have frequently adopted a higher standard of proof when dealing with corruption allegations.[20] This has been partly explained by some tribunals as justified due to the seriousness of the allegations.[21] In the case of *Westinghouse*,[22] the tribunal acknowledged that under the applicable law for civil cases, the standard of "preponderance of the evidence" applies, but decided to apply the higher standard of "clear and convincing" evidence equating issues of bribery and corruption to the national standards of proof used for proving fraud in civil cases.[23] Similarly, the tribunal in *EDF v. Romania* applied a "clear and convincing" standard by simply recognizing that there is a "general consensus among international tribunals and commentators

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[20] *See, e.g., EDF v. Romania*, ICSID Case No. ARB/05/13, Award dated Oct. 8, 2009, ¶ 221; *See also, EDF v. Romania*, Procedural Order No. 3 (the Tribunal held that "[t]he seriousness of a corruption charge also requires that the utmost care and sense of responsibility be taken to ascertain the truthfulness and genuine character of the evidence that the party intends to offer in support of its claim.") ; (*Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated June 1, 2009. Some commentators have advocated for a heightened standard of proof when a party is using the allegations of bribery as a defense, stating that,

> "if the burden of proof is shifted from the defendant to the claimant with respect to the performance of the contract, it is only fair that the defendant carry a higher than usual burden with respect to its defense based on an allegation or suspicion of bribery. Otherwise, it would be temptingly simply for the defendant to raise an allegation of bribery, without any supporting evidence, merely in order to shift the burden of proof to the claimant and thus improve it chances of avoiding payment obligations under the contract.

See J. Rossell and Harvey Prager, *Illicit Commissions and International Arbitration: The Question of Proof"* ARBITRATION INTERNATIONAL, Vol. 15, No. 4, at p. 348.

[21] *See, e.g., EDF v. Romania*, ICSID Case No. ARB/05/13, Award dated Oct. 8, 2009, ¶ 221.

[22] *Westinghouse v. National Power Corporation and the Republic of Philippines*, ICC Case No. 6401, cited in ICC International Court of Arbitration Bulletin, Vol. 24/Special Supplement – 2013 at p. 17.

[23] *Id.*

regarding the need for a high standard of proof of corruption."[24] In some cases, tribunals have outright rejected an automatic application of a heightened standard of proof.[25] There is also dispute among international commentators on whether a higher standard should apply.[26] These divergent approaches demonstrate the uncertainty surrounding the applicable standard of proof. As a strategic point, this creates a challenge to having predictability in the arbitral process for parties deciding to bring forth claims of corruption.

B. Availability of evidence:

When there is no available documentation of the alleged corruption, which is often the case, a party is left to largely rely on witness statements to prove its case. Witness testimony brings with it its own sets of challenges, especially where language, culture and the existence of multiple witnesses can affect the manner in which the evidence is delivered and therefore interpreted by the tribunal. As for documentary evidence of corruption, where it exists, it is often time-consuming, difficult and expensive to gather, creating another obstacle for parties attempting to prove their

[24] *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, ¶ 221.

[25] *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award dated Sept. 2, 2011, ¶¶ 125-26 ("While agreeing with the general proposition that *"the graver the charge, the more confidence there must be in the evidence relied on"* (see paragraph 117(a)above), 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 been discharged").

[26] *See, e.g.,* James J. Saulino, *Corruption is Not Special: Evidence and Standards of Proof for International Claims Involving Corruption,* in Burdens and Standards of Proof for Corruption – is the Allegation of Claimant Corruption by a State Sufficient Basis on which Tribunal May Deny An Investment Claim? Investment Treaty Arbitration and International Law, Volume 9 (2016).

allegations. To overcome these challenges, ICC tribunals have in some instances relied on circumstantial evidence and adverse inferences to make findings on corruption.[27]

As many have observed, direct evidence of corruption is rare and corruption allegations are generally based on the availability of circumstantial evidence, which may involve looking at the terms of the contract; the conduct of the parties; contemporaneous documentary evidence; the "endemic nature of corruption of corruption in certain countries and lines of business;" the agent's fee (amount, proportionality); negotiations between an agent and/or principal and awarding authority; internal structure and organization of agent; type of relationship between agent and public official (friendship or close personal relationship); services rendered by agent; or unusual payment terms.[28] None of these elements in and of themselves may in isolation be sufficient to make a finding of corruption, but one or more of these factors taken together may be sufficient. There is little guidance that can be found from a particular tribunal's treatment of circumstantial evidence, except that each case must be reviewed under its own circumstances. The weight of any evidence is therefore largely left to the discretion and common sense of the arbitral tribunal as further discussed below.

C. The Gathering of Evidence: Admissability issues

As was briefly mentioned in the prior section, corruption largely occurs in a covert manner which makes the uncovering of any documentary or witness testimony challenging for the party bringing forth the allegations of illegality. While generally all evidence that is relevant and material

[27] *See, e.g.,* ICC Case Nos. 1110, 3913, 3916, 5622, 6497, 8891.

[28] For a review of cases applying these elements, *see* Scherer, Mattias, *Circumstantial evidence in corruption before international tribunals in* International Arbitral Law Review, Issue 2, London 2002, *available at* http://trans-lex.org/107450.

to establishing facts or law is admissible, often the means of gathering these documents may raise questions or challenges to their admissibility. In some cases, the authenticity of any documentary evidence may also be called into question. This might be the case if there are allegations by the accused party that the evidence was gathered in a wrongful or illegal manner in order to prevent their admissibility.

While under international law, there are no set rules of guidelines on whether evidence illegally or wrongfully obtained should be admitted, arbitral practice generally leaves it to the tribunal to act as the gatekeeper in whether to admit such evidence.[29] In the international law arena, a leading case on the topic has been the *Corfu Channel Case,* in which the International Court of Justice ("ICJ") admitted evidence obtained by the United Kingdom in violation of international law. [30] As this case illustrates there is no black or white line for admitting evidence, and that in light of the particular circumstances of the case, tribunals are willing to allow evidence even if wrongfully obtained. In other words, there appears to be no bright line rule that evidence wrongfully obtained will always be inadmissible. This is especially the case if the party admitting the evidence did so in good faith and was not the party involved in the wrongful act, but rather the information was obtained from a disinterested third party.[31] Tribunals, on the other hand, have

[29] UNCITRAL Rules, Article 27(4), provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." *See also,* ICSID Arbitration Rule 34(1), which provides that the tribunal is the "judge of the admissibility of evidence adduced and of its probative value."

[30] *Corfu Channel Case* (United Kingdom v. Albania), ICJ Reports p. 4 (1949). *See also, Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, International Court of Justice, May 24, 1980.

[31] *See Fusimalohi v. FIFA*. Fusimalohi was sanctioned after being recorded by a journalist about incidents of corruption within the FIFA World Cup bidding process. Importantly, the panel took note of the fact that FIFA had no hand in recording Fusimalohi; it only procured the recording from the journalist after the information was made public. (CAS 2011/A/2425), Award (March 8, 2012) ¶¶ 73-74, 86. On the protection of privacy rights, the panel distinguished between the violation of privacy by making the secret recording, and by its use as evidence in the arbitration. The latter was deemed justified by the overriding

declined, under certain circumstances, to admit documents that a party obtained unlawfully. For example, in the case of *Methanex v. United States,* a NAFTA tribunal declined to admit certain documents finding that Methanex had trespassed onto private property belonging to the respondent's witness in order to obtain the documents.[32] But a closer look at that case shows that it was not only the party's conduct, but also the materiality of the evidence obtained that affected the tribunal's decision. So even after a finding that there was bad faith conduct on the part of the party admitting the evidence, the tribunal did not stop its analysis there. It added a further element of materiality to its analysis. In doing so, the tribunal found that the evidence had "marginal evidential significance" and when weighted along with the party's conduct, the tribunal decided to exclude the evidence.[33] In the ICSID case of *EDF v. Romania,* the tribunal not only looked at whether the evidence was lawfully obtained, but also whether it was reliable and authentic.[34]

These cases show a growing trend among arbitral tribunals in conducting a balancing test where the party's conduct in the manner the evidence was collected is weighted in light of the authenticity/materiality of the evidence admitted. Therefore, the fact that the evidence might have been gathered through a wrongful act is likely not in itself sufficient to warrant its exclusion, especially if the act was not directed at the opposing party, was carried out by non-interested third-party, or involved evidence that was publicly available. In any event, tribunals generally tread

interests of: (i) the general public (to expose illegal and unethical conduct); (ii) FIFA (to sanction the wrongdoing of its officials); and (iii) the national football associations (to be reassured as to the objectivity of the bidding process).

[32] *Methanex v. United States* (NAFTA), Award (August 3, 2005), Part II – Chapter I, ¶ 55 (finding that Methanex obtained the documents by "deliberately trespassing onto private property and rummaging through dumpsters inside the office building").

[33] *Methanex v. United States* (NAFTA), Award (August 3, 2005), Part II – Chapter I, ¶ 56.

[34] *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Procedural Order No. 3 (August 29, 2008), ¶ 38.

carefully in close cases to avoid subsequent challenges to the award for refusing to receive material evidence.[35]

Challenges to the authenticity of documents raises further issues that the tribunal may need to address in determining the veracity of corruption allegations. One case in which forged documents were submitted as evidence (but later retracted) involved the territorial dispute between the State of Bahrain and the State of Qatar pending before the ICJ.[36] While the tribunal never decided the issue because the documents were retracted from the record, the case nevertheless highlights additional evidentiary issues that may also give rise to fraud on the tribunal during the course of the proceedings. The tribunal in this case was surprisingly silent on addressing the issue. In this particular situation, by retracting the documents from the record, the party appears to have avoided any repercussions for falsely submitting documents to the tribunal. Although outside the scope of this article, issues involving the submission of false documents presented before a tribunal may also implicate violations of rules of professional responsibilities in those jurisdictions in which the parties' counsel is licensed.[37]

[35] *See, e.g.*, Federal Arbitration Act ("FAA") in the U.S. provides, in relevant part, that the Court may vacate an arbitral award "where the arbitrators were guilty of … refusing to hear evidence pertinent and material to the controversy."

[36] International Court of Justice, Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) Judgment of 16 March 2001, Decision No. 847, 40 I.L.M. (July 2001) p. 4.

[37] *See, e.g.,* American Bar Association, Rule 3.3 Candor Toward the Tribunal, Commentary ("The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood").

D. The Role of the Applicable Law:

In accessing allegations related to corruption, tribunals must first determine the law or standard that should be applied. Generally, the substantive law of the contract is the law that governs issues of corruption, but the applicable law on issues of evidentiary proof is less clear.

(i) Law applicable to defining the criteria for corruption:

The general consensus appears to be that a tribunal should apply the substantive law of the contract, unless doing so would contravene international public policy.[38] An interesting case on the issue of applicable law to the substance of the allegations is the *Hilmarton* case, where the arbitrator looked both at the substantive law of the contract (Swish law) as well as the law at the place of contractual performance (Algeria). The arbitrator in that case found that the agreement was in violation of Swiss public policy because the agent had been appointed in violation of Algerian law. In other words, it found that the violation of Algerian law, implicated international public policy against corruption, and therefore was contrary to Swiss public policy.[39] This case illustrates the flexible approach that some tribunals have adopted in addressing these issues.

(ii) Law applicable to evidentiary issues:

As mentioned before, arbitration rules rarely address issues of standards and burdens of proof, other than there appears to be a general consensus requiring that a party alleging a fact also bear the burden to prove it. Issues of burden and standard of proof "are frequently intertwined with

[38] Richard H. Kreindler, *Aspects of Illegality in the Formation and Performance of Contracts*, 16th ICCA Congress, p. 42 (May 2002).

[39] *Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622 (cited in *Mohamed Abdel Raouf,* How Should International Arbitrators Tackle Corruption Issues? in ICSID Review Foreign Investment Law Journal, Volume 24, Number 1, Spring 2009, pp. 116-136.

substantive legal rules,"[40] and therefore it has been argued that the substantive law should be applied. Others believe that it is a discretionary issue left to the tribunal without any required reference to a specific jurisdiction's law.[41] This latter view appears to be the trend. Burden of proof in particular is usually considered an established general principle of law.[42] Tribunals have thus echoed and generally adopted the standard approach cited in some arbitration rules that "it is for a claimant to prove the facts on which it relies in support of his claim"[43] Therefore, burden of proof is generally regarded as a general principle of the law, without the need to define it in reference to any national law. Standard of proof, on the other hand is a more complex issue. Arbitration rules do not address the issue, and arbitrators tend use their discretion in applying standards of proof, many times without a clear indication to the parties of the standard applied or the relevant law from which the standard was derived. For example, in the case of *Siag v. Egypt*, the Tribunal simply adopted a higher standard of proof that was greater than the balance of probabilities but less than beyond reasonable doubt to determine where the claimant had engaged in fraud in bringing forth its claim without reference to any national law.[44]

III. Enforcement Considerations

Corruption issues often arise at the enforcement phase, creating further obstacles for parties seeking to enforce their award. In the commercial arbitration setting, arbitrators have recognized

[40] *See* A. Menaker, Proving Corruption in International Arbitration, in D. Baizeau and R. Kreindler, eds., Addressing Issues of Corruption in Commercial and Investment Arbitration, ICC Dossiers, Vol. 13, 2015, at pp. 78-79.

[41] Gary B. Born, International Commercial Arbitration, 2nd ed., 2014, at p. 2135.

[42] *See Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case nº ARB/02/13, Award dated of January 31, 2006, ¶70.

[43] *Id.*

[44] *Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/1*, ¶ 326 (finding that it is "common in most legal systems for serious allegations of fraud to be held to a high standard of proof. The same is the case in international proceedings…).

that they have a duty to ensure that any award issued will be enforceable under Article V of the New York Convention.[45] Since an award may be set aside or refused enforcement on public policy grounds as noted in Article 34(2)(b)(ii) and 36 of the UNCITRAL Model Law and Article V(2) of the New York Convention, issues of corruption can therefore create an added dilemmas for tribunals. ICC Case No. 1110 was one of the earliest cases to invoke the New York Convention in its reasoning for finding the dispute non-arbitrable.[46]

One recent case where allegations of bribery were raised at the enforcement phase involved Petrobras, Brazil's state run oil and gas company, which argued before a US court that a $622 million award should not be enforced due to the arbitrator's evident partiality and the tribunal's refusal to consider evidence of bribery.[47] Petrobras arguments centered on arguments that sought to vacate the award on the basis of a violation of US policy. In support of its arguments, Petrobras relied heavily on its appointed arbitrator's refusal to sign the award and his one paragraph dissenting opinion expressing concern that Petrobras had been denied fundamental fairness and due process.[48] In doing so Petrobras requested that the court compel the arbitrator to testify

[45] This applies to international commercial arbitration awards only. ICSID awards for example generally are not subject to the review of the enforcing national courts nor are they generally vacated on grounds of public policy (i.e. corruption, etc). Generally, the party participating in an ICSID arbitration is limited to remedies available under the Convention, which includes annulment.

[46] ICC Case No. 1110 (1963) (excerpt) ("It might also be noted that under the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, recognition and enforcement of an award may be refused *ex officio* if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country").

[47] *See Vantage Deepwater Company, et.al. v. PetroBras America Inc.*, Case No. 18-cv-02246, case before the Federal District Court of the S.D. of Texas.

[48] The majority of the tribunal found that Petrobras had provided "no convincing evidence" showing that Vantage was aware that Su and Padilha were involved in bribery to procure the contract. Since Petrobras had entered into novations and amendments to the contract after becoming aware of the bribery allegations in 2013, without the participation of any of the actors accused of participating in the scheme,

regarding his grounds for dissent. The US court denied the request, citing concerns about the scope of the discovery.[49] The award in that case was recently confirmed.[50].

But other jurisdictions have taken a more supervisory approach over arbitral awards where it involves an allegation of a violation of public policy, especially one concerning corruption or bribery. For example, in France, recent cases demonstrate a trend of the courts adopting a more hand-on-approach, opting to conduct a separate analysis in such cases rather than simply rely on the arbitrator's findings. In recent cases, the French courts have expressly found that international public policy is violated by an arbitral award enforcing an agreement to commit corrupt practices."[51]

Even if the corruption or bribery allegations are not ultimately accepted by the tribunal, a party may still be able to challenge an award where new evidence of the corruption arises or where new evidence suggests that the award was tainted by fraud. In a case involving the sale of six frigate warships to Taiwan in 1991, a Swiss court almost ten years later ruled to revise the award after new evidence showed that the award had relied on the false testimony of a key witness.[52] In

Petrobras had therefore "knowingly ratified" the contract. The majority thus concluded that PetroBras was estopped from now claiming it was void.

[49] Michelle Casidy, *Petrobras Can't Depose Arbitrator in $622M Award Row,* Law360, December 19, 2018, available at https://www.law360.com/articles/1113051/petrobras-can-t-depose-arbitrator-in-622m-award-row

[50] https://www.globenewswire.com/news-release/2019/05/20/1827718/0/en/U-S-District-Court-Confirms-Arbitration-Award-in-favor-of-Vantage-Drilling-and-Denies-Petrobras-s-motion-to-Vacate-the-Award.html

[51] Read more at: https://www.law360.com/articles/1127331/in-france-increasing-court-control-over-arbitral-awards?

[52] Award is unpolished but for a discussion of court decision, *see* U. Sulaiman, *Swiss Court Cancels Decade Old ICC Award After New Evidence Surfaces,"* Global Arbitration Review (Oct. 23, 2009) *available at* https://globalarbitrationreview.com/article/1028701/swiss-court-cancels-decade-old-icc-award-after-new-evidence-surfaces.

other words, the issue was not a challenge to the corruption findings themselves, but on the integrity of the evidentiary process. The Court therefore focused heavily on fact that the arbitrator's findings had relied on an lying witness which amounted to a type of "fraud on the court" situation. In this particular case, fraud in the procurement of the award was sufficient for the Swiss Supreme Court to rule in favor of vacatur on award that was a decade old.[53] In the absence of new evidence, swiss courts have otherwise found that the "may not rectify or supplement ex officio the findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law."[54] In most jurisdictions, this is also the case. New evidence that was not previously available is therefore generally a requirement for parties wishing to challenge the corruption findings in an award.

IV. Additional considerations

A. Do arbitrators have a duty to *sua sponte* investigate if corruption is suspected?

Generally, corruption allegations are raised by one of the parties, but in some cases the arbitral tribunal may itself suspect that corruption was involved in the underlying transaction regardless of it being an issue raised by one of the parties. The challenge in this latter scenario and one which has divided opinions is whether the arbitral tribunal has an *ex officio* duty to investigate. There is no clear guidance on this issue.

Perhaps the oldest commercial arbitration case available that has tackled this particular issue is ICC Case No. 1110, where Judge Lagergren felt he had a duty to address corruption and therefore reached a finding that the bribery involved resulted in the non-arbitrability of the

[53] *Id.*

[54] Judgment of the First Civil Law Court of the Swiss Federal Tribunal, Nov. 3, 2016, *available at* http://www.swissarbitrationdecisions.com/atf-4a-136-2016#footnote1_xppk4r2

dispute.[55] In declining to exercise jurisdiction, Judge Lagergren observed that "a case like this, involving such gross violations of good morals and international public policy can have no countenance in any court either in the Argentine or in France, or for that matter, in any civilized country, nor in any arbitral tribunal."[56] The finding of a lack of jurisdiction in this case puts it as an outlier, in light of the well-established doctrine of *kompetenz kompetenz* and doctrine of separability. Generally, these doctrines would allow an arbitrator to rule on its own jurisdiction and exercise jurisdiction over the matter as a result of the arbitration clause separability from the main contract, even if the tribunal ends up deciding that the contract is null and void as a result of the corruption or bribery.[57] In any event, the case illustrates the difficult position facing arbitral tribunals in deciding how to proceed.

Some arbitral tribunals have expressly denounced having a duty to investigate, unless the issue is raised by one of the parties. For example, in ICC Case No. 7047[58], the tribunal stated that,

[55] ICC Case No. 1110 (1963) Yearbook Comm. Arb'n XXI (1996).

[56] *Id.*

[57] In the international commercial arbitration context, corruption issues are generally seen as merits issues. *See* Mark Friedman, *et al.*, Corruption in International Arbitration: Challenges and Consequences, GAR, Aug. 29, 2017, *available at* https://globalarbitrationreview.com/print_article/gar/chapter/1146893/corruption-in-international-arbitration-challenges-and-consequences?print=true; *But see, Metal-Tech Ltd. v. Republic of Uzbekistan*, where the tribunal focused on the text of the treaty (the Israel-Uzbekistan BIT) in applying the corruption defense as a jurisdictional bar. The tribunal focused on the applicable BIT's requirement that arbitration of disputes "concern[] an investment," defined as "any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made…" The tribunal concluded that since corruption occurred in the establishment of the joint venture and the joint venture was not in compliance with the law when it was established, it did not fall under the definition of an "investment" under the applicable BIT and therefore the tribunal had no jurisdiction over the dispute. Yet in *Kim v. Uzbekistan*, the tribunal similarly focused on the text of the Uzbekistan – Kazakhstan BIT, but found that the defense could not be used as a jurisdictional bar, though it might be a factor at the merits.

[58] ICC Award No. 7047, ASA Bull. 1995, at 301 *et seq.*

> If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant. The word "bribery" is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate…[59]

Others in the field have taken the opposite position, in part reasoning that there is a duty in the absence of any express prohibition against a self-initiated investigation. Some have even relied on broad language in the rules as further support that an arbitral is actually empowered to *sua sponte* investigate. For example, the 2012 ICC rules, Article 41, which provides that a tribunal "shall make every effort to make sure that the award is enforceable at law." implicitly requires that a tribunal investigate to ensure that an award is not issued that might violate international public policy and thereby be unenforceable.[60]

Even if the arbitral tribunal believes it has a duty to investigate, there are several constraints its faced with. The most obvious is ensuring that it does not exceed its mandate, such that the "corruption allegation must be determinative of the legal claims at issue."[61] The tribunal's action also must not be seen as infringing on due process concerns, ensuring equal treatment, impartiality and a right to be heard. Besides some of these legal constraints, there are also the obvious practical limitations of a self-initiated corruption investigation. Investigations take up resources, time and

[59] Excerpt of case taken from https://www.trans-lex.org/207047/_/icc-award-no-7047-asa-bull-1995-at-301-et-seq/

[60] For further discussion, *see* A. J. van den Berg, *International Commercial Arbitration: Important Contemporary Questions*, 2003, 227.

[61] *See, e.g.,* Domitille Baizeau and Tessa Hayes, 'The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte, in Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series, Volume 19, Kluwer Law International 2017, pp. 225 -265, *available at* https://www.lalive.law/data/publications/Duty_and_Power_to_Address_Corruption.pdf

money. [62] In light of these issues, tribunals have to carefully consider the scope of their mandate in relation to any corruption issues and the impact such issues may have on the enforceability of an award.

V. Conclusion

Corruption issues are becoming more and more prevalent in international disputes, in part, because there is greater awareness of the issues as a result of the anti-corruption enforcement measures and laws that have increased worldwide. The increase in prevalence means that tribunal and parties need to consider the challenges faced when adjudicating these types of claims. A mistake in the standard applied can potentially change the course of the proceedings and the ultimate resolution of the case, which can thereafter have larger implications at the enforcement stage of the award.

The challenges outlined above have resulted in the varying approaches that tribunals have adopted and similarly varying consequences for parties, especially when reaching the enforcement phase of the award. In determining the standard of proof and other evidentiary issues, these challenges indicate that tribunals need to carefully weigh or balance between on the one hand ensuring that a party has an opportunity to present its case and on the other hand ensuring that these allegations are being raised in good faith and not in an effort to derail or frustrate the arbitration process. In terms of strategy, parties and tribunals must consider and weigh these issues in deciding to raise corruption issues, while at the same time understanding the overall collective worldwide effort to curb corruption and its recognized detrimental impact on international trade and commerce.

[62] *Id.*