

SARAH COTGREAVE

**INTERNATIONAL ARBITRATION: A SAFE HARBOUR
FOR CONSTRUCTION DISPUTES INVOLVING
BRIBERY?**

**MINTR RESEARCH PAPER
LAWS 521: INTERNATIONAL ARBITRATION AND DISPUTE
RESOLUTION**

FACULTY OF LAW



2018

“Infrastructure adds “arms and legs” to strategies aimed at winning “hearts and minds.”

Infrastructure is fundamental to moving popular support away from prewar or during-conflict loyalties and to moving spoilers in favor of postwar political objectives.”

James I Wasserstrom, Head of the Office for Oversight of Publicly Owned Enterprises (Utilities) for United Nations Mission in Kosovo (2008). Cited in United States Institute of Peace “Conflict-Sensitive approach to Infrastructure Development” Special Report 197 (January 2008).

“It is always preferable to resolve disputes in a quick, effective and constructive manner. Otherwise, disputes and uncertainty can lead to additional costs and losses. Commercial arbitration is therefore of great benefit in economic and financial terms – but it is also good for society in general. “

“I ask all of you to use the great power of arbitration to help the world overcome conflict and hatred and build a future of dignity for all on a healthy planet.”

Ban Ki Moon, Keynote Address, International Council for Commercial Arbitration XXIIIrd Congress, Mauritius (9 May 2016).

Acknowledgements: The author thanks Professor Campbell McLachlan QC and Professor Tony Angelo QC of Wellington University Law School for their assistance.

Word length

The text of this paper (excluding title page, abstract, table of contents, footnotes and bibliography) comprises approximately 14,997 words.

Abstract

Construction contracts are of strategic importance for states' economic development. The high level of corruption in such projects is facilitated by their complex nature and significant costs. Estimates of economic losses from corruption in construction, including bribery, could be as high as USD 5.7 trillion between 2015 and 2030.

Arbitration has been described as a "safe harbour for corruption". Disputing parties can limit a tribunal's scope and specify a confidential process that shields their reputation when bribery is suspected. Conversely, an illegality defence may allow respondents to avoid contractual obligations and defendants to persuade national courts not to recognise or enforce international arbitral awards. Could the presence of bribery partially explain why construction disputes have accounted for up to 25% of ICC disputes submitted to arbitration and 10% of regional investment arbitrations?

Few would envy the tribunal's task when adjudicating international construction disputes involving bribery. Tribunals must chart a careful course, navigating between the interests of the parties and other stakeholders, including states wishing to protect their ability to attract foreign investment. Tribunals should fly the flag of transnational public policy against bribery, whilst having limited ability to compel evidence to the accepted high standard. Many different laws and codes must be considered in the jurisdictions of the seat, contract and locations where the bribery allegedly occurred. Whilst tribunals adjudicate in a neutral manner, they may also be influenced by precedent from similar disputes, procedural requirements, plus their own professional standards and codes of ethics.

Kenya's illegality defence in the World Duty Free investment arbitration led to the withdrawal of the machinery of justice from a claim and a windfall for a state where an elected official was bribed to influence the award of the contract. Wide publicity around this outcome could provide the ultimate deterrent for those contemplating bribery. Unsuccessful claimants' options to obtain compensation or remedies include returning to the stormy seas of commercial negotiation where the other party may have little incentive to steer away from an entrenched position. Alternatively, launching litigation to seek restitution or compensation means they may need to sail against the prevailing winds in national courts which are potentially biased towards local entities or the state.

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Note: All errors and omissions are the result of the author’s own work. The views and conclusions expressed in this paper are solely those of the author in her private capacity.

I Introduction

There is an international consensus that bribery, is contrary to public policy.¹ International arbitration may shield allegations of bribery from public scrutiny; hearings are not public, pleadings may be unavailable, and full awards may not be published. By defining the scope of the dispute and limiting what is included in submissions, evidence and hearings, disputing parties may be able to withhold details of suspected bribery to increase the likelihood that tribunals accept jurisdiction and provide prompt, enforceable remedies within their awards.

Commercial contracts for large construction and infrastructure projects may be entered into by investors to make commercial returns or by states to stimulate national development or reconstruct vital infrastructure following natural disasters or conflict. This paper examines whether international arbitration provides remedies within a safe harbour² (affording protection from liability or penalty) for parties involved in bribery within construction contracts to obtain remedies by examining the outcomes from international commercial and investment arbitration of relevant disputes.

Part II sets out the problem and defines its scope. Part III outlines relevant legal concepts, related types of dispute resolution and the interests of stakeholders. Part IV examines legal issues linked to bribery in international arbitration. Part V considering relevant cases from international commercial and investment arbitration, leading to the findings presented in Part VI. The conclusions of this paper are intended to apply to the international arbitration of construction disputes only.

II Construction and Bribery

This section outlines bribery's effects on construction contracting and defines the scope of analysis.

¹ Nigel Blackaby and Constantine Partasides QC with Alan Redfern and Martin Hunter *Redfern and Hunter on International Arbitration* (6th ed, Oxford University Press, Oxford, 2015), at [2.147]. (Redfern and Hunter).

² Thomas Kendra and Anna Bonini, "Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?" (2014) Vol 31 Iss 4 J Intl Arb 439.

A *High Value, Complex Disputes*

The total cost of global construction works has been estimated at USD 17.5 trillion between 2015 and 2030.³ Individual projects may be high value, include many subcontractors, use specialised contract forms⁴ and involve complex, long term financial or investment structures.

Parties use international arbitration to resolve intractable disputes where the issue has not been addressed to the satisfaction of one or both of them within the terms of the construction contract or by commercial negotiation. Claimants in international commercial arbitration may seek relief resulting in payment or performance of the works contracted; the release of equipment, financial guarantees and retentions; restitution; and compensation for related costs. In international investment arbitration, claimants may seek compensation for expropriation of assets.

In 2015, commercial construction and engineering disputes were twenty-five per cent of ICC's⁵ international arbitrations.⁶ From 2014-6, construction investment disputes represented one per cent of all ICSID⁷ cases involving an EU state party; 8-10 per cent involving a state party from the South and East Asia and Pacific region; and in 2015, 9 per cent involving a state party from Africa.⁸ Thus high value, complex construction disputes form a significant proportion of the cases considered by international tribunals.

³ Global Construction Perspectives and Oxford Economics "Global Construction 2030" (2015) Global Construction 2030 <www.globalconstruction2030.com/>.

⁴ Such as the FIDIC suite of contracts. FIDIC is the *Fédération Internationale des Ingénieurs-Conseils* (International Federation of Consulting Engineers).

⁵ International Chamber of Commerce.

⁶ David Kiefer and Adrian Cole "Suitability of Arbitration Rules for Construction Disputes" in Stavros Brekoulakis and David Brynmor Thomas (eds) *The Guide to Construction Arbitration* (Global Arbitration Review, Law Business Research Limited, London, 2016), at 81.

⁷ International Centre for the Settlement of Investment Disputes (ICSID).

⁸ Erin Miller Rankin, Sami Tannous and Matei Purice "Construction Disputes in Investment Treaty Arbitration" in Stavros Brekoulakis and David Brynmor Thomas (eds) *The Guide to Construction Arbitration* (Global Arbitration Review, Law Business Research Limited, London, UK, 2016), at 159.

B The Scourge of Bribery

Businesses' risks of corruption,⁹ including bribery, varies according to size, international exposure, and the nature, scale and diversity of their activities.¹⁰

Bribery is the “act of giving money or another item of value in exchange for an altered behaviour that benefits the giver”;¹¹ whilst kickbacks are bribes paid incrementally, generally a percentage of the contract value.¹² Linked corrupt practices¹³ include: seeking payments (extortion), manipulating tendering processes, wilful blindness to the activities of agents, undisclosed gift giving or extravagant corporate hospitality.

Bribery occurs at many different stages of projects. It taints the procurement of design and construction¹⁴ and is facilitated by the nature of construction.¹⁵ Large projects may involve many participants; every claim for approval of work performed, extension of time or additional payment provides an opportunity for bribes. Decisions made during the term of a contract can have enormous impact on overall cost and the certification of work before it is concealed provides opportunities for bribes to approve defective or non-existent work or materials. State involvement allows government officials to receive bribes for preferential treatment, essential permits or approvals. Low transparency may make bribery difficult to detect; large projects make it easier to hide bribes via inflated claims and unique projects make the benchmarking of costs problematic. A project's context can make construction

⁹ The definition of corruption is “the misuse of office for a private gain.” Peter Spiller *New Zealand Law Dictionary* (8th ed, Lexis Nexis, New Zealand, 2015).

¹⁰ ICC website <<https://iccwbo.org/global-issues-trends/responsible-business/combating-corruption/>>.

¹¹ Serious Fraud Office “What fraud is and what we do” (undated) SFO <<https://www.sfo.govt.nz/what-fraud-is-and-what-we-do>>.

¹² Nassib G Ziadé “Addressing Allegations and Findings of Corruption: The Arbitrator's Investigative and Reporting Rights and Duties” in Domitille Baizeau and Richard Kreindler *Addressing Issues of Corruption in Commercial and Investment Arbitration* (ICC Institute of World Business Law, Paris, 2015), at 117.

¹³ New Zealand's criminal offences relating to bribery and corruption are contained in The Crimes Act 1961 and The Secret Commissions Act 1910.

¹⁴ FIDIC “Corruption: Policy Statement” (September 2003) FIDIC <http://fidic.org/sites/default/files/fidic_policy_corruption.pdf>.

¹⁵ Ahmed Stifi “*The Cause of Corruption in Construction*” (11 July 2017) FIDIC <fidic.org/content/cause-corruption-construction-ahmed-stifi-germany>; Neil Stansbury *Anti-Corruption Training Manual: Infrastructure, Construction and Engineering Sectors* (Global Infrastructure Anti-Corruption Centre, Chesham, UK, 2008); Transparency International “Preventing Corruption on Construction Projects: Risk Assessment and Proposed Actions for Funders” (UK Anti-corruption Forum, 2006).

more prone to bribery, for example, reconstruction in the countries affected by natural disasters or conflict.

Consequently, bribery may be a factor in a number of construction disputes. Bribery may challenge the arbitrator's loyalties to the parties, to party consent, the arbitration agreement and the international legal order and in their role as guardian of good morals in international trade and transnational public policy (TPP).¹⁶

C The Effects of Bribery

Despite global initiatives and national laws combatting corrupt practice,¹⁷ bribery remains a significant risk. Some construction projects have sought to eradicate corruption, for example, the Beijing Olympic Organising Committee intended to make the USD 16 billion construction project the most corruption-free Olympic construction project ever, imposing severe penalties on those who offended.¹⁸

Bribery may lead to excessive or unjustified costs requiring extra investment by companies, taxpayers or financing institutions. The secrecy surrounding bribery makes it impossible to measure. Estimates of losses resulting from corruption, including bribery, in construction contracts generally range between 10 and 30% of the contract value.¹⁹ Transparency International²⁰ estimates that up to one third of construction investment could be lost to corruption.²¹ Therefore, potential global economic losses due to corruption in construction, including from the payment of bribes, could account for up to USD 5.7 trillion between 2015 and 2030.

Bribery is more than an economic problem, inadequate construction designs, materials or methods authorised or ignored as a result of bribes may lead to disasters and loss of life. Other adverse effects include: undermining ability of governments to provide high-quality

¹⁶ L Yves Fortier, QC "Arbitrators, corruption, and the poetic experience: 'When power corrupts, poetry cleanses'", (1 September 2015) *Arbitration International*, Vol 31 Iss 3, at 367–380.

¹⁷ See Part IV.A.

¹⁸ Jim Yardley, "Beijing Olympics Building Chief May Be Executed for Corruption" *New York Times*, (New York, 19 October 2008), <<https://www.nytimes.com/2008/10/20/sports/olympics/20beijing.html>>.

¹⁹ Figures taken from Petter Matthews "This is why construction is so corrupt" (4 February 2016) *World Economic Forum* <www.weforum.org/agenda/2016/02/why-is-the-construction-industry-so-corrupt-and-what-can-we-do-about-it/>.

²⁰ A global civil society organisation fighting corruption.

²¹ Matthews, above n 19.

services; increasing the price of delivering projects; reducing competitiveness of the marketplace by predetermining outcomes of tendering processes; loss of trust and confidence in public officials and business leaders; or destroying a society's social fabric,²² creating dangerous links between business and organised crime, and perpetuating corrupt regimes, indirectly contributing to retarded economic development and human rights abuses.²³ These losses cannot be measured.

D Proposed Analysis

As outlined above, bribery can have serious consequences. This paper focuses on international commercial and investment arbitration involving suspicions, allegations or strong evidence of bribery that have been examined by tribunals at the jurisdiction, merits and enforcement stages. It will also explore incentives for a party to allege bribery during the arbitral proceedings and subsequent enforcement.

To narrow the focus of research, the paper excludes cases where bribery is linked to the conduct of arbitrators or experts during the proceedings and disputes involving concessions for exploitation of natural resources. However, some non-construction arbitral outcomes involving bribery will be used to illuminate related aspects.

The paper will analyse six cases to discover whether international arbitration and the resulting remedies awarded (if any) have successfully upheld TPP against the use of bribery. It will describe how arbitral proceedings have dealt with or potentially uncovered bribery and if it apparent that international arbitration has provided a safe harbour for bribery, protecting or even unjustly rewarding the parties involved.

III Background

Bribery can have a strong effect on many aspects of construction disputes and their arbitration. This part of the paper explores issues which may affect the outcomes.

²² Serious Fraud Office "What fraud is and what we do" (undated) SFO <<https://www.sfo.govt.nz/what-fraud-is-and-what-we-do>>.

²³ Bernardo Cremades and David Cairns, "Transnational Public Policy in International Arbitral Decision Making: The Cases of Bribery, Money Laundering and Fraud", in Andrew Berkeley and Kristine Karsten (eds) in *Arbitration: Money Laundering, Corruption, And Fraud, Dossiers of The ICC Institute of World Business* (ICC, Paris, 2003), at 77.

A Notes on Terminology

New Zealand's primary legislation covering arbitration is the Arbitration Act 1996 (the Act).²⁴ The Act incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).²⁵ This paper uses the interpretation of terms contained in s 2 of the Act. Related concepts are outlined below.

1 Clean hands

This concept examines a party's prior conduct to measure the extent of due protection and claims at two levels: as a bar to jurisdiction and as bar to claims on the merits.²⁶ According to the unclean hands doctrine, a party to a dispute cannot ask for equitable reparation from the other if it is itself in violation of a principle of equity.²⁷

In *Niko Resources v People's Republic of Bangladesh et al*,²⁸ the tribunal considered that three conditions had to be fulfilled to support a clean hands claim: the violation justifying the invocation of the clean hands doctrine should still exist at the time of the claim; the solution requested by the claimant must put an end to such violation; and there must exist a reciprocity in the obligations which constitute the object of the dispute.²⁹

²⁴Arbitration Act 1996, no 99. The Act's purposes are to: encourage arbitration as an agreed method of resolving commercial and other disputes; promote international consistency of arbitral regimes based on the UNCITRAL Model Law on International Commercial Arbitration in its domestic application; promote consistency between the international and domestic arbitral regimes in New Zealand; redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards; facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and give effect to the obligations under the Protocol on Arbitration Clauses (1923), Convention on the Execution of Foreign Arbitral Awards (1927).

²⁵ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, UNTS 330, 3 (opened for signature 10 June 1958, entered into force 7 June 1959). Schedule 3 of the Act incorporates it.

²⁶ Zachary Douglas, "The Plea of Illegality in Investment Treaty Arbitration", ICSID Review, Vol 29 No 1, (2014), at 166-167.

²⁷ *Black's Law Dictionary*, (10th ed, Thomson Reuters, St Paul, MN, USA, 2009), at 306.

²⁸ *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No Case No ARB/10/18 (pending), (*Niko 2*).

²⁹ *Niko Resources v Bangladesh*, ICSID Case no ARB/10/11 (*Niko 1*) (19 August 2013) at [481].

2 *Seat*

The juridical seat of the arbitration³⁰ constitutes the substantive law applied to the subject matter of the arbitration.³¹ Depending on the parties' agreement and the relevant circumstances, the seat can be designated by the parties, or a tribunal.

3 *Lex arbitri*

This is the procedural law of arbitration,³² dealing with the internal procedure of the arbitration itself, for example commencement of the arbitration, appointment of arbitrators, pleadings, provisional measures, evidence, hearings and awards and the external intervention of national courts in the arbitral process.³³

4 *Separability*

This principle results in the construction contract and arbitration agreement being divided or severed into separate contracts.³⁴ Separability leads to an effective arbitration agreement and sustains jurisdiction for the tribunal to make a binding award in the case where the construction contract is not held to be valid as a result of bribery.³⁵

5 *Arbitrability*

The ability of the parties to submit a dispute to arbitration is relevant in several different fora. These include: before the tribunal at the beginning of the proceedings; before state courts, either as a matter to be determined before the arbitration can go ahead, or as a question of whether the award should be set aside; and before the court of enforcement.³⁶

³⁰ Section 3 of Arbitration Act 1996 of England and Wales.

³¹ Section 28(1) of the Act allows the tribunal to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."

³² Lord Collins of Mapesbury (ed) *Dicey, Morris and Collins on The Conflict of Laws* (15th ed, Sweet and Maxwell Limited, London, 2012), at [16-029]. (Dicey).

³³ Dicey, above n 32, at [16-029].

³⁴ Schedule 1, s 16(1) of the Act states: "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not entail *ipso jure* (necessarily) the invalidity of the arbitration clause."

³⁵ Gary Born *International Arbitration: Cases and Materials* (Kluwer Law International, Alphen aan den Rijn, 2011), at 516.

³⁶ Bernard Hanotiau "What Law Governs the Issue of Arbitrability?" (1996) 12 Arb Intl, at 391.

Section 10(1) of the Act restricts parties from using arbitration where the arbitration agreement is contrary to public policy or the dispute is not capable of determination by arbitration. The tribunals' ability to consider matters that are usually referred to the New Zealand courts was recently clarified by adding s 10(2).³⁷

Under art II(1) of the NYC, a state is not obligated to refer a dispute to arbitration if it is not capable of settlement by arbitration.³⁸ Similarly, art V(2)(a) provides that an award need not be recognised if the subject matter of the difference is not capable of settlement by arbitration under the law of that country. These provisions permit the assertion of non-arbitrability defences for both arbitration agreements and awards.

Thus, arbitrability limits the issues that may be adjudicated by a tribunal.³⁹ It involves determining which types of dispute belong exclusively to the domain of the courts,⁴⁰ drawing the line between freedom of contract and the role of courts as protectors of the public interest.⁴¹ Determining which matters are incapable of being arbitrated is the "classic function of arbitrability",⁴² even if the parties otherwise validly agree to arbitrate such matters,⁴³ and is generally known as the non-arbitrability doctrine.⁴⁴ Non-arbitrability varies from country to country.⁴⁵

³⁷ The Act was amended on 1 March 2017 by section 261 of the District Court Act 2016, no 49. Section 10(2) provides: "The fact that an enactment confers jurisdiction in respect of any matter on the High Court or the District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration."

³⁸ See also s 10(1) of the Act.

³⁹ Redfern and Hunter, above n 1, at [2.153].

⁴⁰ Redfern and Hunter, above n 1, at [2.153].

⁴¹ Thomas E Carbonneau with Francois Janson "Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability" (1994) 2 Tul J Intl & Comp L 193 at 194.

⁴² Carbonneau, above n 41, at 195.

⁴³ Gary B Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2014), at 767. See also Carbonneau, above n 41, at 195, 210.

⁴⁴ Carbonneau, above n 41, at 195-196 and 210.

⁴⁵ Albert Jan van den Berg "The New York Convention of 1958: An Overview" in Emmanuel Gaillard and Domenico Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards*, (Cameron May, London, 2008), at 64.

Objective arbitrability relates to the subject matter of the dispute,⁴⁶ such as bribery, and raises questions in respect of fundamental policy.⁴⁷ It is a condition placed on the validity of both the agreement to arbitrate, and the arbitrator's jurisdiction.

Subjective arbitrability is the effectiveness of arbitration agreements categorised by reference to the nature and identity of the parties who must agree to submit to arbitration, such as companies, their agents and states. Subjective arbitrability is concerned with whether there is a valid agreement to arbitrate.⁴⁸

When more than one jurisdiction connects with the arbitration,⁴⁹ choosing which law governs arbitrability is challenging and may depend upon the stage at which arbitrability is raised.⁵⁰ The options for the applicable law include: the law governing the parties' arbitration agreement; the law of the seat of the arbitration; the law of the judicial forum where an arbitration agreement is sought to be enforced; the law that provides the basis for the relevant substantive claim that is said to be non-arbitrable; or a uniform international definition of non-arbitrability derived from the NYC (or other relevant conventions).⁵¹ Some authorities have held that a jurisdiction's non-arbitrability rules will only apply if that jurisdiction has a material connection to the parties' underlying dispute.⁵² There is no consensus about how the choice should be made,⁵³ except during enforcement, when the law governing arbitrability is the law of the forum where enforcement is sought.⁵⁴

⁴⁶ Hazel Fox "State Immunity and the New York Convention" in Emmanuel Gaillard and Domenico Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, London, 2008), at 844.

⁴⁷ Carbonneau, above n 41, at 195.

⁴⁸ Carbonneau, above n 41, at 195, 196 and 210.

⁴⁹ Okezie Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books, London, 1994), at 53.

⁵⁰ Hanotiau, above n 36, at 393.

⁵¹ Gary Born, above 43, at 517.

⁵² Born, *International Arbitration: Law and Practice* (2nd ed, Kluwer Law International, Alphen aan den Rijn, 2016), at 90.

⁵³ Redfern and Hunter, above n 1, at [2.115] and [10.42].

⁵⁴ NYC art V(2)(b). See also Jean-Francois Poudret and Sebastien Besson *Comparative Law of International Arbitration* (2nd ed, Sweet & Maxwell, London, 2007), at [331].

6 *Illegality doctrine*

Illegality in common law jurisdictions covers a violation of a valid law and public policy and may rest in the nature and purpose of such conduct.⁵⁵ As a consequence, two approaches can be used to determine illegality: either it is linked to civil law or it “represents a different level of unlawfulness which is a state of non-conformity with law.”⁵⁶

The illegality doctrine is based on the principle that protection cannot be provided to such conduct or claim, if illegality of conduct has reached a certain level of intensity.⁵⁷ English courts may consider whether the conduct would be considered criminal or otherwise contemptible globally when not punishable under national law.

Some types of illegality of the underlying contract may also render the associated arbitration agreement invalid: “The English court would not recognise an agreement between ... highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds.”⁵⁸ When a dispute includes a claim that a construction is illegal, separability and competence must be considered.

7 *Illegality defence*

This defence arises when the respondent or defendant argues that the claimant should not be entitled to their normal rights or remedies because they have been involved in illegal conduct linked to the claim.⁵⁹ It may be offered to challenge jurisdiction or enforcement. If the tribunal refuses to consider the illegality defence, it may be seen to be sheltering a claimant who has behaved illegally within a safe harbour.

8 *Transnational public policy*

Public policy is the “principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good”⁶⁰ and is incorporated in

⁵⁵ Alexander Bělohávek *Arbitration, Ordre Public and Criminal Law* (Taxon, Ukraine, 2009), at 2527-9.

⁵⁶ Loukas Mistelis “Legal Issues Arising out of Disputes Involving Fraud, Bribery, Corruption and Other Illegality and Illicitness Issues” in Emmanuel Gaillard and Domenico Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards*, (Cameron May, London, 2008), at 575.

⁵⁷ Bělohávek, above n 55, at 2543.

⁵⁸ *Soleimany v Soleimany*, [1999] QB 785 (CA), 3 All ER 847, at 796. (*Soleimany*).

⁵⁹ Law Commission, “The Illegality Defence,” Law Com No 320 (2010),

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229171/0412.pdf>.

⁶⁰ *Egerton v Brownlow* (1853) 4 HLC1.

international conventions to prevent unwanted effects.⁶¹ A contract may be contrary to domestic public policy if it contemplates an act which is illegal in that state.

TPP can be defined as “the set of legal principles, not belonging to the law of a particular State”.⁶² It is reliant on consensus between states⁶³ and prevails over other domestic and international norms. The number of matters considered as falling under TPP is smaller than those covered by domestic public policy and constitutes the questions of arbitrability⁶⁴ and whether an arbitral award can be recognised and enforced as a matter of public policy.⁶⁵ TPP is confined to “violation of really fundamental conceptions of legal order in the country concerned”⁶⁶ and is applied by a national court to foreign arbitral awards in an international context.⁶⁷

When used negatively, public policy prevents the enforcement of otherwise valid contracts, for example, if an act would be illegal abroad. Positively used, it can give effect to agreements invalid under contractual law.

B Construction and Dispute Resolution

Construction disputes are frequently technically complex, requiring specialist guidance.⁶⁸ Commercial parties may be able to forum-shop for dispute settlement once negotiation-

⁶¹ Dirk Otto and Omaia Elman “Article V(2)” in Herbert Kronke, Patricia Nascimento, Dirk Otto and Nicola Christine Port *Recognition and Enforcement of Foreign Arbitral Awards* (Kluwer Law International, Alphen aan den Rijn, 2010), at 365

⁶² Pierre Mayer “Effect of International Public Policy in International Arbitration?” in Loukas A Mistelis and Julian D M Lew (eds) *Pervasive Problems in International Arbitration* (Kluwer Law International, The Netherlands, 2006), at [2-8].

⁶³ See International Law Association Committee on International Commercial Arbitration “Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards” (International Law Association New Delhi Conference, 2002) at [11], (ICC Report); and Mayer, above n 62, at [2-9].

⁶⁴ Van den Berg, above n 45, at 63.

⁶⁵ Articles V(2)(a) and V(2)(b) of the NYC respectively.

⁶⁶ Pieter Sanders “Commentary” in *International Arbitration: 60 years of ICC Arbitration, a look in the future* (ICC Publishing, Paris, 1984).

⁶⁷ Deniz Yalcin *Bribery, Public Policy and Enforcement of Arbitral Awards*, Victoria University of Wellington, Law School Research Paper (2008), at 35.

⁶⁸ ICC Report, at [10].

based avenues have become untenable, if the contract permits this.⁶⁹ The most frequent commercial claims that employers or clients pursue are: the time for delivery of a project; the quality of what is delivered; termination and payment.⁷⁰

Parties may resolve disputes using methods other than arbitration.

1 Contractual provisions

Construction contracts allocate risks between clients and contractor and may be subject to specific national legislation.⁷¹ The contract may include agreements on: contractor compensation; remedies or damages; and financial structure and ownership of the assets. Many issues can be resolved by recourse to provisions in the contract.

Recent revisions to FIDIC contracts aimed to promote active project management and continuous dispute resolution throughout the contract period.⁷² Some forms establish a Dispute Avoidance Adjudication Board (DAAB) to assist on request. Where a party is dissatisfied with the DAAB's decisions, it may commence arbitration as a claimant. Disputes that cannot be resolved at this stage are likely to be relatively intractable.

Anti-bribery provisions are included in some standard construction contract forms. In the NEC4 suite,⁷³ the contractor undertakes not to perform a "corrupt act"⁷⁴ and ensures that the construction contractor has similar provisions within their subcontracts.⁷⁵ A right to terminate exists in certain circumstances where there has been a corrupt act.⁷⁶ The FIDIC

⁶⁹ Moritz Renner "Private Justice, Public Policy: The Constitutionalization of International Commercial Arbitration" in Walter Matti and Thomas Dietz *International Arbitration and Global Governance* (Oxford University Press, 2014), at 117.

⁷⁰ James Bremen and Mark Grasso "Employer's claims and Remedies" in Stavros Brekoulakis and David Brynmor Thomas *The Guide to Construction Arbitration* (Global Arbitration Review, Law Business Research Limited, London, UK, 2016), at 72.

⁷¹ Jane Jenkins and Simon Stebbings *International Construction Arbitration Law* (Kluwer Law International, Alphen aan den Rijn, 2006), at 7.

⁷² Norton Rose Fulbright, "FIDIC 2017...The end of the rainbow?" (January 2018) Norton Rose Fulbright <www.nortonrosefulbright.com/knowledge/publications/162807/fidic-2017the-end-of-the-rainbow>.

⁷³ NEC website at <<https://www.neccontract.com/NEC4-Products>>.

⁷⁴ Core Clause 18.1 NEC4 Engineering and Construction Contract, Core Clause 17.1 NEC4 Professional Services Contract, Core Clause 18.1 NEC4 Design, Build and Operate Contract.

⁷⁵ Core Clause 18.2 NEC4 Engineering and Construction Contract, Core Clause 17.2 NEC4 Professional Services Contract, Core Clause 18.2 NEC4 Design, Build and Operate Contract.

⁷⁶ See Clause 91.8 of NEC4 Engineering and Construction Contract, June 2017.

“Pink Book”⁷⁷ allows the employer to terminate the contract if it has determined that the contractor has engaged in corrupt practices. However, termination may be impractical where a substantial proportion of the works have been completed or there is no alternative contractor who may be qualified, willing and available to achieve their completion.

2 *Commercial negotiation*

Parties may choose to negotiate variations to the construction contract or another form of settlement to resolve any contractual dispute. This option allows the facts and outcomes to remain confidential and could involve an independent mediator.

3 *Commercial litigation and mediation*

Specific legislation may govern construction.⁷⁸ A contractor may be able to enforce the construction contract, or sue for damages or payment on a *quantum meruit* (as much as one has deserved) or *quantum valebant* (as much as they were worth) basis for work done or goods supplied, or for the return of property transferred.⁷⁹ Advantages of using litigation includes: the ability to join related proceedings; bind other parties; orders of interim relief and ability to subpoena witnesses. However, listing delays, lengthy procedures (where the facts available within the proceedings may become publicly available as part of the court’s records and affect the parties’ reputations), the “home court advantage”, inability to choose a judge knowledgeable in construction and the right to appeal may be too limiting for a party to an international dispute where bribery may be present.

Using litigation may be a risky strategy if the contract requires the use of arbitration and one party seeks to enforce arbitration via the principle of separability. Some claims may be non-justiciable; English courts refuse to provide relief to a party privy to illegality, including where the contract was procured by the claimant’s pre-contractual bad faith⁸⁰ and the court may not entertain claims based on foreign penal law which punishes an offence under the law of a foreign state or if the defendant has immunity from the suit.⁸¹

⁷⁷ Clause 15.6 of FIDIC *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer*, Multilateral Development Bank Harmonised Edition, (FIDIC, Paris, June 2010).

⁷⁸ Such as the Construction Contracts Act 2015 which determines how a contractor should be paid.

⁷⁹ Richard Fentiman *International Commercial Litigation* (Oxford University Press, 2010), at 135-140.

⁸⁰ Fentiman, above n 79, at 709.

⁸¹ Fentiman, above n 79, at 409-411.

C Types of Party

In terms of subjective arbitrability, parties to a construction contract can be individuals, private organisations, states, government agencies or State-Owned Entities (SOEs). Construction contracts will define the roles of the parties: client (or employer) and the contractor (or investor) executing or delivering the works. Some contract structures require an engineer⁸² or project manager⁸³ supervising or managing the construction who may also certify progress and issue instructions to the contractor.

Two specific party types requiring consideration in relation to bribery are discussed below.

1 Agents

As agents or consultants may channel bribes to recipients; some states regulate their involvement or activities.⁸⁴ If a tribunal gives little weight to mandatory provisions of any law forbidding the use of intermediaries in tendering for public contracts, and instead relies decisively on the law chosen by the parties, its decisions will be open to criticism and potential challenge.

Analysis of 25 arbitral awards involving agents and bribery⁸⁵ concluded that international arbitrators: accepted jurisdiction; considered their primary duty was owed to the parties to settle the dispute in accordance with the parties' agreement; required clear proof of bribery before invalidating an agency agreement; searched for indications of bribery on their own initiative only in a minority of cases; gave precedence to the public policy rules established by the governing law as designated by the agreement between principal and agent. This research was conducted 15 years ago, so tribunals' practice in this area may have evolved.

⁸² FIDIC has adopted codes of conduct which underscore the importance of combating corruption in the profession. For instance, FIDIC encourages the implementation of an 'Integrity Management System', focusing on preventive action to fight corruption. See, the FIDIC Integrity Management System (2011), <<http://fidic.org/node/777>>.

⁸³ Such as in some NEC4 contracts used in the UK, which offer a provision for dispute resolution procedures, with new processes to help parties avoid the time and costs of formal disputes.

⁸⁴ See *Hilmarton* in Part V.D.

⁸⁵ Antonio Crivellaro "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in Kristine Karsten and Andrew Berkeley (eds) *Arbitration: Money Laundering, Corruption and Fraud, Dossiers of the ICC Institute of World Business Law Vol 1* (Kluwer Law International; International Chamber of Commerce, 2003), at 118.

2 States

The principle of *pacta sunt servanda* (agreements are to be kept) requires parties to adhere to the terms of their contract. Exceptions for states are only justified in cases of fundamental and unforeseeable changes in circumstances such as revolutionary turmoil or significant change in the political relationship between countries.⁸⁶

Public interest and policy considerations may justify special provisions where states conclude commercial contracts requiring arbitration.⁸⁷ Public or other mandatory law rules may come into consideration more often than in contracts between private enterprises.⁸⁸

As SOEs are prone to specific corruption vulnerabilities,⁸⁹ the arbitrability of disputes involving states and their officials must consider whether they can claim immunity (see Part IV.C below).

Investors' requirement to feel secure in their investments has led some states to enter into bilateral and multilateral investment treaties. States may be subject to investment arbitration under the Washington Convention⁹⁰ (and use ICSID⁹¹ as a forum). If an investor can evidence that it qualifies for protection and the contractual arrangement is an investment, it may be able to separately pursue a legal claim under an applicable treaty, once all other legal recourse has been exhausted.

⁸⁶ ICC Case 7365 (unpublished), cited in Eduardo Silva Romero "ICC Arbitration and State Contracts", (2002) 13 ICC Bulletin 34, at 79.

⁸⁷ Silva Romero, above n86, at 36; see also Karl-Heinz Böckstiegel *Arbitration and State Enterprises* (Kluwer, Deventer, The Netherlands, 1984), at 41.

⁸⁸ Böckstiegel, above n 87.

⁸⁹ Peter Wilkinson "10 Anti-Corruption Principles for State-Owned Enterprises" (28 November 2017) FIDIC <<http://fidic.org/node/13724>>. These include: close relationships between government, politicians, SOE boards and senior management; poor governance and management; poorly managed conflicts of interest; lack of accountability through transparency and public reporting. These vulnerabilities can result in bribery.

⁹⁰ The Washington Convention, or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966 (entered into force on October 14, 1966). It is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment.

⁹¹ ICSID was established by the Washington Convention.

Policy concerns can be invoked by the state to avoid specific obligations under a contract or to escape from liability, resulting in grave disadvantages for the private party.⁹² Thus, there may be an imbalance of contractual rights where one party is a state. Therefore, contractors may prefer to use international arbitration to be able to pursue claims and enforce an award via the NYC. Selecting arbitration means that parties can avoid the idiosyncrasies of local court systems and their inherent risks.⁹³

D Parties' Interests

Parties may share interests to a greater or lesser degree.

1 Confidentiality

Parties may commit a tribunal to maintain confidentiality of the proceedings, unless the tribunal's procedural rules or applicable treaties prohibit it. This may preserve business reputation, protect sensitive information, and allow resolution in private to facilitate ongoing relations.⁹⁴ Information disclosed is less likely to be published than in litigation or the judicial context, where facts may automatically become part of the public record.⁹⁵

Tribunals may not allow public interest concerns to be met during relatively closed, non-transparent processes.⁹⁶ Arbitration may shield allegations of bribery from public awareness or scrutiny. However, if the losing party seeks to have an award vacated by a court, much of the information in the proceedings may escape into the public domain.

The ability of third parties to participate in ICSID proceedings by submitting *amici curiae* (friends of the court) briefs slightly improves public access. The recent Mauritius Convention on Transparency⁹⁷ is intended to contribute to a "legal framework for a fair

⁹² See Eduardo Silva Romero "The Dialectic of International Arbitration Involving State Parties" (2004) 15 ICC Bulletin, at 80.

⁹³ Kiefer, above n 6, at 81

⁹⁴ Emmanuel Gaillard and John Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) (Fouchard), at [1412] notes that "The confidentiality of both the proceedings and the award is of course one of the attractions of arbitration in the eyes of arbitration users."

⁹⁵ The choice of arbitration rules may provide for such a duty. The UNCITRAL Arbitration Rules provide that "the award may be made public only with the consent of both parties." art 32(5).

⁹⁶ Cecily Rose *Questioning the Role of International Arbitration in the Fight Against Corruption* (27 August 2013) Leiden Law School Research Paper, Leiden, Netherlands, at 185. <ssrn.com/abstract=2374452> accessed on 10 July 2018.

⁹⁷ United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Resolution 69/116 adopted by the UN General Assembly on 10 December 2014 (open for signature on 17 March 2015, entry into force on 18 October 2017) <www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>.

and efficient settlement of international investment disputes”.⁹⁸ Its preamble recognises the need for transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved.

2 *Predictable outcomes*

Tribunals and counsel may consult previous awards to inform interpretations of contractual provisions or situations in cases involving suspected or alleged bribery.⁹⁹ The ICC publishes excerpts from awards dealing primarily with FIDIC contracts.¹⁰⁰ This soft law influences the decisions of future panels and the conduct of the parties, the advantages or disadvantages of being the respondent or the claimant, and what claims will be submitted.

3 *Claimant or respondent?*

There are asymmetric effects from being a claimant or respondent. The respondent has the potential advantage of submitting an illegality defence. In investment arbitration, where the host state is usually a respondent, the traditional approach to bribery, according to which parties should be left where they stand and no legal remedy should be granted to the claimant, can result in unsatisfactory and inefficient outcomes. The potential for using the illegality defence could represent an incentive for the host State to favour a scheme involving bribery.

4 *Specialist arbitrators and experts*

Construction disputes may involve complex technical issues. Arbitration allows parties to appoint arbitrators with construction experience¹⁰¹ ensuring a breadth and depth of legal and subject matter expertise, supplemented by expert witnesses.¹⁰² This can make hearings more efficient and reduce the probability of an unpredictable result.

⁹⁸ Ban Ki Moon “Keynote Address to International Council for Commercial Arbitration Congress”, in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Volume 19 (Kluwer Law International, online, 2017), at 18–20.

⁹⁹ For example, *ICC Case No 5277* (1988) 13 Y B Comm Arb 80 relies on prior FIDIC arbitration decisions.

¹⁰⁰ For example, “International Construction Contract Disputes: Fourth Commentary on ICC Awards Dealing Primarily with FIDIC Contracts” (2013) 24 *ICC Bull no 2* at 49.

¹⁰¹ For example, the FIDIC President’s List of Approved Dispute Adjudicators are experienced in their Contracts, dispute resolution, construction contract adjudication and DAABs. President’s List adjudicators must pass tests administered by the FIDIC Body of Adjudicators.

¹⁰² Specialized arbitration rules for use in construction disputes include the Construction Industry Model Arbitration Rules in the UK, the American Arbitration Association Construction Arbitration Rules.

5 *Neutrality*

Arbitrators must be acceptable to both parties. Arbitration may provide a more neutral system for resolving disputes, reducing the potential for bias towards locally based parties in litigation undertaken in national courts.

6 *Time and cost*

The client may have an interest in ensuring that the construction is completed on-time, to the required standard and at the agreed cost with limited variations. The contractor will wish to be paid for work done and ensure timely release of equipment, materials, retentions and financial securities or guarantees.

Depending on the jurisdiction, arbitration may allow parties to commence proceedings faster than via litigation, and to receive interim or partial awards before the final award. Parties may seek to expedite an outcome to minimise the time and costs of participation, including that of adjudicators and expert witnesses. International commercial arbitration may also reduce project disruption, protecting the parties existing investment and assisting in maintaining their relationship.

7 *Enforcement*

Parties may use international arbitration to ensure that the award(s) cannot be contested via national courts in other jurisdictions. The source of validity from which arbitrators derive powers to make awards has been conceptualised as originating from national legal orders recognising the existence of an autonomous “international arbitral legal order” which makes decisions based on “universal acknowledgement of the moral norm”.¹⁰³

International arbitration awards, properly rendered, are easier to enforce in foreign jurisdictions than national court judgments. Arbitration treaties, including the NYC, require courts in signatory states to recognise and enforce foreign awards. Parties may be nationals of different countries, with assets located in several jurisdictions. Arbitral awards may be the only means of means of enforcing remedies obtained in other jurisdictions. However, the binding nature of arbitral awards means that parties can be forced to comply with unpredictable outcomes considering the wide range of laws, regulations, interests and stakeholders when bribery is suspected, alleged or evidenced. Outcomes may be seen as sub-optimal if the tribunal avoids issues related to bribery. Parties may then wish to consider challenging the award.

¹⁰³ Emmanuel Gaillard *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, 2010), at 45.

Awards from commercial arbitration may be annulled or denied recognition if they concern a non-arbitrable matter. Public policy grounds to deny enforcement of an award may include judgements that would further an act illegal in a foreign state¹⁰⁴ or where it involves objectionable conduct. During enforcement, the fundamental issues may only be relitigated if the tribunal did not have the opportunity to consider the matter fully. Fresh evidence may allow the defendant to raise public policy by way of defence.¹⁰⁵ Illegality can provide “the special circumstances in which an estoppel will not provide a defence”¹⁰⁶ and requires determination of whether there is prima facie evidence that the contract is tainted by illegality.¹⁰⁷

Historic appeals in cases involving foreign bribery may not have always invoked the principle that infringement of public policy must be prevented. In *Westacre*,¹⁰⁸ Sir David Hurst accepted the view of Colman J that “although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug trafficking.”

E Tribunals’ Considerations

The tribunals’ interests include ensuring that its jurisdiction cannot be subsequently challenged and the award can be recognised and enforced.¹⁰⁹ These considerations support the maintenance of individual arbitrator’s professional reputation and that of international arbitration as a reliable and binding method of dispute resolution.

I Arbitration agreement

Using the principle of separability, the tribunal has jurisdiction to determine the parties’ respective rights and to decide their claims and pleas even though the construction contract may be null and void.¹¹⁰

The agreement should provide a clear and unequivocal consent to submit to arbitration. The choice of certain arbitration rules may constitute a waiver or "exclusion agreement"

¹⁰⁴ *Soleimany v Soleimany* [1999] QB 785 (CA), 3 All ER 847 (*Soleimany*) held that an arbitral award, domestic or foreign, was unenforceable if contrary to public policy.

¹⁰⁵ Fentiman, above n 79, at 710.

¹⁰⁶ *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [2000] QB 288, at 306-317. (*Westacre*)

¹⁰⁷ *Soleimany*.

¹⁰⁸ *Westacre*, at 773.

¹⁰⁹ G Horvarth “The duty of the tribunal to render an enforceable award”, (2001) 18 J Int’l Arb 135.

¹¹⁰ Article 6.9 of the International Chamber of Commerce, *Rules of Arbitration* (2012). (ICC Rules).

by which the parties may voluntarily restrict judicial review or eliminate it altogether. The arbitration agreement may allow the disputing parties to limit the scope of the tribunal as set out in any claim and response.

2 Arbitral procedure

Specialist procedural rules may be used during construction arbitration. FIDIC arbitration uses the ICC Rules of Arbitration (ICC Rules), requiring tribunals, parties and their representatives to abide by the highest standards of integrity and honesty.¹¹¹ The court and tribunal act in the spirit of the Rules and make every effort to ensure that the award is enforceable at law.¹¹² Any party may apply to the tribunal for the determination that matters in claims or defences fall outside the tribunal's jurisdiction.¹¹³

Whilst the ICC Rules provide a framework, the tribunal needs to understand how to achieve efficient management of large and complex construction arbitrations.¹¹⁴

3 External stakeholders

Tribunals may consider the interests of stakeholders who are external to the arbitration. These include: national investigators and prosecutors; professional bodies; banks; investors; taxpayers; governments; non-government organisations; and private citizens. External stakeholders' interests may include: seeking transparency and prosecution of bribery; value for money; protecting investment returns; or states maintaining a location's reputation to attract foreign investment.

4 Morality

Tribunals uphold the international commercial contracts of private parties, which are then enforced in domestic courts of law. This process can be considered as transforming private enforcement of commercial agreements into a matter of public interest and responsibility as a public good.¹¹⁵ Investigations of claims of bribery, particularly where it was not raised

¹¹¹ ICC Rules, art 22.4; see also ICC "Note to parties and tribunals on the conduct of the arbitration under the ICC rules of arbitration" (30 October 2017) at [32]. (ICC Notes).

¹¹² ICC Rules, art 42.

¹¹³ ICC Notes, at [60]

¹¹⁴ Humphrey Lloyd QC, J, ICA Report on Construction Industry Arbitrations, (2002) Building Dispute Practitioners' Society Newsletter, FIDIC
<http://fidic.org/sites/default/files/29_humphrey_lloyd_arbitrations02.pdf> accessed on 30 April 2018.

¹¹⁵ A Claire Cutler "Arbitration and New Constitutionalism", in Walter Mattli and Thomas Dietz *International Arbitration and Global Governance* (Oxford University Press, 2014), at 151-4.

by the parties, may invite challenges to the arbitrator's jurisdiction and the validity of the award on the basis of *ultra vires*. Conversely, to disregard the possibility of bribery in a dispute may undermine the enforceability of the award.¹¹⁶

The *Westacre* tribunal considered that if “the defendant does not use it in his presentation of facts, an arbitral tribunal does not have to investigate”. Given that bribery may be considered prohibited by TPP, arbitrators should pay due regard to it. Arguably, arbitrators should be proactive in dealing with bribery issues and arbitral courts should provide instructions in their procedures or guidelines on how to deal with bribery. Otherwise, it is possible that a tribunal may validate the legality of a contract that a state prosecutor would view as illegal.¹¹⁷

If an internationally agreed *ordre public* (public order) banning bribery has emerged,¹¹⁸ one can examine motives which may affect adjudication, including morality.¹¹⁹ Arbitrators may take the moral high ground against corrupt investors. A fear of being seen as soft on bribery may drive tribunals to dismiss claims on either jurisdictional or admissibility grounds. Zero tolerance of corruption may be seen as necessary in order to uphold international public policy and maintain the integrity of the arbitral process. On the other hand, such an approach might encourage corruption when host states benefit from an illegality defence to claims in respect of investments or contracts procured by bribery

Dismissing claims on contracts involving bribery does not involve tribunals taking one side; it withdraws the machinery of international justice from all involved.¹²⁰ If a contract is no longer actionable because of illegality, a claim for restitution may be available to innocent parties in certain circumstances to account for value that has nevertheless transferred without recompense.

¹¹⁶ D Srinivasan, H Pathak, P Panjwani, and P Varma (2014) ‘Effect of bribery in international commercial arbitration’, *Int. J Public Law and Policy*, Vol. 4, No 2, at 142.

¹¹⁷ A Timothy Martin ‘International arbitration and corruption: an evolving standard’, *International Energy and Minerals Arbitration* (Spring, 2002), Mineral Law Series, at 5-7.

¹¹⁸ Mark Pieth “Transnational commercial bribery” in Kristen Karsten and Andrew Berkeley (eds) *Arbitration; Money Laundering, Corruption and Fraud* (ICC Publishing SA, Paris, 2003), at 45.

¹¹⁹ Ziadé, above n 12, at 746–759.

¹²⁰ Constantine Partasides “Remedies for Findings of Illegality in Investment Arbitration”, in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series, Volume 19 (Kluwer Law International, 2017) at 745.

Part III has outlined that arbitrators in disputes involving bribery have a difficult balancing act: compliance with TPP, the procedural requirements and limits emanating from the arbitration agreement, the standards of their individual professional bodies, including any ethical codes; meeting applicable legal, regulatory or procedural requirements of the jurisdiction of the seat and the forum; and the requirement for neutrality.

Whilst a number of the attributes of international arbitration may lead to it being seen as a safe harbour for corruption, the journey may not be smooth. Arbitration may be costly and time-consuming, challenges via national courts can halt proceedings, tribunals cannot exceed their authority;¹²¹ the binding nature of awards and lack of appeal may mean the destination may be unpredictable;¹²² and there may be issues with enforcement in countries that are not signatories to the NYC. Legal issues connected to bribery are explored in Part IV.

IV Bribery: Applicable Law, Policy and Procedures

This part of the paper examines specific legal issues in construction disputes involving bribery that are referred to international arbitration.

A Anti-bribery Laws and Regulations

From an economic perspective, bribery may be beneficial or harmful depending on efficiency or welfare effects, benefits may include opening up competition, although it can lead to a loss of confidence in the institutional structure of society.¹²³ In contrast, bribery of officials is prohibited via civil laws or codes in many countries.

1 International instruments

Increased globalisation may have created the momentum for increasing development of anti-corruption measures by international financial institutions, NGOs and the private sector.¹²⁴ After the 1977 enactment of the Foreign Corrupt Practices Act (FCPA),¹²⁵ the United States pressed for an international standard against bribery to avoid losing

¹²¹ Arbitral awards can be partially enforced when they contain decisions within and outside authority.

¹²² William H Knull and Noah D Rubins “Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?” (2000) *Am Rev Int’l Arb* Vol 11, at 538.

¹²³ Mushtaq H Khan “A Typology of Corrupt Transactions in Developing Countries” (1996) *IDS Bulletin* Vol 27 No 2, at 12-20.

¹²⁴ Pieth, above n 118, at 42.

¹²⁵ Foreign Corrupt Practices Act 1977.

competitive advantage,¹²⁶ culminating in a 1997 OECD Convention requiring signatories to criminalise practices with might facilitate or conceal bribery.¹²⁷ In 2003, the United Nations Convention against Corruption (UNCAC)¹²⁸ defined a minimum standard for prevention, criminalisation, international cooperation, and recovery of the proceeds of corruption, when ratified by its signatories and enacted into their domestic legislation.

2 National legislation

National laws and codes have resulted in differing standards defining or prohibiting the bribery.¹²⁹ For instance, prohibited and illegal bribery in domestic civil laws and regulations may overlap with legally approved lobbying in some countries. The standards to be applied may depend on the seat of the arbitration.¹³⁰

Tribunals should address alleged bribery under relevant civil law and codes to uphold public policy. To assess bribery's illegality, it may also be necessary to consider subjective arbitrability issues such as the personal status of a participant, including when acting as an agent.

3 Proceedings in national courts

Bribery is a crime in many countries. It can occur at different times and involve different parties. Usually surrounded by secrecy, bribery's effects on commercial transactions may be difficult to prove if there is little conclusive evidence. Even where there is sufficient evidence to justify a criminal prosecution or other penalty such as a fine, investigations and legal proceedings may be lengthy and bear no relation to the timescales within which the parties may wish to settle commercial disputes.

Anti-bribery laws can have international reach and impose substantial fines. The convictions or determinations from national courts will usually meet tribunal's high standard of evidence for bribery. An investigation under the FCPA resulted in a penalty for

¹²⁶ Cremades, above n 23, at 68-9.

¹²⁷ OECD Convention on Combatting Bribery of Foreign Public Officials 1997

¹²⁸ United Nations Convention against Corruption 2003, UNTS 2349, 41 (opened for signature 31 October 2003, entered into force 14 December 2005) ("UNCAC").

¹²⁹ The UNCAC was ratified by New Zealand in 2015. The Organised Crime and Anti-Corruption Legislation Bill (2015), which amended created new corruption offences related to solicitation and acceptance of bribes by foreign public officials.

¹³⁰ Bělohávek, above n 55, at 2431.

Siemens¹³¹ in 2008. Including construction related offences, Siemens's settlement resulted in a total of USD 1.6 billion in fines, including €395 million in Germany.¹³²

B Illegality

Illegality involves the intersection of civil and private law and is connected to four issues: validity of arbitration agreements; arbitrability of a dispute involving illegality based on a genuinely international public policy; applicable civil law which may differ between jurisdictions and affect arbitrability; and enforceability of an award.¹³³

1 Determining illegality

The suppression of corruption, including bribery and money laundering, is an established part of TPP and must be respected by international arbitrators.¹³⁴ A tribunal may, on its own motion, investigate suspicions of serious illegality or refer to the related judgments of national courts.

2 Contracts for corruption

Two categories of contract involving bribery may arise in international arbitration. The first is contracts for corruption; where evidence of suspect agreements with an object of corruption has been established and the bribery was intended by both parties to the contract. Under English law, a contract for corruption is illegal and contrary to public policy; such contracts are treated as automatically void and unenforceable. This contract may involve an agent or intermediary.

In the event that contracts for corruption and their associated arbitration agreements are found to be null and void, then NYC art II(I) allows a contracting state to find that the subject matter is not capable of settlement by arbitration. National courts have authority to issue orders which prevent initiation or further continuation of arbitration, so that arbitrators or parties are forced to leave the arbitration to avoid being in contempt of court.

¹³¹ *Securities and Exchange Commission v Siemens Aktiengesellschaft*, Civil Action No 08 CV 02167 (DDC).

¹³² Securities and Exchange Commission Press Release "Litigation Release No 20829" (15 December 1998) <<https://www.sec.gov/litigation/litreleases/2008/lr20829.htm>>.

¹³³ Mistelis, above n 56, at 582.

¹³⁴ Cremades, above n 23, at 68.

3 *Contract obtained by corruption*

The second type of contract is a contract obtained by corruption,¹³⁵ where one of the parties is normally aware of the corruption and intended to obtain the contract by these means.¹³⁶ These are regarded under English law as being voidable at the option of an innocent party, and not automatically void, unless and until the innocent party elects to avoid the contract. This protects the party that suffers the effects of improper influence.¹³⁷

If a party can evidence that a contract is invalid, it may be able to seek monetary damages, contractual restitution or avoid the contract via negotiation or litigation. Depending on the jurisdiction, avoidance of the contract can either be retroactive or be limited to the application of the contract in the future. Expenses incurred by the contractor for having to reapply for the contract via a procurement process or negotiate a new contract may or may not qualify as damages.

A state may wish to enforce the contract derived from the bribe if, for example, execution is already too far advanced or the provider has proprietary or unique goods or services. In that case, damages may consist of the excess amount paid by the state under the contract.

Separability of the arbitration agreement means that contracts obtained by corruption may still be found to be arbitrable. Schedule 1, s 16 of the Act allows a tribunal constituted under New Zealand law to rule on its own jurisdiction, including any objections with respect to the validity of the arbitration agreement linked to bribery. Parties may make a plea that the tribunal does not have jurisdiction no later than the submission of the statement of defence. If allegations of bribery are alleged during the proceedings and are seen to be beyond the scope of the tribunal's authority, a party can raise a plea as soon as the matter arises. The tribunal may also admit a later plea if it considers the delay justified. The arbitral tribunal may rule on such pleas either as a preliminary question or in an award on the merits. If the tribunal rules on the plea as a preliminary question, any party may request the High Court to decide the matter, within 30 days after receiving notice of the ruling.

4 *Intersection of civil and private laws*

The interconnection of civil law and private law, especially the consequences of punishable conduct for the assessment of the validity of a private claim and its enforceability, is

¹³⁵ Fortier, above n 16, at 367–380.

¹³⁶ *Niko I*, above n 30, at [443].

¹³⁷ Fouchard, above n 94, at [586].

assessed as stronger under common law, and in English legal practice in particular, than in civil law systems where these domains may be more delimited.¹³⁸

One commentator has argued that tribunals have made an unsatisfactory contribution to the adjudication of bribery allegations,¹³⁹ as research uncovered avoidance techniques by tribunals and parties, questionable reasoning by tribunals and major evidentiary problems that tribunals face in ruling on such allegations. A number of tribunals “avoided the difficult task of ruling on corruption allegations through jurisdictional manoeuvres” and rarely found the party raising allegations of corruption met the requisite standard of proof.¹⁴⁰ Some awards referenced the potential harm that findings of bribery could do to a state's ability to attract foreign direct investment.

The notion that the enforcement of privately created arbitration agreements including illegality is in the public interest has been subject to criticism. By privatizing what should be public regulation, and by putting investors on an equal footing with sovereign states instead of subjecting them to sovereign power, democracy may be undermined, and as a consequence, public interests are not sufficiently considered.¹⁴¹

C State Immunity

States and SOEs often fund major construction and infrastructure. It is a generally accepted principle in international law that a state may not abuse legal rights to evade obligation; nor may it excuse itself for breaches of obligations in public international law by reference to its own national law.¹⁴²

State immunity issues can be covered in the arbitration agreement, providing effective waiver of immunity provision for commercial proceedings brought against the state and its agencies and against enforcement of an arbitral award or judgement against the state.¹⁴³

¹³⁸ Bělohávek, above n 55, at 2541.

¹³⁹ Rose, above n 96, at 183-264.

¹⁴⁰ Rose's conclusion notes that inaccurate assumptions about the inherently low likelihood of corruption may have informed some older arbitral awards, but this type of reasoning seems to have largely dropped out of the jurisprudence in more recent years.

¹⁴¹ Ralf Michaels “International Arbitration as private and public good”, (16 August 2017) Duke Law School Public & Legal Theory Series No 2017-57, Durham, NC, United States.

¹⁴² Böckstiegel, above n 87, at 45.

¹⁴³ See Jenkins, above n 71, at 91.

Thus, commercial arbitration can be used to resolve disputes regardless of the potential jurisdictional immunity of government organisations.

Arbitrators considering disputes involving a state or SOE may treat the issue of immunity as a prior procedural point to ensure that awards can be enforced by national courts applying the New York Convention (NYC).¹⁴⁴ Arbitrators may require separate waivers from state organisations to consent to jurisdiction and for enforcement of the resultant award before undertaking the arbitration process.¹⁴⁵ In cases where immunity is disputed, the burden of proof is on the private applicant to show that immunity does not apply.

Research on ICC arbitrations involving states and SOEs found that the possibility of raising pleas concerning the existence, validity or scope of the arbitration agreement was an important factor.¹⁴⁶ When they object to the jurisdiction of the tribunal or the admissibility of one or more claims, the ICC Rules¹⁴⁷ allow the bifurcation of the proceedings or rendering one or more partial awards on key issues.

D Public Policy, Party Autonomy and Choice of Law

When a dispute involves bribery, the tribunal must examine substantive public policy which deals with “the recognition of rights and obligations by a tribunal or enforcement in connection with the subject matter of the award,¹⁴⁸ which also includes fundamental principles of law, principles of good morals, public order, national interests and foreign relations.¹⁴⁹

TPP can be a source of law for arbitrators, distinct from domestic public policy. When adjudicating large cross-border construction disputes, the tribunal’s complex international

¹⁴⁴ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, UNTS 330, 3 (opened for signature 10 June 1958, entered into force 7 June 1959). (NYC)

¹⁴⁵ Fox, above n 46, at 852

¹⁴⁶ Peter Goldsmith and Eduardo Silva Romero *States, State Entities and ICC Arbitration* (International Chamber of Commerce, 2012), at [32].
<http://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR_0046.htm?11=Commission+Reports>

¹⁴⁷ ICC Rules, at appendix IV.

¹⁴⁸ International Law Association London Report Conference 2000, at IV B.

¹⁴⁹ At IV.

legal environment includes pressure to maintain TPP enshrined within national and international laws, codes and treaties.¹⁵⁰

Many laws are largely permissive and aim to support and enforce the agreement to arbitrate, rather than to intervene.¹⁵¹ If the parties' arbitration agreement encompasses statutory or public law claims, that agreement will ordinarily be a sufficient justification for the arbitrator's power to resolve such claims.¹⁵²

Party autonomy in an international contract involving parties of different nationalities may mean that the choice of law is entirely free.¹⁵³ Using international arbitration, parties may seek to create a safe harbour for bribery by limiting the scope of the dispute considered by the tribunal to achieve adjudication on disputes that would otherwise potentially be non-justiciable in national courts.

Many jurisdictions have annulled awards in limited cases of clear violations of fundamental, mandatory legal rules.¹⁵⁴ Most national courts agree¹⁵⁵ that vital domestic policies and mandatory laws override the parties' agreed dispute resolution mechanisms. In this case, it may be prudent for the arbitrator to consider where the status of civil law or jurisprudence based on bribery in states where enforcement is likely (where the defendant's main assets are held). This can be complex where the defendant is a multinational organisation with assets in many countries.

Many national conflicts of law systems recognise that public policy may override an otherwise valid choice-of-law agreement.¹⁵⁶ In *Niko*,¹⁵⁷ the tribunal noted: "party autonomy is not without limits. In international transactions the most important of such

¹⁵⁰ Public policy is defined as the "principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good". *Egerton v Brownlow* [1853] 4 HLC1.

¹⁵¹ Julian D M Lew QC and Loukas A Mistelis and Stefan M Kroll *Comparative International Commercial Arbitration* (Kluwer Law International, the Hague, 2003), at [1-11].

¹⁵² Born, above n 52, at 255.

¹⁵³ *ICC Case No 4629* (1989) YB Comm Arb VIII (1993), at 11.

¹⁵⁴ Born, above n 43, at 3321-26, 3340-58.

¹⁵⁵ Born, above n 52, at 333.

¹⁵⁶ For example, Article 21 of the Rome I Regulation provides: "[t]he application of a provision of the law of any country specified by this Regulation may be refused only if such application is incompatible with the public policy ('*ordre public*') of the forum."

¹⁵⁷ *Niko 2*.

limits is that of international public policy. A contract in conflict with international public policy cannot be given effect by arbitrators.”¹⁵⁸

Most legal systems also provide certain minimum standards which may not be violated for the recognition of the right to arbitrate and for ongoing support from the judiciary, and for a certain degree of judicial intervention. Thus, courts may deny effect to a choice-of-law clause on the grounds that the chosen law violates the mandatory law or public policy of the forum. In some circumstances, the mandatory law and public policies of a state other than the forum will be given effect under conflict of law systems.¹⁵⁹ This exception has been described as “a very unruly horse, and once you get astride it you never know where it will carry you.”¹⁶⁰

E Arbitral Proceedings

While disputes may arise at any point during construction, arbitration is usually only commenced once there is sufficient evidence of a contract and an arbitration agreement. When faced with possible bribery in arbitration, arbitrators should consider four questions: consideration of their own competency to hear and resolve a dispute; independence of the arbitration agreement in arbitration clause; competency to hear and resolve the issues; and determination of the substantive law to evaluate the consequences of such a finding for the dispute and its evaluation.¹⁶¹

1 Jurisdiction and admissibility

Tribunals may have jurisdiction over disputes when the main contract is void, based on the principle of separability. Tribunals can determine whether to accept jurisdiction or refer the dispute or any suspected illegality linked to bribery to other courts. Arbitrators will also treat the issue of state immunity as a prior procedural point to ensure that awards can be enforced by national courts applying the NYC.

¹⁵⁸ *Niko 2*, at [434]

¹⁵⁹ For example, Article 7(1) of the Rome Convention provides that “effect may be given to the mandatory rules of another country with which the situation has a close connection, if and in so far as, under the law of the later country, those rules must be applied whatever the law applicable to the contract.” Article 9(3) of the Rome I Regulation provides that “[e]ffect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.”

¹⁶⁰ *Richardson v Mellish* [1823-34] All ER (Common Pleas)

¹⁶¹ Bělohávek, above n 55, at 2427.

Some investment treaty tribunals have recourse to the doctrine of admissibility in order to enforce the international public policy against bribing public officials.¹⁶² Admissibility assumes that no jurisdictional bar is prescribed by the treaty, or, alternatively, that the jurisdictional legality requirement set out in the treaty refers solely to the stage of inception of the investment. For example, the *Kim*¹⁶³ tribunal noted a violation of international public policy against corruption “would result in the inadmissibility of a claim where the investment at issue was made possible by such corruption”. The doctrine of admissibility enables investment treaty tribunals to refrain from deciding claims on their merits, even though those claims are covered by their jurisdiction as prescribed within the investment.

Bilateral investment treaties (BITs) may require that, for an investment to be covered by the treaty, it must be made in accordance with the law of the host State.¹⁶⁴ Under such treaties, non-conformity with the local law is likely to affect the jurisdiction of the BIT-based tribunal. Illegality under the host State law, as well as bribery contrary to international public policy, is decided at the merits phase.

In *Niko v Bangladesh*,¹⁶⁵ the tribunal was able to establish, based upon a criminal conviction of the investor’s parent company in Canada, that the investor had bribed a Minister in the host State subsequent to the initiation of the investment but prior to the conclusion of a further agreement between the investor and host State authority. As the bribe had been revealed by the media in the host State, the Minister resigned long before the conclusion of the further agreement, and the tribunal found no causal link between the bribe and the conclusion of that agreement.¹⁶⁶ Accordingly, the *Niko* tribunal refused to decline jurisdiction, noting that the Bangladeshi authorities and state entities did not avoid the contracts they had concluded with the investors, and enjoyed the continuance of the contract.¹⁶⁷

2 Merits

Suspicious or allegations of bribery may arise after jurisdiction has been accepted. A tribunal must determine whether one party has alleged bribery for tactical reasons; when the allegations were raised; the standard of evidence provided; whether other competent or

¹⁶² *Kim et al v Republic of Uzbekistan*, ICSID Case no 13/6 (*Jurisdiction*) (8 March 2017), at [592–98]. (*Kim*).

¹⁶³ *Kim*, above n 162, at [593].

¹⁶⁴ Rudolph Dolzer and Christoph Schreuer *Principles of International Investment Law* (2nd ed, Oxford University Press, 2012), at 91.

¹⁶⁵ *Niko I*.

¹⁶⁶ *Niko I*, at [381–92], [428–29] and [454–55].

¹⁶⁷ *Niko I*, at [456–72].

criminal authorities have made findings on the claims; and whether the parties want the tribunal to address the bribery.

ICSID Rule 43,¹⁶⁸ may allow parties to an investment arbitration to agree on a settlement of the dispute or otherwise to discontinue the proceedings. When strong evidence of corruption had emerged, parties have reached independent binding settlement to resolve disputes,¹⁶⁹ leading to the tribunal dismissing the case for lack of jurisdiction.

Arbitration rules allow interim or conservatory measures.¹⁷⁰ The ICC and ICDR rules allow parties to seek judicial interim relief to maintain the status quo until the tribunal provides awards based on the full hearing on merits.¹⁷¹ Tribunals will need to rely on state courts to enforce these judgements or orders, although parties usually comply voluntarily.¹⁷²

Due process and equal treatment of parties are fundamental to arbitration. Arbitration may be stayed for reasons internal to the principles of arbitration, as the need to uphold the principle of party autonomy is closely aligned with ensuring fairness to all parties concerned.¹⁷³ Staying the proceedings ensures that the best possible case is brought by both parties, to avoid the risk of increased costs and delay on appeal.¹⁷⁴ Such an approach respects the autonomous nature of arbitral proceedings, while still allowing the tribunal to take account for the adverse effects of continuing with arbitration. The ILA recognises that, when matters of *lis pendens* (a pending suit) are at issue, this is as a valid reason for a stay of arbitral proceedings.¹⁷⁵ This allows the tribunal to protect a party from oppressive

¹⁶⁸ Rule 43, ICSID Rules of Procedure for Arbitration Proceedings (April 10, 2006) ICSID. (ICSID Rules). <<http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partF-chap05.htm#r43>>.

¹⁶⁹ *Azpetrol Intl Holdings BV, Azpetrol Group BV, Azpetrol Oil Services Group BV v Republic of Azerbaijan* ICSID Case No ARB/06/15 (Award) (2009), at [105].

¹⁷⁰ Kiefer, above n 95, at 85.

¹⁷¹ Article 28 of ICC Rules and Secretariats Guide to ICC Arbitration, at [3-1032 to 3-1050]; ICDR Rules, art 24; LCIA Rules art 25.

¹⁷² Peter Hirst and David Brown “Interim Relief, including Emergency Arbitration, in Construction Arbitration” in Stavros Brekoulakis and David Brynmor Thomas (eds) *The Guide to Construction Arbitration* (Global Arbitration Review, Law Business Research Limited, London, UK, 2016), at 103.

¹⁷³ Alan Redfern and others *Law and Practice of International Commercial Arbitration* (5th ed, Sweet & Maxwell, London, 2009), at 267.

¹⁷⁴ Steven S Gensler “Judicial Case Management: Caught in the Crossfire” (2010) 60 Duke LJ 669, at 727.

¹⁷⁵ Filip De Ly and others “International Law Association Toronto Conference (2006): International Commercial Arbitration” (2006) 72 Int’l L Ass’n Rep Conf 145, at [6].

tactics¹⁷⁶ (such as a vexatious illegality defence) so both parties are given a fair opportunity to present a case.

3 *Enforcement*

(a) Challenging awards based on illegality or public policy

To challenge the validity or effect of an arbitral award, a claimant addresses a national court that has jurisdiction, generally in the seat. This allows unsuccessful parties “another bite of the cherry”¹⁷⁷ and provides a safeguard against a tribunal’s failure to adequately address illegality issues.

Article V(1) of the NYC lists exhaustive grounds for refusal of recognition and enforcement which are to be proven by the claimant. The wording of NYC art (V)(1)(a) considers that it should not be contrary to the public policy of the law in the country in which enforcement is sought to enforce an award which is valid under the law of the seat.¹⁷⁸ Article V(2) lists the grounds on which a national court may refuse enforcement on its own motion.¹⁷⁹ This includes the circumstances that the “difference is not capable of settlement by arbitration under the law of that country”;¹⁸⁰ or “recognition or enforcement of the award would be contrary to the public policy of that country.”¹⁸¹

Thus, public policy “can be read into the condition of validity of the agreement”.¹⁸² The associated language is permissive;¹⁸³ enforcement *may* be refused if one of the grounds is present. In New Zealand, the public policy ground should be given a restrictive application.¹⁸⁴ This is consistent with a pro-enforcement view of the object and purpose of the NYC which obliges signatories to recognize foreign arbitral awards as binding and to enforce them in accordance with their own rules of procedure.

¹⁷⁶ De Ly, above n 175, at [6].

¹⁷⁷ Jenkins, above n 71, at 305.

¹⁷⁸ Dicey, above n 32, at [16-150]

¹⁷⁹ van den Berg, above n 45, at 55-56.

¹⁸⁰ Article V(2)(a) of the NYC.

¹⁸¹ Article V(2)(b) of the NYC.

¹⁸² Hanotiau, above n 36, at 799.

¹⁸³ Articles V(1) and V(2).

¹⁸⁴ *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2003] 2 NZLR 92, cited in Dicey, at [16-145].

(b) Public policy challenges

The illegality defence can be used to challenge an arbitral award on public policy of the country in which enforcement is sought (which may be where the unsuccessful party is domiciled or incorporated). However, challenge in national courts may remove the benefit of a previously confidential dispute resolution process. The identity of the parties and the exact wording of the award may become publicly available when an appeal is filed. The submission to the public record of large portions of evidence and testimony presented to the arbitrators will be necessary to present a case for vacatur before a national court.

According to the International Law Association (ILA), the elements of public policy justifying a court's refusal to enforce a foreign award include "fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned."¹⁸⁵

For a party's plea based on public policy to succeed, it must demonstrate some element of illegality, that recognition or enforcement of the award would be injurious to the public good, or that recognition or enforcement would be wholly offensive to the public on whose behalf the powers of the State are exercised.¹⁸⁶

While courts applying Article V(2)(b) generally consult their own jurisdiction's conception of what public policy interest may justify denying effect to a foreign award, they may legitimately take into consideration principles that reflect a consensus within the international community. The ILA recommends a court should consider "the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration."¹⁸⁷ Where such a consensus can be established, it strengthens the case for denying recognition or enforcement of an award. Thus, the application of TPP modifies the assumption of arbitrability for disputes that "contravene certain fundamental values or interests".¹⁸⁸

¹⁸⁵ ILA Recommendation 1(d), International Law Association, "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" (2002), *Arbitration International*, Vol 19 Iss 2, (1 June 2003), at 249–263.

¹⁸⁶ Dicey, above n 32, at [16-150].

¹⁸⁷ ILA Recommendation 2(b), above n 185.

¹⁸⁸ Mayer, above n 62, at [2-12]: the function of public policy is eliminating "agreements, rules or decisions that would contravene certain fundamental values or interests".

However, arguments that raise the suspicion of illegality may not serve to overturn an arbitral award. In *Westacre*¹⁸⁹, the tribunal rejected allegations of illegality as unproven. The English High Court's consideration of an application to set aside the award concluded that the public policy of sustaining international arbitration awards on the facts of that case outweighed the public policy in discouraging international commercial corruption,¹⁹⁰ and declined to re-examine the issue as the arbitrator's reasons did not impinge on public policy.¹⁹¹ However, the High Court's judgment was provided before the Bribery Act 2010, and, as a consequence, a future assessment of bribery and public policy by the English High Court could provide a different outcome in similar circumstances.

A principle of public policy that the prohibition of bribery overrides the general principle of party autonomy.¹⁹² Arbitrators have increasingly viewed the prohibition of corruption as one of the norms of TPP.¹⁹³ This can override the national law which would otherwise apply, although it is rare for arbitrators not to apply the law of the seat.¹⁹⁴

4 *Annulment or revision*

Some authorities hold that public policy in the context of annulment refers to international public policy and this is explicit in some jurisdictions.¹⁹⁵ Success before a local court in seeking vacatur does not firmly close the book on enforcement outside that jurisdiction. Because the NYC exception to enforcement based on annulment at the place of arbitration is worded permissively,¹⁹⁶ some courts have responded positively to requests for enforcement of awards that had been set aside in other countries' courts.¹⁹⁷

¹⁸⁹ *Westacre Investments Inc v Jugoimport SPDR Holdings Co Ltd* [1998] 3 WLR 770, at 773.

¹⁹⁰ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB288 (CA) (12 May 1999).

¹⁹¹ *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd*, (1998) YCA 23, 836, at 837-838; and (1999) YCA 29a, at 753.

¹⁹² Cited in *Niko Resources v People's Republic of Bangladesh*, at [434].

¹⁹³ Alec Stone Sweet and Florian Grisel "The Evolution of International Arbitration: Delegation, Judicialization, Governance" in Walter Matti and Thomas Dietz *International Arbitration and Global Governance* (Oxford University Press, 2014), at 37-8.

¹⁹⁴ Fouchard, above n 95, at [1535-6].

¹⁹⁵ Born, above n 52, at 334.

¹⁹⁶ NYC, art V(1)(e) "recognition and enforcement of the award may be refused . . . if . . . the award . . . has been set aside or suspended by a competent authority of the country in which . . . the award was made".

¹⁹⁷ See *Hilmarton* in Part V.D below.

ICSID awards are final and binding on the parties to the dispute. A state may apply to revise or annul an ICSID award before an ICSID ad hoc committee. A party may request the stay of enforcement of the award pending an ICSID ad hoc committee's decision.¹⁹⁸ Where an application appears dilatory, the applicant can be required to post a bond, to deter vexatious applications.

Grounds for annulment or revision of ICSID awards are very limited and subject to the post-award remedies provided for in the Washington Convention.¹⁹⁹ For example, a party may apply for full or partial annulment of an award on the basis of the Tribunal manifestly exceeding its powers and a serious departure from a fundamental rule of procedure. If an award is annulled in whole or in part, a party is entitled to request resubmission to a newly constituted Tribunal to obtain a new award concerning the matter.²⁰⁰

In February 2007, the ICSID Tribunal²⁰¹ in *Siemens v Argentina* had awarded Siemens USD 217.8 million in compensation and the release of a USD 20 million performance bond after finding that Argentina had breached the Argentina-Germany BIT²⁰² when cancelling a contract. An extensive investigation by the German and US authorities (Department of Justice (DOJ) and Securities and Exchange Commission) specifically found that the telecommunications contract which formed the basis of Siemens' ICSID claim against Argentina had been obtained through payment of bribes of USD 40 million.²⁰³

Subsequently, Argentina requested ICSID to revise the award (which had previously been subject to an Argentine application for annulment). These revision proceedings were

¹⁹⁸ Article 52(5) of the Washington Convention; ICSID Arbitration Rule 54.

¹⁹⁹ Annulment of an ICSID award is an exceptional recourse to safeguard against the violation of fundamental legal principles relating to the process. See art 52 of the Washington Convention, ICSID Arbitration Rules 50 and 52-55.

²⁰⁰ ICSID Arbitration Rule 55(1).

²⁰¹ *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8 (*Award*) (6 February 2007).

²⁰² Agreement between the Argentine Republic and the Federal Republic of Germany for the promotion and reciprocal protection of investments (signed 9 April 1991, entered into force 8 November 1993).

²⁰³ Joe Tirado, Matthew Page, Daniel Meagher "Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship" *ICSID Review Vol 29 No 2* (2014), at 508.

discontinued in 2009²⁰⁴ when Siemens abandoned the award in exchange for Argentina's consent to discontinue the annulment and revision proceedings.²⁰⁵

F Evidence of Bribery

International tribunals' procedures may adopt specific rules of evidence.²⁰⁶ These may give the tribunal the right to exclude any evidence which has a lack of sufficient relevance or materiality.²⁰⁷

1 Tactical allegations

Allegations of bribery may be used to deflect one party's contractual non-performance, including avoiding making payments or sharing benefits with the other party.²⁰⁸ Bribery is an easy allegation to make.²⁰⁹ On the rare occasions²¹⁰ that bribery is raised by investors; the issue is whether the state violated the fair and equitable treatment standard or other treaty obligations when it requested the investor to pay a bribe.²¹¹

2 Standard of evidence

Bribery may be alleged, suspected, evidenced or even proven as the result of a judgment in a national court. More than one occurrence may be present and levels or issues of bribery

²⁰⁴ On 9 September 2009, the ad hoc ICSID Committee issued an order taking note of the discontinuance of the proceeding <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/02/8>>.

²⁰⁵ Jason Yackee "Investment Treaties and Investor Corruption: An Emerging Defense for Host States?" (19 October 2012), IISD <<https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/>>.

²⁰⁶ For example, see the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010) which provides provisions on the production of documents; witnesses of fact; and experts.

²⁰⁷ IBA Rules of Evidence 2010, above n 206, art 9.1.

²⁰⁸ "... The enterprise having benefitted from the bribes (i.e., having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organised the payment of the bribes. The nullity of the agreement is generally only beneficial to the former, and thus possibly inequitable. But this is legally irrelevant." *ICC Award 6497* of 1994, (1999) YB Comm Arb XXIV 71-79, at 72.

²⁰⁹ See, for example, *Westacre*.

²¹⁰ For example, in *EDF (Services) Limited v Romania* ICSID Case No ARB/05/13, (*Award*) (8 October 2009), at [221], the investor alleged that government officials solicited a bribe from the investor and, when no bribe was paid, the ten-year investment contract was not renewed. The Tribunal found that the Claimant had failed to prove its allegation of a demand for a bribe.

²¹¹ *Ziadé*, above n 12, at 747.

may vary over time, particularly on complex, high value projects. Each party bears the burden of providing the facts necessary to its claims or defences.²¹²

Arbitrators' freedom from applying strict procedural and evidentiary technicalities may allow them to accept hearsay evidence.²¹³ However, serious wrongdoing may require more convincing evidence. The Iran-US Claims Tribunal summarised its approach: "if reasonable doubts remain, such an allegation cannot be deemed to be established."²¹⁴

Arbitral tribunals have required a high standard of proof,²¹⁵ reducing national courts' ability to overturn awards during enforcement processes. In a mining case, *Metal-Tech Ltd v Uzbekistan*, the tribunal proactively investigated the indicia of corruption in three consultancy contracts in violation of Uzbek law when neither party had alleged corruption.²¹⁶ The claimant failed to comply with evidence requirements and the tribunal noted that its inference was "no evidence of services or at least no legitimate services ... were in fact performed"²¹⁷ in accordance IBA Rules.²¹⁸ These inferences may be critical to reaching a sufficient threshold of proof.

3 *Natural justice*

A serious crime must be approached with procedural safeguards matching the severity of the allegations, allowing the accused party the time and opportunity to respond. If the evidence is not convincing, then the tribunal should reject its argument, even if the tribunal has some doubts about the possible nature of the agreements.²¹⁹

²¹² For example, see UNCITRAL Rules, art 27(1), "Each party shall have the burden of proving the facts relied on to support its claim or defense."

²¹³ Gary Born, above n 52, at 181-2.

²¹⁴ *Oil Fields of Texas v Islamic Republic of Iran (Award)* (8 October 1986) IUSCT case No 258-43-1, 12 Iran-US CTR 308, at [25].

²¹⁵ Crivellaro, above n 85.

²¹⁶ *Metal-Tech Ltd v Uzbekistan*, ICSID Case No ARB/10/3 (*Award*) (4 October 2013), at [290].

²¹⁷ At [265].

²¹⁸ International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules). Articles 9(5) and 9(6) provides for the drawing of adverse inferences when one party has failed to cooperate with an order by a tribunal.

²¹⁹ *ICC Award 6497* of 1994, (1999) YB Comm Arb XXIV, at 73.

4 *Confidentiality*

The tribunal may consider special orders whilst allegations are under investigation, for example holding hearings in private.²²⁰

5 *Privilege*

Parties may invoke legal privilege to reject the tribunal's requests for more information.²²¹ Whilst this may lead to a negative inference, such inferences must be drawn with care given the seriousness of the allegations and the tribunal may need to declare that evidence was inconclusive.

6 *Duty of disclosure*

Tribunals should consider legislation or professional standards under which they may need to disclose evidence to regulatory authorities in any jurisdiction where criminal activity may have occurred, including bribery of a foreign official and related money laundering. Whilst arbitrators may not always have an obligation of proactive notification of suspected crimes, they may be obliged to provide information or documents to other courts or authorities.²²²

7 *Compelling evidence*

A tribunal should consider investigating bribery for four reasons:²²³ ensuring the award is enforceable;²²⁴ public responsibility to the administration of justice; a proactive approach assists states and businesses to eliminate bribery; and weak or apathetic judicial authorities have been identified as one of the root causes of the persistence of corruption.

Investigations protect the integrity of the institution of arbitration.²²⁵ The tribunal's dilemma includes its relative inability to compel evidence compared to the powers of national courts. One party may be in possession of evidence required by its counterparty, requiring disclosure or witness testimony. Arbitration allows parties to permit and tailor procedures to a specific case, such as the power to determine "the admissibility, relevance, materiality and weight of the evidence offered."²²⁶ However, arbitral bodies may have

²²⁰ Section 14 of the Act provides for conducting arbitral proceedings in private and confidentiality.

²²¹ Or in some jurisdictions, the privilege against self-incrimination.

²²² Bělohávek, above n 55, at 2067.

²²³ Cremades, above n 23, at 80

²²⁴ As set out in art 35 of the ICC Rules of Arbitration.

²²⁵ Cremades, above n 23, at 83-86.

²²⁶ Article 9(1) of UNCITRAL Rules.

limited means to discover facts or press for documents or evidential points which impacts the consideration of the burden of proof of illegality.

Tribunals could pursue five potential solutions to such problems; drawing adverse inferences, placing greater reliance on circumstantial evidence, lowering the standard of proof, shifting the burden of proof, and drawing on factual findings in domestic proceedings.²²⁷

Whilst courts in many jurisdictions have narrowed the non-arbitrability doctrine to where statutory provisions expressly require,²²⁸ virtually all states regard criminal matters as non-arbitrable. However, tribunals may have competence to consider allegations of conduct that would amount to a criminal offence.²²⁹ On the basis of Niko's guilty plea in Canadian proceedings, the tribunal evidenced corruption in the *Niko*²³⁰ dispute and determined that it had jurisdiction.²³¹

As outlined above, national court proceedings played a determinative role in *Siemens v Argentina*²³² where the revelations of corruption emerged in domestic proceedings in Germany and the United States after the award had been delivered led to a request by Argentina to ICSID for revision of the award.

G Remedies

1 Remedies resulting from commercial contract law

New Zealand law addresses illegality resulting from the creation of the contracts,²³³ and allows for the courts to provide relief in the forms of: restitution of real or personal

²²⁷ Rose, above n 96, at Abstract.

²²⁸ Born, above n 35, at 959-72, 1039-45.

²²⁹ Born, above n 52, at 89.

²³⁰ *Niko 2*.

²³¹ *Niko 2*, above n 29, at 423–29.

²³² *Siemens AG v Argentine Republic* ICSID Case No ARB/02/8 (*Award*) (6 February 2007).

²³³ Section 71(1) of the Contract and Commercial Law Act 2017 sets out that “illegal contract - (a) means a contract governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or the performance of the contract; and (b) includes a contract that contains an illegal provision, whether that provision is severable or not.”

property;²³⁴ compensation; contract variation; or validation of the contract in whole or in part.²³⁵

Where jurisdictions do not provide recommendations or legislation relating to remedies, courts may refer to published recommendations such as the UNIDROIT Principles of International Commercial Contracts (PICC), intended to harmonize international commercial contracts law in different jurisdictions. Article 3.3.1 considers a contract that infringes a mandatory rule. Where a mandatory rule does not expressly prescribe the effects of infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable. To determine what is reasonable,²³⁶ the court will have regard to: the category of persons for whose protection the rule exists; any sanction that may be imposed under the rule infringed; the seriousness of the infringement; whether one or both parties knew or ought to have known of the infringement; and the parties' reasonable expectations. It may grant ordinary remedies available under a valid contract (including the right to performance), or other remedies such as the right to treat the contract as being of no effect, the adaptation or termination of the contract.

The PICC recommends that restitution may be more reasonable than contractual remedies in contracts involving illegality.²³⁷ Even if illegality means parties are denied any remedies under the contract, they may claim restitution for what they have rendered in performing the contract.²³⁸ The PICC recommends a flexible approach and provides that where there has been performance under a contract, restitution may be granted if this would be reasonable in the circumstances depending on whether it is more appropriate to allow the recipient to keep what it has received or to allow the performer to reclaim it.

2 Remedies awarded by arbitral tribunals

Arbitral tribunals may award the same range of remedies that would be available from national courts using the law of the seat. This is made explicit in Section 12(1) of the Act which provides that an arbitral tribunal may award any remedy or relief that could have

²³⁴ Section 95 of the Contract and Commercial Law Act 2017.

²³⁵ Section 76(1) of the Contract and Commercial Law Act 2017.

²³⁶ UNIDROIT Principles of International Commercial Contracts 2016 (PICC), at 125.

²³⁷ PICC, above n 236, Comment 1 to art 3.3.2.

²³⁸ PICC, above n 236, Comment 1 to art 3.3.2.

been ordered as a result of civil proceedings in the High Court and interest on the whole or any part of any sum awarded.

Arbitration laws and institutional rules may contemplate a variety of different awards,²³⁹ including final awards, interim awards, consent awards and default awards. Arbitrations are occasionally concluded without an award, typically because the parties agree to settle their dispute or because the claimant abandons its claims.²⁴⁰

Arbitrators may have broad discretion in fashioning relief based on their commercial expertise; monetary awards are common. Other awards have included injunctive or declaratory relief, upheld during enforcement by national courts when the arbitration agreement or the institutional rules used provide such authority.²⁴¹

Arbitral awards in construction disputes may additionally grant extensions of time; correct contractual decisions by engineers, architects and other experts; order restitution, specific performance, punitive damages (where the jurisdiction permits); adapt contracts, fill gaps in contracts; order rectification of contracts and make decisions on interest and costs.²⁴²

Research into construction related awards provides guidance on how to calculate and quantify construction claims.²⁴³ Where evidence has not already been provided in the case statement (or prior to arbitral proceedings) to justify the amount of a claim, claimants can be required to produce primary documents in support of these sums, in a form that will enable the respondent to know how the amounts were derived and why they were incurred.

V International Arbitration Involving Construction and Bribery

Summaries of a sample of 6 arbitral awards and related national court cases seeking or challenging enforcement are presented below. These were identified via citations and summaries in books, journals and articles, and a list of FIDIC-related court judgements and arbitral awards.²⁴⁴ As not all arbitral proceeding or awards are independently published in

²³⁹ Section 31 of the Act does not limit the types of awards or relief available.

²⁴⁰ Born, above n 52, at 293, 297.

²⁴¹ Born, above n 52, at 302-3.

²⁴² Jenkins, above n 71, at 280.

²⁴³ Lloyd, above n 115, at [27].

²⁴⁴ Corbett and Co “Corbett and Co's FIDIC Case Law Table” (2017) <corbett.co.uk/wp-content/uploads/Table-of-FIDIC-Cases.pdf>.

a neutral manner, this paper may unintentionally reproduce a biased view of the facts and outcomes, and be subject to translation errors where relevant.

*A ICC Case No 1110*²⁴⁵

In an early arbitration disputes where bribery was reported, the claimant, an agent from Argentina, was in dispute with a UK contractor for commission on public works. In this arbitration, held in Paris under Argentinian law, the respondent acknowledged that large commissions were required to bribe Argentinian officials.

The sole arbitrator, Lagergren J determined that the evidence “plainly established ... that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business”, that the amounts involved were huge and noted that: “corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.”²⁴⁶

Lagergren J examined the question of his jurisdiction to decide upon a contract “condemned by public decency and morality” and referred to the NYC which provided that the competent authority may refuse *ex officio* (by virtue of office) the recognition or enforcement of an award that would be contrary to the public policy of that country.

The opinion referred to the law of France, the seat of the arbitration, and to Argentine law, the law of the place where the contract(s) were to be performed and concluded that both French and Argentine law would not allow this case to be arbitrated. Lagergren J then stated that “there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.”

Before providing the decision, Lagergren J noted that “care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other” and recognized the dilemma of dealing with two parties with “unclean hands.” Lagergren commented:²⁴⁷ “Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or tribunals) in settling their

²⁴⁵ *ICC Case No 1110, (Award)* (1963); cited in Gilles Wetter “Issues of Corruption Before International Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No 1110” (1994) *Arb Int’l* Vol 10 no 4, 227, at 294.

²⁴⁶ At [20].

²⁴⁷ Wetter, above n 245, at 291.

disputes.” It was decided that each party should pay its own costs and the arbitrator’s fees were to be divided equally.

Lagergren J declined jurisdiction. This case has subsequently been criticised on the grounds that the arbitration agreement was entirely separate and distinct from the contractual relationships of the parties.

*B ICC Case No 3913*²⁴⁸

The claimant was an English company and the respondent a French contractor. The dispute was heard under French law. The respondent asked the claimant to assist it, for a fee, in obtaining certain contracts to be awarded by the government of an African country. The claimant undertook to provide to the respondent a number of services consisting of information and assistance aimed at facilitating to the extent possible the award of the contract to the respondent. In exchange, the respondent undertook to pay to the claimant a fee of 8% of the amount of the contracts awarded, after deducting certain supplies and services included in the contracts.

The contract’s content did not evidence illicit or immoral activity. Certain statements by the parties and their witnesses, along with other evidence produced in the arbitration, indicated that the contractual obligations were quite different from the intent of the parties. One of the witnesses stated that the commission was “intended to remunerate the (African) counterparties.” The evidence showed that the claimant was a financial intermediary who received money to redistribute “*pots-de-vin*” (bribes) to members of a network consisting of local persons in decision-making positions and that the commission due to the claimant was to be knowingly used to pay kickbacks. The tribunal concluded, accordingly, that the purpose of the agreement was illicit and immoral under French law. This rendered the agreement null and void and prevented the parties from asserting rights under it both as a matter of French domestic public policy and (translation) “the concept of international public policy as recognized by most nations.”

²⁴⁸ *ICC Case No 3913* [1981], in Bruno Oppetit, “Le paradoxe de la corruption à l’épreuve du droit du commerce international.” *Journal Droit International* (1987), at 9-11; see also *Collection of ICC Arbitral Awards 1974-85*, at 497.

*H Westinghouse v Philippines*²⁴⁹

The claimants were Westinghouse and Burns & Roe (US) and the respondents were National Power Co and the Republic of the Philippines. The arbitration was held in Geneva under Swiss law.

National Power Co of Philippines agreed two engineering and consulting contracts, one with Westinghouse and one with Burns & Roe, to construct a nuclear plant in the Philippines. To obtain the award, Westinghouse paid commissions to an associate of former President Marcos who acted as local agent for both claimants. Construction of the power plant began in 1975 and was completed in 1985; however, the plant was not accepted by the Philippines, did not receive an operating license and never went into operation. The Philippines government decided in June 1986 not to operate the plant and did not complete its payments to Westinghouse under the construction contract. The dispute arose when the claimants sought recovery of certain outstanding claims and the respondents denied payment on the ground that the claimants had paid bribes.

The first issue addressed by the arbitral tribunal was its own jurisdiction. The tribunal stated: “it is well established that the Tribunal has jurisdiction to determine its own jurisdiction, a proposition that is not disputed by the parties. This basic principle is reflected in both the ICC Rules and Swiss law. ... Furthermore, the doctrine of *Kompetenz-Kompetenz* has been consistently confirmed by various decisions and commentators, which similarly recognize their own competency is an inherent attribute of international tribunals.”²⁵⁰

The tribunal then discussed the issue of the doctrine of separability. Both parties accepted the existence of the doctrine; however, they differed on the effect. The claimants contended that in all events the doctrine applies; whereas, the defendants argued that the doctrine would not apply if they established that the main contract was obtained by bribery.

The tribunal required that the standard of proof to be applied was the “preponderance of evidence”²⁵¹ standard generally understood in the three states of the parties (the Philippines, New Jersey and Pennsylvania). For the allegation of bribery, a high standard

²⁴⁹ *Westinghouse International Projects Company and Burns & Roe (USA) v National Power Company and the Republic of the Philippines ICC Case No 6401 (Award)* (19 December 1991) Mealey’s Int’l Arb Rep (February 1992) Vol 7 Iss 1, at 3 and A-1 (*Westinghouse*).

²⁵⁰ At 17-18.

²⁵¹ At 33-35.

of “clear and convincing evidence” was applied, which could not be justified by mere speculation. Even though evidence existed that Westinghouse intended to bribe President Marcos by paying the local agent, the tribunal stated that the Respondents failed to carry their burden of proof, since they neither provided evidence of payments to Marcos nor proved the existence of an agreement between President Marcos and Westinghouse.²⁵² The tribunal considered that the construction contracts were valid and rejected any allegation of bribery.

The Respondents filed multiple tort and contract claims with the US Courts. The Court for the District of New Jersey held that the ICC tribunal “applied a significantly heavier burden of proof than would be applied at trial.”²⁵³ It added that “by compartmentalizing and segregating the categories of evidence the Tribunal deprived it as a whole of its natural collective force in a way in which the evidence might not be so deprived in this Court.”²⁵⁴ As a result, the judge ruled that “there is ample evidence to permit a reasonable jury to find that the [local agent's] commissions were intended to be paid in whole or in part to President Marcos and were in fact paid in whole or in part to him or upon his direction.” The judge did not criticise the conclusions in the ICC award and stressed that the ICC tribunal “was considering somewhat different issues and applying a different standard of proof”²⁵⁵ and upheld the arbitral award. However, this comment shows that the District Court may have come to a different conclusion on whether bribery had been evidenced in accordance with the FCPA.

*I Hilmarton v Omnium de Traitement et de Valorisation SA*²⁵⁶

This tribunal was held in Geneva under Swiss law. The subject matters were whether corruption was proved or not and whether a violation of the Algerian law prohibiting

²⁵² At 77-78.

²⁵³ *Republic of the Philippines and The Nat'l Power Comm v Westinghouse Elec Corp et al*, 782 F Supp 972, 981 (D NJ, 4 February 1992)

²⁵⁴ At 982.

²⁵⁵ *Republic of the Philippines and The Nat'l Power Comm v Westinghouse Elec Corp et al*, 1438, 1446 F Supp 972, 981 (D NJ, 20 September 1991, as amended 1 October 1991 and 1 November 1991).

²⁵⁶ *ICC Case no 5622 (Award)* (August 1982) (*Hilmarton*). This case includes two awards, the first was annulled and the second was provided in April 1992. Cited in Antonio Crivellaro “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence” in Kristine Karsten and Andrew Berkeley (eds), *Arbitration: Money Laundering, Corruption and Fraud, Dossiers of the ICC Institute of World Business Law Vol 1* (Kluwer Law International, International Chamber of Commerce, 2003), at 124-126.

recourse to intermediaries in public contracts also violated Swiss public policy. It included two arbitration awards where enforcement was contested in three different countries.

OTV, a French company, entered into an agreement with Hilmarton, an English consulting company, under which Hilmarton was to give legal and fiscal advice to OTV, to help it obtain a contract with the Algerian authorities. In exchange, OTV undertook to pay Hilmarton fees equal to 4% of the total amount of the primary contract. OTV was awarded the primary contract and paid Hilmarton only 50% of the agreed commission.

In the first award,²⁵⁷ the arbitrator examined two questions: whether it had been proved that kickbacks were paid and whether the violation of the Algerian law prohibiting the trafficking of influence implied a violation of international public policy or of Swiss public policy, with the effect of rendering the agreement null and void.

The arbitrator concluded that the evidence was not sufficient to conclude with certainty the payment of kickbacks. As regards Algerian law, the arbitrator noted that the prohibition on using intermediaries in contracts with the public authorities had almost certainly been violated and that this implied a violation of international public policy, as well as of moral standards contemplated in Article 20 of the Swiss Code des Obligations.²⁵⁸ As a result, the arbitrator declared the agreement null and void and rejected the claim.²⁵⁹

In 1989, at the request of Hilmarton, the Court of Justice of the Canton of Geneva annulled the award, stating that the violation of a foreign law did not imply the violation of moral standards in Swiss law, particularly since no kickbacks were contemplated in the agreement nor proved in the arbitration. The Swiss Federal Tribunal approved the annulment on 17 April 1990.

Following the annulment of the first award, Hilmarton resumed ICC arbitration under Swiss law with a second arbitrator. Neither of the Parties requested supplemental evidence in the second arbitration, nor did they allege new facts in relation to the substance of the case. In April 1992, the second arbitrator declared the agreement valid. Hilmarton's claim was accepted. However, the Courts, the second arbitrator and the English Courts which had later knowledge of the case all admitted, in the words of the Commercial Court, that “a

²⁵⁷ *ICC Case no 5622 (Award)* (August 1982).

²⁵⁸ *Revue de l'arbitrage* (1993) no 2, at 334.

²⁵⁹ At 341.

finding of fact of corrupt practices”, if established, which it was not in this particular case, “would give rise to obvious public policy considerations”.

*J Honeywell International Middle East Limited v Meydan Group LLC*²⁶⁰

In June 2009, a contract was signed between Meydan and Honeywell. In July 2010, arbitration was commenced by Honeywell against Meydan under the rules of the Dubai International Arbitration Centre (DIAC).²⁶¹ Honeywell had not been paid since December 2009. Honeywell claimed for the recovery of retention money, payment for completed works, materials on site and contractor's equipment left on site, return of performance security and advance payment guarantee and prohibiting a call on those documents and was awarded AED 77 million. In February 2013, the Dubai Court of First Instance ratified the award. Meydan appealed this decision and the appeal proceedings were stayed by the courts in November, referring to a bribery complaint against Honeywell made in October 2013 to the Dubai Public Prosecutor as well as a requesting that investigations be conducted under UAE Federal Civil Procedures Law.

In November 2012, Honeywell made an application before the English courts under the Arbitration Act 1996 and Akenhead J made an order granting Honeywell leave to enforce the award.²⁶² Meydan's application to have the order set aside was brought to a hearing before Ramsey J in February 2014.²⁶³ Meydan's application was based on the validity of the arbitration agreement between Meydan and Honeywell, including public policy and procedural challenges. Ramsey J rejected Meydan's application as, in accordance with s 103(1) of the English Arbitration Act 1996, recognition or enforcement of a New York Convention award shall not be refused except under the grounds listed at ss 103(2) and (3). Ramsey J noted that "the intention of the New York Convention ... is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively".²⁶⁴

Meydan argued that because Honeywell's application for ratification had been stayed by the Dubai Court of Appeal, it had therefore been suspended by a competent authority in

²⁶⁰ *Honeywell International Middle East Limited v Meydan Group LLC* [2014] EWHC 1344 (TCC). (*Honeywell*)

²⁶¹ *Honeywell International Middle East Limited v Meydan Group LLC*, DIAC Case 201/2010.

²⁶² Akenhead J qualified this order by stating that it should not be enforced for 21 days after service of the relevant documents on Meydan or, in the event that Meydan applied within those 21 days to set aside the order, until such application had been finally disposed of.

²⁶³ *Honeywell*, above n 260.

²⁶⁴ At [66].

the country in which it was made. The Judge rejected this argument, stating that under the DIAC Rules the award was final and binding.

*K World Duty Free v Republic of Kenya*²⁶⁵

This investment arbitration between World Duty Free (incorporated in UK) and Kenya stemmed from a 1989 agreement for the construction, maintenance, and operation of duty-free complexes at the Nairobi and Mombasa airports. World Duty Free became a party to this contract in 1990.²⁶⁶

A claim of expropriation was made by the investor who claimed restitution of complexes at both airports and payment of USD 500 million in damages. In the course of the proceedings, World Duty Free described how the 1989 agreement had been concluded, including the payment of bribes to the former president of USD 2 million.²⁶⁷ Kenya claimed the agreement was unenforceable because it was procured by the payment of a bribe.²⁶⁸ Kenya based its request on applicable English and Kenyan laws, and, on a secondary basis, on international public policy and public interest: “[c]laims founded on illegality have to be dismissed for the benefit of the public and for the advantage of the defendant.”²⁶⁹

The tribunal stated “bribery is contrary to the international public policy of most, if not all, States”²⁷⁰ and considered whether the corruption activity resulted in the legalisation of the revenues from crime. It affirmed that: “illegal contract’s non-contractual legal effects are significant under English law in regard to possible restitutionary and proprietary consequence”²⁷¹

The tribunal referred to the unclean hands doctrine’s *ex turpi causa non oritur actio* (from a dishonourable cause an action will not arise) principle²⁷² to deny any relief to the Claimant. It did not consider the respective misconduct of the claimant nor Kenya’s failure to investigate allegations of bribery and prosecute government officials. The tribunal ordered that each party should bear in full its own legal costs.

²⁶⁵ *World Duty Free Company Ltd v Republic of Kenya*, ICSID Case No ARB/00/7 (Award, 4 October 2006). (*World Duty Free*)

²⁶⁶ At [63].

²⁶⁷ At [34].

²⁶⁸ At [105].

²⁶⁹ At [118].

²⁷⁰ At [38].

²⁷¹ At [162].

²⁷² At [179].

VI Findings

The six construction disputes summarised in this paper and are a mixture of contracts for corruption and contracts potentially obtained by corruption in the form of bribery or kickbacks.

A Arbitrability

Allegations or strong evidence of bribery is not always a bar to arbitrability, especially for contracts obtained by corruption. Many of the cases demonstrated arbitrability based on separability (with the exception of *Case No 1110*). Tribunals were willing to consider the merits of contractual disputes where the arbitration agreement was valid and there was no requirement to refer criminal activity via a national court.

In terms of subjective arbitrability, a number of the cases where the contracts allegedly facilitated the payment of bribes and kickbacks involved a party that was an agent or consultant (*ICC Case No 1110*, *ICC Case No 3913* and *Hilmarton*). The use of an intermediary to pay bribes was alleged in *Westinghouse* and evidenced in *World Duty Free*.

B Separability and Competence

In *ICC Case No 1110*, Lagergen J declined the tribunal's jurisdiction based on the NYC²⁷³ allowing recognition and enforcement of an arbitral award to be refused when the award is contrary to public policy. This reasoning was criticised for failing to recognise the separability of the contract and arbitration agreement and the fact that the arbitration agreement is unlikely to be tainted by corruption.²⁷⁴ The lack of consideration of separability was not a feature of subsequent disputes examined.

In *Westinghouse*, the tribunal addressed jurisdiction by determining its competency as an inherent attribute of international tribunals based upon both the ICC Rules and Swiss law. In *World Duty Free*, the tribunal treated the issue of bribery as a "preliminary issue on the merits".²⁷⁵

C Evidence and Effects of Illegality

The facts of *ICC Case No 1110* appear to categorise it as a contract for corruption, so the decision to decline the tribunal's jurisdiction matches that of outcome from the tribunal in

²⁷³ Article V2(b).

²⁷⁴ Wetter, above n 245, at 278-279.

²⁷⁵ At [52], [59].

ICC Case No 3913 which determined that a contract whose purpose is the payment of kickbacks (another contract for corruption) is null and void and the claim was rejected at the merits stage.

The *Westinghouse* tribunal determined that they did not have to decide on the effect of bribery on the validity of the arbitration clause since the defendants failed to prove their allegations of bribery with “clear and convincing evidence” and “a degree of probability which is commensurate with the occasion.”²⁷⁶ The standard of proof was essentially an American standard for civil fraud cases. The alleged bribery included using intermediaries but clear and direct evidence was required to satisfy the standard of proof set by the tribunal. This standard of proof was considered during enforcement through the Court for the District of New Jersey which enforced the awards, indicating that it may have reached a different conclusion on the facts, commenting that the arbitral procedures requiring a significantly heavier burden of proof of bribery and different categories of evidence deprived it of its collective force.

In *Hilmarton*, the tribunal reviewed the contract under both the substantive law of the contract chosen by the parties (Swiss) and the law of the place where the contract was to be performed (Algeria). It finally concluded that Hilmarton had engaged in “influencing” Algerian government officials but that bribery was not proven “beyond doubt.” There was no direct evidence that a bribe was paid. This case illustrates that different approaches and conclusions that can be reached by tribunals and courts on the same facts, in this case relating to the application of Algerian law prohibiting the trading in influence or lobbying.

In *World Duty Free*, from an evidentiary perspective, the claimant effectively provided the respondent with proof of bribery, so the respondent had no need to engage in fact-finding.

D Application of public policy

In *Hilmarton*, the English High Court speculated that a different outcome would have resulted from the local application of the English legal principle that a court will not enforce a contract or award damages for its breach if its performance will involve the performance of an act which violates the law of a foreign, friendly state.

²⁷⁶ Edward Eveleigh, “General Standards of Proof in Litigation and Arbitration Generally” (1994) 10 *Arb Int’l J*, at 334.

The *World Duty Free* tribunal stressed that their reasoning was rooted in ICC arbitral practice and a transnational construction of public policy²⁷⁷ and that the “law protects not the litigating parties but the public”.²⁷⁸

E Unclean Hands

World Duty Free applied the unclean hands doctrine, clarifying a possible legal consequence of a contract obtained by bribery. After weighing the strong evidence furnished to it under English, Kenyan law and international law, the tribunal concluded that Kenya legally avoided the contract it had concluded with the investor, which had been obtained through bribes paid.²⁷⁹ The claimant was not legally entitled to maintain any of its pleaded claims as a matter of international public order and public policy under the contract’s applicable laws.²⁸⁰ The tribunal rendered its award based on English law²⁸¹ and decided that ultra vires acts of the former President of Kenya could not be imputed to the Republic. Dismissing claims in *World Duty Free* did not mean the tribunal favoured one side; it withdrew the machinery of international justice from all parties.

F Enforcement

In two disputes, *Hilmarton* and *Honeywell*, awards were received by parties that then sought to enforce through national courts. In *Hilmarton*, both parties obtained an award which they separately tried to enforce. Shortly after the first arbitral award, OTV took the award to France to obtain enforcement, but before the French courts ruled on OTV’s application, the award was annulled in 1989 by the Court of Justice of Geneva and confirmed in 1990 by the Swiss Supreme Court (Tribunal Fédéral) as described above. Notwithstanding this, the Paris Court of Appeal in 1991 granted *exequatur* (enforcement) to OTV for the 1988 ICC award. This decision became final in 1994 when the French *Cour de Cassation* (Supreme Court) rejected an appeal brought by Hilmarton.²⁸² The court held the award “remains in existence even if set aside”.²⁸³ OTV was entitled to avail itself of the more favourable French law provision.

²⁷⁷ *World Duty Free* at [157]

²⁷⁸ At [181].

²⁷⁹ At [188(1)].

²⁸⁰ At [188].

²⁸¹ At [158-159], [165].

²⁸² *Hilmarton Limited v Omnium de Traitement et de Valorisation* Decision No 484, Cour de Cassation, First Civil Chamber (1994); “Award Upheld in France Despite Annulment by Swiss Court”, (1994) Int’l Arb Rep Vol Iss 5, at 6.

²⁸³ Article 1502 of the French New Code of Civil Procedure.

In 1992, the new arbitrator decided that Hilmarton was entitled to its fee from OTV. Hilmarton also took this second award to France to request its exequatur. This was granted by the Court of First Instance in Nanterre in 1993 which also enforced the decision of the Swiss Supreme Court annulling the first ICC award. OTV then filed an appeal on both Nanterre court decisions to the Versailles Court of Appeal, which in 1995 rejected the appeal and upheld both decisions. OTV then appealed the Versailles Court's decisions to the French Cour de Cassation which in 1997 overturned and annulled the two 1995 decisions of the Versailles Court and held that Hilmarton's request for exequatur was inadmissible.

The second *Hilmarton* award was recognised and enforced in England.²⁸⁴ The High Court cited the Court of Appeal judgment in *Westacre*²⁸⁵ in consideration of the enforcement of an award and not the underlying contract. The High Court speculated that an English arbitral tribunal may have reached a different result applying the English legal principle that “an English court will not enforce a contract or award damages for its breach if its performance will involve the doing of an act in a foreign and friendly state which violates the law of that state.” However, the High Court did not consider this relevant as the parties had chosen Swiss law and Swiss arbitration in their Protocol of Agreement and the findings and conclusions of the arbitrator under such Swiss law must be respected. The second ICC award was enforced. Since the second arbitrator did not have any finding of fact of corruption or bribery, there was no public policy grounds on which the enforcement of the *Hilmarton* award could be refused as the award which was legal by its proper law and by the law of the seat.

In *Honeywell*, no grounds for refusing recognition or enforcement of the Award under s 103 of the English Arbitration Act 1996 were found, as no bribery had been proven in the Dubai courts and contracts procured by bribe are enforceable. Thus, the court resisted using any discretion to refuse enforcement of an award under the NYC's public policy exception.

VII Conclusions

Bribery is a global scourge affecting construction, leading to substantial economic losses and numerous other adverse effects. It is facilitated by the high value, complex nature of projects and the context in which they occur. Many stakeholders are interested in

²⁸⁴ *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222.

²⁸⁵ See Part IV.E.3 above.

international arbitrations consideration of bribery, including national courts, politicians, media, NGOs, and the public.

International arbitration could be perceived as providing a safe harbour for bribery due to high standards of evidence applied by tribunals, the ability of parties to limit the scope of proceedings and the lack of transparency. As a result, parties may earn excessive profits from secret arrangements, avoid contractual obligations or evade national laws prohibiting bribery. Where arbitral outcomes potentially assist the implementation of criminal intention, lead to unjust enrichment, and fail to maintain the international public order, tribunals should consider their potential to destroy arbitration's reputation as an autonomous legal order, alongside national courts.

Different outcomes in the six disputes considered may be attributed to different facts, the strength of evidence presented and applicable laws. However, the passage of time may have affected tribunals' willingness to address bribery to maintain an international public order due to growing "opprobrium" as anti-bribery international conventions have been increasingly implemented into national laws and codes, some with global reach. Comments by national courts enforcing the *Westinghouse* and *Hilmarton* awards indicated that they may have reached different conclusions on the facts.

Tribunals are equipped with broad procedural powers which they can use to adjust to different situations. However, with limited means at their disposal to gather evidence, arbitral tribunals may continue to experience difficulties in satisfying the high standards of evidence of bribery that has developed. Conversely, clear evidentiary rules will ensure that the facts are properly determined and allow tribunals to reject vexatious use of the illegality defence. This may have been a factor in the *Honeywell* case where the allegations of bribery had not been confirmed by national courts or criminal prosecutions in Dubai.

If a respondent successfully invokes the illegality defence, a non-contractual claim for restitution may still be available. Arbitral tribunals could consider granting this form of relief, departing from a traditional approach that denies the claimant any legal remedy. This could be more efficient than parties having to seek separate restitution through national courts. However, tribunals could undermine the sovereignty of national courts in decide such cases with a lower level of transparency over the award may be considered to be against the public interest in the countries concerned.

The *World Duty Free* tribunal upheld TPP against bribery to protect the public interest. Future claims involving allegations of bribery with similar standards of evidence may be inadmissible when tribunals apply the doctrine of clean hands. Related discontinuance of arbitral proceedings may prevent wasted cost and effort when awards cannot be enforced or need to be annulled due to findings from concurrent investigations.

If strong evidence of bribery emerges after arbitral proceedings commence, parties may steam ahead to settle the dispute themselves to avoid admissions of wrongdoing being captured in arbitral decisions or awards. Settlements may remain confidential unless disclosure is required by mandatory discovery in court proceedings.

If tribunals fail to provide claimants with the relief they seek, setting sail to pursue a claim for restitution in the turbulent seas of national courts may remain an unattractive alternative, particularly when evidence becomes a matter of public record. If forced to return to the negotiating table, claimants seeking compensation may make little progress in steering respondents away from entrenched positions with significant open water between the parties.

Whilst the outcome of *World Duty Free* tribunal could be considered to have provided an additional windfall for the state that had received the bribe, publicity surrounding this and similar cases may, in future, be seen as reducing the parties' ability to seek safe harbour via international arbitration, contributing upholding the international order. Such publicity may be a more effective deterrent for companies considering bribery in construction projects than national laws prohibiting bribery.

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