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ARBITRATION AND THE FIGHT AGAINST CORRUPTION IN CONTRACTS: A PROPOSAL TO REFORM THE UNCITRAL MODEL LAW

by Mateo Miguel Verdias

I. INTRODUCTION

In cases where the underlying contract to an arbitral dispute has proven to be tainted by corruption, there are not at present enough legal tools for arbitrators to avoid enforcing corruption-obtained rights, nor for national courts to reject the enforcement of the arbitral award which upheld, in one way to another, such rights. A preliminary review of domestic court decisions shows that the most frequently applied ground for rejecting enforcement of an award containing corruption-obtained rights is the violation of public policy as provided in the UNCITRAL Model Law and the New York Convention. Still, violation of public policy may entail a myriad of meanings and consequences from one jurisdiction to another. Its ambiguity is less than satisfactory when it comes to tackling such a problematic issue as corruption in contracts.

This article, therefore, argues that a more explicit ground for annulment of awards should be incorporated to the UNCITRAL Model Law: when in the conclusion or performance of the contract or legal relationship whose rights were enforced in the arbitral proceedings, there has been corruption of any of the parties, in accordance with the transnational understanding of corruption. By doing so, we, the arbitral community, would contribute to discourage those engaged in corrupt dealings from using arbitration as a means to have their rights upheld and enforced.

This article is structured as follows. *First*, it assesses the problem of corruption and its impact on the global economy. *Second*, it reviews the transnational legal treatment that states have given to corruption generically and in the context of arbitration (Section III). *Third*, it dives into the analysis of how domestic courts acted to prevent—or not—the enforcement of arbitral awards upholding rights acquired corruptly (Section IV). *Fourth*, it suggests a single legal text solution that tackles the two sides of the same coin: on the one hand entitling domestic courts to reject

enforcement of awards upholding rights arising out of such contracts and, on the other hand, implicitly obliging arbitrators not to uphold corruption-obtained rights in a final award (Section V). Finally, Section VI summarizes the considerations of the author as to the responsibility of the arbitral community to contribute to the fight against corruption in businesses by *expressly* regulating against it.

It is noted that this article focuses on the approach of domestic courts towards the enforcement of commercial arbitration awards. The exequatur of investment arbitration awards is deliberately left out of this analysis, as the instruments available for arbitral tribunals deciding investment disputes are often sufficient to combat corruption contracts:[1] the investment treaties' requirement that the investment must be made in accordance with the laws of the host state allows tribunals to decline jurisdiction over claims arising out of corrupt investments. This tool is not available for commercial arbitration tribunals.

II. THE PROBLEM: CORRUPTION AND ITS IMPACT ON THE GLOBAL ECONOMY

A. A *Transnational Definition of Corruption*

States have adopted several, yet often differing, domestic concepts of corruption. Consequently, conduct considered as corrupt in one country could easily be performed in another state with no fallout. Acknowledging the need to transnationally tackle corrupt conduct, an international legislative process to halt corruption has been underway since 1996. Its main milestone was reached on October 31, 2003, when the United Nations (UN) General Assembly adopted the UN Convention against Corruption ("Convention against Corruption")—of which there are currently 186 signatory states.[2]

Corruption, in the context of public functions, was defined by the Convention as "[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official

[1] Corruption does not necessarily occur through contracts, but we centralize the issue around them as they are the most common form of corruption.

[2] United Nations Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter Convention against Corruption].

duties."[3] The same far-reaching definition applies when it is the public official who requests or accepts the "undue advantage."[4] In the private sector, the signatory states to the Convention agreed to consider adopting such legislative or other measures to criminalize corruption defined as "[t]he promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting."[5] Again, this definition applies when it is the private official who requests or accepts the undue advantage.[6]

Transnationally, and outside these specific treaty definitions, corruption may also encompass, non-exhaustively, other conduct such as embezzlement, self-dealing, trading in influence, and extortion.[7] Through corrupt conduct, numerous entities have historically secured commercial contracts containing arbitration clauses. As a result, when disputes arose out of those contracts, those parties utilized the arbitration process to have their corruption-obtained rights enforced through the resulting award. Ultimately, those awards were enforced by domestic courts.

B. *The Impact of Corruption on the Global Economy*

On December 9, 2018, the Secretary General of the UN reported very alarming data. Specifically, it was revealed that US$1,000,000,000,000 is spent annually on corruption payments, while US$2,600,000,000,000 is the global cost of corruption. Considering that the estimated Gross World Product ("GWP") in 2018 was US$80,000,000,000,000, the UN concluded that annually the equivalent to 5% of the GWP is lost to corruption.[8]

Likewise, a report issued by the UN Office on Drugs and Crime disclosed

[3] *Id.* art. 15(a).

[4] *Id.* art. 15(b).

[5] *Id.* art. 21(a).

[6] *Id.* art. 21(b).

[7] *See generally* ANA PEYRÓS LLOPIS, TRANSNATIONAL CORRUPTION (2017).

[8] *See The costs of corruption: values, economic development under assault, trillions lost, says Guterres*, U.N. NEWS, (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971.

severe figures on the losses incurred by corporations when investing in corrupt countries:[9]

i. Investing in a moderately corrupt country can be up to 20% more costly than investing in a country without corruption. This directly affects emerging economies that depend on foreign investments.[10]

ii. Countries that combat corruption and strengthen the rule of law could increase their national income by 400%.[11]

Similarly, a memorandum prepared jointly by the World Bank and the European Bank for Reconstruction and Development shows that in small companies, corruption payments account for 5% of these small companies' annual income, while in medium-sized companies it is 4% and in large companies 3%.[12] This evidences a disparity of at least 2% in profits between a large and a small company, simply because of corruption. Experts rightly point out that generally, corruption helps consolidating large companies while endangering the survival of start-up and middle-sized enterprises.[13]

Considering the transnational effort put in motion by the international community to specifically target corrupt activities, this author believes that more far-reaching and specific action is needed from the arbitral community to prevent the enforcement of rights derived from corrupt bargains. This paper aims to provide a clearer understanding of the current role that the arbitral legal tools available are playing.

III. LEGAL TREATMENT OF CORRUPTION

A. *Generic Legislative Crusade to Tackle Corruption*

Since 1996, states have ratified numerous instruments aimed at combating

[9] *See* U.N. Off. on Drugs & Crime, Corruption Facts, https://www.unodc.org/pdf/facts_E.pdf.

[10] Daniel Kaufmann, *Corruption: The Facts*, FOREIGN POLICY, Summer 1997, at 5, https://web.worldbank.org/archive/website00818/WEB/PDF/FP_SUMME.PDF.

[11] Press Release, U.N. Off. on Drugs & Crime, Eliminating corruption is crucial to sustainable development, U.N. Press Release UNIS/CP/866 (Nov. 1, 2015).

[12] *See* Stephan Sumah, *Corruption, Causes and Consequences in* TRADE & GLOBAL MARKET 73 (Vito Bobek ed., 2018).

[13] *Id.*

corruption. In order of ratification, these include:

i. Inter-American Convention against Corruption, adopted by the Organization of American States (OAS) (1996).

ii. Organization for Economic Co-operation and Development (OECD) Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996).

iii. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

iv. European Union (EU) Convention against corruption involving public officials (1997).

v. Criminal Law Convention on Corruption (Treaty No. 173 of the Council of Europe) (1999).

vi. Civil Law Convention on Corruption (Treaty No. 174 of the Council of Europe) (1999).

vii. African Union Convention on Preventing and Combating Corruption (2003).

viii. United Nations Convention against Corruption (2003, in force since 2005).

Specifically, in the Preamble to the Convention against Corruption, the signatory states indicated that the Convention's adoption was based on the conviction that "the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively."

In Article 12, the Convention expressly provides that "[e]ach State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption",[14] which may consist in "[p]romoting the development of standards and procedures … for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the

[14] Convention against Corruption, art. 12(1).

State."[15] All the above strongly suggests that states must incorporate specific provisions aimed at tackling corruption. It is not enough to approve generic norms with which, eventually, some forms of corruption can be combated. Specificity is required. And it is on that basis that this article proposes an amendment to the UNCITRAL Model Law.

B. *Lack of Express Legal Tools to Combat Corruption in the Context of Arbitration*

Article 34 of the 2006 UNCITRAL Model Law on International Commercial Arbitration, entitles a state court (of the seat) to annul an arbitral award provided that:[16]

i. Upon request of the challenging party, the tribunal verifies that either:
   1. The arbitration agreement was invalid;
   2. There was a violation to the due process of the law;
   3. The award exceeded the terms of the dispute encompassed by the arbitration agreement; or
   4. The tribunal was unregularly constituted.

ii. Alternatively, on its own, the tribunal finds either:
   1. The subject matter of the dispute was not arbitrable under the terms of the applicable law; or
   2. The award is contrary to (international) public policy.

This legal formula has been adopted, literally or with minor modifications, by the 85 states that have enacted arbitral legislation based on the UNICTRAL Model Law.[17] This means that, in at least 85 states, the law does not provide for "the award upholds rights arising out of a corrupted contract" as an express ground for annulment of the award that decided the dispute.

[15] *Id.* art. 12(2)(b).

[16] U.N. Commission on Int'l Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, U.N. Sales No. E.08.V.4 (2006), art. 34 [hereinafter UNCITRAL Model Law].

[17] *See* UNCITRAL, Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Nov. 15, 2021).

A distinction is due at this point. This article's analysis and proposal aims to tackle two different situations: (i) what *arbitral tribunals* should do (*i.e.*, avoid enforcing rights arising out of corrupted contracts and make relevant inquiries to that end), and (ii) what *domestic courts* should do when faced with awards that uphold corrupted contracts (*i.e.*, make relevant inquiries and annul the award where applicable). To these ends, the author proposes a reform of the UNCITRAL Model Law, which, upon enactment by states, will create an obligation for both domestic courts (to annul) and an entitlement to arbitral tribunals (to consider how this obligation of the courts under the *lex arbitri* will affect the enforceability of their awards). It is a single measure that could have an impact in both forums.

It should be borne in mind that, in the absence of an express ground for annulment due to corruption in the underlying legal transaction, there has been a position—currently abandoned in practice[18]—according to which the arbitrator should not necessarily make inquiries on this matter whenever it is not an issue in dispute

[18] This approach is no longer followed by most tribunals. *See* GARY BORN INTERNATIONAL COMMERCIAL ARBITRATION 2183 (2009) ("Insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition to the fulfillment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy . . . a tribunal is incapable of deciding that Party A is legally obligated to pay €100, or to hand over specified property, to Party B without considering public policy objections to the existence of such an obligation. Inherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to consider and resolve public policy (and other mandatory legal) objections."). *See also* Anne-Catherine Hahn, *Bribery Allegations in Arbitration Proceedings*, *in* THE INTERNATIONAL ARBITRATION REVIEW 39 (James H. Carter ed., 10th ed., 2019) ("If they want to avoid their award from being annulled or declared unenforceable, arbitrators can no longer turn a blind eye to red flags indicating potentially illegal behavior, but must address their potential relevance."). There is a well-established rule in comparative jurisprudence, which indicates that arbitrators shall not exceed their mandate when investigating on uncontested points, to the extent that such uncontested points may affect the core of the dispute. *See* Minmetals Germany GmbH v Ferco Steel Ltd, [1999] 1 All ER (Comm) 315, 325-326. ("[T]he arbitrators' reliance on evidence derived from their own investigations . . . went to a central issue within the overall dispute referred to arbitration, namely what loss had been caused to [claimant] by [respondent's] breaches of contract. Whether in relying upon that evidence or in omitting to disclose it to [respondent] ... is entirely irrelevant to the question whether the tribunal's decision was inside or outside 'the scope of submission'. That scope [within the meaning of Section 103(2)(c) of the UK Arbitration Act 1996] falls to be defined by reference to the issues to be resolved by the arbitrators . . . This head of objection to enforcement must therefore be rejected."). *See* Michael Hwang S.C., & Kevin Lim, "Corruption in Arbitration— Law and Reality", 8 ASIAN INT'L ARB. J. 1, 20 (2012), ; ("A tribunal is not 'solely a manifestation and instrumentalization of party autonomy which can ignore' international goals of sanctioning illegality.") (quoting Richard Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators", 6th IBA International Arbitration Day, Sydney (Feb. 13, 2003) at 15).

between the parties.[19] And if the arbitrator does so, and issues a decision on the matter, the arbitrator could decide an issue not submitted to it (*ultra petita*) and therefore exceed her mandate. Therefore, it would be left to the will of the parties whether the arbitrator should make inquiries to verify the existence of corruption in the underlying contract: whether to include it as a disputed issue or not. This position derived from a legislative vacuum. Thus, and although it is not an approach currently followed by tribunals, it remains an issue that deserves an express solution to avoid its potential, and undesirable, return to practice. Notably, as the author will propose, the inclusion of an additional and more explicit ground for annulment of awards enforcing corruption-obtained rights, will—implicitly—entitle a tribunal to make the relevant inquiries even when the parties did not dispute the issue considering the possible impact on the enforceability of the tribunal's eventual award.

The lack of a specific rule aimed at combating corrupted contracts whose rights are sought to be enforced in arbitration is evident. And this is contrary to the international commitments assumed by many states in which, as seen, the insertion of *specific* and not *generic* norms aimed at combating corruption in all its versions, is key.

However, the arbitral community should ask itself: have arbitrators and state judges succeeded in practice to effectively close "arbitral doors" to corruption through the grounds provided for in the UNCITRAL Model Law?

The answer is negative.[20] A review of comparative case law shows that

[19] *See* Westacre Investments Inc. v. Jugoimport-SDPR Holdings Co. Ltd. And Beogradska Banka, ICC Case No. 7047, Final Award (Feb. 28, 1994), *in* 13 ASA Bulletin 301, 343 (1995) ("The word 'bribery' is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate."). In this case, the tribunal considered that if corruption is not a debated issue, the tribunal does not have the duty to analyze it.

[20] The reader should bear in mind, as a starting point, that the allegation of corruption is arbitrable subject matter, as required by the UNCITRAL Model Law. Initially, it was considered that the arbitrator should decline jurisdiction. This was on the grounds that corruption is a matter of public policy (and that the arbitrator should not adjudicate on the performance or breach of a contract that was contrary to public policy, since it was absolutely invalid). If the arbitrator were to rule on the merits of an allegedly corrupt contract, the award would be annullable). This was the understanding of the Swedish arbitrator Gunnar Lagergren in 1963 in the award of the emblematic ICC Case No. 1110, when he considered, from the perspective of "general principles of law" (and not of a national law), that corruption disputes cannot be arbitrated because this would imply enforcing a contract that is absolutely invalid and contrary to

domestic courts on the one hand, and arbitral tribunals on the other hand (considering the different concerns that each entail, as analyzed in the following section) have not always sought to combat corrupted contracts and, in those cases where they have done so, they have repeatedly used the ground of "violation of international public policy" to justify an annulment of the contract in dispute or, perhaps, of the award enforcing the rights of such corrupted contract.[21] However, and as it will be demonstrated below, in most of these cases, by relying on such a ground, the decision-makers faced legal challenges and a lack of uniformity of criteria, enabling corruption to go unpunished. And this is something that the arbitral community should not tolerate.

The duties of courts and tribunals as to how to "close the arbitral doors to corruption", raise certainly different considerations in terms of their legal powers. Still, and to simplify the analysis, the author emphasizes that a new ground for

public policy. Case No. 1110 of 1963, ¶¶ 16, 23 (ICC Int'l Ct. Arb.), *reprinted in* 10 ARB. INT'L 282 (1994) ("[I]t cannot be contested that there exists a general principle of law recognised by civilised 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… [J]urisdiction must be declined in this case… Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes . . ."). However, this position has been minor and little followed. Based on the doctrine of separability and, bearing in mind that arbitrators deciding on corruption are merely analyzing the way the contract was arrived at, and that broadly drafted arbitration clauses encompass disputes concerning the invalidity of the contract due to corruption, different arbitral tribunals and state courts have recognized the arbitrability of the dispute. *See* Fiona Trust & Holding Corp. v. Privalov, [2007] EWCA Civ 20 [2007]; *aff'd* [2007] UKHL 40 ("[I]f arbitrators can decide that a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery."). Consequently, an award could not be annulled under the pretext that the tribunal lacked jurisdiction. *See also* Case No. 6474 of 1992, 25 Y.B. Comm. Arb. 279 (ICC Int'l Ct. Arb.) ("The Republic of X alleged that the contract was induced by corruption and fraud. The arbitral tribunal held that corruption or fraud could not be determined in the context of a discussion on jurisdiction. Moreover, even if the Republic of X could prove fraud, it would have to prove that the arbitration clause was entered into due to corruption and fraud."). Finally, there is a consistent practice under the New York Convention to allow arbitrability of disputes where corruption of the underlying contract is alleged. This, in light of Art. VII(2), and Art. II(1), which seek to avoid the application of idiosyncratic approaches of each State to grounds for non-recognition of arbitration clauses. *See*, *e.g.*, Gary Born, International Commercial Arbitration 1079, n. 298 (3d ed., 2021) ("That is particularly true in light of Article II(1)' s requirement that international arbitration agreements be recognized as to differences whether 'contractual or not,' which plainly contemplates recognition of arbitration agreements as applied to non-contractual fraud claims."). Moreover, if understood otherwise, a mere allegation of corruption would be sufficient to remove the court's jurisdiction.

[21] *See supra* note 19, . *See also* Mohamed Abdel Raouf, *How should international arbitrators tackle corruption issues*? 24 ICSID REVIEW 116, 120 (2009).

annulment of awards on the basis of corruption of the underlying contract, will entail two different but effective consequences on both forums: (i) for enforcing courts, to make the relevant inquiries and rejecting enforcement of an award which upholds the rights of a corrupted contract, and (ii) for arbitral tribunals, to make the relevant inquiries and to deny upholding rights arising out of corrupted contracts that will, in any case, later be denied enforcement by domestic courts (such inquisitive approach by tribunals would decrease desirability of corrupts to have arbitration as a means to have their corrupt contracts enforced).

IV. FAILURE OF THE JURISPRUDENCE TO STANDARDIZE CRITERIA TO COMBAT CORRUPTION

Both arbitral and judicial jurisprudence have failed to establish uniform criteria to determine the existence of corruption in a contract and to eradicate it accordingly. The challenges that state courts and arbitrators have faced in establishing uniform criteria can be grouped into three areas:

i. Determination of the applicable law for defining and verifying the existence or non-existence of corruption. This issue, as this paper will further develop, should be tackled by relying on a broad transnational definition of corruption.

ii. Determination of the consequences of a finding of corruption, namely whether corruption leads to unenforceability of the contract (when seen from the perspective of the arbitral tribunal) and, ultimately, to the annulment of an award that would enforce rights arising out of a corrupted contract (when requested before a domestic court). Considering that these are different sides of the same issue (corruption of the underlying contract), and that judicial rulings are generally publicly available allowing the establishment of "trends", this paper analyzes domestic case law exclusively.

iii. Determination of the scope of authority, namely whether the arbitral tribunal can or, on its turn, the state judge, decide on corruption issues if it was not a point disputed by the parties.

A. *First Problem: the Applicable Law*

The determination of the applicable law to define corruption activities is a key element and problem to the effort of combating such activities.

Not all jurisdictions equally criminalize both private and public corruption and, similarly, not all jurisdictions consider the same actions to be corrupt.[22] In fact, courts have varied as to the laws they apply to define corruption and investigate it accordingly: some have chosen to analyze it in light of the law of the seat of arbitration (*lex fori*);[23] others under the law of the place of performance of the contract (*lex loci solutiones*);[24] others based on the law of the country where enforcement is sought;[25] among others.[26]

As arbitrator Alfredo Bullard has rightly stated, it is not clear which law should be applied by the judge to determine the existence of a violation of public order:

> [and] if we want to complicate the picture, the relevant public policy may not only be that of the seat of arbitration, that of the country whose law is applicable to the merits of the dispute, but also that of the law of the country of the parties, or that of the country or countries in which the award will be enforced. As can be seen, a rather more complex problem than simply determining when we are faced with an 'impure act' as sin. The problem is not a simple one. An exaggeratedly broad interpretation of the concept of public policy (as would be the case with impure acts) could lead to a judicial review (always ex post) of almost any aspect of the dispute.[27]

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[22] *See* Matthias Scherer, *Circumstantial evidence in corruption before international tribunals*, 5 Int'l Arb. L. Rev. 28, 29-30 (2002). Even in Scherer's table of cases, it can be seen that under different applicable laws, several amounts of commission in the case of agency contracts have been considered as corrupt.

[23]*See* A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard*", TRANSNAT'L DISP. MGMT, no. 2, 2004, at 13 (analyzing Lagergren's decision in ICC Case No. 1110).

[24] Case No. 3916 of 1982 (ICC Int'l Ct. Arb.), *in* I Collection of ICC Arb. Awards 1974-1985 (1994), at 509. The arbitrator had to resolve first the question of applicable law, concluding that the laws that made the most sense to apply were those of Iran (because that was where the contract had been signed and where the obligations were to be performed), and the law of France (because it was the law referred to as the as applicable in the English version of the contract). The arbitrator found that under both regulatory regimes, bribing was illegal and entailed the absolute nullity of the contract.

[25] *See* Martin, *supra* note 23, at 14-15 (analyzing ICC Case No. 3913 of 1981).

[26] *See id.* at 12 *et seq*.

[27] *See* Alfredo Bullard, *No cometerás actos impuros: el orden público y el control judicial del laudo arbitral*, 63 THEMIS REVISTA DE DERECHO185, 190 (2013)(Original in Spanish: "*Y si queremos complicar el panorama, el orden público relevante puede no sólo ser el de la sede del arbitraje, el del país cuya Ley es aplicable al fondo de la controversia, sino también el de la ley del país de las partes, o el del país o países en los que el laudo será ejecutado. Como se ve, un problema bastante más complejo que simplemente determinar cuándo estamos frente a un 'acto impuro' como pecado. El problema no es sencillo. Una interpretación*

The lack of clarity as to the applicable law to determine the existence of corrupt conduct has meant that corruption contracts cannot be tackled adequately in arbitration. Yet, simply shedding light over which would be the appropriate applicable law to define corruption can still potentially fail to tackle the issue of non-uniformity as to such definition (even when the applicable law to define corruption is clear, there are a myriad of conflicting definitions between jurisdictions—which is the true problem we must tackle). Hence, as this paper develops in Section IV, a transnational definition of corruption should be applied in all cases.

A clear example of this is the well-known 1992 ICC case *Hilmarton v. OTV*, in which an arbitral tribunal had to consider allegations of corruption and traffic of influence in an intermediation contract with the Algerian government.[28] Specifically, OTV alleged that Hilmarton had engaged in traffic of influence with the Algerian government to obtain a contract for OTV with the State, and therefore should not perform the intermediation contract because it was a contract with an unlawful object.[29]

The arbitral tribunal conducted a double analysis on the allegations of corruption and traffic of influence. It understood that the analysis should be made (i) in light of the substantive law of the contract (*lex causae*) chosen by the parties (Swiss law), and (ii) under the law of the place of performance of the contract (*lex loci solutiones*) (Algerian law).

Under Swiss law, corruption—specifically bribery—was contrary to public policy. However, traffic of influence did not fall under the Swiss definition of corruption (note that, under a transnational definition of corruption, traffic of influence does constitute corruption). And, since only traffic of influence (but not bribery) had been proven, the contract was not voidable under Swiss law.

Under Algerian law, the arbitrator found that both the payment of bribes and

exageradamente amplia del concepto de orden público (como sucedería con los actos impuros) podrían llevar a una revisión judicial (siempre ex post) de casi cualquier aspecto de la controversia.").

[28] *See* Case No. 5622 of 1992, 19 Y.B. Comm. Arb. 105 (ICC Int'l. Ct. Arb.) [hereinafter *Hilmarton v. OTV*].

[29] *See* Martin *supra* note 23, at 20.

traffic of influence with members of the government were corrupt, illegal, and contrary to public policy. Considering the applicability of both sources of law, and that traffic of influence having been proved (although corruption had not), the arbitrator annulled the contract based on the Algerian legal regime, stating:

> Law of Algeria lays down a general principle which must be respected by all legal systems wishing to fight corruption. This is why the violation of this Law, which concerns international public policy . . . . Hence the brokerage contract is null and void in its entirety.[30]

It is important to note that the arbitrator annulled the contract, considering that under exceptional circumstances, the violation of the public policy of a foreign legal system could be contrary to the standards of morality and good customs of Swiss law, which also implied a violation of the public policy of the latter.[31]

Yet, as explained below, this problematic and complex set of applicable laws—with a non-settled criterion—only benefited the corrupt. What could have been a victory in the fight against corrupted contracts turned out to be the opposite. The Court of Justice of Geneva, in a decision later confirmed by the Swiss Federal Court (1989 and 1990, respectively), annulled the award on the grounds that the arbitrator's analysis of Algerian public policy was incorrect.[32] According to the Court, the applicable law for determining the existence of corruption was the *lex causae* exclusively (Swiss law), not the law of the place of execution of the contract (Algerian law). In fact, the Swiss court considered that "the violation of Algerian law did not conflict with good morals under Swiss law and that, therefore, the arbitrator's decision to annul the contract ' . . . constituted a clear violation of Swiss law . . . '."[33] This conclusion reaffirms the position that there is no clearly defined *transnational* public policy behind the concept. Following this annulment, a new tribunal was then

[30] *Id.*

[31] *See* Raouf *supra* note 21, at 121.

[32] *See* Martin *supra* note 23, at 22.

[33] *See* Fernando Mantilla-Serrano, *Algunos apuntes sobre la ejecución de los laudos anulados y la Convención de Nueva York*, REVISTA COLOMBIANA DE DERECHO INTERNACIONAL, 2009, at 24 (author's translation).

appointed, which, applying only Swiss law, did not annul the contract.[34] Ultimately, a contract that—as proven in the arbitration—was obtained through traffic of influence with the Algerian government, was enforced. Arbitration thus served to enforce a contract obtained through governmental traffic of influence.

B. *Second Problem: the Consequences of Corruption Findings*

Another recurrent issue, which evidences a lack of uniformity, are the consequences of corruption findings. From the perspective of a competent domestic court, can corruption lead to the annulment of the award that indeed enforces a corrupted contract?[35] Once again, the answer will depend not only on each jurisdiction but on fluctuant and changing decisions of state courts (in the case of annulments). And this uncertainty and inconsistency simply facilitates the way for further corrupted contracts.

Recent examples in some of the most sophisticated jurisdictions shed light over this problematic reality. The following analysis focuses on how domestic courts have tackled the issue of enforcing arbitral awards that decided disputes arising out of corrupted contracts (regardless whether such contracts were enforced or not).

In England, for instance, there is no consensus in the courts as to whether to set aside awards where contracts with a lawful object—but which were obtained through corruption—are to be enforced. The following cases are representative of this issue:

i. *Crescent Petroleum Company International Ltd and Crescent Gas Corporation Ltd v. National Iranian Oil Company*, High Court of England and Wales: In 2016, the High Court of England and Wales adopted a particular annulment criterion under public policy: the concept of violation of public policy encompasses contracts that are absolutely void (*e.g.*, for having as main object an unlawful element), but not those

[34] *See* Martin *supra* note 23, at 24.

[35] A similar question could be asked in the context of arbitration proceedings: does corruption lead to the non-enforceability of the contract in the final award? As we argue in this paper, considering that arbitrators are obliged to issue an enforceable and non-annullable award, the existence of a ground to annul awards that enforce corrupted contracts would create an obligation to arbitrators to deny enforceability of such contracts in a final award.

that are potentially voidable (*e.g.*, those with a lawful object but which were procured through corruption). Consequently, according to the Court, it is a ground that does not necessarily prevent the enforcement of contracts *procured* through corruption. The Court held that insofar as the plaintiff in the request for annulment of the award did not add new evidence and no exceptional circumstances were verified to consider that the contract was absolutely null and void, the fact that it had been procured through corruption did not constitute a violation of public policy that would justify a new review of the facts and the annulment of the arbitration award.[36] The award was not annulled, and the Court reasoned:

> I reach the following conclusions: … (2) There is no English public policy requiring a court to refuse to enforce a contract procured by bribery. A court might decide to enforce the contract at the instance of one of the parties. It is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other.[37]

ii. *Patel v. Mirza*, UK Supreme Court: In 2016, the UK Supreme Court ruled on a case in which annulment of an award was requested because the decision mandated the restitution of a payment that, from its very origin, was for the purpose of paying a bribe.[38] Yet, the court rejected

[36] *See* National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor [2016] EWHC 510, ¶ 49 (Comm) (Mar. 4, 2016) [hereinafter *NIOC v. Crescent Petroleum*].

[37] *See id.* Facts: In 2001 Crescent and NIOC signed a contract for the purchase and supply of gas. In 2009 Crescent initiated arbitration alleging that NIOC breached its obligation to supply gas. NIOC denied the allegations, and argued that the contract had also been procured through corruption. In its decision, the tribunal held that while it had been proven that corrupt payments had been discussed during the negotiation of the contract, there was insufficient proof that such payments had actually been made. Moreover, there was no imbalance in the contract that would suggest corruption. The tribunal indicated that NIOC should have provided the minutes of the meetings where the alleged corruption took place. In seeking to vacate the award, NIOC argued that the tribunal erroneously failed to find corruption, and that in any event, the mere fact that the contract was "tainted" with corruption was sufficient grounds for not recognizing and nor enforcing the award (and also to vacate it). Crescent held that the mere "taint" of corruption in the contract did not justify its annulment. The Court indicated that the mere existence of "stains" of corruption is not sufficient to annul an award, since this would violate legal certainty. Finally, it rejected the nullity stating that it can only proceed when there is new evidence that was not presented before the arbitral tribunal or "in very exceptional circumstances". *Id.* at ¶ 32.

[38] Patel v Mirza [2016] UKSC 42 (July 20, 2016).

the request for annulment considering that the restitution of what was considered as an "illegal" payment was not contrary to UK law.[39] In fact, the Judge held that: "Bribes of all kinds are odious and corrupting, *but it does not follow that it is in the public interest to prevent their repayment*."[40] The Judge did not develop the analysis of the existence or not of sufficient evidence of corruption. The award was not annulled.

iii. *Honeywell International Middle East Limited v. Meydan Group LLC (formerly Meydan LLC)*, High Court of England and Wales: In 2014, the High Court of England and Wales dismissed a request to annul an arbitral award in which it was argued that enforcing contracts "tainted" by corruption would render the award contrary to public policy.[41] It should be noted that the Court has historically been opposed to finding

[39] *See id.* at ¶¶ 118-121 ("Bribes of all kinds are odious and corrupting, but it does not follow that it is in the public interest to prevent their repayment. There are two sides to the equation. If today it transpired that a bribe had been paid to a political party, a charity or a holder of public office, it might be regarded it as more repugnant to the public interest that the recipient should keep it than that it should be returned. We are not directly concerned with such a case but I refer to it because of the reliance placed on that line of authorities. … The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal.")

[40] *Id.* at ¶ 118 (emphasis added).

[41] *See* Stacey McEvoy, *Arbitration award upheld by the English court in the face of allegations of bribery*, ALLEN & OVERY (July 15, 2014), https://www.allenovery.com/en-gb/global/news-and-insights/publications/arbitration-award-upheld-by-the-english-court-in-the-face-of-allegations-of-bribery.

that corruption contravenes international public policy and, accordingly, has generally indicated that this is not a sufficient *per se* argument for setting aside an award.[42]

C. *Third Problem: Ex Officio Investigations*

Finally, the third—though far from last—issue involving the arbitration of corrupted contracts, is the lack of clarity as to which approach state courts should take when deciding whether to annul awards related to cases where corruption was not alleged or not sufficiently proven in the arbitration proceedings.

In Switzerland, it is settled that contracts involving corruption payment are invalid and contrary to public policy. However, state courts often dismiss motions for annulment when corruption was not sufficiently proven in the arbitration. There is no *de novo* review nor even further inquiry by the state court. This even means that parties cannot make new corruption arguments with the evidence that was *already* presented before the arbitral tribunal: "It would not be compatible with the foregoing to allow the parties to state facts other than those found by the arbitral tribunal other than in the exceptional cases reserved by case law, even though such facts may be established by the evidence included in the arbitration file."[43] This approach is consistent with the principle that issues on the merits must not be subject to a *de novo* review by domestic courts (unless newly discovered evidence is made available to such court). Some examples:

i. First Civil Law Court of the Swiss Federal Tribunal, July 11, 2017, Judgement 4A-50/2017: allegations of corruption that were known but not alleged by the parties at the time of the arbitration, or that were not

[42] *See* Luis María Clouet, *Arbitrating under the table: the effect of allegations of corruption in relation to the jurisdiction of the arbitral tribunal and the enforcement of foreign arbitral awards* 27(NYU academic paper 2018), *available at* https://www.academia.edu/14855822/Arbitrating_under_the_table_the_effect_of_allegations_of_corruption_in_relation_to_the_jurisdiction_of_the_arbitral_tribunal_and_the_enforcement_of_foreign_arbitral_awards .

[43] First Civil Law Court, Case No. 4A-532/2014, Jan. 29, 2015, ¶ 4.1 (emphasis added) (translation by swissarbitrationdecisions.com), *available at* https://www.swissarbitrationdecisions.com/sites/default/files/29%20janvier%202015%204A%20532%202014%20%20et%204A%20534%202014.pdf;

sufficiently established in the arbitral proceedings, cannot be raised in annulment proceedings.[44] The court noted that "the Appellants submit that the award under appeal is incompatible with substantive public policy because it orders them to make payments to the Respondent that do not comply with their 'compliance rules' [sic] in the fight against corruption and which may expose them to severe criminal sanctions." The court indicated, however, that any annulment based on corruption arguments requires corruption to have been sufficiently established in the course of the proceedings but not taken into consideration in the arbitral award:

> [P]romises to pay bribes, according to the Swiss legal order, are contrary to good morals and, therefore, null and void due to a defect affecting their content. According to past case law, they also contravene public policy . . . . However, in order for the corresponding grievance to be admissible, *corruption must have been established but the arbitral tribunal must have refused to take it into account in its award.*[45]

In practice, applications for annulment based on allegations of illegal conduct are generally dismissed in Switzerland.[46] The ICC award dated December 13, 2016, was not set aside.

ii. First Civil Law Court, case *A. SA v. B. SA*, 4A-532/2014, January 29, 2015: the court held that an annulment on the grounds of corruption will proceed only when the party alleging corruption was able to "establish" it during the arbitration and it was not taken into consideration by the tribunal in its award.[47] In that case, the party alleging corruption

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First Civil Law Court of the Swiss Federal Tribunal, July 11, 2017, Judgement 4A-50/2017, ¶ 1.2 (translation by swissarbitrationdecsions.com), *available at* https://www.swissarbitrationdecisions.com/sites/default/files/11%20juillet%202017%204A%2050%202017.pdf.

[45] *Id.* at ¶ 4.3.2 (emphasis added).

[46] See Natalie Voser & Nadja Al Kanawati, *Arbitral tribunal does not act extra or ultra petita if it limits scope of declaratory judgment by imposing conditions (Swiss Supreme Court)*, Aug. 28, 2018.

[47] First Civil Law Court, Case No. 4A-532/2014, Jan. 29, 2015, ¶ 5.1 (translation by swissarbitrationdecisions.com), *available at* https://www.swissarbitrationdecisions.com/sites/default/files/29%20janvier%202015%204A%2053 2%202014%20%20et%204A%20534%202014.pdf.

> requested the tribunal to stay the proceedings until there was a judgment on a criminal proceeding being conducted in parallel against the alleged defendants for the corruption payment alleged in the arbitration.[48] The arbitral tribunal considered that, being unable to determine an approximate duration of the criminal proceedings, it was not appropriate to suspend the arbitration.[49] In hearing the request for annulment, the court indicated that in accordance with Swiss law, (a) a request for set aside cannot be based on facts other than those presented to the arbitral tribunal; (b) a contract promising corruption payments is void, and that any award enforcing such a contract is contrary to public policy; and (iii) corruption must be proven, and an allegation of corruption with parallel criminal proceedings may or may not justify a stay of the arbitration, but if not stayed, it does not amount to a violation of public policy.[50] Based on these arguments, the court dismissed the annulment.

In France, awards enforcing contracts obtained through corruption are considered a violation of international public order.[51] Historically, French courts have required that, in order to annul awards for violation of international public policy, the violation must be "flagrant, effective and concrete."[52] The courts would not conduct an independent analysis of the facts of the dispute and the application of the law by the arbitrator but limit themselves to determining in a "minimalist" manner whether the award manifestly contravened international public policy. However, beginning in 2014, a trend of relaxation of the standard in cases involving allegations of corruption emerged.[53] Thus, the tendency since 2014 has been: if during the *exequatur*

[48] *Id.* at ¶ B.

[49] *Id.* at ¶ 5.

[50] *Id.* at ¶ 5.1.

[51] For further discussion *see* Pierre Pic & Asha Rajan, *The Public Policy Exception in International Arbitration: A Snapshot From France*, 6 INDIAN J. ARB. L. 197 (2017).

[52] Verhoeft v. Moreau, Court of Cassation Mar. 21, 2000, 2001 Revue de l'ArbItrage 805 (2001).

[53] *See* Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France,

proceedings there is an allegation that the award enforces a contract "tainted" with corruption, the court deciding on a request for annulment for breach of public policy may analyze both the facts and the law to determine the corrupted nature—or not—of the underlying contract, and decide whether enforcing it would breach public policy.[54]

The current inquisitorial approach of the French courts favors the fight against corruption contracts in arbitration. Even if corruption had not been a controversial point in the arbitration dispute, French courts tend to analyze the facts and consider corruption for an eventual annulment of the award. The following emblematic decisions represent this jurisprudential shift:

i. *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH v. Sté CPL Industries Limited* ("*Schneider*"), Paris Court of Appeal, 2009, and Cour de Cassation, 2014:[55] relevant case as it was one of the last (if not the very last) where French courts took a "minimalist / restrictive" position on the analysis to be conducted when deciding on the annulment of awards.[56]In that case, the parties entered into a joint venture agreement whereby CPL Industries and other Nigerian companies were to assist Schneider in the negotiation and execution of public bidding contracts in Nigeria. A dispute arose out of that contract, and CPL Industries initiated arbitration proceedings against Schneider, claiming payment of sums due for the intermediation services performed.[57] Schneider argued that, for the purpose of

Paris Court of Appeal Mar. 4, 2014, 2014 Revue de l'ArbItrage 502 (2014)..

[54] *See* Pic & Rajan *supra* note 51, at 206.

[55] *See* Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited, Paris Court of Appeals, Sept. 10, 2009, 2010 Revue de l'Arbitrage 548 (2010); Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited, Court of Cassation, 1st Civil Law Chamber, Feb. 12, 2014, 2014 Revue de l'Arbitrage 231 (2014).

[56] *See* Clouet *supra* note 42, at24, n. 92.

[57] *See* Patricia Peterson, *The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?*, KLUWER ARBITRATION BLOG, Dec. 10, 2014, http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/.

winning the public tender awards, CPL Industries had engaged in corruption practices in violation of Nigeria's public policy.[58] The sole arbitrator held that the evidence was insufficient to establish corruption on the part of CPL and, accordingly, ordered Schneider to pay the sums due.[59] During the proceedings to annul the award (in France, seat), Schneider alleged that the award violated the public policy of France, alleging fraud and corruption, on the grounds that the arbitrator did not conduct a proper analysis of the factual evidence, and that the award did nothing more than endorse corruption.[60] When the annulment application was brought before the Paris Court of Appeal, the Court rejected Schneider's arguments. It noted that the Court's role was limited to simply analyzing whether the enforcement of that award would violate French international public policy, and whether such violation was "flagrant, effective and concrete."[61] The Court decided that such standard was not met and rejected all of Schneider's arguments related to public policy violations. Five years later, on cassation, the French Court of Cassation reaffirmed the decision of the Court of Appeal and demonstrated a willingness to continue with the minimalist approach to the review of arbitral awards, even when the challenge is based on allegations of corruption.[62]

ii. *Sté Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France* ("*Gulf Leaders*"), Judgments of the Paris Court of Appeal and the Court of Cassation of France, 2014: in a decision issued approximately 20 days after the Court of Cassation's decision in the Schneider case, the Paris Court of Appeal

[58] *See Schneider*, Cour de Cassation, Feb. 12, 2014, ¶¶ 2.4, 2.5, 8.

[59] *Id.*at ¶ 8.

[60] *Id.*

[61] *Id.*at ¶¶ 2.4-2.5.

[62] *See also* Hwang & Lim *supra* note 18, at ¶ 144.

adopted an opposite position (which was later confirmed by the Court of Cassation).[63] Under this approach, the court's review when analyzing the request for annulment or for recognition and enforcement of the award must be broader and may enter into an analysis of the facts and the law.[64] In this case, the Court enforced the award because corruption allegations were not sufficiently proved.

iii. Paris Court of Appeal, case SAS *Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd.* ("*Man Diesel*"), 2014: a party sought to challenge the enforcement of the award on the basis that it would be contrary to international public policy because the underlying contract was "tainted" with corruption.[65] The tribunal re-examined the arguments and allegations of corruption. By analyzing both facts and the law, it concluded that no corruption was sufficiently established.[66] The award was therefore not annulled.

iv. Paris Court of Appeal, *Belokon v. Kyrgyzstan*, February 21, 2017, decision Nº 15/01650: although this is not a case concerning corruption in the exact meaning as it has been analyzed so far, this case concerns activities of money laundering (which, under a transnational concept of corruption as suggested in this paper, should be tackled as well).[67]

[63] *See Gulf Leaders*, Paris Court of Appeal, Mar. 4, 2014, and Court of Cassation, June 24, 2015. *See also* Peterson *supra* note 57. In this case, SA Crédit Foncier de France (CFF) granted a loan to Gulf Leaders to be paid in three installments plus a service fee. Upon failure to pay the third installment and fees, CFF initiated an ICC arbitration. Gulf Leaders argued that the payments were not due because the contract had been obtained through corruption and therefore it was not appropriate to return the money already received. The tribunal found that corruption had not been sufficiently proven and ordered Gulf Leaders to return the money and pay what was owed. Gulf Leaders attempted to challenge the recognition and enforcement of the award on the grounds of corruption of the underlying contract. Both the Paris Court of Appeal and the Court of Cassation dismissed the challenge. However, it is interesting to note that both Courts independently conducted their own analysis of the facts and law to conclude that there was no corruption.

[64] *See* Peterson *supra* note 57.

[65] *See* SAS Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd., Paris Court of Appeals Nov. 4, 2014, 2014 Revue de l'Arbitrage 1037 (2014).

[66] *See* Inan Uluc, *Corruption in International Arbitration* 348 (Penn State L. Sch., SJD Dissertation, Apr. 13, 2016) *available at* https://elibrary.law.psu.edu/sjd/1/.

[67] *See* Kyrgyz Republic v. Valeri Belokon, Paris Court of Appeals, Feb. 21, 2017, 2017 Revue de l'Arbitrage

> Relevantly, it illustrates the continuing tendency of the Paris Court of Appeal to conduct a detailed re-investigation of the facts of the case before the tribunal in cases alleging violation of international public policy (whether for corruption or money laundering). In this case, the Paris Court of Appeal annulled an investment treaty award based on strong indications that the underlying investment would have been concluded for the purpose of money laundering, after having carefully re-examined the evidence in the case and having considered a fine for non-compliance with anti-money laundering regulations imposed after the arbitration on the party opposing the annulment.[68] This judgment confirms the trend that has been developing since 2014.

Except for the recent trend in the French courts, it can be affirmed that the lack of uniformity in criteria for defining and combating corruption has prevented arbitration from becoming a relevant actor in fulfilling this cross-border objective.

D. *A Recent Case That Reminds Us It Is Time to Act*

The current jurisprudence (except for the French trend since 2014), is unsatisfactory. The lack of jurisprudential uniformity and the different barriers to tackle corruption are contrary to the transnational legislative efforts on which states have embarked to eradicate corruption.

In the author's view, a recent example on how the lack of available tools prevented corruption from being properly tackled via arbitration, is the award dated August 6, 2019, in the case *Concesionaria Ruta del Sol* S.A.S. *contra la Agencia Nacional de Infraestructura* – ANI, Consolidated Proceedings Nº 4190 and 4209 administered by the Centre of Arbitration and Conciliation of the Chamber of Commerce of Bogota.[69] The following analysis is not a critique of the tribunal's ruling, but a

336 (2017).

[68] *See* April Lacson, *French Court of Cassation affirms de novo review of arbitral award for compliance with public policy*, LEXOLOGY, May 26, 2022, https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/french-court-of-cassation-affirms-de-novo-review-of-arbitral-award-for-compliance-with-public-policy.

[69] *See* Concesionaria Ruta del Sol S.A.S. v. Agencia Nacional de Infraestructura – ANI, arbitral proceedings No. 4190 and 4209 of the Centro de Arbitraje y Conciliación de la Cámara de Comercio de Bogotá, Final

consideration of how the tribunal lacked the appropriate legal tools to reach a different solution regarding the compensation to the–proven–corrupt claimant.

In 2015, the construction company Concesionaria Ruta del Sol S.A.S., together with Construtora Norberto Odebrecht S.A. and others, initiated an arbitration against Agencia Nacional de Infraestructura – ANI (*i.e.*, a Colombian public entity) for breach of a concession contract, claiming restitution of sums invested (*e.g.*, tax payments) and additional costs incurred due to delays in the works, allegedly attributable to ANI.[70] The seat of the arbitration was Bogotá, and the applicable substantive law was that of Colombia.

In its defense, ANI argued that the concession contract was null and void due to "unlawful cause and object . . . Likewise, there was a misuse of power . . . due to serious acts of corruption, circumstances that, however, fall under the grounds for nullity due to unlawful cause and object."[71]

The arbitral tribunal considered the allegation of corruption sufficiently proven.[72] Consequently, it declared the contract null and void. However, the award obliged the ANI to restitute part of the capital contributed by the claimant/corrupt company.[73] It considered that under Colombian jurisprudence, restitution is indeed

Award, Aug. 6, 2019.

[70] *See id.* at § 5.3.

[71] *See id.* at 64. Original in Spanish ("[P]or causa y objeto ilícitos … Así mismo, se presentó desviación de poder y se incurrió en expresa prohibición legal por graves actos de corrupción, circunstancias que, sin embargo, se reconducen en las causales de nulidad por causa y objeto ilícitos.").

[72] *See id.* at 304, (ANI's submission: "There are abundant procedural pieces that demonstrate the seriousness of the acts of corruption that had a clear and direct impact on the awarding of Concession Contract No. 001 of 2010 whose validity is the subject of study in this case. It is not necessary to delve into legal disquisitions on the causality and effects of the acts of corruption nor to enter into a debate on capricious arguments that try to mitigate and lessen the very serious situation of corruption that surrounded the awarding of the contract, since it is unquestionable that in the present case illegal agreements were made, bribe payments were made and a number of crimes were committed in connection with the awarding of the contract, to such an extent that the Manager of the Granting Entity (INCO) himself, who awarded the Contract, confessed to the acts of corruption and was convicted for such punishable act." The tribunal agreed with this view in its ruling, p. 679: "In short, everything stated throughout the award brings as an obvious consequence the fact that part of the interests caused and/or paid by the Concessionaire, have not complied with the condition of having been destined to the attention of the public interest, in the terms of article 20 of Law 1882 of 2018.") (author's unofficial translation) (emphasis added).

[73] *See id.* at 691.

admissible when the contract was obtained thorough corruption, as long as it had not an unlawful purpose *per se*.[74] The situation would have been different for a contract with an intrinsic unlawful purpose. Based on Ruling C-207-18 of the Colombian Constitutional Court, the arbitral tribunal had to establish to which of Claimant's *bona fide* creditors should the amounts restituted to the company be allocated.[75] Still, although the restituted amounts were not for the direct enjoyment of the claimant, they were for the company to cover its debts with *bona fide* third parties.[76] And this does nothing more than alleviate the corrupt company's debts.[77]

The claim was for COP$361,346,451,890, and the sum awarded as restitution for Claimant was COP$211,273,405,561 (*i.e.*, 58% of the total amount claimed).[78]

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[74] *See id.*

[75] *See id.*

[76] *See id.* ("Application of Ruling C-207-18 of the Constitutional Court for the direction of payments to bona fide third parties. . . . The amount to be recognized to the Concessionaire in the amount of $211,273,405,561, shall be distributed as follows, in accordance with the guidelines established by the Constitutional Court in its Ruling C-207-19. . . . 'Therefore, the recognition of the restitutions to be made is not a simple payment to the contractor, but rather the competent authority of the declaration of nullity of the contract must direct the resources to guarantee the payment of the obligations with the creditors in good faith, including the protection of the savings captured from the public. Only if after paying all the debts of the project to the bona fide creditors there are resources available, the appropriation of such resources may be made by way of restitution of the capital invested by the contractor or partner that is part of the contractor, who has acted without fraud, bad faith or knowledge of the unlawfulness that gave rise to the nullity. (Emphasis added) In this sense, the Constitutional Court considers that the first part of paragraph 1 being challenged must be declared conditionally executory, in the understanding that the acknowledgments by way of restitutions will be directed to the payment of the external liabilities of the project with third parties in good faith. With the remainder, restitutions may be recognized in favor of the contractor, or the member or partner of the contracting party, in those cases in which it is not proven that he acted by means of a fraudulent conduct in the commission of a crime or an administrative infraction, giving rise to the nullity of the contract for unlawful object or cause, or that he participated in the execution of the contract knowing of such unlawfulness.") (author's unofficial translation).

[77] The claim was for US$361,346,451,890. Simply anecdotally, it should be noted that a petition for annulment was filed against the award on elements unrelated to issues concerning to the corruption of the underlying contract. That appeal was dismissed essentially on procedural grounds by a judgment of September 19, 2020 issued by the Sección Tercera de la Sala de lo Contencioso Administrativo del Consejo de Estado de Colombia. *See* Mónica Alejandra León Gil, *Recurso de Anulación – Concesionaria Ruta de Sol S.A.S. vs. Agencia Nacional de Infraestructura*, Departamento de Derecho Procesal, Universidad Externado de Colombia, Oct. 15, 2020, https://procesal.uexternado.edu.co/recurso-de-anulacion-concesionaria-ruta-de-sol-s-a-s-vs-agencia-nacional-de-infraestructura/.

[78] *See Concesionaria Ruta del Sol*, Final Award, at 698 ("As *a consequence of the declaration of absolute nullity of Concession Contract No. 001 of 2010, and its other contractual agreements, in accordance with the provisions of Article 20 of Law 1882 of 2018 and in strict compliance with Ruling C-207 of 2019 issued by the Constitutional Court, to fix in the amount of* TWO HUNDRED ELEVEN THOUSAND TWO HUNDRED SEVENTY THREE MILLION, FOUR HUNDRED FIVE THOUSAND FIVE HUNDRED SIXTY ONE PESOS

It could be argued that, ultimately, a company that induced a proven corrupted contract, was successful in recovering money via the arbitration proceeding, whichever the ultimate purpose of that restitution was. To the author's view, the available legal tools prevented the tribunal from effectively closing the "doors of arbitration" to corruption.

V. REFORM PROPOSAL TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION.

In light of the flagrant inconsistencies in comparative jurisprudence when closing the arbitration doors to corruption and considering the safe-conduct that these undesirable practices have repeatedly found in arbitration, the author proposes a regulatory modification that complies with the transnational premise of regulating *specifically*—not *generically*—against corruption.

Therefore, and considering the foregoing, the author argues that it is necessary to incorporate, as Article 34.2.b.iii of the UNCITRAL Model Law, the following ground for annulment:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
> [. . .]
> b) the court finds that:
> iii) in the conclusion or performance of the contract or legal relationship whose rights were enforced in the arbitral award, there has been corruption of any of the parties, in accordance with international treaties on the subject matter.

This simple and clear text would allow a wide margin of action to investigate corruption, both for the arbitrator and for the state court of annulment when considering—at the request of a party or *ex officio*—possible circumstances of corruption.[79]

($211,273,405,561), the value of the acknowledgments that the NATIONAL INFRASTRUCTURE AGENCY - ANI *must make in favor of the* CONCESIONARIA RUTA DEL SOL S.A.S.") (author's unofficial translation).

[79] A separate discussion, which has not been settled at the international level, is the evidentiary standard to be applied by the state judge in reviewing the award when deciding whether the allegations of corruption are sufficient for its annulment. An emblematic and, in the author's view, accurate example is the one established in the final award in the case *Waguih Elie George Siag and Clorinda Vecchi v. The*

The reference to "in accordance with international treaties on the subject matter", imposes an obligation over reviewing courts (and in parallel, implicitly, over the arbitral tribunal) to analyze allegations of corruption with the standpoint of the broad transnational (and not domestic) definition of corruption. As defined in Section II of this paper, such definition would include several practices by both private and public officers, not limited to the promise, offering, giving, or receiving of bribes only, but also to practices of embezzlement, self-dealing, trading in influence, extortion, among many others defined in international instruments.

This proposal, while aimed at reforming the UNCITRAL Model Law and allowing annulments based on this ground, could—and should—also be replicated by each State in an interpretative law of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; such approach would secure a total block on corrupted contracts in arbitration: by means of annulment but also by rejecting recognition and enforcement on the same grounds.

VI. CONCLUSION

There is no denying that it might be burdensome for states to introduce changes to their arbitration laws; and it is also true that arbitration laws will hardly become obsolete simply because of the lack of advanced changes as the one proposed. But the objective of the arbitration community should not be to keep a law from becoming obsolete, but rather to modernize our laws in such a way that justice prevails over bureaucracy. This legislative reform proposal has a very clear objective: to make corruption more expensive for the corrupt.

Arab Republic of Egypt, ICSID Case No. ARB/05/15. The ICSID tribunal held that an intermediate standard should be applied between the two extreme standards that have been applied in the different systems, indicating that: "The Tribunal accepts that the applicable standard of proof is greater that the balance of probabilities but less than beyond reasonable doubt." *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 326. *See id.* at ¶¶ 325-326 ("The standard suggested by the Claimants was the American standard of 'clear and convincing evidence,' that being somewhere between the traditional civil standard of 'preponderance of the evidence' (otherwise known as the 'balance of probabilities'), and the criminal standard of 'beyond reasonable doubt.' The Tribunal accepts the Claimants' submission. … The Tribunal accepts that the applicable standard of proof is greater that the balance of probabilities but less than beyond reasonable doubt. The term favoured by Claimants is "clear and convincing evidence. The Tribunal agrees with that test.") (internal footnotes omitted).

This reform simultaneously achieves two objectives:

i. Deter corrupts from concluding such contracts: there would be a clear message that if they obtain a contract through (any) corruption practices, they will not be able to enforce (any) rights arising from that contract in an arbitration process.

ii. Incentivize state and private companies to enhance controls so as to eliminate corrupted public officials and private employees: the state or private company will not be entitled to enforce an award ordering the private company to perform a work or pay fines or damages arising from corrupted contracts.

Finally, a strong reminder to lawmakers: according to the UN, the global economic cost of not acting is that, every year, an estimated US$1,000,000,000,000 is paid in bribes while the annual cost of corruption on the global economy is US$2,600,000,000,000. Together, this sum represents 5% of annual GWP. As explained by a World Bank report, the direct costs arising out of corruption include loss of public funds by means of misallocations or higher expenses and lower quality of goods, services, and works.[80] Importantly, corrupts frequently seek to recover their capital contributions by "inflating prices, billing for work not performed, failing to meet contract standards, reducing quality of work or using inferior materials, in case of public procurement of works."[81]

It must not be forgotten that corruption is "a key element in economic underperformance and a major obstacle to poverty alleviation and development" and that it "undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."[82]

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[80] *See The costs of corruption: values, economic development under assault, trillions lost, says Guterres*, U.N. NEWS (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971.

[81] *See* OECD, *Preventing Corruption in Public Procurement* 7 (2016), *available at* https://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf.

[82] *See* Convention Against Corruption, at 3 (Preface). *See also The costs of corruption: values, economic development under assault, trillions lost, says Guterres*, U.N. NEWS (Dec. 9, 2018), https://news.un.org/en/story/2018/12/1027971.

MATEO MIGUEL VERDIAS MEZZERA is a Visiting Lawyer in the International Arbitration & Litigation Group of Sullivan & Cromwell LLP, New York office.
He obtained his J.D. degree at the University of Montevideo, Uruguay ('17), and holds an LL.M. degree from Columbia Law School ('22) where he worked as a Research Assistant to Prof. George Bermann (international arbitration) and was honored with the Parker School Certificate of Achievement on International Law.

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5201 Democracy Drive
Plano, Texas, 75024-3561
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