

INTERNATIONAL ARBITRATION AND CORRUPTION: An Evolving Standard*

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Introduction

International arbitration has been used to resolve disputes for a long time. As noted by one commentator: “Commercial arbitration must have existed since the dawn of commerce.”¹ Unfortunately, another side of business transactions, corruption, has been around a long time also.² Inevitably, it has appeared in international commercial arbitration cases. This article reviews some of those cases and analyzes the evolving trends on how international arbitrators have dealt with this difficult issue.

Most countries in the world have laws dealing with corruption. However until recently, they have dealt primarily with corrupt activities within a country’s own borders. They have historically not been extraterritorial in nature. That changed with the enactment of the *Foreign Corrupt Practices Act*³ (“FCPA”) in the United States in 1977, which criminalized the bribery of foreign government officials. Even though there has been a growing body of opinion and jurisprudence (as evidenced in the attached cases) that there is a moral consensus or international public order on the illicit nature of foreign corruption, it has only been in recent years that a large number of countries have formally agreed, through treaties, to enact similar laws to make it a criminal offence for their nationals to bribe foreign public officials.⁴ There are now several major treaties ratified by more than 60 countries addressing this significant international issue, including:

¹ Lord Musthills, “Arbitration: History and Background” (1989) 6 *Journal of International Arbitration*, p.43.

² For a more complete history of corruption in both business and government, see: J. Noonan, Jr., *Bribes* (New York: Macmillan, 1984). A. Timothy Martin, “Corruption and Improper Payments: Global Trends and Applicable Laws” (April 1998) Volume 36, No. 2 *Alberta Law Review* 416. A. Timothy Martin, “The Development of International Bribery Law” (Fall 1999) Vol. 14, Issue 2 *Natural Resources & Environment*, ABA. Michael Levi & Monty Raphael, “Anti-Corruption - a signpost for transactional lawyers” (1999) Issue 1 *Business Law International*, IBA.

³ Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by *Omnibus Trade and Competitiveness Act of 1988*. Pub. L. 100-418, Title V, Sec. 5003(c), 102 Stat. 1107, 1419 (1988)(codified at 15 U.S.C. 78dd-1,2), and further amended by *The International Anti-Bribery and Fair Competition Act of 1998*, s.2375.

⁴ Lucinda Low and Michael Burton, “The OECD, OAS and Council of Europe Antibribery Conventions: New International Standards and their Implications” (September, 2000) *ABA Third Annual Symposium on the Implementation of the OECD Convention*, Bruges, Belgium.

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- OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*⁵
- OAS *Inter-American Convention Against Corruption*⁶
- Council of Europe *Criminal Law Convention on Corruption*⁷

More work is being done on other conventions such as the Organization of African Unity Convention on Combating Corruption that could include another fifty countries. Finally, the United Nations Convention Against Corruption will possibly be completed by the end of 2003. This convention will cover the entire UN membership resulting in a worldwide consensus on the illegality of corruption.

Until now the cases enforcing these laws have been strictly American.⁸ There have been nearly 40 prosecutions and settlements and about 35 opinions or “review releases” concerning the bribery sections of the FCPA. There have been a small number of reported prosecutions under the foreign bribery laws of other countries; a reflection of these laws being relatively recent in origin. While this particular case law dealing with the prosecution of corruption has developed over the last twenty-five years, there has been another area of jurisprudence that has quietly and separately evolved. That area is international commercial arbitration. Over the last forty years there have been at least twenty cases that have dealt with this issue. A significant number of these cases are summarized in the attached Appendix. They are not well known or reported on, given the rules around confidentiality of arbitration proceedings. But they are becoming more significant given the increase in global trade and the future impact of the various international anti-corruption conventions.

Evolving Standards

There are a number of principles that continuously arise in international arbitration cases dealing with corruption. There is a growing consensus on how to deal with some of these issues but for many of the issues, there is presently no finality on how to deal with them.

Kompetenz – Kompetenz

⁵ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998).

⁶ OAS *Inter-American Convention Against Corruption*, Mar. 29, 1996, 35 I.L.M. 724 (1996).

⁷ Council of Europe Criminal Law Convention on Corruption, Jan. 27, 1999, European Treaties, ETS No. 173.

⁸ William Pendergast, “Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions” (1995) 7 *International Quarterly*, 187.

The competence or jurisdiction of the arbitral tribunal to decide upon a contract involving corruption has been challenged in a number of arbitral awards. Probably the most well known case is ICC Case No. 1110⁹ where the sole arbitrator, Judge Lagergren, disqualified himself as not having jurisdiction. That case has been subsequently distinguished¹⁰ on the grounds that the arbitration agreement was entirely separate and distinct from the contractual relationships of the parties.

Other than the above mentioned case, all of the arbitral awards reported have proclaimed their jurisdiction over the dispute. As stated in the Westinghouse case; “. . . 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.”¹¹

This principle is supported by Article 16.1 of the UNCITRAL Model Law¹² and Article 21.2 of the UNCITRAL Arbitration Rules¹³ which essentially say: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

As referred to in the Westinghouse case, Article 6(2) of the 1998 ICC Rules of Arbitration states: “. . .the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist.”

Doctrine of Separability

The issue of the separability or autonomy of the arbitration agreement (or clause) has been challenged in many corruption arbitral awards. Under this doctrine, the arbitration clause is separate and independent from the contract in which it is contained. The effect of this doctrine is that the arbitration clause will survive and continue to be valid, even if

⁹ Award in Case No. 1110 of 1963, Yearbook Comm. Arb'n XXI (1996) 47.

¹⁰ J. Gillis Wetter, “Issues of Corruption before International Arbitral Tribunals; The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110” (1994) Vol. 10, No. 4 Arbitration International 227.

¹¹ ICC Case No. 6401, Westinghouse International Projects Company v. National Power Corporation, as reported in 7 *Mealey’s International Arbitration Report*, Issue No. 1, Section B, at pp. 17 & 18 (1992).

¹² Model Law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985.

¹³ UNCITRAL Arbitration Rules, adopted by UNCITRAL on December 5, 1976.

the arbitral tribunal decides that the main contract is null and void because it involves bribery.

There is universal support for this principle: “Acceptance of this autonomy of the arbitration clause is a conceptual cornerstone of international arbitration.”¹⁴ All of the reported arbitral awards, except for ICC Case No. 1110, consistently adhere to this principle. Otherwise, it would undermine their ability to investigate allegations of corruption and to ultimately decide upon the validity of a contract with corruption as its purpose.

This principle is supported in institutional rules such as Article 6(4) of the 1998 ICC Rules of Arbitration¹⁵: “The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.”

The tribunal in the Westinghouse case took a slightly different approach to this issue when it stated that there are certain instances, such as a contract obtained by threat, that go to the root of an agreement and effect the validity of both the contract and the arbitration clause. However, they got themselves out of this corner by remarking that “. . . the Tribunal does not have to solve this delicate issue since it has found on the facts presented to it that the Defendants have failed to prove their allegations of bribery.”¹⁶

Does one therefore conclude that if the tribunal had found evidence of bribery that it would have invalidated the contract, the arbitration clause and the entire arbitration? Not very likely. Logic supports the application of the doctrine of separability in all instances. The parties have chosen international arbitration as their forum of dispute resolution. International treaties and national courts recognize and enforce arbitral awards. Therefore, one can only conclude that it is the arbitral tribunal’s responsibility to recognize the validity of the arbitral clause in these cases.

International Public Order

The arbitral tribunals and the courts that have enforced or annulled their arbitral awards have consistently stated that there is an international public order, which makes bribery contracts invalid and contrary to *bonos mores*. Many tribunals have found that national laws also hold such contracts to be illegal. However until now, these cases have not been able to cite specific international laws that support this view.

That situation has now dramatically changed with the ratification of the various international conventions referred to above which make the bribery of foreign public officials illegal and subject to criminal prosecution. There is now no question that a

¹⁴ W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce* § 5.04 at 65 (1990).

¹⁵ Rules of Arbitration of the International Chamber of Commerce in force as from January 1, 1998.

¹⁶ ICC Case No. 6401, *supra* at p. 20.

bribery contract is illegal and not just a breach of moral standards. More than sixty countries now have laws, which make it illegal to bribe a foreign official. The number of countries with similar laws will expand significantly when the UN Convention Against Corruption and the Organization of African Unity Convention on Combating Corruption are ratified. In addition, most sovereign nations presently have laws, which make it illegal to bribe domestic public officials. The ramification of these treaties should be far reaching on arbitral awards. In effect an arbitrator now has a duty to uphold this international law and this should effect how the arbitration is conducted.

Role of Arbitrator

An arbitrator, unlike a judge in a national court, is appointed at the request of the parties having the contractual dispute. His role can therefore be viewed quite differently than a judge. Put another way: "Is the arbitrator the servant of the parties, or of the truth?"¹⁷ The arbitrator may assume that he only needs to address the particular interests of the parties in the arbitration and need not be concerned with international policy issues.

That may no longer be the case in the area of corruption. Given the ratification of these corruption treaties, it is clearly the international rule of law that bribing government officials is illegal and those charged with the administration of justice, including international arbitrators, have the responsibility to ensure that such laws are applied properly.

This may place an arbitrator in a dilemma. He can naturally accept that if bribery is proven, then he should declare such a contract illegal and invalid. But what if all the parties are circumspect on the purpose of the contract and are unwilling or unable to produce such evidence? If the arbitrator is suspicious and detects clues or "red flags" indicating that corruption is behind the parties' behavior and their contract, should he wait for one of the parties to produce the evidence or should he take a more proactive role?

The tribunal in the Westacre¹⁸ case took the position that "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' presentations of facts that decides in what direction the arbitral tribunal has to investigate." The tribunal in this case saw its role more as an adjudicator than as a prosecutor. It took a passive role and did not see itself undertaking an investigation when neither of the parties was willing to provide the evidence.

This approach contrasts with other arbitral cases where the tribunal listed a series of indicators it was looking for and once they had been ascertained, determined that there was bribery and declared the contract null and void. ICC Case No. 8891¹⁹ illustrates this

¹⁷ P. Sieghart, "Viewpoint" (1982) 48 *Arbitration* 133 at p. 135.

¹⁸ ASA Bulletin 2 (1995) 301.

¹⁹ Journal du Droit International 4 (2000) 1076.

proactive approach where the tribunal considered the issue of burden of proof. According to the rules on burden of proof, it is incumbent upon the party claiming illegality to prove this fact. The tribunal noted that in alleging corruption, this is usually a very difficult task. In fact, the illicit object of the contract is generally hidden behind apparently insignificant contractual clauses. That is why arbitrators are left with no other choice than to analyse the clues. The convergence of these clues or indicators resulted in the arbitral tribunal concluding that the object of the consulting contract was to obtain an increase in the defendant's contract price by handing out *pots de vin* or bribes to government officials. In the opinion of the tribunal, all of these signs in their aggregate left no shadow of a doubt that the intention of the parties, at the time of signing the contract, was to engage in bribery.

Arbitrators need to decide what kind of role they will assume when they suspect corruption is at the heart of the contract. Are they going to be passive or proactive? If they are passive, then the corruption will likely not be unearthed if the parties wish to steer away from it.

Does the arbitrator have a duty to the parties or a duty to uphold the law? One of the primary duties of the arbitrator is to ensure that the award is enforceable at law pursuant to Article V of the New York Convention²⁰: "Recognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that...the recognition or enforcement of the award would be contrary to the public policy of that country." If the arbitrator validates a contract that is based upon corruption, which is now clearly contrary to public policy worldwide, then the arbitrator has the duty to uphold the law above and beyond the duty to the parties.

Given the clear confirmation that bribery is *bonos mores* and illegal in international law and that the duty of arbitrators is to uphold such law, arbitrators need to clearly set the indicators of bribery that would invalidate a contract. They then need to be proactive in determining whether such indicators exist and draw the appropriate conclusions. Otherwise, it is possible that an arbitral tribunal may be used to validate the legality of a contract that a state prosecutor would view as illegal and the participants as criminal.

Evidentiary Proof

The issue of proof is usually the thorniest one for the arbitral tribunal. Given that its traditional role is to adjudicate and not to prosecute, how is the tribunal to properly set the burden and standards of proof and yet be reassured that the parties will properly meet them given that the party presenting the evidence is a likely participant in the illicit activity? Despite the difficulties presented by this scenario, a tribunal must still apply proper rules of evidence. It cannot make decisions based upon suspicions or allegations.

Most of the reported arbitral decisions state that the burden of proof is on the party alleging the corruption. This is based upon the general evidentiary rule that the burden of

²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

proof is on the party making a claim, as reflected in Article 24.1 of the UNCITRAL Arbitration Rules: “Each party shall have the burden of proving the facts relied on to support his claim or defence.”

The tribunal in ICC Case No. 6497²¹ provided that the burden of proof could be reversed under certain circumstances; i.e., if the alleging party brought forth relevant evidence without it being conclusive, the tribunal could request the other party to bring counter evidence. If the other party failed to do so, the tribunal could then conclude that the alleged facts were true.

The Westinghouse case provided the greatest elaboration on standards of proof required. It considered two American evidentiary standards; firstly, the civil standard of “preponderance of evidence” and secondly, the standard for frauds of “clear and convincing evidence.” It considered the latter one more appropriate for allegations of corruption.

There are similar standards in other jurisdictions. The standard of proof for civil litigation in England is the “balance of probabilities.” In civil law jurisdictions, the judge seeks an “inner conviction” in determining the facts. These various standards are viewed as having little difference.²²

However, most legal systems apply a higher standard of proof for cases involving allegations of fraud or bribery. As pointed out in the Westinghouse case, American jurisprudence requires “clear and convincing evidence.” English judges have required “a degree of probability which is commensurate with the occasion.”²³ This higher standard of proof is also required in European civil law systems for cases involving corruption. These standards should naturally be considered for international arbitration cases:

“In international arbitrations it makes sense to impose a heightened standard of proof on a party raising a defence based on an allegation of bribery. In particular, if the burden of proof is shifted from the defendant to the claimant with respect to the performance of the contract, it is only fair that the defendant carry a higher than usual burden with respect to its defence based on an allegation or suspicion of bribery. Otherwise, it would be temptingly simple for the defendant to raise an allegation of bribery, without any supporting evidence, merely in order to shift the burden of proof to the claimant and thus to improve its chances of avoiding payment obligations under the contract.”²⁴

²¹ Yearbook Comm. Arb. XXIV (1999) 71.

²² Patocchi and Meakin, “Procedure and the Taking of Evidence in International Commercial Arbitration” (1996) *International Business Law Journal* 7, at p. 889.

²³ Edward Eveleigh, “General Standards of Proof in Litigation and Arbitration Generally” (1994) 10 *Arbitration International* 3, 334.

²⁴ Jose Rossell and Harvey Prager, “Illicit Commissions and International Arbitration: The Question of Proof” (1999) *Arbitration International* Vol 15, No. 4 at p. 348.

These heightened standards of proof naturally place a very significant hurdle to overcome for bribery to be found by a tribunal. Especially, when the tribunal does not have investigative tools at its disposal and the parties may have potentially participated in the illicit activity. Some commentators have suggested that the easier route is to place the burden on the claimant to prove that he performed his contractual obligations. That is not such an easy thing to press when some contracts, such as in the Westacre case, not only do not list the services to be provided but exonerate the agent from having to prove that it provided services. Usually, what triggers the payment of a commission and the fulfillment of the agent's obligations, is the awarding of a government contract to the business enterprise. The occurrence of that trigger is not necessarily a direct result of the agent's services nor is it easy to prove that bribery is directly linked to the trigger.

Applicable Laws

In considering what law to apply on the issue of corruption and whether it invalidated the contract, the arbitral tribunals in the attached cases considered a number of different laws, including:

- *Lex Fori* (Law of the seat of arbitration)
- *Lex Locus Solutiones* (Law where the contract was performed)
- Law of enforcement jurisdiction
- *Loi de Police* (Mandatory law)
- Principle place of business of party(s)
- Laws connected to parties or contract

The arbitral tribunal would normally rely upon the substantive law of the contract chosen by the parties based upon the principle of party autonomy. This principle allows the parties the freedom to choose the law and the relevant rules applicable to their contract. However, the contract may not explicitly state the substantive law of the contract or the parties may have deliberately chosen a law of a single country that condones corruption (if one did exist). What should the arbitrator do? "The agreed substantive law should be applied except to the extent it violates generally accepted international norms. Alternatively, the tribunal may be entitled to conclude that even if the agreed substantive law is the law of that single country, it will disregard that governing law if applying it would contravene international public policy."²⁵

Given the impact of all the anti-corruption conventions referred to above, most substantive laws now clearly make corruption illegal. Beyond these various national

²⁵ Richard H. Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts" (May 2002) 16th ICCA Congress at p. 42.

laws, there is a clear convergence on international public policy in this area. Bribes are illegal and contracts used to further such activity are invalid. An arbitral tribunal should therefore, in most instances, be able to determine that under the substantive law chosen by the parties, that corruption is illegal. Where no substantive law has been chosen by the parties, the tribunal either under the law mostly connected to the parties, the contract or the principal place where the business activity is conducted or under international public policy, should be able to quickly conclude that corruption is illegal.

Definition of Bribery

Most of the attached arbitral cases did not attempt to define bribery. Apparently, the arbitral tribunals assumed that all of the parties would recognize it when they saw it. The various international anti-corruption treaties now clearly define and establish the criteria for bribery. This is reflected in the national laws that implement these treaties. In the future, arbitrators should use such definitions when considering whether corruption exists in the business transaction.

However, these national implementing laws do not always say the same thing. There are differences on whether payments to political parties are legal, whether facilitating or “grease” payments are an exception, or whether political lobbying (as opposed to bribery) is acceptable. The Hilmarton²⁶ case is illustrative of this last problem.

In that case, the sole arbitrator 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, *lex loci solutiones* (Algeria). He also distinguished between the activities of trafficking in influence and the payment of bribes. Based upon the evidence provided, the arbitrator concluded that Hilmarton primarily engaged in the activity of influencing Algerian government officials. However, he concluded that bribery was not proven “beyond doubt.” There was no direct evidence provided in the case that a bribe was paid and even though it was possible to prove something through indirect evidence, the arbitrator concluded that there was not a sufficient amount of it to determine that bribery had occurred.

The arbitrator opined that under Swiss law a contract having illegal contents or violating *bonos mores* was null and void. Under Swiss law, it was not illegal to trade in influence but it was illegal to pay bribes. Since the latter had not been proven, the application of Swiss law alone did not make the contract null and void. Therefore the arbitrator turned to the law of Algeria. It prohibited all trading in influence to guarantee fairness in the allocation of government contracts and to ensure that contractual partners with the government were chosen on the basis of objective criteria. He therefore held that the law of Algeria had been violated since it was proven that Hilmarton had engaged in such influencing. Taking the argument further, the arbitrator concluded that the “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

²⁶ Collection of ICC Arbitral Awards (1991-1995) 220. ASA Bull. 1993, 247; Rev. arb 1993, 327; Riv. Dell' Arbitrato 1992, 773; Yearbook Comm. Arb'n XIX (1994) 105 (in English).

international public policy, is contrary to the notion of morality based on...Swiss public policy. Hence the brokerage contract is null and void in its entirety.” The Swiss courts later overturned this decision and another arbitrator was appointed who concluded that the contract was valid.

This case illustrates that the law that the arbitral tribunal chooses to apply will determine the criteria for defining the corrupt activity and that criteria will determine the final conclusion reached by the tribunal on whether the contract is valid or not.

Risks in Using Bribery Defence

Parties that decide to use the allegation of bribery to invalidate a contract need to proceed with extreme caution. One should not assume that their arbitration is automatically protected by confidentiality requirements, even if they are provided for in the dispute resolution clause in their contract. There is probably an obligation and even a duty on an arbitral tribunal to inform the appointing authority and the administering institute of suspicions or proven allegations of corruption. That is especially the case for an institution such as the ICC that is very involved in the scrutiny of the final award. “There would appear to be no reason not to entitle and even obligate the arbitrator to inform the [institute] of such illegality, particularly in those cases where the circumstances give rise to penal sanctions which go beyond the arbitrator's review of the civil obligations between the contracting parties.”²⁷

Is there an obligation on the arbitral tribunal to go further and inform the appropriate criminal authorities of the illegality? As opined by one commentator: “The desire and duty to inform the authorities of the suspicion or existence of such acts, and their perpetrators, would be great, but not necessarily flow from the mission as arbitrator. In the absence of a corresponding treaty, the state courts of one country are not obliged to enforce the penal laws of another country. Why then should an arbitral tribunal do so?”²⁸ However, if one looks closely at anti-corruption treaties such as the OECD, OAS and Council of Europe Conventions, there are clear mandatory obligations established between and amongst the signatory countries for mutual legal assistance and enforcement of their respective laws. Do these obligations extend to international arbitral tribunals? This question has not been tested, but arbitral tribunals need to seriously consider these potential obligations.

If an arbitral award is moved to a national court by a party wishing to annul it, then it will likely lose its confidentiality. This has happened in many of the arbitral awards dealing with corruption that have been published. Given the controversy around such disputes, one should therefore assume that confidentiality concerning allegations of corruption would likely not be maintained. That being the case, what are the potential liabilities that may flow from public disclosure of such allegations? They can be significant. Now that there are many laws around the world which make it a both a civil and criminal offence

²⁷ Richard H. Kreindler, *supra* at p. 48.

²⁸ *Ibid* at p. 49.

to bribe foreign public officials, the chances of being caught in the prosecutorial net have increased. Therefore, one needs to ensure that one has “clean hands” before invoking such a defence and that one was not complicit in the act of corruption either directly or by taking a “head in the sand” approach.

Conclusions

International arbitral tribunals and their administering institutes are faced with difficult and complex challenges when allegations or suspicions of corruption arise in an international arbitration. The cases reviewed in this paper are not consistent in their approach, methodology or conclusions. This is reflective of the extreme difficulty that various tribunals had when grappling with this problem.

There is now a clearer picture of the standard expected for international public order in the area of corruption. That standard has been set by the various anti-bribery international conventions and their implementing national laws. However, for these conventions to be effective, international arbitrators must be cognizant of their obligations and properly apply them to their decisions. As shown in the reviewed arbitral decisions, the approach of the arbitrators is very decisive to the conclusions reached. The more proactive the arbitral tribunal, the more likely that indicators of corruption can be discovered and proven. But it is the requirement of sufficient evidentiary proof that will be the most difficult and challenging area for tribunals to address. Obviously, clear evidentiary rules need to be established and applied to ensure that the facts are properly determined. However, with limited means at their disposal for gathering evidence, arbitral tribunals will have difficulty in satisfying the high standards of proof normally required in fraud or corruption trials.

APPENDIX

SUMMARY OF INTERNATIONAL ARBITRATION CASES
DEALING WITH CORRUPTION

ICC Case No. 1110 (1963)²⁹

This ICC case is one of the first reported international arbitral awards dealing with corruption. It has been cited and criticized frequently for how it dealt with the *Kompetenz-Kompetenz* and separability doctrines. This view of the case has been recently revised with a more complete understanding of what happened.

Facts:

The claimant was an Argentinean engineer who had acted as an agent for the respondent, a British company, in Argentina during the Peron era. The British firm wanted to sell electrical equipment to the Argentinean government for power plants in Buenos Aires. Both parties agreed in 1950 to enter into an arrangement whereby the claimant would act as the agent for the respondent in Argentina. This was reduced to a series of very brief letters in which the respondent agreed to pay a total commission of 10% on the value of the order (split 5%, 2.5% and 2.5% and transferable to unnamed third parties). This was allegedly reconfirmed in 1953 on a verbal basis.

The claimant acted in such capacity until June 1955 when he was forced to go to Germany for medical reasons. Up to that point of time, the respondent had not made any sales to the Argentinean government. Then in 1958, the respondent, through a partnership, sold nearly £28 million of electrical equipment to the Argentinean government. The partnership had retained another agent to assist in that transaction. He was paid nearly £1 million for his efforts. The claimant subsequently demanded 10% of the total sale under the 1958 sales contracts or £2.8 million based upon the commission set in the 1950 arrangements.

Given the paucity of their contractual arrangements, the parties entered into a wholly separate and independent arbitration agreement prior to commencing the arbitration process.

In the testimony provided at the arbitration, the respondent stated that the sole reason why the claimant was retained was “the quite remarkable degree of influence which he

²⁹ Yearbook Comm. Arb'n XXI (1996) 47. J. Gillis Wetter, “Issues of Corruption before International Arbitral Tribunals & The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110” (1994) *Arbitration International*, Vol. 10, No. 3, 277. 10 Arb. Int. 282 (1994).

had with the political appointees of the Peronista Government.” Several other witnesses stated that the claimant had said that he would only retain about 2% of the commission with the remainder going to his collaborators.

Neither of the parties argued that the 1950 agent contract was illicit nor necessarily invalid. Rather, the respondent simply argued that the 1958 sale contracts awarded to the partnership and the respondent by the Argentinean Government were totally different from what was agreed upon in 1950 and allegedly reconfirmed in 1953. The claimant was not even present in Argentina when the new project was announced in 1956 and the awarding of the contracts to the respondent and its partnership could “in no way be attributed to any efforts or activities carried on by the claimant.”

Opinion:

The sole arbitrator, Judge G. Lagergnen, 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” and that the amounts involved were huge.

Judge Lagergnen examined, on his own motion, the question of his jurisdiction to decide upon a contract “condemned by public decency and morality.” He referred to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which provided that the competent authority may refuse *ex officio* the recognition or enforcement of an award that would be contrary to the public policy of that country.

He referred to the law of France, the seat of the arbitration or *lex fori*, and to Argentine law, the law of the place where the contract(s) were to be performed, *lex locus solutiones*. He concluded that both French and Argentine law would not allow this case to be arbitrated. Judge Lagergnen 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.” He did not refer to any particular law, treaty or convention to substantiate this opinion but rather to “general principles denying arbitrators to entertain disputes of this nature.”

Before providing his decision, Judge Lagergnen did note 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.” He recognized the dilemma of dealing with two parties with “unclean hands.” He addressed this dilemma while setting the costs.

He concluded that “a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilized country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case.”

Judge Lagergnen decided that each party should pay its own costs and the arbitrator’s fees were to be divided equally.

Commentary:

This case set the stage for dealing with corruption in international arbitral awards. Whether one agrees with the arbitrator's disqualification of himself, the result if he declared himself competent to hear the case would likely have been the same. He found bribery and would likely have declared the contract invalid. Thus, the claimant would not have gotten his commission.

ICC Case No. 3913 (1981)³⁰

This early bribery case reinforced the trend of arbitrators condemning corruption in international transactions. In particular, it demonstrated that arbitrators acting under the auspices of the ICC Court of Arbitration were eager to show their opposition to business practices incompatible with *bonos mores*.

Facts:

The Defendant was a French firm attempting to win business with the government of an African country. The Claimant was a British firm who entered into an agreement (Consulting Agreement) with the Defendant to assist them in winning business with that African government. The services provided by the Claimant included providing information and facilitating the winning of business deals, negotiating and carrying out the deal between the Defendant and the government authority. Under the Consulting Agreement, the Defendant agreed to pay to the Claimant 8% of the amount of the business deal excluding materials and charges.

The letter of the contract did not show illicit or immoral activity. But certain statements from the parties and their witnesses along with other evidence produced in the arbitration clearly indicated that the written contractual obligations were quite different from what was the actual intent of the parties. One of the witnesses stated that the commission provided for in the contract was "intended to remunerate the (African) counterparties." The evidence showed that the Claimant was a financial intermediary who received money to redistribute to members of a network consisting of local persons in decision-making positions. In other words, the commission payable to the Claimant under the Consulting Agreement was intended to pay "*pots-de-vin*" or bribes.

The published report does not provide details on the choice of law or dispute resolution mechanism in the Consultancy Agreement; however, it can be assumed, based upon the stated facts, that the parties agreed to ICC Arbitration and that their choice of law was French law.

Opinion:

The arbitral tribunal held that under French law, bribes were illicit and immoral. Apart from the criminal provisions making corruption illegal, there was extensive civil

³⁰ Collection of ICC Arbitral Awards 1974-85, 497 (note Derains).

jurisprudence in France confirming that contracts involving bribery were null and void. These principles of law not only conformed to French internal public order, but also arose from international public order as recognized by most nations. The arbitral tribunal pointed out that the international business community and the majority of governments oppose all such corrupt practices. As an example, the ICC established its Rules of Conduct on Bribery in International Business Transactions in 1977. The tribunal also noted that the enforcement of an arbitral award that strayed from these principles could, under the 1958 New York Convention, be refused by the judicial authorities of the country in which it is submitted.

The arbitral tribunal concluded that the parties knowingly entered into an illicit contract. The tribunal therefore held that the Consulting Agreement was null and void and that the parties could not require performance of the contract nor seek restitution under it.

Commentary:

This case moved away from the approach used in ICC Case No. 1110 where the arbitrator considered the matter non-arbitrable. In this case, the arbitral tribunal declared themselves to have sufficient jurisdiction and competence to arbitrate a contract which they eventually ruled void because of its illicit nature.

ICC Case No. 3916 (1982)³¹

This case had to first deal with the issue of which law to apply; but having done so, the arbitrator quickly came to the conclusion that under any of the laws considered, the activity of bribery was illegal and would render any agreement null and void.

Facts:

The Plaintiff was an Iranian national who assisted the Defendant, a Greek firm, with the obtaining of contracts from the Iranian Government. The Parties entered into an agreement in which the Defendant would pay commissions to the Plaintiff for a minimum of 2% of the amount of each contract signed with the Iranian Government.

The Parties signed two original versions of their contract in Tehran. One version of the contract was in French and the other version in English. The English version was similar to the French version with one exception: the French version did not mention the applicable law of the contract; whereas, the last sentence of the English version of the contract stated:

“If the disagreement persists, the Parties will eventually call on final arbitration to result in an award according to French Law by the International Chamber of Commerce in Paris.”

³¹ Sentences Arbitrales, Chambre de Commerce Internationale, 930. 111 *Journal du droit international* (1984) 930. Collection of ICC Arbitral Awards 1974-85, 507.

Under the contract, the Plaintiff was to assist the Defendant “through his information, advice and actions” in obtaining orders from various Iranian authorities. The Plaintiff was successful in obtaining several contracts from the Iranian Government for the Defendant. But the 1979 Iranian Revolution stopped the Greek firm’s activities in Iran and resulted in it incurring substantial loses. As a result, the Defendant paid only a portion of the promised commissions to its Iranian partner.

The Plaintiff was the administrator of an Iranian Government department. Prior to his resigning from government service, the Plaintiff had entered into the private sector and established a consulting firm. During the arbitration, the Plaintiff refused to provide any details on how he influenced the Iranian authorities to award business to the Greek Defendant.

Opinion:

The first issue the sole arbitrator decided upon was the applicable substantive law of the contract. He noted that the contract was ambiguous on this matter. The French version did not choose any law at all; whereas, the English version chose a law but it was unclear as to whether it was procedural law, substantive law or both. The arbitrator considered the following laws: Iranian, Greek, French, Austrian, and English. He concluded that the laws which were most applicable were Iranian law, since the contract was signed in and the activities occurred in Iran, and French law, which was the law referred to in the English version of the contract.

In reviewing Iranian law, the arbitrator found that numerous laws of Iran made bribery and corruption illegal and under its civil code, contracts which were contrary to Iranian public order were void. Under French law, the arbitrator determined that agreements where a person is hired for consideration to use his influence with a public official to obtain a business deal for the benefit of the contracting party is void because of its illegal purpose. Since it was contrary to “ordre public et bonnes moeurs”, such contracts are absolutely null. The arbitrator found no conflict between Iranian law and French law on this matter and found that French law was not limited to considering only corrupt activities in France but extended to corruption or influence peddling, period.

The arbitrator then reviewed international law in this area. He referred to ICC Case No. 1110 and stated that civilized nations recognize the legal principle that agreements that seriously breach acceptable standards of behavior or international public order are void and cannot be enforced. That is true even if in certain countries corruption of public officials is generally accepted as a way to conduct business affairs.

The arbitrator dismissed the Plaintiff’s claim and made him responsible for all of the arbitration costs. Each of the parties was responsible for their own legal costs pursuant to an agreement between them.

Commentary:

The sole arbitrator reached the conclusion that contracts that breach acceptable standards of behavior or the public order are void. A reviewer of this published case commented

that it is appropriate that arbitrators accept their competence in such matters since they are in a better position than the local judiciary to be aware of international business standards and are therefore able to contribute to the creation of a true international public order.

ICC Case No. 4145 (1983, 1984 & 1986)³²

This case took several years and three awards to decide upon all the issues. The tribunal determined that a US \$50 million payment was not a bribe but it restricted some of the further demands of the agent.

Facts:

The defendant was a South Asian construction company who in 1978 entered into an agreement with the claimant, an entity from Middle East Country X, to represent them on a Project to construct a group of buildings in Country X. In 1979, the Government Ministry awarded a US \$374 million Project to the defendant. Upon receipt of its down payment from the Ministry, the defendant deposited US \$50 million into the claimant's Geneva bank account. The chairman of the defendant expressed his "sincere thanks on your excellent efforts" in a telex to the principal representative of claimant.

The defendant obtained an extension of the original contract in 1979 for additional work of approximately US \$54.5 million. The claimant demanded further compensation for this extension. The defendant refused to pay anything more resulting in the claimant initiating legal action and asking for US \$16.5 million plus interests and costs. This claim was for compensation on the original contract and two different components of the extension contract.

The agreement between the parties contained an ICC arbitration clause. The choice of governing law in the agreement was Swiss or the laws of Country X, or both. There was no place of arbitration chosen in the agreement, so the ICC Court of Arbitration selected Vienna as the situs. There were a number of issues to be determined resulting in the arbitral tribunal issuing three separate awards in sequence.

Opinion:

First Interim Award (1983)

The defendant made the argument that the agreement was unenforceable under the law of Country X as well as under Swiss Law or under applicable principles of international public order because the main purpose of the agreement was to influence the price of the Project by illegal means. The tribunal determined however, that the question of nullity of the agreement for reasons of public policy or illegality was one of merits and not of

³² Yearbook Commercial Arbitration, Vol XII (1987) 97. Collection of ICC Arbitral Awards 1974-85, 559.

jurisdiction. They were not prepared to address the merits of the case in the First Interim Award and confined themselves to the issue of jurisdiction.

The arbitration clause had a number of linguistic deficiencies but the tribunal determined that the parties' clear intent was to submit any dispute to ICC arbitration and that the tribunal had jurisdiction to arbitrate the case.

Second Interim Award (1984)

The claimant argued that Swiss Law was the substantive law of the agreement, whereas the defendant claimed it was the law of Country X. The tribunal held that Swiss law was the governing law on the principle that from two legal solutions, a judge will choose the one which favours the validity of an agreement (*favor negoti*).

The tribunal then considered the issue of the validity and enforceability of the Agreement if there was bribery. Under Swiss law, bribery is considered immoral. If it was found that an agreement's purpose was for bribery, it would be null and void. The tribunal determined that the defendant's accusation was not supported either by direct or circumstantial evidence. Circumstantial evidence can be considered under Swiss law but it must lead to a very high probability. Some of the facts considered by the tribunal in concluding that the Agreement's purpose was not for bribery were:

- The Agreement did not mention bribery.
- Defendant's principal witness categorically denied that bribery was intended.
- The Ministry cut back on the final price requested by the defendant.
- The Project was supervised by the World Bank and the Ministry and any attempt to bribe all of those people would be very hazardous.
- The fact that claimant did not perform all of the work it claimed it did was not sufficient grounds to conclude the Agreement was for bribery.

The tribunal next considered whether the Agreement was invalidated as a result of the defendant's contention that the claimant engaged in extortion. The fact that the defendant sent "sincere thanks" to the claimant and sent US \$50 million to claimant's bank "for services which were received in full", was absolutely incompatible with the accusation of extortion. The tribunal therefore concluded that there was no material evidence of extortion and that the Agreement continued to be valid.

Finally, the tribunal concluded that the object of the Agreement was to be an intermediary or brokerage agreement on a contingency basis and not solely a consultancy agreement. According to Swiss law, an intermediary agreement is perfectly valid and the tribunal thus considered the Agreement valid and enforceable.

Final Award (1986)

The defendant argued that the claimant was not instrumental in the awarding of the Project and in particular, the extension of the contract. The tribunal rejected this contention based upon the facts provided and found that there was a causal link between the claimant's activities and the award of the Project.

The tribunal then rejected the claimant's claim for further compensation for the initial contract and determined that the US \$50 million was in full settlement.

The tribunal then considered the claimant's compensation for the contract extension which was broken into US \$14.5 million for new items and US \$40 million for Bill of Quantities (BOQ) work for a total extension price of US \$54.5 million. Given the contradictory submissions and it not being addressed in the parties' agreement, the tribunal was unable to establish true or even reliable figures to use in calculating compensation.

With regards to the new items, given the lack of proof around profit or loss and the lack of ability to link compensation, the tribunal held that no compensation was due. As for the BOQ, the tribunal found that there had been a profit. To calculate an appropriate fee, it looked at Swiss law which accepted brokerage rates for the sale of real property between 2% to 5% and the law of Country X which limited an agent's commission by statute to 5%. The arbitral tribunal then fixed the claimant's remuneration at 4% of US \$40 million (for the BOQ work) which was the equivalent of US \$1.5 million.

Commentary:

The tribunal took its time in considering the issues and methodically addressed them one at a time. It continued the trend of arbitral tribunals establishing their own competence. Since it decided that there was no bribery, the separability of the arbitration clause was not in question. The tribunal considered both direct and circumstantial evidence but did not elaborate further on the standard of proof.

ICC Case No. 5622 (Hilmarton - 1988 & 1992)³³

The Hilmarton case is one of the most controversial arbitration cases ever reported. There were two separate arbitration awards and they were contested in the courts of three different countries

³³ Collection of ICC Arbitral Awards (1991-1995) 220. ASA Bull. 1993, 247; Rev. arb 1993, 327; Riv. Dell' Arbitrato 1992, 773; Yearbook Comm. Arb'n XIX (1994) 105 (in English).

First Arbitration Award (1988)

Facts:

The claimant, Hilmarton Ltd., a U.K. company, entered into a Protocol of Agreement with the defendant, Omnlun de Traitement et de Valorisation (OTV), a French Contractor, under which Hilmarton was to give legal and tax advice to OTV and coordinate its subcontractors to help defendant obtain a construction contract to design and build a drainage project in the City of Algiers for the Algerian government. Under the Protocol, Hilmarton was to be paid 4% of the construction contract price. The Protocol contained an ICC arbitration clause, Swiss law was the substantive law of the contract and the place of arbitration was to be Geneva. Hilmarton appears to be the corporate entity used by an Algerian national whereas, OTV was represented by its managers in Algeria.

OTV successfully won the construction contract from the Algerian government. However, it only paid 50% of the agreed fee to Hilmarton alleging that his performance under the Protocol was deficient. Hilmarton initiated the arbitration for the balance of his fee which was approximately 2.5 million French Francs. The total fee would have thus been about 5 million French Francs (or about US \$550,000 using 1985 exchange rates.)

The sole arbitrator noted the lack of tangible evidence in the case. There was no written evidence that legal and fiscal evidence was given or administrative coordination provided. Based upon the testimonies provided, it appeared that Hilmarton spent 85% of his time using his influence on Algerian authorities to ensure preference of OTV's bid over bids from other companies. The remainder of his time was spent gathering confidential information.

OTV apparently never worried about receiving a single written document from Hilmarton over a three year period and did not object to claimant's activities to the extent that it paid Hilmarton 50% of the fee under the Protocol. The arbitrator therefore concluded that OTV tacitly approved of Hilmarton's activity.

Opinion:

The sole arbitrator reviewed the Protocol 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, *lex loci solutiones* (Algeria). He also distinguished between the activities of trafficking in influence and the payment of bribes. Based upon the evidence provided, the arbitrator concluded that Hilmarton primarily engaged in the activity of influencing Algerian government officials. However, he concluded that bribery was not proven "beyond doubt." There was no direct evidence provided in the case that a bribe was paid and even though it was possible to prove something through indirect evidence, the arbitrator concluded that there was not a sufficient amount of it to determine that bribery had occurred.

The arbitrator opined that under Swiss law a contract having illegal contents or violating *bonos mores* was null and void. Under Swiss law, it was not illegal to trade in influence

but it was illegal to pay bribes. Since the latter had not been proven, the application of Swiss law alone did not make the Protocol null and void. Therefore the arbitrator turned to the law of Algeria. It prohibited all trading in influence to guarantee fairness in the allocation of government contracts and to ensure that contractual partners with the government were chosen on the basis of objective criteria. He therefore held that the law of Algeria had been violated since it was proven that Hilmarton had engaged in such influencing. Taking the argument further, the arbitrator concluded that the “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, is contrary to the notion of morality based onSwiss public policy. Hence the brokerage contract is null and void in its entirety.”

The arbitrator then provided an analysis of U.S. jurisprudence dealing with using agents to win contracts in foreign countries, including the Northrop, Raytheon, Lockheed and Occidental cases. All of which, he claimed, had striking parallels to the case at issue.

Finally, the arbitrator examined the consequences of the nullity of the contract itself on the validity of the arbitral clause contained in the contract. He reviewed ICC Case No. 1110 of 1963 and ICC Case No. 3916 of 1983. He stated: “In the first case, having found that the contract, and consequently the arbitral clause, was null and void, Lagergren held that he had no jurisdiction, finding that the dispute was not arbitrable. In the second case, the arbitrator held that he had jurisdiction by applying the principle, now universally accepted, that the nullity of the main contract does not imply *ipso iure* the nullity of the arbitral clause... In the present case, this second solution has consequently been followed by the arbitral tribunal. Also, its jurisdiction is not invalidated by the Protocol of Agreement being declared null and void.”

Interestingly almost in passing, the arbitrator did state that Hilmarton had not proven that it had performed as a legal and fiscal advisor as required in the Protocol of Agreement. He therefore seems to imply that Hilmarton had a burden of proof to show that he had performed under the contract and that he had failed to do so.

Finally, the arbitrator dealt with the thorny question of both parties’ behavior being reprehensible. Indeed, he stated that “one party is not worthier of protection than the other.” He first declared the contract null and void and denied Hilmarton’s demand for payment of the remaining fees. As to costs, the arbitrator determined that Hilmarton was responsible for all costs of the arbitration and its own costs. OTV was denied its claim for damages and had to also pay its own costs.

Second Arbitration Award (1992)

Appointment of New Arbitrator:

Hilmarton applied to the Court of Justice of Geneva to annul the first arbitration award, which the Court did in a 1989 decision. The Geneva Court found it “absolutely shocking” that OTV, which had paid the amounts due under the Protocol until the awarding of the construction contract, refused to comply fully with its contractual

obligations once it signed the contract. The Court found no factual grounds that corrupt activity was involved and refused to admit any illegality or public policy defense to the claim. The Geneva Court annulled the first ICC award for “arbitrariness” in accordance with the Swiss International Arbitration Convention which applied to international arbitrations in Geneva prior to the entry into force of the Swiss Private International Law Act. The Swiss Supreme Court (Tribunal Fédéral) confirmed the Geneva Court’s decision in 1990.

The original sole arbitrator resigned subsequent to the reversal of his decision by the two Swiss courts. The ICC Court appointed a new sole arbitrator in November, 1990. The arbitration was continued on the basis of Article 2(12) of the 1988 ICC Rules which specified that where an arbitrator is to be replaced, the arbitral tribunal shall determine if and to what extent prior proceedings shall take place.

Facts:

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. The second arbitrator made two further findings:

1. “In the case in question, the facts of the main issue have already been examined in detail by the first arbitrator, then by the Court of Justice of Geneva and the Swiss Supreme Court. Before the undersigned arbitrator, the Parties waived their right to submit new evidence. The procedure on the main issue is therefore so advanced that from the point of view of the procedural economy and the efficiency rule that characterizes the arbitration process, postponement of the decision on the merits to a later stage cannot be justified.”
2. The arbitrator determined that he had sufficient knowledge of the decisive facts and rejected OTV’s request for a re-hearing of the whole matter. These procedural decisions were not challenged by the parties.

In effect, the second arbitrator did not determine any new facts different from the findings of the first arbitrator. He did, however, direct himself that he was bound by the opinions expressed by the Court of Justice of Geneva and the Supreme Court of Switzerland.

Opinion:

The second arbitrator confirmed that Hilmarton, with OTV’s consent, approached Algerian public officials to obtain the construction contract. This activity “wittingly” breached an Algerian law that prohibited the intervention of a middleman or intermediary to obtain a public contract. This breach of Algerian law was not unlawful from the point of view of Swiss law. The arbitrator also held that this activity did not invoke any bribery or other corrupt activity. The facts presented did not establish that Hilmarton paid bribes, carried out lobbyist or insider acts that diverted Algerian public officials from their duties or indulged in the trading of favours. The contract between the parties was thus not contra *bonos mores*.

The arbitrator therefore held that the Protocol was valid and enforceable and granted Hilmarton's claim.

Chronology of Appeals:

Shortly after the first arbitral decision, *OTV* took the award to France to obtain its *exequatur* or 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* to *OTV* for the 1988 ICC award. This decision became final when the French Supreme Court (Cour de Cassation) in 1994 rejected an appeal brought by Hilmarton. The Cour de Cassation held that, as the annulment of an international arbitral award in its country of origin, unlike under Article V of the 1958 New York Convention, is not a ground for refusing its enforcement in France under French law (Article 1502 of the New Code of Civil Procedure), *OTV* was entitled to avail itself of the more favourable French law provision and hence obtain the award's enforcement pursuant to Article VII of the Convention. Article VII provides:

“The provisions of the present Convention shall not...deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law...of the country where such award is sought to be relied upon.”

These French court decisions did not end the *Hilmarton* affair. As described above, Hilmarton began a second ICC arbitration against *OTV* to obtain its fee. In 1992, the new arbitrator decided that, contrary to the finding of the first arbitrator, the Protocol was enforceable and Hilmarton was entitled to its fee from *OTV*. Hilmarton then took the new award to France to request its *exequatur*. This was granted by the Court of First Instance in Nanterre in 1993, notwithstanding the existing order of *exequatur* in respect of the first award. Hilmarton was also successful in having the Nanterre court enforce 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, the argument being that the second order of *exequatur* was inconsistent with the first, which had already acquired *res judicata* effect, and that the recognition of two contradictory decisions would be contrary to French international public policy. The Versailles Court of Appeal in 1995 rejected the appeal and upheld both decisions. *OTV* then appealed the Versailles Court's decisions to the French Supreme Court (Cour de Cassation).

The Cour de Cassation in 1997 overturned and annulled the two 1995 decisions of the Versailles Court. It held that a final French decision bearing on the same subject between the same parties creates an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it. The Cour de Cassation also held that Hilmarton's request for *exequatur* was inadmissible.

Hilmarton remained undaunted and continued the quest for its fee. It moved to the English courts to enforce the second ICC award in which it was successful. The English court issued an *ex parte* order in 1998 giving effect to the second arbitral award in England. OTV applied to set aside this order under s. 103 of the English Arbitration Act of 1996 which stated that enforcement of a New York Convention award *shall* not be refused except in certain limited cases and enforcement *may* also be refused if it would be contrary to public policy to enforce the award.

The High Court of Justice, Queen's Bench Division issued its decision in 1999. It decided that the only matters relevant for consideration were the findings in the second arbitration. The second sole arbitrator found that Hilmarton wittingly breached an Algerian statute but it did not involve any bribery or similar corrupt activity. The Court was not willing to go behind this explicit and vital finding of fact. Based upon the decisions of the Swiss courts, the parties' agreement was not unlawful under Swiss law (the law chosen by the parties) and was not contra *bonos mores*.

The High Court cited the Court of Appeal judgment in Westacre Investments with approval. The High Court in the Hilmarton case had been asked to consider the enforcement of an award and not the underlying contract. As long as the underlying contract, on the facts and reasons in the arbitral award, did not infringe on a rule of public policy, then the English court will enforce the award. Since the second arbitrator did not have any finding of fact of corruption or bribery, there were no public policy grounds on which the enforcement of the Hilmarton award could be refused.

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 Court did not consider this relevant. 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. Thus the second ICC award was enforced under the public policy of upholding international arbitral awards.

Commentary:

This case illustrates the different approaches and conclusions that can be reached by both arbitral tribunals and courts on essentially the same set of facts. In all instances, it was held that bribery was illegal and if proven, would render the Protocol of Agreement null and void. However, both arbitration cases found that bribery was not proven "beyond doubt." The differences occurred in the application of Algerian law prohibiting the trading in influence or lobbying.

ICC Case No. 5943 (Northrop - 1990)³⁴

This case provides a different twist on the illicit contract theme. Rather than the agent demanding its commission or fee, it is the company claiming reimbursement for monies it advanced under a fraudulent side agreement.

Facts:

Northrop Corporation, an American defence company, was attempting to sell its F-20 fighter plane to the South Korean government. To assist in its marketing, in 1983 Northrop hired Mr. Chong Kyu Park, a powerful Korean businessman with ties to upper levels in the Korean government. Mr. Park, a gregarious former army colonel nicknamed "Pistol Park" because of his fondness for guns, was a close associate of former President Chun Doo Hwan. Northrop entered into a consulting agreement directly with Mr. Park who was paid a modest consulting fee of several U.S. thousand dollars for his services.

Northrop, through one of its subsidiaries, subsequently entered into another agreement with a Korean group (Asia Culture Travel Development Co.) to finance the construction of a hotel and office complex in Seoul, South Korea. In 1984, Northrop invested US \$6.25 million, which it forwarded to a bank account in Hong Kong held by Asia Culture. Neither Northrop nor Asia Culture had any experience in the hotel business. Northrop never sold any F-20s to South Korea. Nor, for that matter, did it sell any to the United States or to any other foreign country. Northrop eventually cancelled the F-20 project without selling a single plane. The hotel and office complex was never built and Northrop demanded that Asia Culture reimburse the US \$6.25 million it had provided in 1984.

The Korean partners refused to reimburse the sum and Northrop initiated arbitration. It began an action in the Korean Commercial Arbitration Board which it lost in a 1990 decision. It also initiated arbitration at the ICC.

Opinion:

The sole arbitrator dismissed the claim by Northrop that a group of unscrupulous South Korean businessmen had bilked the defence contractor out of US \$6.25 million in the joint venture hotel agreement. He concluded that the facts demonstrated that neither party was serious in their intention to invest in a hotel as stated in their joint venture agreement. One of the most telling pieces of evidence was that the plaintiff, Northrop, paid the US \$6.25 million into a Hong Kong bank account held by Asia Culture over which Northrop had no control. Also, this transfer was made before the joint venture agreement came into effect and before there was any need to pay the entire sum, since governmental approval for the hotel development had not yet been granted. In fact, a development application had never even been made. Northrop had also not taken basic preliminary steps to acquire financial statements from Asia Culture to guarantee the

³⁴ J.D.I. 4, 1996 *Chambre De Commerce Internationale*; *The New York Times* (September 1990); *The Wall Street Journal* (20 September 1990).

investment. Indeed, there was not even an Asia Culture shareholder meeting to consider the matter. On top of that, Northrop had transferred the funds despite irregularities involving the appraised value of the property to be used for the hotel complex.

The arbitrator pointed out that while Northrop justified the need for the hotel investment as part of a standard industry practice of offsetting currency fluctuations in foreign countries, the company never involved its offset manager in Korea in the hotel project. The plaintiff's lack of interest in the hotel project was also emphasized by the scarcity of correspondence between the parties regarding their agreement.

Northrop argued that even if the officers of the parent company had reached a verbal secret understanding with the defendants to divert the payment planned for the hotel project, this had not been authorized by the board of directors of the parent company and; therefore, the actions of the officers could not be attributed to the company. The arbitrator determined that: "This was not a situation where low level employees colluded to defraud Northrop, but instead Northrop was acting through its highest level of management in violation of the law."

The arbitrator rejected this argument since it would allow a legal entity to benefit from the illegal activities of its management as long as they keep the matter hidden from their board of directors. The arbitrator concluded that the actions of the Northrop subsidiary and the top management of Northrop were attributable to the parent company.

Under the Korean Civil Code, "colluding with another party to make a declaration of intention that is fictitious is void." The arbitrator therefore concluded that the parties acted in concert to falsely declare their intentions with respect to the use of the US \$6.25 million by entering into the joint venture agreement and the agreement was void at least as to the payment.

The arbitrator held that the validity of the arbitration clause was not affected by any conclusion that the basic agreement was partially or totally void. He relied on the doctrine of separability to justify his conclusion. He also noted that the parties had intensely negotiated the arbitration clause even though they knew the true destination of the payment. This was simply one further argument in support of the validity of the arbitration clause, even if all or part of the basic contract was null or void.

The arbitrator finally held that if the hotel joint venture agreement, as well as their oral understanding, constituted a breach of federal anti-corruption laws, as appeared to be the case, the plaintiff could not seek reimbursement under its contract. It is a fundamental legal principle of all civilized nations that a payment made in breach of a criminal law cannot be reimbursed to anyone who has broken that law. The arbitrator determined that the joint venture agreement was void and dismissed Northrop's demand for payment or reimbursement under the contract. Finally, he allocated the cost of arbitration between the parties.

Commentary:

When the decision of the ICC arbitrator was released, the chairman of Northrop, Thomas V. Jones, announced his retirement. Also, two U.S. Federal Grand Juries examined whether Northrop executives violated the *Foreign Corrupt Practices Act* in its marketing of the F-20 jets.

The facts of this particular case were simple on the surface and the dispute appeared just as simple. However, the arbitrator did not accept the dispute at face value. Rather, he looked at the true object of the joint venture agreement and actively pursued his line of investigation to determine that the parties' intent was to funnel money to Mr. Park, in order to obtain the sale of the F-20 fighter planes. To reach this conclusion, the arbitrator analysed not only the clauses of the contract, but also the behavior and relationship between the parties. Once he reviewed all of the facts and the evidence, including the behavior of the parties as a whole, the arbitrator deduced that the sole purpose of the joint venture agreement was to illegally remunerate their agent, Mr. Park. The U.S. \$6.25 million was to complement the modest amount paid to Mr. Park for his consulting activities under the consulting agreement.

ICC Case No. 6248 (1990)³⁵

This case primarily deals with the fiduciary obligation of an agent and the invalidity of a consulting agreement resulting from potential conflicts of interest. However, it also examines secret commissions, kickbacks and bribes to agents.

Facts:

The claimant was a Mr. Z, the principal of an architectural firm, that acted in several capacities in the construction of a project (the "Project") in a Middle Eastern country. He acted as a consultant to the defendant, a construction firm, by assisting it in securing cost savings on the Project and in acquiring extensions on the total value of the Project. The defendant, acting on behalf of a "Joint Venture" had contracted with a "Group" (it is unclear whether this was a government or private entity) to construct the Project. The Group had also entered into a Supervision Contract with an architectural firm as its engineering consultant on the Project to supervise defendant's performance. Mr. Z was the partner of that same architectural firm and was personally involved in the performance of the Supervision Contract whenever important matters were discussed with the Group.

Mr. Z. also had an agreement ("Consulting Agreement") with the defendant in which his compensation was fixed at a certain sum, being the "gross maximum compensation". The Consulting Agreement had an ICC arbitration clause with the situs in Zurich, Switzerland. This agreement was governed by the Swiss Federal Code of Obligations and stated that the invalidity or unenforceability of any part of the agreement did not affect the validity and enforceability of the whole of the agreement.

³⁵ Collection of ICC Arbitral Awards (1991-1995) 239. Yearbook Comm. Arb'n XIX 1994, 124.

The construction firm (defendant) refused to pay Mr. Z (claimant) his compensation under the Consulting Agreement resulting in the claimant initiating arbitration in which he demanded the gross maximum compensation plus additional sums based upon payments received by the defendant from the Group. The defendant argued that the claimant was nothing more than a post office box address providing cover for the improper activities of Mr. Z, the principal of the architect firm. The defendant contended that Mr. Z abused his position as consultant to the Group to extort payments from the defendant for his private gain instead of acting exclusively in the interests of the Group, and accordingly the Consulting Agreement was null and void as being contrary to *bonos mores*.

Opinion:

The arbitral tribunal first discussed its own jurisdiction to try the case even though neither party raised the issue. Their concern was based upon the defendant's allegations that good morals and public policy were violated under the Consulting Agreement and because arbitrability had been previously denied in ICC Case No. 1110 (1963) in similar circumstances. The tribunal referred to Article 8(3) of the ICC Rules of Conciliation and Arbitration and Article 178(3) of the Swiss Private International Law Act and stated that "the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid. This principle of severability has long been recognized not only generally, but also specifically with respect to main contracts which were found void on the ground of a violation of good morals and public policy." Thus, the arbitral tribunal decided that it had jurisdiction over the case regardless of whether it found the main contract null and void.

The tribunal accepted Swiss law as the applicable substantive law of the contract and under Swiss law contracts which violate *bonos mores* are null and void. In order to determine whether the Consulting Agreement violated ethical and social principles, the tribunal looked at the real intention of the parties beyond the words used in their agreement. Under Swiss law there are agency agreements with and without fiduciary duties and architects are considered to be a profession with a "particularly strict duty of loyalty towards their principals." The tribunal therefore concluded that Mr. Z had a fiduciary duty to the Group even though he argued that his duty under the Supervision Contract was limited to only providing technical supervision of the Project. Mr. Z also claimed that the practices and moralities in a Middle Eastern country were different from the ones in a European country like Switzerland. The tribunal considered this irrelevant. Since the parties chose Swiss law as the substantive law of their contract, it was Swiss law that determined whether the contract was null and void if it was contrary to *bonos mores*.

Based upon the behavior of both parties, the tribunal concluded that the "defendant had retained claimant against an important remuneration to secretly exercise influence on the decisions of the Group for the benefit of the defendant and that this common intent was opposed to the interests which the architectural firm had to represent under its special fiduciary duties resulting from the Supervision Contract."

The tribunal determined that it was highly offensive if the agent misused his influence as a reward for betraying the principal. It designated such 'traitor's rewards' as secret commissions. They are also commonly referred to as bribes, corruption money, pots-de-vin or kickbacks.

“Since in the case at issue none of the Parties has its domicile or its principal office in Switzerland it should be emphasized that the attitude of Swiss law towards secret commission agreements is in accordance with international public policy.

‘International interests and the general interest in a normal functioning of international trade appear to coincide and to justify the conclusion that there does exist a principle of truly international or transnational public policy which sanctions* corruption and ‘bribery-contracts’ (see P. Lalive, “Transnational (or Truly International) Public Policy and International Arbitration” in *Comparative arbitration practice and public policy in arbitration*, P. Sanders, ed., *ICCA Congress Series no. 3* (1987) p. 276 et seq.).

This also corresponds to the practice in the domain of international commercial arbitration (see ICC awards nos. 2730 and 3916 , in *Journal du droit international* (Clunet) (1984) pp. 914 and 930).”

The arbitral tribunal concluded that the Consulting Agreement was null and void because it was a particularly offensive violation of a third party's rights. The defendant was not estopped from invoking the nullity of the contract even though it participated in the immoral contract and took advantage of claimant's activities.

Having failed entirely in its claim, the claimant was required to pay all the arbitration fees and his own legal costs. The defendant was not awarded its legal costs, since in the words of the tribunal “defendant's own corrupt attitude cannot remain unnoticed completely.”

Commentary:

In dealing with a different type of corruption, the tribunal confirmed that international public policy considers corruption and bribery contracts illegal.

ICC Case No. 6401 (Westinghouse-1991)³⁶

This ICC case is voluminous in its facts, arguments and reasoning. The arbitral tribunal heard testimony from a total of 26 witnesses providing thousands of pages of transcripts. The parties submitted nearly 100 volumes of materials to the tribunal for its

³⁶ 7 Mealey's Int. Arb. Report, Jan 1992, Issue No. 1, Section B, p. B-1.

consideration, including 15 briefs, 69 volumes of evidence and 7 volumes of legal authorities.

Claimants: Westinghouse International Projects Company (U.S.A.)
Burns & Roe Enterprises Inc. (U.S.A.)

Defendants: National Power Corporation (Philippines)
The Republic of the Philippines (Philippines)

Facts:

In 1973 President Ferdinand Marcos announced plans to build the first nuclear power plant in the Philippines. The National Power Corporation (NPC), a state owned entity, was responsible for planning and constructing the plant. It was under the direct supervision of the office of the President. The first contract (Consulting Contract) to be awarded was to hire an outside consultant with knowledge of nuclear power to help design the plant and evaluate proposals submitted by various companies interested in the contract to build the plant. In February 1974, NPC awarded the Consulting Contract to Ebasco Overseas Corporation (Ebasco) and then reversed itself and awarded it to Burns & Roe Enterprises, Inc. (Burns & Roe), a U.S. based engineering consulting firm. This was subsequently changed into a sub-contracting arrangement with Westinghouse. In June 1974, NPC awarded a contract (Construction Contract) to build the plant to Westinghouse International Projects Company (Westinghouse), a subsidiary of a U.S. based electrical power company.

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

Under its SSR agreement with Technosphere, Burns & Roe agreed to pay a commission of 5% of the value of its sub-contract from Westinghouse, up to \$1 Million. In addition, Technosphere provided engineering and design services to Burns & Roe for which it received 5% of the value of Burns & Roe's contracts. During the term of this agreement, Burns & Roe paid Technosphere a total of U.S. \$2.2 million. Westinghouse entered into a formal SSR contract with Herdis, represented by Disini, its Chairman and President, which provided for the payment of a 3% commission on the price of the nuclear power plant project. At the same time, Westinghouse also executed an SSR contract with a company called Asia Industries, owned by a prior agent of Westinghouse called Jesus Vergara, that provided for a commission of 0.5% on the price of Westinghouse manufactured products included in the power project. Altogether, Westinghouse paid a total of U.S. \$17.2 million to Herdis and U.S. \$2.9 million to Asia Industries during the term of the nuclear power plant project.

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 Marcos regime was overthrown in February 1986 and a new government of the Philippines headed by President Corazon Aquino decided in June 1986 not to operate the plant. The new Philippine government did not complete its payments to Westinghouse under the Construction Contract.

Westinghouse initiated an arbitration claiming that it was owed tens of millions of dollars under the Construction Contract for numerous unpaid items. The arbitration clause in the Construction Contract provided that the agreement was governed by the laws of Pennsylvania, U.S.A. and that it would be an ICC arbitration held in Geneva. The Defendants named were NPC and the Republic of the Philippines. They denied all of the Claimants allegations and asserted a counter claim that the Claimants committed fraud in procuring the contract, their work was defective and they abandoned the defective plant before it was complete. They also asserted that the Republic of the Philippines was not a party to the Construction Contract or to the arbitration and that the tribunal was without jurisdiction over the Republic. The tribunal did not address the counter claims of the Defendants but rather only addressed the following issues in its Preliminary Award:

- Were the arbitration clauses relied upon by the Claimants obtained in such a manner as to render them invalid?
- If the answer was in the negative, was the Republic of the Philippines bound by the arbitration clauses?
- Were the contracts obtained by the Claimants obtained in such a manner as to render them invalid?

In addressing the above questions, the Defendants asserted that both Westinghouse and Burns & Roe had obtained their respective contracts with the NPC through bribery.

Opinion:

The first issue addressed by the arbitral tribunal was its own jurisdiction. It relied upon the doctrine of *Kompetenz-Kompetenz* which recognized that the power to determine their own competency is an inherent attribute of international tribunals. The arbitral tribunal asserted this basic principle based upon both the ICC Rules and Swiss law, the *lex arbitri*.

The tribunal then discussed the issue of the doctrine of separability where an arbitration clause is considered to be separate from and independent of the agreement in which it is contained pursuant to which an arbitration clause may survive the nullity or invalidity of that agreement. 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 stated that there might be instances where a defect going to the root of the agreement between the parties affects both the main contract and the arbitration clause, an example being a contract obtained by

threat. However, the tribunal determined that they did not have to decide on the effect of bribery on the validity of the arbitration clause since they found on the facts that the Defendants had failed to prove their allegations of bribery.

The tribunal then addressed the issue of the governing law of both contracts. The Burns & Roe Consulting Contract did not contain a governing law clause. The tribunal held that it was governed by the law of its principle place of business, i.e. the State of New Jersey, U.S.A. The Westinghouse Construction Contract was held to have its governing law based upon the location where Westinghouse had its principle place of business, i.e. the Commonwealth of Pennsylvania, U.S.A.

The arbitral tribunal then considered the standard to be applied in weighing the evidence. Since the contracts in question were negotiated, executed and performed in the Philippines and the United States, the tribunal determined that the most appropriate standard for the burden of proof was that found in the Philippines and in the States of Pennsylvania and New Jersey, U.S.A. In reviewing the rules of evidence for those jurisdictions, the tribunal found that the standard of proof was essentially the same. The party having the burden of persuasion must establish the facts on which it relies by a “preponderance of evidence.” In other words, it must have the “superior weight of evidence” and must establish that its version of the facts is “more likely true than not true.”

However, the tribunal considered a further, higher standard since bribery was considered a fraud. Reviewing all three jurisdictions, the tribunal determined that it would apply a “clear and convincing evidence” standard to the Defendants’ claims of bribery. Having determined the two standards of proof, the tribunal remarked that in the final analysis, it did not make any difference in their conclusions:

“Under the facts of this case, however, this difference in standards of proof is of no moment. Whether the standard applied is the general civil standard of ‘more likely true than not true’ or, as put by Defendants’ lead counsel, ‘Does the evidence tested against human experience and common sense persuade or does it not?’ or the higher standard of ‘clear and convincing evidence,’ the tribunal’s findings would be the same.”

The arbitral tribunal then determined the definition of bribery it would apply in its review of the facts. The tribunal first stated that if the Defendants were able to prove that Marcos received a payment from the Claimants, it would be a clear instance of bribery. However, they were prepared to accept a more indirect determination by providing that the Defendants had to establish by clear and convincing evidence the following elements:

- that the alleged briber intended to provide a payment or another thing of value to President Marcos, and
- that President Marcos agreed to accept this consideration, either directly or through Disini, in exchange for his directing NPC to enter into the contract with the briber.

The Defendants did not have to show that consideration was actually received by Marcos but they had to prove the existence of an actual agreement.

The tribunal next considered the facts presented for both contracts. The following facts were determined with regards to the activities of Burns & Roe and its Consulting Contract:

- Burns & Roe used the term “bag person” in doing business in the Philippines.
- Burns & Roe conducted a due diligence on the candidates it considered for an SSR.
- President Marcos personally instructed that the award to Ebasco be overturned and that a contract should be entered into with Burns & Roe and that Disini had supported it. However, the evidence established that these activities were prior to and independent of any contract with Burns & Roe.
- There were no facts that established that Burns & Roe ever intended to provide a payment to Marcos or that Marcos agreed to accept any payment from Burns & Roe through Disini.

The tribunal then considered the following facts with regards to Westinghouse and its Construction Contract:

- Westinghouse considered three people for their SSR. They conducted a due diligence and even contacted the U.S. Embassy in their inquiries.
- The Defendants claimed that Marcos had a financial interest in Herdis and shared in Westinghouse’s payments to Disini. The tribunal found insufficient proof that Herdis was actually owned or controlled by Marcos or that Disini acted as an agent for Marcos.
- There was strong evidence that Westinghouse employees believed that there was a relationship between Disini and Marcos; however, it was not clear what they knew about its extent. The tribunal found that this evidence standing alone did not establish that Disini was a “front man” for Marcos’ interests or that Herdis belonged to Marcos.
- There was no direct evidence that Marcos supported Westinghouse getting the Construction Contract because he expected to benefit from the SSR payments to Herdis. The evidence indicated that some Westinghouse employees thought that Marcos owned some of Herdis and that Marcos had documents in his possession that outlined the commissions Herdis was supposed to receive for the contracts. However, there was no evidence that Marcos received any share of those commissions. There was no evidence before the tribunal that showed any transfer from the accounts of Disini in which the Westinghouse commissions were deposited to any Marcos or Marcos-related account.

The tribunal concluded that the Defendants failed to carry their burden of proof that either Westinghouse or Burns & Roe had engaged in bribery.

In late 1986, the new President of the Philippines, Corizon Aquino, transferred control of the nuclear power plant from the NPC to the national government. As a result, both Claimants argued that the Republic of the Philippines was bound to arbitrate as per the dispute resolution clause under its respective contracts. The tribunal found that they had not met their burden of proving by a preponderance of the evidence that NPC's transfer of the ownership of the nuclear power plant to the Republic also assigned the right and obligation to arbitrate disputes with respect to the Construction Contract. Therefore, the tribunal determined that the Republic was not a party to this ICC Arbitration.

Finally, the tribunal determined that they would postpone the decision with regards to the costs of the arbitration until they determined the final award with one exception. Since the Republic of the Philippines was no longer a party to the arbitration and had won on the issue of jurisdiction, the Republic was awarded a reasonable contribution to their legal fees.

Commentary:

The Westinghouse case looked closely at the standard of proof to be used in a bribery case and it also considered a definition for bribery. The standard of proof was essentially an American standard for civil cases, and in particular for standards required in fraud cases. The definition of bribery included the using of intermediaries but clear and direct evidence was required to satisfy the standard of proof set by the tribunal.

ICC Case No. 6497 (1994)³⁷

This case elaborates on the burden of proof used in deciding upon the existence of bribery and the relevance of the percentage of an agent's commission.

Facts:

The claimant was a consultant from Liechtenstein and the respondent was a German construction firm. The parties had entered into a number of consultancy agreements ("Basic Agreements") over a ten year period in which the claimant provided services to the respondent to successfully obtain construction contracts in a number of countries including a certain Middle Eastern country ("Country X"). Under the Basic Agreements, the claimant received 1.5% of the amounts received by respondent under its construction contracts. In addition, the parties had a great number of specific "Product Agreements" providing additional obligations and remuneration to the claimant. As a result of both sets of agreements, claimant's remuneration over this ten year period was approximately 5.5% of the amounts received by respondent.

³⁷ Yearbook Comm. Arb. XXIV (1999) 71.

One particular agreement, Product Agreement Q, was the most contentious. It provided a commission of 33.33%. It did not describe the services to be rendered by the claimant. It simply stated that the commission was to be paid “for the performance of extraordinary services received in full” by respondent.

The dispute arose around the balance of payments with respect to certain contracts. The claimant sought payment of the amounts due while the respondent argued that no payments were due because the real objective of the agreements was to bribe officials in Country X. All of the agreements contained an ICC arbitration clause. The arbitration was initiated in Geneva and under the Terms of Reference, the parties agreed that Swiss law was applicable to the merits of the case.

Opinion:

The arbitral tribunal quickly held that “if the bribery nature of the agreements would be demonstrated, such agreements would be null and void in Swiss law. This is not because such bribe would be prohibited by the criminal law of the country in which bribes had been paid, but because the bribes in themselves cannot be, in Swiss law, the object of a valid contract. This is also admitted in most legal systems.”

The tribunal then quickly moved to the issue of proof and held that the party alleging the existence of bribes has the burden of proof. If the proof submitted was not convincing, then the tribunal should reject it; even if there were doubts about the possible bribery nature of the agreements. However, this burden of proof could be reversed under certain circumstances. If the alleging party brought forth relevant evidence without it being conclusive, the tribunal may exceptionally request the other party to bring some counter evidence if it was possible to do so and not too burdensome. If the other party failed to bring such counter evidence, the arbitral tribunal may conclude that the facts alleged were proven.

The respondent’s main argument was the size of the claimant’s remuneration against its limited costs. The claimant referred to the costs of his subcontractors, but refused to provide any details on them even though most of these subcontracts were in writing, citing business secrecy or legitimate interests of third parties. The respondent then argued that the structure of the claimant’s group was not transparent, maintaining that some officials of Country X had a stake in some of the claimant’s companies. However, the respondent did not provide proof to substantiate its allegations and the tribunal held that this argument was not conclusive even though the claimant refused to provide information on its corporate structure. One of respondent’s directors stated that he knew about 30 of the beneficiaries of bribes but he refused to name them because he had received threats around this matter and considered it dangerous.

After hearing all of this evidence, the tribunal decided that it was not appropriate to shift the burden of proof onto the claimant with regards to the Basic Agreements and the majority of the Product Agreements. It stated that “even if the figure for the amounts paid to claimant is very high, even if it is possible that the effective costs of claimant have been only a small fraction of such amount, such amount is ‘only’ 5.5% of the global

amount awarded to respondent. Such percentage is not perceived as being abnormal for a consultancy agreement (without any bribery nature).” The tribunal therefore held these contracts to be valid.

The tribunal viewed Product Agreement Q differently from the other agreements between the parties. It considered the commission of 33.33% extraordinary and extremely unusual. The tribunal appeared to encourage a more active investigation into the facts surrounding the remuneration paid for Product Agreement Q. The respondent requested from claimant the production of banking documents relating to payments under several agreements (in particular for Product Agreement Q) to determine the destination of the payments. The claimant strongly objected on the basis that it would jeopardize its legitimate business secrets.

The tribunal first proposed to use an independent expert to review the documents and accounts. The claimant opposed any such review. The tribunal then ordered the claimant to produce copies of all subcontracts relating to Product Agreements P and Q which the claimant also refused to do. The tribunal then went back to its original proposal and ordered a review by an independent expert which the claimant ultimately failed to cooperate on. However, the claimant eventually agreed to produce the banking documents originally requested by the respondent. These documents showed that the payments made by respondent to claimant went into a transit account. When pressed for details on these banking transactions, the claimant’s statements and those of its witnesses were either nebulous, non-existent or simply untrue.

The tribunal’s conclusion was that “Taking into account all circumstances, the arbitral tribunal considers (contrary to its decisions on all other agreements...) that there is a high degree of probability that the real object of Product Agreement Q was to channel bribes to officials in Country X who had the power to decide that both amounts mentioned in the Agreement were to be paid to respondent. Such probability is high enough for the arbitral tribunal to consider that such allegation presented by respondent is to be admitted.” The tribunal thus held that Product Agreement Q was null and void and the claim for this agreement was rejected.

On the dilemma of nullifying a contract that results in one of the parties gaining benefit even though their behavior is not exemplary, the tribunal had some interesting comments: “By the way, the result of such nullity is not necessarily equitable. The enterprise having benefited from the bribes (i.e. having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organized 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.”

Commentary:

This case confirmed the general principle that bribery invalidated a contract. The tribunal clearly required that the party alleging bribery had to prove it but it also provided for the reversal of that burden using evidence that wasn’t quite conclusive. It considered the percentage of commission as relevant in determining the probability of bribery.

ICC Case No. 6662 (1992)³⁸

This case illustrates the willingness of an appeal court to consider new evidence concerning fraud and to annul the decision of an arbitration tribunal.

Claimant: Westman International Ltd. (English)

Defendant: Alsthom Turbines A Gaz S.A.
(European Gas Turbines S.A.) (French)

Facts:

Alsthom Turbines A Gaz S.A. (Alsthom) was attempting to sell gas turbines to the National PetroChemical Company (NPC) for a petrochemical project in Arak, Iran. In 1985, Alsthom entered into a contract with Westman International Ltd. (Westman), in which it was to provide Alsthom with information and provide advice to improve Alsthom's bid for the gas turbine contract. Alsthom had to go through a pre-qualification process for this project. Westman agreed to provide Alsthom with the maximum information possible and communicate its suggestions for acquiring the bids. Also, Westman was to give Alsthom advice during their negotiations to obtain a contract from NPC. The Westman contract had a three year term if Alsthom pre-qualified within two years of its execution. If Alsthom pre-qualified, Westman was to be paid a commission which would cover its expenditures and which would be set by mutual agreement before Alsthom submitted its bid. There was another provision in their agreement that if Alsthom pre-qualified within the two year period and if it sold the turbines within six months of the three year term, Alsthom would pay Westman half of the negotiated commission provided above.

In 1987 Westman informed Alsthom that it had pre-qualified to furnish gas turbines for the Iranian project. Later in mid 1988, Westman advised Alsthom that four bids were to be examined by the head of the Iraq project, including that of Alsthom's. In the same correspondence, Westman sought confirmation on their rate of commission "which would be paid by Alsthom upon receipt of the contract." Over several months, Westman continued to request negotiations to agree upon the rate of commission and to obtain payment for the expenses it had borne. In March of 1989, Alsthom notified Westman that it did not want to renew its contract with Westman and stated that their existing agreement had expired on December 1, 1988. Eleven days later Alsthom and NPC signed a contract to furnish gas turbines to NPC.

The dispute resolution clause in the consulting agreement provided that the applicable law was French law. The arbitration clause provided for ICC arbitration to be held in Paris with three arbitrators named according to the ICC rules.

³⁸ 8 Mealey's International Arbitration Report, Issue No. 11, p. 5 and B-1. Summarised in Rev. Arb. 2/1994, p. 359.

Westman, in its correspondence to Alsthom, proposed setting a commission of 3% of the value of the gas turbines sold to the Arak project. Alsthom refused to pay the amount requested and Westman initiated the ICC arbitration.

Opinion:

Westman argued in its petition that it was due a 6% commission on the value of the turbine sale. In response, Alsthom stated that the consulting contract was null and void since it was illicit or amoral in its objects and motives. In the arbitral hearing, Westman produced a detailed accounting of its expenses totaling more than 7 million Swiss francs that it certified having expended in accomplishing its tasks under the agreement.

The arbitral tribunal held the consulting agreement to be valid and that Westman had proven that it had fulfilled its obligations. The tribunal found that Westman had served as Alsthom's broker in pre-qualifying for the NPC bidding process and that Westman had advised Alsthom on its bid and assisted in the execution of the contract with NPC. However, the tribunal noted that Westman's role consisted "only of promotion of Alsthom's gas turbines". The tribunal stated that Westman "did not emerge from the contract as it was written that Westman had to exercise influence upon NPC to obtain the pre-qualification." The arbitrators directed Alsthom to pay Westman a total amount of 5.7 million Swiss Francs which included an amount equal to 4% paid by NPC to Alsthom under the gas turbines contract. Alsthom was also ordered to pay the costs of the arbitration set at US \$145, 000 plus all the defence expenses incurred by Westman, set at 450,000 French Francs.

Paris Court of Appeals (1993)

European Gas Turbines S.A. (EGT), successor to Alsthom, filed an appeal to the Paris Court of Appeal for annulment of the ICC arbitration decision. EGT argued that the enforcement of the arbitration ruling was contrary to the public order because it supported a contract "having as its motive and goal the exercise of influence peddling or the payment of bribes". It also filed a civil complaint for false evidence and for swindling.

Facts:

EGT submitted financial documentation prepared by the accounting firm of Touche Ross & Co. regarding the accounts of Westman filed in the business registry in London, England where the company was incorporated and registered. These accounts made no mention of the expenditures certified to by Westman in the arbitral tribunal even though English company law required disclosures of that nature in the filed company annual accounts.

Opinion:

The Court of Appeal considered two grounds to invalidate the enforcement of the ICC award:

- The arbitration ruling was contrary to both French public order and international public order, in that its enforcement in France would result in upholding a contract that was illicit in its motive and its object and which are the exercise of influence peddling or the payment of bribes.
- The arbitration ruling was contrary to international public order in that its enforcement would lead to upholding a fraud committed by Westman in the arbitration hearing.

The Court of Appeals rejected EGT's first claim on the reasoning that Westman's role as a broker and advisor, which was not clearly defined within the contract, "cannot be regarded as devoid of any usefulness." The Court determined that there was a lack of detail to "form evidence of concrete actions that could be characterized as influence peddling." However, the Court did find, based upon the documents submitted by EGT, that Westman did not incur any of the expenditures that it had certified to the ICC arbitral tribunal. Thus, Westman had not fulfilled its contractual obligations. The non-fulfillment of the contract by Westman, however, did not necessarily imply that the motive or objective of the contract was either influence peddling or bribery.

On the second ground for nullifying the contract, the Court concluded that the expense statement presented by Westman in the arbitration hearing "constitutes a fraud and not mere artfulness." The Court reasoned that the arbitrators "took into consideration the voluntarily erroneous statement of expenses to determine the amount of the commission which it found due Westman." The Court of Appeal therefore concluded that "on application of the general principle of law according to which fraud constitutes an exception to all rules (*fraus omnia corrumpit* - fraud taints all), these dispositions are contrary to French international public order and, as such, must be annulled."

The Court declared that EGT's appeal was partially founded and, as a result, annulled the majority of the ICC arbitration ruling in respect of the amounts:

- Where Westman gave proof of "fulfilling its obligation toward obtaining pre-qualification of Alsthom."
- Where Westman was "hindered by Alsthom in fulfilling its obligation after pre-qualification of Alsthom."
- The four percent commission on the NPC contract.

Finally, the Court of Appeal ordered Westman to bear the costs of the court hearing and Westman was to pay EGT the sum of 30,000 French Francs.

Commentary

This case illustrates the willingness of an appeal court to annul a decision of an ICC arbitral tribunal. It did not hesitate to consider new evidence with respect to the fraudulent financial statements of Westman, even if it meant that the Paris Court of

Appeal was allowing a retrial of the facts. The Court was not prepared to conclude that Westman had engaged in bribery based upon the new facts; however, it used the fraudulent financial statements as the basis for partially annulling the arbitral award and defeating most of Westman's claim.

ICC Case No. 7047 (Westacre - 1994)³⁹

The Westacre case was a very controversial arbitration case which was appealed in two countries and enforcement sought in three different countries.

Claimant: Westacre Investments Inc. (Panama)

Defendants: 1) Judoimport - SDPR Holdings Co. Ltd.
2) Beogradska Banka
(all Yugoslavian)

Facts:

Defendant #1 entered into a sales contract (M-84 Contract) in 1989 with the Kuwaiti Ministry of Defence (MoD) for 215 M-84 tanks at a sales price of US \$500.5 million plus £11.4 million. It also entered into a construction contract for an M-84 training facility at US \$39.1 million. The Defendant also signed an agreement (Consultancy Agreement) in 1988 with the Claimant whereby Claimant was to assist Defendant #1 in the MoD sale. In return the Defendant was to pay a "Consultant's Fee" of 15% of the value of the M-84 tanks delivered and paid by MoD and 10% of the value of the training facilities built and paid by MoD. Defendant #2 acted as guarantor for the Consultant's Fee under the Consultancy Agreement.

Prior to the conclusion of the MoD contracts, the MoD supplied to the Defendant a circular (MoD Circular) requesting that contracts on the delivery of arms, ammunition and spare parts be made directly with the MoD without the participation of an agent or intermediary. Further, contractors had to refrain from paying money to an agent and had to assure the MoD that its prices did not contain commissions or similar money for agents. The parties disputed whether the Defendant knew about the MoD Circular at the time they concluded their Consultancy Agreement and whether the Kuwaiti authorities applied the MoD Circular in practice.

After the MoD placed an order for some of the tanks, the Defendant gave Westacre a written notification that it was terminating their Consultancy Agreement because it was in violation of the mandatory law of Kuwait as set out in the MoD Circular. The Defendant also claimed that the information provided by the Claimant was useless and did not promote its project with the MoD and that they were the only activities performed by the Claimant.

³⁹ ASA Bulletin 2 (1995) 301.

The Consultancy Agreement was governed by Swiss law and provided that disputes were to be settled by ICC Arbitration in Geneva. The arbitral tribunal consisted of three arbitrators.

Opinion:

The tribunal determined that the laws of Switzerland applied to the Consultancy Agreement and its validity. It rejected the Defendant's assertion that the mandatory laws of Yugoslavia applied.

The Defendant argued that it did not require any services from the Claimant and therefore did not have to pay the fee. The tribunal rejected this defence. They held the Consultancy Agreement did not require the Claimant to prove its activities and was thus exonerated from such a burden of proof. However, despite not having to prove it under the Consultancy Agreement, the Claimant did in fact establish its activities to the satisfaction of the tribunal.

In its final oral pleadings on the last day of the arbitration, the Defendant pled that the Consultancy Agreement was void due to illicit activities of the Claimant. The tribunal held that the Defendant failed to substantiate and prove that the MoD Circular was part of the mandatory law of Kuwait. Rather it was only shown to be a contractual condition of the M-84 Contract.

The tribunal held that the Consultancy Agreement would be null and void if the parties had intended to obtain the M-84 Contract by illicit means, such as bribery. Reviewing the evidence provided, the tribunal did not find that the following circumstances proved bribery:

- The Consultancy Agreement exonerated Claimant from proving its services.
- The Claimant's fees were disproportionately high and unusual.
- Using an offshore company as an "international paper vehicle".

The tribunal held that unusually high fees did not invalidate an agreement. Nor did the validity depend on the quantity of services. The tribunal also rejected the Defendant's claim that there was faulty performance on the part of the Claimant since the M-84 Contract was successfully obtained and the Defendant did not sustain any damages.

The Defendant also alleged that the Consultancy Agreement was void because of illicit lobbying activities. The tribunal held that lobbying was not an illegal activity and thus did not invalidate it.

The tribunal expressed concern that the Defendant failed to submit its suspicions in its written briefs before the witness hearings and considered its subsequent allegations as speculative. They addressed the issue of bribery and the need to prove it as follows:

“The majority also hold that bribery renders an agreement invalid. In arbitration proceedings, however, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defence, nullifying the claims arising from a contract. The consequences of this are decisive.

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

If the claimant’s claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere ‘suspicion’ by any member of the arbitral tribunal, communicated neither to the parties nor to the witnesses during the phase to establish the fact of the case, is entirely insufficient to form such a conviction of the Arbitral Tribunal.”

The tribunal held that the Consultancy Agreement did not infringe upon international public order and did not violate *bonos mores*. The Claimant was thus entitled to its fees under the Consultancy Agreement. These were calculated based upon the M-84 tanks delivered and paid at the time of the arbitral award and not the total number of tanks under the M-84 Contract. The Claimant received 15% of the value of the tanks paid for and 10% of the value of the construction contract along with 5% interest from the dates of default. The total amount awarded was over US \$50 million. Finally, the tribunal ruled that the arbitration costs of US \$700,000 were split evenly between the Claimant and the Defendant and each party should bear its own legal costs.

Chronology of Appeals:

The Defendants appealed the ICC Award to the Swiss Supreme Court (Tribunal Fédéral) arguing that it was contrary to public policy because it was contrary to or evaded Kuwaiti law or it was a contract to pay bribes and was thus immoral and void. The Swiss Supreme Court in 1996 rejected these arguments and upheld the ICC Award stating that the arbitral tribunal had not violated substantive public policy in finding the Consultancy Agreement to be in conformity with the law.

Westacre obtained an order from the Kuwait Commercial Court in 1994 enforcing the ICC award. It also sought enforcement of the award in Cyprus. Westacre then pursued enforcement of its award in the English courts. It first obtained an *ex parte* order in 1995 from an English court. The Defendants sought to set aside that order in its application to the High Court of Queen’s Bench.

High Court, Queen's Bench (1997)⁴⁰

Westacre enjoined the Federal Directorate of Supply and Procurement of the Federal Republic of Yugoslavia (new Directorate) as the successor to Defendant #1 and the Beogradska Banka DD as the successor to Defendant #2 in the English enforcement of the arbitral award.

The Defendant introduced new evidence in the English High Court proceedings by way of a sworn affidavit of the legal counsel to the Directorate, Miodrag Milosavljevic (M.M.) who was involved in the negotiations for the Consultancy Agreement and the M-84 Contract. In his affidavit, M.M. alleged that Mr. Al-Otaibi, the Secretary General of the Council of Ministers of Kuwait was the principal behind Westacre. Mr. Al-Otaibi was involved in the deal from the beginning. Apparently, high placed Kuwaiti officials had stated to the Defendant that no contracts for military equipment would be placed with the Defendant unless a consultancy agreement was first entered into with a nominated consultant. When the issue of the MoD Circular was brought up, Mr. Al-Otaibi expressed concern that the Defendant should even raise this question and stated to the Defendant that his "group" had succeeded in procuring the armaments contract. The two main shareholders of Westacre were a Mr. Al-Wazzar (who was the son-in-law of Mr. Al-Otaibi) and a Mr. Al-Ghanim. The Defendant alleged that the evidence put forward by Westacre at the arbitration portraying these two individuals as playing central and important roles was false. Rather, the Consultancy Agreement was a contract to pay Mr. Al-Otaibi a bribe through the vehicle of Westacre which was set up to maintain the anonymity of Mr. Al-Otaibi and his associates.

Opinion:

The Court made an extensive review of English and American cases dealing with the enforcement of foreign awards. The case of *Soleimany v Soleimany* concerning the export of carpets from Iran contrary to Iranian law and with evidence of bribery was discussed. The arbitration award determined that the contract was valid in accordance with Jewish law. The English court held that the award was enforceable even though it was illegal under English law on the grounds that the contract was to be treated as governed by Jewish law which had no doctrine of illegality in respect of the facts of the case.

The High Court determined that the effect of the various authorities was:

- If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favour of the claimant would not be enforced for it would be contrary to public policy for an arbitrator to ignore palpable and indisputable illegality.

⁴⁰ [1998] 4 All ER 570.

- If the court concluded that the arbitration agreement conferred jurisdiction to determine if the underlying contract was illegal and the arbitrators determined that it was not illegal, *prima facie* the court would enforce the resulting award.
- If the enforcement of the award was challenged on facts not placed before the arbitrators that the contract was illegal, the enforcement court must consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy supporting the finality of international arbitral awards.

In considering the two countervailing public policies, the Court noted the following points about the arbitral award:

- The parties selected arbitration by an impressively competent international body, the ICC.
- The English court was entitled to assume that the arbitrators appointed were of undoubted competence and ability.
- Since the parties chose Swiss law and had referred the issue of illegality to the arbitrators, the English court can conclude that there was no objection to the exercise of their jurisdiction over issues of illegality.
- English courts give full recognition of the separability principle and thus the arbitration clause is valid whether the arbitrators find the main contract invalid because of illegality.

Given the above considerations, the Court stated:

“I have no doubt that an English court would give predominant weight to the public policy of sustaining the parties’ agreement to submit the particular issues of illegality and initial invalidity to ICC arbitration rather than to the public policy of sustaining the non enforcement of contracts illegal at common law. The importance of the former consideration would be held to outweigh the need to protect against the risk that arbitrators might by way of uncorrectable errors of fact enforce an illegal contract.”

The court then discussed the issue of the fresh evidence in MM’s affidavit which it considered directly relevant to the issue of illegality. The Court determined that the Defendant was seeking to use the public policy against the enforcement of illegal contracts to conduct a re-trial at the enforcement stage of an arbitral award on the basis of additional evidence of illegality when it was open to them to adduce that evidence before the arbitrators at the time of the arbitration. The Court concluded that “such an exercise would appear to be clearly in conflict with the principles of issue estoppel.”

Finally, the Court considered the significance of the public policy of discouraging corrupt trading in order to determine its preference over the public policy of sustaining the finality of international arbitral awards. The Court noted the “mounting international

concern about the prevalence of corrupt trading practices.” In particular, it referred to the OECD Convention on Combating the Bribery of Foreign Officials in International Transactions and stated that “It is therefore important that although the Convention has not yet come into force the English courts should not be seen to be encouraging the corruption of government officials as an instrument of international trade or merely to be paying lip service to such widespread disapproval.”

Having considered all of the above, the Court concluded:

“However, although commercial corruption is deserving of strong judicial and governmental approval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking.

On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards *on the facts of this case* (emphasis added) outweighs the public policy in discouraging international commercial corruption. Accordingly, the defendants’ primary point does not bring them within the public policy exception to enforcement of the award under Sect. 5(3) of the *Arbitration Act 1975*. That conclusion is not to be read as in any case indicating the Commercial Court is prepared to turn a blind eye to corruption in international trade, but rather as an expression of its confidence that if the issue of illegality by reason of corruption is referred to high calibre ICC arbitrators and duly determined by them, it is entirely inappropriate in the context of the New York Convention that the enforcement court should be invited to retry that very issue in the context of a public policy submission.”

The Court finally considered two other issues; the public policy around lobbying and the allegations by the Defendant that the Plaintiff’s witnesses gave false evidence.

The High Court noted that the arbitral tribunal had reviewed the issue of lobbying under both Swiss law and Kuwaiti law and had found that a contract to lobby a government minister would not be contrary to public policy. The Court therefore concluded “That it should be the policy of the English courts to deter the exercise of personal influence short of corruption and fraud to obtain valuable contracts in foreign countries in which such activity is not contrary to public policy by refusing to enforce contracts would involve an unjustifiable in-road into the principle of *pacta sunt serranda*.” The Court thus rejected the Defendant’s argument.

Finally, the High Court considered the Defendant’s request that the arbitration award not be enforced because the Plaintiff’s witnesses perjured evidence at the arbitration as stated in MM’s affidavit. The Court considered this “an open invitation to disappointed parties to re-litigate their disputes by alleging perjury and a major inroad would be made into the finality of Convention awards.” The Court reached the following conclusions on how to address this request.

“Where a party to a foreign New York Convention arbitration award alleges at the enforcement stage that it had been obtained by perjured evidence that party will not normally be permitted to adduce in the English courts additional evidence to make good that allegation unless it is established that:

1. The evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators’ conclusion had it been advanced at the hearing; and
2. the evidence was not available or reasonably obtainable either
3. at the time of the hearing of the arbitration; or
4. at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators’ award if such procedure were available.”

The High Court concluded that, based on the facts, the Defendant failed to meet this test and rejected its application to re-try the case on this point. The Court thus enforced the ICC award in favour of Westacre.

Court of Appeal – Civil Division (1999)

The Defendant appealed the High Court decision to the three member Court of Appeal. The majority of the Court of Appeal dismissed the appeal finding that the arbitrators’ finding of fact in the bribery issue could not be challenged in the enforcement proceedings. The single dissenting judge opined that public policy against enforcing a corrupt bargain for the agreement in question should prevail and that the Defendant was entitled to prove the facts set out in the MM affidavit.

Facts:

The Court of Appeal did not consider any new facts.

Opinion:

The Court of Appeal considered two separate questions:

1. Was it open to the Defendant in the enforcement proceedings to challenge the arbitrators’ findings of fact on the bribery issue as asserted in MM’s affidavit?
2. If so and if successful in proving such assertions, should the English court enforce the award?

The entire Court agreed that the first question was the key one. The majority held “that the attempt to re-open the facts should be rebuffed” using the following criteria:

- The evidence before the arbitral tribunal was that it was a straightforward, commercial contract.
- The arbitrators found that the underlying contract was not illegal.
- There was nothing to suggest the incompetence on the part of the arbitrators.
- There was no reason to suspect collusion or bad faith in the obtaining of the award.

On the second question, the majority held that the seriousness of the alleged illegality was not a factor to be considered at the enforcement stage on whether to decide on mounting a full scale inquiry. They were of the opinion that the High Court, Queen's Bench decision struck the correct balance between the public policies of commercial corruption and the finality of international arbitral awards.

The dissenting judge expressed a different opinion on what weight to give the issue of corruption:

“The [High Court] judge performed the balancing exercise and narrowly came down on the side of upholding the finality of the award. It would seem that if the case had concerned a drug trafficking contract he might well have taken a different view but he placed ‘commercial corruption’ at a different level of opprobrium from drug trafficking.

I have reached a different conclusion to that of the judge. I disagree with him as to the appropriate level of opprobrium at which to place commercial corruption. It seems to me that the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in MM's affidavit are correct, is based on public policy of the greatest importance and almost certainly recognized in most jurisdictions throughout the world. I believe it is important that the English court is not seen to be turning a blind eye to corruption on this scale. I believe that if unanswered, the case at present made on MM's affidavit would be conclusive against Westacre being entitled to enforce the agreement and thus the award as a matter of English public policy. I also believe that the judge did not sufficiently consider the extent to which the case now presented on bribery was examined by the Arbitration Tribunal. When one examines the circumstances of this case one can see that in truth the bribery issue has not been ventilated properly before the Swiss Arbitral Tribunal Both parties bear responsibility for the fact that the matter was not properly considered.

The fact is that the arbitrators simply did not have an opportunity of considering the case as now made, and whatever their suspicions, the majority did not feel it in their place to make inquiries. I draw attention to the quotation from the reasons of the majority at the commencement of this judgment, where they say, if the defendant does not present the facts

‘an Arbitral Tribunal does not have to investigate,’ and to the fact that they asserted to the Swiss court that the allegation that the appellants were themselves involved in the bribery was not part of the case before the arbitrators

If the agreement represented a contract to pay a bribe, Westacre should not be entitled to enforce the agreement before an English court and should not be entitled to enforce an award based on it If the court were concerned with a domestic arbitration and citizens of this country, I would have thought that if a party were to come before the English court and seek to prove that an agreement was unenforceable because it was in fact an agreement to pay a bribe, in addition to the contract not being enforced by the English court, *the papers would be sent to the Director of Public Prosecutions.*” (emphasis added)

Commentary:

The Westacre case illustrates a number of points frequently encountered in these corruption cases. The issue of corruption is brought forth as a last desperate attempt to invalidate a contract. Usually, both parties are reticent to raise the issue and if they do, it is done in an obfuscating manner.

This problem is compounded in the Westacre case by the approach of the Arbitration Tribunal in dealing with both the burden and standard of proof. As pointed out by the dissenting judge in the English appellate court, the Arbitral Tribunal refused to take the initiative to investigate the facts around bribery. In effect, they were quite satisfied to leave the responsibility of proving that there was bribery to one of the very parties actively involved in the corrupt activity. They also appeared to discount all of the circumstantial evidence provided. Rather than consider certain signs or “red flags” that indicate that bribery was most likely happening, they appeared to demand more direct or concrete evidence of bribery rather than “a mere suspicion.” Even in the best of circumstances, it is difficult if not impossible to directly prove bribery. So to expect it to be proven using the criteria demanded by the tribunal given the dynamics of this case was unrealistic. The combination of these factors inevitably resulted in the tribunal not finding bribery.

The decisions in the English courts were very much influenced by the high credibility of the ICC and the subsequent assumption that “the arbitrators appointed were of undoubted competence and ability.” The courts were thus more likely to accept the findings of fact and law of the tribunal. When they engaged in the balancing process of determining which countervailing public policy to give priority to, the policy against enforcing illegal contracts vs. the policy supporting the finality of arbitral awards, the item that tipped the scales was their opinion on the importance of the laws and policies on bribing foreign public officials. Except for the one dissenting appellate judge, they did not consider these policies as important or as significant as the universal social abhorrence against prostitution or drug-trafficking. The result was the refusal by the English courts to invalidate the ICC arbitral award and their decision to enforce the award

of more than U.S. \$50 million to a Kuwait agent as a commission on a Middle Eastern armaments contract.

ICC Case No. 8891 (1998)⁴¹

This classic case replays the scenario of an agent seeking payment of its commission under a consulting agreement with a company wishing to win new business in a foreign country. In looking at the contract, the arbitral tribunal took a proactive approach in establishing the evidence on whether bribery existed.

Facts:

The reported case is short on the background of the dispute. However, one can deduce that the plaintiff was a Swiss company whose principal was a French national and that the defendant was affiliated to France. The plaintiff acted as an agent of the defendant under an agreement in which the plaintiff had the responsibility of increasing the price obtained by the defendant under two government contracts. There is no indication in the case of the particular government involved. The defendant failed to pay the agreed upon commission of 18.5% to the plaintiff and the result was that the plaintiff initiated legal action to claim his fee. The defendant first claimed that the consulting agreement had reached the end of its term and then argued that the purpose of the agreement was corrupt thus making it void.

The arbitration clause gave the arbitrators the powers of an *amiable compositeur* but did not specify the applicable law. The parties agreed upon ICC arbitration.

Opinion:

The arbitral tribunal noted that both French law, which was closely linked to the contract between the parties because of its affiliation to the defendant and the nationality and domicile of the principal actor of the plaintiff, as well as Swiss law, the country of incorporation of the plaintiff, consider corruption as contrary to both internal public order and to international public order. If the contract was found to be illegal, the consequence would be the voiding of the contract. In analysing the case, the arbitral tribunal confirmed that based upon the doctrine of separability, an arbitration clause in a voided contract was not affected by the nullification of the main contract itself.

The tribunal considered the issue of burden of proof. According to the rules on burden of proof, it is incumbent upon the party claiming illegality to prove this fact. The tribunal noted that in alleging corruption, this is usually a very difficult task. In fact, the illicit object of the contract is generally hidden behind apparently insignificant contractual clauses. That is why arbitrators are left with no other choice than to analyse the clues. To review the evidence and to address the burden of proof, the arbitral tribunal, based on arbitral doctrine and jurisprudence, identified the following criteria or signs:

⁴¹ Journal du Droit International 4 (2000) 1076.

- The agent's inability to submit proof of his activity. The refusal by the agent to provide explanations regarding his activity constituted an *a fortiori* sign.
- The duration of the agent's involvement in the contract. A very short duration indicates signs of corruption.
- The remuneration under the contract is in the form of a commission based on the amount or value of the contract signed by the business client.
- A particularly high rate of commission raises a flag and leads to the presumption that the intermediary is disbursing money to government officials. The tribunal noted that it is rare for a simple agent to receive commissions greater than 1% or 2%. One needs to establish both the accepted practice regarding commissions, and compare the amounts provided to the agent with the efforts expended by him.

The tribunal then analysed the evidence based upon the above criteria. It found the following:

- Duration of Plaintiff's Involvement.

The duration of this particular plaintiff's involvement in the government contracts was approximately 2 ½ months. The arbitral tribunal found this period to be extremely short given the task assigned and felt that it was a sign of corruption.

- Method of Remuneration

The plaintiff's remuneration was a percentage of the increase in the contract price obtained from the government ministry. The tribunal held that this was not a determining factor and, in fact, several witnesses explained that this "success fee" method of calculation was common practice in the country.

- Rate of Commission

The commission of 18.5% was deemed particularly high and the arbitral tribunal found that this indicated that the plaintiff was disbursing significant sums of money to third parties.

- Agent's Activities

The activity of the agent was barely documented in the proceedings. Indeed it was hard to define exactly what the plaintiff accomplished. Given the statements of some of the witnesses, the tribunal concluded that the plaintiff's task was to ensure that monies were paid to third parties. The tribunal thus concluded that this was a particularly strong indication that the purpose of the consulting contract was illicit.

The tribunal noted that the testimony from several witnesses provided very explicit confirmation that influential people had to be guaranteed payment if one was to win deals. The tribunal also noted the absence of the President and General Manager of the

plaintiff, even though he was requested to appear in front of the tribunal. This led the tribunal to determine that he was deliberately avoiding having to testify in the matter. There was also a series of invoices and telexes that alluded to payments to government officials. This provided further corroboration that the object of the contract was to engage in illicit activity.

The convergence of all these indicators resulted in the arbitral tribunal concluding that the object of the consulting contract was to obtain from the Ministry an increase in the defendant's contract price by handing out *pots de vin* or bribes to government officials. In the opinion of the tribunal, all of these signs in their aggregate left no shadow of a doubt that the intention of the parties, at the time of signing the contract, was to engage in bribery.

The arbitral tribunal declared the consulting contract void and dismissed each of the claims of the plaintiff. In doing so, the tribunal referred to the growing international consensus condemning bribery of government officials. In particular, it referred to the OECD Convention of 1997 dealing with corruption. The arbitral tribunal ordered the plaintiff to pay two-thirds of the arbitration costs while the defendant was to pay one third because of its ambiguous behavior.

Finally, the arbitral tribunal noted that voiding a contract for bribery causes the party who benefited from the services to be relieved from having to pay the price agreed upon to the consultant. This was undoubtedly an unpleasant consequence but it was not sufficient to legitimize a contract whose purpose was illicit.

Commentary:

ICC Case No. 8891 takes a strong, proactive approach in dealing with the issue of corruption. As the tribunal clearly stated: "To ask arbitrators who hand out justice, to condone this type of practice is inconceivable to this tribunal." The award affirms and re-enforces the clear duty of international arbitrators to penalize parties who ignore the principles and rules of the international public order concerning corruption. The approach of this award contrasts with the more passive position taken by arbitral panels in other cases.

ICC Case No. 9333 (1998)⁴²

This case deals with the termination of an agent's agreement and the refusal to pay further commissions by a company after it was taken over by an American firm that alleged that American law, in the form of the FCPA, prevented it from carrying out its obligations under the agent's agreement.

Facts:

A French company, Société L. France, wanted to make its first entry into an African country and sell its products and services to a company in that country. In order to secure

⁴² ASA Bulletin 4(2001) 757.

that business, Company L entered into an agreement (Consulting Agreement) in January, 1995 with a Mr. X, a national of that African country whose father was the mentor of the President of the African company. In exchange for his services and the successful award of a deal greater than 7 million French Francs from the African company, Company L agreed to pay Mr. X a commission of 1.9 million French Francs (after taxes). The Consulting Agreement was negotiated and drafted prior to Company L being awarded its deal but it was signed after the African company awarded the deal to Company L.

In July 1995, Company L was taken over by R Inc., an American company. After the acquisition, Company L notified its various agents that remuneration for any services provided to it would be paid only in the country in which the agents were located and services rendered. It introduced these directions because its new American head office and all of R Inc.'s companies had to adhere to the U.S. law dealing with foreign bribery, the Foreign Corrupt Practices Act (FCPA).

Company L had already paid Mr. X 415,000 French Francs and in January 1996, deposited a further 310,000 French Francs in a Swiss bank account owned by Company SA on behalf of Mr. X. Mr. X's company sent a third invoice for the amount of 435,000 French Francs in March 1996 but Company L did not pay it. As a result of the non-payment, Mr. X contacted the business development manager of Company L who was involved in initially putting the deal together. He advised Mr. X to contact a Mr. G who was the new marketing manager for the company.

Mr. X and Mr. G met in July 1996. Each party's version of what occurred at that meeting was quite different from each other. Mr. G alleged that he explained to Mr. X that Company L's new policy prevented them from paying the commission to an account outside of the African country. Apparently Mr. X became angry and explained that he had to share his remuneration with certain employees of the African company who did not want to receive payment in the country itself. Mr. G considered this statement an admission by Mr. X that the remuneration was being used in part to make "pots de vin" or bribes. Therefore, Mr. G suspended all payments to Mr. X. In contrast, Mr. X testified that he denied having made such a statement to Mr. G. According to Mr. X, his recollection of the meeting was that Mr. G explained that Company L had been bought out by an American company and the FCPA did not allow commissions to be paid outside of the place where the services were provided or the agent's legal address. Mr. G had maintained therefore that the payment of commissions had to be either suspended or stopped. Mr. X rejected that and felt that the ultimate aim of Company L was to reduce his amount of commission.

The Consulting Agreement contained an arbitration clause which provided a sole arbitrator with the ICC Rules of Conciliation and Arbitration. The governing law of the contract was the Swiss Code of Obligations and the choice of the seat of arbitration was left to the arbitral tribunal. Mr. X initiated arbitration to recover the remainder of his commission.

Company L, the Defendant, stated that it had stopped making commission payments to Mr. X, the Plaintiff, because the Consulting Agreement's purpose was illicit and contrary

to moral standards. It asked the tribunal to invalidate the Consulting Agreement on the grounds that it was incompatible with Article 20 of the Swiss Code which provided “a contract is void if it proposes to do something impossible, illicit or against moral standards.” The Defendant also argued that the payments demanded by the Plaintiff were contrary to the FCPA.

Opinion:

The sole arbitrator first determined that under Swiss law a contract can be illicit if the services contemplated in such contract were prohibited or if the aim pursued by *both contracting parties* is against the law. The arbitrator held that since the Defendant maintained that it was unaware of the Plaintiff’s actions, the contract between the parties could not therefore be illicit. The arbitrator also opined that under Swiss law, a bribery contract whose object was to pay a corrupt person to accomplish his duty or to refrain from doing so, would not be considered illicit but rather against moral standards. The arbitrator therefore held that if there is no common aim to corrupt a third party, the Consulting Agreement cannot be contrary to moral standards under Swiss law and thus invalid.

In determining whether illicit or corrupt activities occurred, the sole arbitrator reviewed the following facts:

- The only evidence provided by the Defendant to support its position was the testimony of Mr. G on his discussion with the Plaintiff in July, 1996.
- There were no witnesses present at that meeting.
- Both the Plaintiff and Mr. G were steadfast in their version of the facts which were diametrically opposed.

It was thus impossible to learn exactly what happened and the tribunal had no basis to give preference to one testimony over another.

Given the limited amount of clear evidence, the arbitrator analyzed certain indicators of corrupt behavior. The primary indicator that it considered was the amount of commission paid to the Plaintiff. The commission of 1.9 million French Francs for successfully acquiring a deal for Company L of 7 million French Francs represented about 30% of the value of the deal. Such a high commission initially appears exorbitant. Such an amount is disproportionate to common practice and could legitimately spark suspicions about whether it is used for bribes. However, the arbitrator looked at other circumstances around which the Consulting Agreement was negotiated and concluded that the agent could be merely greedy or the company simply did a poor job of negotiating the contract. However, in these particular circumstances the arbitrator found that the amount of commission was justified for the following reasons:

- The Defendant could not have won the award from the African company without the intervention of the Plaintiff.

- The African company was not familiar with the Defendant.
- The Plaintiff's father had been instrumental in advancing the career of the President of the African company.
- The Plaintiff had provided all of the services it agreed to perform under the Consulting Agreement.
- The commission initially demanded by the Plaintiff was 4 million French Francs and it was unilaterally reduced by the Defendant from 2 and then to 1.9 French Francs.
- The Defendant wanted to penetrate into a new market by way of a strategic deal.
- The deal won by the Defendant apparently had already been secured by another company.

The arbitrator therefore concluded that it was difficult, if not impossible, for the Defendant to have won this deal without the intervention of the Plaintiff. Therefore the arbitrator concluded that even though the commission was above the norm it was justified and reasonable under the circumstances.

The sole arbitrator noted that there was a complete lack of documentary evidence brought forward by the Defendant in arguing its case. The Defendant failed to show that it provided a written explanation to its agents of the new policy in place nor did it immediately confirm in writing the substance of the meeting between their manager, Mr. G, and the Plaintiff. The alleged notice of suspension from the Defendant was also not substantiated and the Defendant refused to produce evidence showing the implementation of its policy based on the FCPA. The arbitrator considered the lack of evidence provided was stunning.

The arbitrator maintained that under Swiss law, each party must prove the facts that it alleges in order claim a right. The Defendant therefore had the burden of proof to prove its allegation of corruption which it failed to do. The only thing that the Defendant relied upon was the statement of Mr. G. There was no other circumstantial evidence nor any indication to show corruption in any convincing way. The arbitrator therefore concluded that the payment of bribes by the Plaintiff was not proven.

The arbitrator next considered the application of U.S. law, in particular the FCPA, to the contractual relationship between the parties. The Defendant alleged that the FCPA prohibited it from making payments to the Plaintiff outside of the African country. The arbitrator opined that in exceptional circumstance, violating a foreign law may be considered contrary to Swiss moral standards and thus contrary to Swiss law. The arbitrator determined that there was insufficient proof to establish corruption and therefore fundamental Swiss moral standards had not been violated and thus a potential breach of a foreign law, such as the FCPA, was not recognized under Swiss law.

It was possible that a foreign law could have the status of a *loi de police* or mandatory rule. The tribunal was of the opinion that applying the FCPA as a mandatory rule was simply not justified. The Defendant was a French subsidiary of a U.S. company and the Plaintiff was a national of an African country. The U.S. Company R was not a party to the proceedings. Therefore there was no link to U.S. law and the FCPA therefore did not apply to the contract in dispute. The arbitrator held that the FCPA did not apply to foreign subsidiaries of American companies but rather was the law to which the U.S. parent company was subject. In addition, even if the FCPA was applicable to the Defendant, this did not mean that an international arbitral tribunal could be forced to apply it and no other. The arbitrator did not consider it appropriate to impose the FCPA on businesses outside of the United States even though it was a commendable goal to fight corruption.

Finally, the arbitrator considered the issue of whether or not the Plaintiff had a fiduciary obligation to the African company and whether it was in breach of that obligation. The arbitrator noted that Swiss law allowed the use of commissions in contracts even in relations with state organizations. However, the Swiss Code disapproved of so called "traitorous" contracts where one party commercialized its position of a trustee or fiduciary. Based upon the facts, the arbitrator concluded that the Plaintiff did not have the status of a fiduciary even though he had an excellent relationship with the President of the African company. Therefore, the arbitrator concluded that there was no breach of a fiduciary obligation and it did not invalidate the Consulting Agreement.

The arbitrator awarded the Plaintiff the sum of 1.176 million French Francs which was the remainder of the commission owed by the Defendant plus interest of 5%. Finally, the arbitrator ordered the Defendant to pay both the arbitration costs and the legal cost of the Plaintiff.

Commentary:

The arbitrator opined that a bribery contract was against moral standards but not illegal under Swiss law. This holding differs from most of the other arbitral awards which applied Swiss law and held that such a contract was illegal under Swiss law. The Defendant clearly did a poor job of providing evidence of bribery. Given the burden of proof and the two diametrically opposed testimonies, the decision of the arbitrator on the facts is quite understandable. The comments of the arbitrator on the applicability of the FCPA is quite interesting. It contrasts with the view of U.S. prosecutors who maintain that the FCPA has a much larger reach.