

Recibido: 17 febrero 2106
Aceptado: 9 junio 2016

Arbitraje, vol. IX, n° 1, 2016, pp. 369–396

Combating Corruption and Fraud from an International Arbitration Perspective

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Summary: I. Introduction. II. Current Legal Regime for Combating Corruption and Fraud in International Arbitration. III. Handling Allegations of Corruption and Fraud in International Arbitration. 1. Denying Jurisdiction to Hear the Dispute. 2. Hearing the Allegation and Ruling on It: A) Burden of Proof; B) Standard of Proof. 3. Leaving It Unresolved. IV. Conclusion.

Resumen: Combatiendo la corrupción y fraude desde la perspectiva del arbitraje internacional

El arbitraje internacional se ha convertido en el camino predilecto para resolver disputas internacionales, y, dada su creciente popularidad, los tribunales arbitrales están manejando temas que antes eran resueltos por las cortes nacionales. Específicamente, los tribunales arbitrales internacionales han tenido que conocer sobre denuncias de corrupción o fraude. La corrupción o el fraude pueden surgir en varios contextos durante un arbitraje, pero este documento explora cómo un tribunal se aproxima a una denuncia de corrupción o fraude cuando ésta es presentada contra una de las partes dentro de un arbitraje como parte sustantiva de los méritos del caso.

La corrupción y el fraude son problemas globales. Las denuncias de corrupción y fraude se encuentran presentes en todos los niveles de la sociedad, incluyendo el mundo de los negocios, los deportes, el entretenimiento y a nivel gubernamental. Sin embargo, a pesar de su universalidad, la corrupción y el fraude pueden ser más prevalentes en ciertas regiones, y es importante para los abogados y los hombres de negocios que trabajan en estas regiones tener presentes los problemas que rodean estos temas.

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Arbitraje, vol. IX, n° 2, 2016, pp. 369–396
ISSN 1888–5373
DOI: 10.19194/arbitrajeraci.9.2.02

Frecuentemente la corrupción es mucho más generalizada en regiones como Latinoamérica, Asia y África. En países en donde la corrupción está propagada, el ofrecimiento de un soborno para conseguir un contrato se convierte en una expectativa, en lugar de ser una anomalía. En estos países, los funcionarios públicos pueden llegar a esperar un soborno a cambio de un contrato o de regulaciones favorables. Estos funcionarios citan sus bajos salarios y la cultura arraigada del soborno como justificación al momento de aceptar sobornos, a pesar de que la corrupción les hace daño a sus países.

De hecho, evidencia empírica confirma que hay una relación inversa entre el nivel de corrupción de un país, la inversión extranjera y su crecimiento económico. Asimismo, entre más corrupto sea el gobierno de un país, su población confía menos en dicho gobierno. En Latinoamérica, donde sólo dos países están en la lista de los países menos corruptos del mundo, la mayoría de la población ha perdido la fe en la capacidad de sus gobiernos de administrar de manera efectiva las leyes nacionales.

Palabras clave: ARBITRAJE INTERNACIONAL, ARBITRAJE INVERSIONISTA—ESTADO, ARBITRAJE COMERCIAL INTERNACIONAL — CORRUPCIÓN — FRAUDE — ORDEN PÚBLICO TRANSNACIONAL — CARGA DE PRUEBA — ESTÁNDAR DE PRUEBA.

Abstract: Combating Corruption and Fraud from an International Arbitration Perspective

International arbitration has become the preferred avenue for resolving international disputes, and, with its increasing popularity, tribunals are handling issues that previously were resolved by national courts. Specifically, international arbitral tribunals have had to confront allegations of corruption or fraud. Corruption or fraud may arise in a variety of contexts during an arbitration, but this paper explores how a tribunal handles an allegation of corruption or fraud when it is levied against one of the parties to the arbitration as part of the substantive merits of the case.

Corruption and fraud are global problems. Allegations of corruption or fraud are present at all levels of society, including in business, sports, entertainment, and government. However, in spite of their universality, corruption and fraud can be more prevalent in certain regions, and it is important for lawyers and business people who work in these regions to be aware of the issues surrounding these topics.

Corruption is often more pervasive in regions such as Latin America, Asia, and Africa. In countries where corruption is more widespread, offering a bribe for securing a contract becomes an expectation, rather than an anomaly. In these countries, public officials may come to expect a bribe in exchange for a contract or favorable regulations. These officials cite inadequate salaries and an ingrained culture of bribery as rationales for accepting bribes, even though bribery is harmful to their countries.

Indeed, empirical evidence confirms that there is an inverse relationship between a country's level of corruption, foreign investment, and economic growth. Further, the more corrupt a country's government is, the less trusting the population is of that government. In Latin America, where only two countries rank among the fifty least corrupt countries in the world, the majority of the population has lost faith in their governments' ability to effectively administer national laws.

Keywords: INTERNATIONAL ARBITRATION — INVESTOR—STATE ARBITRATION — INTERNATIONAL COMMERCIAL ARBITRATION — CORRUPCIÓN — FRAUD — TRANSNACIONAL PUBLIC POLICY — STANDARD OF PROOF — BURDEN OF PROOF.

I. Introduction

International commercial arbitration “has become so widespread that it is a primary method for dispute resolution of transnational contracts”¹. The United States Supreme Court has recognized that “[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade”². Arbitration’s prevalence is increasing in regions that previously were hostile to adopting the practice³. With the increasing popularity, arbitral tribunals are becoming more efficient and fluent in analyzing issues that courts historically have handled. Specifically, international arbitral institutions have had to learn to address allegations of corruption and fraud. This paper sets out the current legal regime in place to combat corruption and fraud and explains how international arbitration tribunals handle such allegations.

First, it is important to note that this paper will not address corruption and fraud of the arbitrators or the arbitral process itself. Instead, this paper will explore how an international arbitral tribunal manages issues of corruption and fraud when an allegation is levied against one of the parties to the arbitration as part of the substantive merits of the case.

Corruption and fraud are not topics that are unfamiliar to those engaged in cross-border transactions—they are global problems. However, corruption and fraud are more common in certain regions, such as Latin America, Asia, and Africa⁴; and lawyers and business people engaged with these regions need to be mindful of corruption and fraud issues in the international arbitration context. In Latin America, it can be common for public officials to encourage, or at least expect,

¹ M.P. Sullivan, “The Scope of Modern Arbitral Awards”, *Tul. L. Rev.*, 62, 1988, pp. 1113, 1122.

² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, 105 S. Ct. 3346, 3360 (1985).

³ D. Bishop, “The United States’ Perspective Toward International Arbitration with Latin American Parties”, *Int’l L. Practicum*, Autumn 1995, pp. 63, 65 (“Several Latin American countries have amended their domestic legislation to facilitate the commercial arbitration process, providing for the enforceability of an arbitration clause, the use of a foreigner as arbitrator and, in general, creating a climate that is more hospitable to the process of international commercial arbitration.”).

⁴ *Vid. Corruptions Perceptions Index 2015*, Transparency International, <http://www.transparency.org/cpi2015>. The countries that rank 100–167 on the Corruption Perceptions Index (*i.e.*, the most corrupt countries) are all in Africa, Asia, or Latin America.

bribes from foreign business executives in exchange for lucrative government contracts or more favorable regulations⁵. These public officials recognize the pervasiveness of bribery in their countries and, therefore, expect illicit payments when negotiating and transacting business with foreigners because it has become so customary⁶. Further, public officials, especially in the developing world, usually receive lower salaries than business people in their country or government officials elsewhere and, therefore, justify the bribe as “compensat[ion] . . . for their [otherwise] inadequate salaries”⁷. Given the expectation of a bribe, foreign business people often claim that an illegal payment is necessary to obtain or retain business in these countries⁸. In some countries, a bribe will open doors to business opportunities *and* reduce that company’s tax liability⁹.

Corruption does not come without consequences; it poses a serious threat to society. Empirical evidence confirms that there is “an inverse relationship between levels of corruption, foreign investment, and economic growth”¹⁰. In countries where corruption is more common, a bribe usually will result in more favorable treatment for that particular business; however, it could discourage foreign businesses, as a whole, from investment in the country since paying a bribe means an

⁵ *Vid.* J. M. Freeman, “The Razor’s Edge in CAFTA’s Bribery Provision: Is the U.S. Really Concerned About Eliminating Corruption?”, *Sw. J. L. & Trade Am.*, 13, 2006, pp. 189, 191 (claiming that Central American political leaders insist that the payments to business leaders are neither illegal nor morally wrong in their customs or beliefs).

⁶ *Vid.* M. Chevalier, Latin America Corruption Survey (2012), available at <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=81701> (last visited Mar. 31, 2016) (noting that one U.S. executive came to the “conclusion that corruption is institutionalized in [Latin America]” and “is so present at all levels of society and in every corner that it is part of one’s everyday life when living in these societies.”).

⁷ *Vid.* Freeman, *supra* note 5, at 192; *vid. also Mauritania: Ministers Receive 600 Percent Pay Raise*, Africa News, Mar. 28 2005, available at http://www.irinnews.org/report.asp?Report_ID=46343&SelectRegion=West_Africa&SelectCountry=MAURITANIA (“[Mauritania] government insiders said that generous pay increase was intended to stop rampant corruption within the top levels of government by paying ministers a decent wage which they would not feel obliged to supplement by taking bribes . . .”).

⁸ M. Chevalier, Latin America Corruption Survey (2012), <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=81701> (last visited Mar. 31, 2016).

⁹ *Vid.* Freeman, *supra* note 5, at 191 (“Corporations justify these bribes as necessary to obtain or retain business, reduce political risks, avoid harassment, reduce taxes, and induce official action”).

¹⁰ G.D. Altamirano, “The Impact of the Inter-American Convention Against Corruption”, *U. Miami Inter-Am. L. Rev.*, 38, 2, 2006–2007, pp. 487 y 493–494; R.H. Sutton, “Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption”, *Fordham Int’l L.J.*, 20, 1997, pp. 1427, 1436 (“Investments from outside sources [decrease in frequency and amount] as corruption increases in prevalence”).

increase in the overall transaction cost to that company as well as potential legal liability¹¹.

Further, the more corrupt a government is, the less trusting the population is of that government. One can see this by looking at Latin America, given the region's higher perception of corruption¹². A United Nations Development Program study found that the majority of Latin America's population distrusts its government and has lost faith in its ability to govern effectively and make their lives more prosperous¹³. Former U.S. Assistant Secretary of State of Hemispheric Affairs, Otto Reich, remarked that studies estimated the societal cost of corruption in Latin America at "\$6000 per man, woman, and child" in a region where "one third of [the population] live[s] on \$2 a day"¹⁴.

Fraud, like corruption, is similarly perilous to society. In 2001, Enron, once the sixth largest energy company in the world, crumbled due to the fraudulent activities of its executives¹⁵. Its stock value plummeted within months of the allegations. However, the collapse of Enron and its loss in stock value were not the only casualties—many lower-level employees lost their jobs and life-savings¹⁶. Similar to Enron, a Spanish stamp company and its parent company, Afinsa, faced dozens of class-action lawsuits and a U.S. Securities and Ex-

¹¹ Altamirano, *supra* note 10, at 495 ("Investment is reduced because of the high cost of bribes. Investors view bribery as a private tax on their investment [and] tend to shy away from jurisdictions with high rates of private taxation.") (internal quotation omitted); see also 15 U.S.C. § 78ff(a) (2009).

¹² *Vid. Corruptions Perceptions Index 2015*, Transparency International, available at <http://www.transparency.org/cpi2015>. Only two Latin American countries, Chile and Costa Rica, rank among the 50 least corrupt countries in the world.

¹³ United Nations Development Program [UNDP], *Democracy in Latin America: Towards a Citizens' Democracy* 131 (2004), available at <http://democracia.undp.org/Informe/Default.asp>. Over 54% of respondents claimed that they would actually support an authoritarian government so long as the government would help resolve social and economic problems. Also, 56% said economic development was a more important goal than democracy for them. *Vid. generally* M. Berg, *Economic Effects of Political Corruption in Developing Countries*, 1 Gattton Research Publication 2 (2009), available at <http://gattton.uky.edu/GSRP/Downloads/Issues/Fall2009/Economic%20Effects%20of%20Political%20Corruption%20in%20Developing%20Countries.pdf>.

¹⁴ L. Estella Nagle, "The Challenges of Fighting Global Organized Crime in Latin America", *Fordham Int'l L.J.*, 26, 2003, pp. 1649, 1693 (citing J.O. Tamayo, "As Latin America Economies Modernize, Intolerance For Corruption Is Spreading", *Miami Herald*, Oct. 13, 2002, at HW 9.).

¹⁵ *Enron Fast Facts*, CNN, updated 9:39 AM ET, Apr. 26, 2015, <http://www.cnn.com/2013/07/02/us/enron-fast-facts/>.

¹⁶ *Id.*

change Commission investigation for alleged fraud in 2006¹⁷. The company promised investors annual returns of 6% to 10% for investing in its stamp collections¹⁸. Meanwhile, the stamps sold for pennies online and were essentially worthless.¹⁹ Nearly 190,000 people lost money due to the fraudulent scheme, and the company's executives faced prison sentences of nearly two decades.²⁰

Enron and Afinsa are not anomalies. Ten percent of large companies lose over \$100 million per year to fraud.²¹ Additionally, there is no indication that fraudulent conduct is decreasing since the early 2000s. From 2007 to 2011, the amount of pending corporate fraud cases pursued by the U.S. Federal Bureau of Investigation's Financial Crimes Section increased every year.²² This type of conduct impacts not only the economy where the fraud occurred, but the world economy as well. The former European Commission said: "The corporate scandals of recent years and the fallout that they created underlined how interdependent our economies really are. It is our job as regulators to come up with frameworks that, to the extent possible, bring about financial stability and reduce the risk of contagion of financial crises"²³.

II. Current Legal Regime for Combating Corruption and Fraud in International Arbitration

Given the problems caused by corruption and fraud, there is general consensus that corrupt and fraudulent acts should be curtailed.²⁴

¹⁷ 'Enron of Spain' Fallout Ripples Into U.S. Markets, FoxNews.com, June 8, 2006, <http://www.foxnews.com/story/2006/06/08/enron-spain-fallout-ripples-in-to-us-markets.html>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Guillermo—EWN, *Calls for Afinsa directors to spend 19 years in jail for fraud*, EuroWeeklyNews, July 31, 2015, available at <http://www.euroweeklynews.com/3.0.15/news/on-euro-weekly-news/spain-news-in-english/131628-calls-for-afinsa-directors-to-spend-19-years-in-jail-for-fraud>.

²¹ *Survey Finds Corporate Fraud Impacts 80 Percent of Businesses Worldwide*, The Economist Intelligence Unit, Kroll Inc., 2007 WL 4054825.

²² *Financial Crimes Report to the Public, Fiscal years 2010–2011*, FBI, <https://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011>.

²³ J. Slawotsky, "The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act", *Duke J. Comp. & Int'l L.*, 17, 2006, pp. 131, 147–148 (internal citation omitted).

²⁴ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 142 (Oct. 4, 2006) ("[T]he Tribunal first notes that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries").

Most countries view corruption and fraud as contrary to their public policy. Public policy is “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against public good”²⁵. When most countries’ public policies are similar on an issue, a transnational public policy emerges. Transnational public policy thus “refers to those principles that receive an international consensus as to universal standards and accepted norms of conduct that must always apply”²⁶.

In international dispute resolution, and specifically in arbitration, transnational public policy can serve as a powerful tool. If there is global consensus over an issue, arbitrators can apply transnational public policy. Using these rules of general consensus may expedite the proceeding—which is a concern for parties in resolving their dispute²⁷. Notably, a true transnational public policy must have emerged on the issue for an arbitral tribunal to rely correctly on this principle.

Some international arbitral tribunals have relied on transnational public policy in the past. In *World Duty Free Company v. Republic of Kenya*, there was a dispute over a contract procured by a \$2 million bribe. The tribunal noted that “bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries”²⁸. The tribunal affirmed that “bribery is contrary . . . to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld . . .”²⁹ Similarly, in *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, El Salvador argued that a businessman was not entitled to the protections of the El Salvador–Spain BIT because his investment was the

²⁵ *Egerton v. Brownlow*, (1853) 4 A.C. 1 (H.L.) 195 (appeal taken from Eng.) (U.K.).

²⁶ V.S. Vadi, “Cultural Diversity Disputes and the Judicial Function in International Investment Law”, *Syracuse J. Int’l L. & Com.*, 39, 2011, pp. 89, 128.

²⁷ W.L. Craig, “The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration”, *Am. Rev. Int’l Arb.*, 21, 2010, pp. 243, 258 (“Where the agreement between the parties does not posit an applicable law to the dispute, modern arbitration rules give wide and flexible powers to the arbitrators to choose the applicable law.”).

²⁸ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 43 (Oct. 4, 2006).

²⁹ *Id.* at ¶ 142. It is important to note that international arbitral tribunals have made a distinction between investments procured through corruption, which results in a lack of arbitral jurisdiction, and investments operated through corruption, which does not affect the jurisdiction of the tribunal. *Vid.*, e.g., *Veteran Petroleum Ltd. (Cyprus) v. Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014, ¶ 1354 (finding unpersuasive the “contention that [jurisdiction] must be denied to an investor not only in the case of illegality in the making of the investment but also in its performance”) (emphasis in original).

result of making fraudulent representations during the bidding process³⁰. The tribunal noted that giving effect to fraudulent acts would violate transnational public policy by “sanctioning illegal acts and their resulting effects”³¹. Also, in ICC Arbitration Case No. 1110/1963, the tribunal said that “it cannot be contested 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”³².

Further, in the international commercial arbitration context, it is not only beneficial for the tribunal to look at transnational public policy, but also essential. Transnational public policy represents the unity of most countries’ public policies. If a tribunal issues an award that contravenes transnational public policy, then it likely contravenes an individual country’s public policy where the award will be enforced. Under the New York Convention, a national court is entitled to refuse recognition and enforcement of the award if the decision contravenes its public policy³³. Similarly, the UNCITRAL Model Law, which has been adopted as law in several countries and U.S. states³⁴, allows a national court to set aside awards that violate that country’s public policy³⁵ “[C]ommentators have highlighted that [a]ny tribunal owes an obligation to the international community to apply international public

³⁰ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006).

³¹ *Id.* at ¶ 247.

³² ICC Case No. 1110 of 1963, Award, by G. Lagergren, *Arb. Int’l*, 1994, p. 291.

³³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (entered into force June 7, 1959), Art. V(2)(b), 30 U.N.T.S. 3. Several arbitration statutes also allow a court to annul an arbitral award that is contrary to the public policy of the seat of the arbitration. *Vid., e.g.*, French Code of Civil Procedure, Art. 1484; Swedish Arbitration Act 1999, art. 33; German Civil Code, Sec. 1032.

³⁴ N.J. Arentsen & M. Weber, *UNCITRAL Model Law: Still a Model or Second Best?*, Kluwer Arbitration Blog, July 1, 2014, available at <http://kluwerarbitrationblog.com/2014/07/01/uncitral-model-law-still-a-model-or-second-best/#fn-9872-1>. Nearly half of the Latin American countries have adopted the UNCITRAL Model Law, including: Chile, Costa Rica, Dominican Republic, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. See also *Status UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. Over 70 countries have adopted the Model Law, as well as several Canadian provinces and U.S. states, including California, Florida, Georgia, and Texas.

³⁵ United Nations, Commission on International Trade Law, Model Law on International Arbitration (1985), Arts. 34(2)(b)(ii) & 36(1)(b)(ii), U.N. Doc. A/40/17.

policy’ and that ‘nothing can acquit a tribunal of its mandate to apply public policy’³⁶.

Arbitral tribunals *must* endeavor to render an enforceable award³⁷. If the tribunal’s decision is not mindful of transnational public policy and consequently delivers an unenforceable award, then it renders the arbitral proceeding pointless and undermines international commercial arbitration as the preferred dispute resolution for foreign parties. It is thus imperative that tribunals examine transnational public policy in reaching their decisions. But where does an international tribunal look to determine if some rule of transnational public policy has evolved? There are several sources that may be relevant to such an inquiry.

The first such source is the domestic legal regimes of the relevant countries. For example, the United States has enacted a meaningful and aggressive domestic anti–corruption statute. Nearly four decades ago, the United States enacted the Foreign Corrupt Practices Act (“FCPA”), which punishes individuals and businesses that bribed foreign officials³⁸. Any U.S. citizen, or resident, as well as U.S. businesses and their employees that are organized under U.S. laws or have their principal place of business in the United States can violate the FCPA³⁹. However, the FCPA’s reach also applies to foreign subsidiaries of a U.S. company *or* a foreign company that has a class of securities registered under the SEC⁴⁰. The broad jurisdiction imposed by the FCPA ensures that any business with a U.S. nexus must comply with the country’s anti–corruption laws⁴¹.

The FCPA imposes both criminal and civil penalties⁴², and U.S. prosecutors have sought both civil and criminal penalties for violators⁴³. In 2001, an employee of a U.S.–based investment company

³⁶ V.S. Vadi, “When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law”, *Colum. Hum. Rts. L. Rev.*, 42, 2011, pp. 797, 863 (external citation omitted).

³⁷ *Vid.* LCIA Rules, Art. 32.2^o and ICC Rules, Art. 35.

³⁸ M. Koehler, “The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence”, *Ind. L. Rev.*, 43, 2010, p. 389; V. Foley & C. Haynes, “The FCPA and its Impact in Latin America”, *SUM Currents: Int’l Trade L.J.*, 17, 2009, p. 28.

³⁹ Foley & Haynes, *supra* note 41, at 28.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 15 U.S.C. § 78ff(a) (2009). Individuals who violate the FCPA are subject to fines of up to either: (1) \$250,000 per violation or (2) twice the amount of economic gain realized from the illegal payment.

⁴³ 15 U.S.C. § 78ff(a) (2009). An individual can be imprisoned for up to 5 years for each violation.

received a two and half year prison sentence and a \$60,000 fine when a federal court found that he offered a bribe to Costa Rican officials to obtain concessions for a land development project⁴⁴. The FCPA is generally regarded as one of the most robust domestic anti-corruption laws in the world.

Similarly, in 2010, the United Kingdom enacted the Bribery Act, which also is considered “among the strictest legislation internationally on bribery”⁴⁵. The law applies to both individuals and companies and requires companies to show that they have adequate procedures in place to prevent bribery⁴⁶. Also, like the FCPA, the UK Bribery Act has extraterritorial reach and applies to United Kingdom companies operating abroad, as well as foreign companies operating in the United Kingdom⁴⁷. In addition to the United Kingdom, Brazil recently enacted a similar comprehensive anti-corruption law. The Brazilian law imposes a strict liability standard and requires certain Brazilian companies to adopt anti-corruption compliance programs.⁴⁸ Further, over the past couple of decades, several other countries, including Argentina⁴⁹, Colombia⁵⁰, France⁵¹, Italy⁵², South Korea⁵³, and Spain⁵⁴ have enacted forceful penalties for those engaged in corrupt acts.

To the extent the law of any of these countries is applicable or relevant to the arbitration in question, it should be considered.

⁴⁴ *United States v. King*, 351 F.3d 859, 862 (8th Cir. 2003).

⁴⁵ *The Bribery Act*, Transparency International, <http://www.transparency.org/our-work/business-integrity/bribery-act/>.

⁴⁶ *Adequate Procedures Guidance*, Transparency International, <http://www.transparency.org/our-work/business-integrity/bribery-act/adequate-procedures-guidance/>.

⁴⁷ *The Bribery Act*, Transparency International, <http://www.transparency.org/our-work/business-integrity/bribery-act/>.

⁴⁸ R. C. Smith, *A Comparison of Anti-Corruption Laws in US, UK, Brazil*, Law360, Apr. 3, 2015, <http://www.law360.com/articles/638561/a-comparison-of-anti-corruption-laws-in-us-uk-brazil>.

⁴⁹ *Argentina*, OECD Review of Implementation of the Convention and 1997 Recommendation, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2078382.pdf>.

⁵⁰ Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Colombia, Dec. 2012, <http://www.oecd.org/daf/anti-bribery/ColombiaPhase1ReportEn.pdf>.

⁵¹ *France*, OECD Review of Implementation of the Convention and 1997 Recommendation, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2076560.pdf>.

⁵² *Italy*, OECD Review of Implementation of the Convention and 1997 Recommendation, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2019055.pdf>.

⁵³ *Korea*, OECD Review of Implementation of the Convention and 1997 Recommendation, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2388296.pdf>.

⁵⁴ *Spain*, OECD Review of Implementation of the Convention and 1997 Recommendation, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2389614.pdf>.

Many countries have similarly strict laws against fraudulent activity, especially in the corporate and financial contexts. In the United States, Congress passed the Sarbanes–Oxley Act (“SOX”), which sought to prevent the type of corporate fraud that occurred in Enron by requiring publically traded companies to comply with stricter accounting, reporting, and transparency measures⁵⁵. Companies and individuals that run afoul of the law’s requirements can face civil and criminal penalties. For example, SOX imposes a penalty of up to 25 years in prison for knowingly executing a scheme to defraud a person in connection with a sale of any security of a public company⁵⁶. Additionally, in the United States, over seven government agencies work to combat fraudulent activities⁵⁷.

In 1999, the European Union created the European Anti–Fraud Office (“OLAF”). Its mission is three–fold in combating fraud by: (1) investigating allegations of fraud and other illegal activity in the European Union; (2) detecting and investigating “serious matters relating to the discharge of professional duties by members and staff of the EU institutions and bodies;” and (3) supporting the European Commission in developing and implementing anti–fraud legislation and policies⁵⁸. OLAF conducts internal and external investigations over allegations of fraud and helps coordinate with national authorities in the European Union where a case of financial fraud is alleged⁵⁹.

In the United Kingdom, Parliament adopted the Proceeds of Crime Act 2002, which provides for criminal penalties of imprisonment and fines, as well as civil penalties for money laundering and other fraudulent financial related activities⁶⁰. Similarly, France has a strict anti–money laundering law that it enacted in 1996⁶¹.

⁵⁵ See generally W. H. Donaldson, Chairman, U.S. Sec. and Exchange Comm., *Testimony Concerning Implementation of the Sarbanes–Oxley Act of 2002*, Sept. 9, 2003, available at <https://www.sec.gov/news/testimony/090903tswhd.htm>; and 15 U.S.C.A. § 7243 and § 7262.

⁵⁶ 18 U.S.C.A. § 1348.

⁵⁷ *Financial Crimes Report to the Public, Fiscal years 2010–2011*, FBI, <https://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011> (“[In addition to the FBI, t]hese agencies include the SEC, U.S. Attorney’s Offices (USAO), CFTC, FINRA, USFIS, and the IRS, among others, serving as force multipliers to more effectively address the securities and commodities fraud threat.”).

⁵⁸ European Commission, European Anti–Fraud Office, *What we do*, http://ec.europa.eu/anti_fraud/about-us/mission/index_en.htm.

⁵⁹ *Id.*

⁶⁰ UK Proceeds of Crime Act 2002 §§ 327–30.

⁶¹ French Law No. 96–392 of May 13, 1996.

In addition to the national laws combating corruption and fraud, several international agreements address these problems. One of the first global treaties to address corruption was the Anti-Bribery Convention of the Organization of Economic Co-operation and Development (“OECD”). The OECD members include most of the economically advanced countries in the world, as well as some developing economies, such as Mexico and Turkey⁶². In 1997, the OECD members signed the Anti-Bribery Convention which obligated member states to adopt legislation that criminalized bribery of a foreign official.⁶³ In addition to the member countries, seven non-member countries—Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa—adopted the OECD Anti-Bribery Convention⁶⁴. These countries recognized that corruption “is a widespread phenomenon in international business transactions . . . which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions”⁶⁵. In addition to requiring countries to criminalize and actively pursue corrupt acts, the OECD Anti-Bribery Convention requires the signatory countries to provide mutual legal assistance to each other in combating corruption⁶⁶.

Following the OECD’s Anti-Bribery Convention, the United Nations General Assembly adopted the United Nations Convention Against Corruption (“UNCAC”) in 2003⁶⁷. The UN recognized that corruption was “no longer a local matter but a transnational phenomenon that affects all societies and economies” and thus was convinced that “international co-operation to prevent and control it [was] es-

⁶² *List of OECD Member countries – Ratification of the Convention on the OECD*, OECD, available at <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> (last visited Mar. 31, 2016).

⁶³ *Article 1*, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization of Economic Co-operation and Development, Adopted by the Negotiating Conference on 21 Nov. 1997 (requiring countries to establish that offering a bribe, or being “complicit[] in, including incitement, aiding and abetting, or authorization of an act of bribery,” is a criminal offense).

⁶⁴ *List of OECD Member countries – Ratification of the Convention on the OECD*, OECD, available at <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> (last visited Mar. 31, 2016).

⁶⁵ *Preamble*, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization of Economic Co-operation and Development, Adopted by the Negotiating Conference on 21 Nov. 1997.

⁶⁶ *Article 9*, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization of Economic Co-operation and Development, Adopted by the Negotiating Conference on 21 Nov. 1997.

⁶⁷ General Assembly resolution 58/4 of Oct. 31, 2003, United Nations Convention against Corruption, United Nations General Assembly.

sential”⁶⁸. Like the OECD’s Convention, UNCAC “requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law”⁶⁹. UNCAC obligates countries to cooperate with each other in limiting corruption, including prevention, investigation, and prosecution of offenders⁷⁰ “Countries are also required to undertake measures. . . [to] support the tracing, freezing, seizure and confiscation of the proceeds of corruption”⁷¹.

Several regional agreements also have addressed corruption. In 1996, the Organization of American States (“OAS”) adopted the Inter-American Convention Against Corruption (“Inter-American Convention”)⁷² which required each signatory country to “adopt the necessary legislative . . . measures to establish [corrupt acts] as criminal offenses under their domestic laws”⁷³. The OAS members were concerned that “corruption undermine[d] the legitimacy of public institutions and [struck] at society, moral order and justice, as well as the comprehensive development of peoples”⁷⁴. The Inter-American Convention takes a transnational approach to combating corruption. It compels each country to offer “the widest measure of mutual assistance” in helping other member nations to prosecute corrupt acts⁷⁵.

Further, in the Americas, Central American countries and the Dominican Republic are subject to the anti-corruption provisions in the Central American Free Trade Agreement (“CAFTA”). Article 18.8 of CAFTA deals specifically with the parties’ resolve to eliminate bribery in international trade⁷⁶. The parties to CAFTA also included a “Statement of Principle” that affirmed their commitment “to eliminate bribery and corruption in international trade and investment” in order to “create a more predictable, open environment in which investment

⁶⁸ *Preamble*, General Assembly resolution 58/4 of Oct. 31, 2003, United Nations Convention against Corruption, United Nations General Assembly.

⁶⁹ *Convention highlights*, United Nations Convention against Corruption, <https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html> (last visited Mar. 31, 2016).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Inter-American Convention against Corruption, March 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M. 724 (1996).

⁷³ *Id.* at Art. VII.

⁷⁴ *Id.* at Preamble.

⁷⁵ *Id.*

⁷⁶ Dominican Republic–Central America–United States Free Trade Agreement, Aug. 5, 2004. Art. 18.8.

and trade can prosper, helping to guarantee long-term economic and political benefits for [the Central American] region”⁷⁷.

Other regions have also banded their countries together to fight corruption. In 1999, Europe followed the lead from the Americas and adopted two regional conventions against corruption.⁷⁸ In 2003, thirty-nine African countries signed a regional anti-corruption convention⁷⁹. One year later, the countries in the Asia-Pacific Economic Cooperation (“APEC”)⁸⁰ established the Anti-Corruption Experts’ Task Force to tackle corruption in the region⁸¹. And in 2014, the APEC members adopted the Beijing Declaration on Fighting Corruption⁸².

International agreements condemning fraud are not as prevalent as those against corruption. Some have argued, however, that there nonetheless is an emerging international consensus against fraudulent acts. Forty years ago, a U.S. appeals court found that, although commercial fraud constituted a form of “stealing” and should be condemned, it was not condemned by enough countries to be considered an international norm⁸³. In recent years, however, more international organizations have dedicated resources to combating fraudulent activities.

For example, the World Bank established the Oversight Committee on Fraud and Corruption⁸⁴. The World Bank also adopted the first Uniform Framework for Preventing and Combating Fraud and Corruption along with the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the International

⁷⁷ *Id.*

⁷⁸ Criminal Law Convention on Corruption, January 27, 1999, 38 I.L.M. 505 (1999), [http://conventions.coe.int/Treaty/Commun/QueVoulez-Vous.asp? NT=174&CM= 8& DF= 5/5/2006&CL=ENG](http://conventions.coe.int/Treaty/Commun/QueVoulez-Vous.asp?NT=174&CM=8&DF=5/5/2006&CL=ENG).

⁷⁹ African Union Convention on Preventing and Combating Corruption, July 11, 2003, *I.L.M.*, 43, 2005, p. 5.

⁸⁰ APEC is a forum of 21 Pacific Rim member countries.

⁸¹ Anti-Corruption and Transparency Experts’ Working Group home page, APEC, <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Anti-Corruption-and-Transparency.aspx> (last visited Mar. 16, 2016).

⁸² *Id.*

⁸³ J. Slawotsky, “The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act”, *Duke J. Comp. & Int’l L.*, 17, 2006, pp. 131, 132.

⁸⁴ *Vid.* Annual Update 2014, *The Past: Building Integrity at the World Bank Group*, The World Bank, http://siteresources.worldbank.org/EXTDOII/Resources/588920-1412626296780/INT_Annual_Update_FY14_WEB_Milestones.pdf.

Monetary Fund⁸⁵. Further, in 2010, the five regional development banks signed a cross-debarment agreement, which provided that entities barred by one bank will be sanctioned for the same misconduct by the other banks⁸⁶.

Additionally, the International Organization of Securities Commissions (“IOSCO”) helps regulate financial and security transactions across the world, and some of its initiatives have targeted corporate fraud. IOSCO members are national securities commissions in their respective jurisdictions, and today the organization has over 120 member countries⁸⁷. IOSCO encourages international cooperation among its members against corporate fraud⁸⁸.

Finally, in 1989, the Financial Action Task Force (“FATF”) was established at the G-7 Summit in order to combat money laundering⁸⁹. FATF began with sixteen member countries, but today has thirty-seven members⁹⁰. FATF attempts to set standards and promote legal, regulatory, and operational measures for combating fraudulent activities, such as money laundering, terrorist financing, and other threats “to the integrity of the international financial system”⁹¹. FATF monitors the progress of its member countries in addressing these issues and “works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse”⁹².

The final important source to consider in determining if transnational public policy exists is the body of existing arbitral decisions. In this context, several international arbitral tribunals have recognized a global consensus against corruption. As noted above, in *World Duty Free v. Republic of Kenya*, the tribunal was “convinced that bribery is contrary . . . to transnational public policy”⁹³. In another international arbitration, the tribunal concluded that corruption is against “interna-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Fact Sheet*, International Organization of Securities Commission, Feb. 2016 at 3, <http://www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf>.

⁸⁸ *Id.*

⁸⁹ *About: History of the FATF*, Financial Action Task Force on Money Laundering (FATF), <http://www.fatf-gafi.org/about/historyofthefatf/>.

⁹⁰ *Id.*

⁹¹ *About: Who We Are*, Financial Action Task Force on Money Laundering (FATF), available at <http://www.fatf-gafi.org/about/>.

⁹² *Id.*

⁹³ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

tional *bonos mores*⁹⁴. In ICC Arbitration No. 1110/1963, the international tribunal stated that “[c]orruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations”⁹⁵.

Some international arbitration tribunals have recognized a similar transnational consensus in combating fraudulent activities. In *Inceysa v. El Salvador*, the tribunal held that fraudulent misrepresentation in the bidding for a government contract violated “international public policy”⁹⁶. And in *Phoenix Action Ltd. v. Czech Republic*, the tribunal asserted that it would not “protect investments made in violation of the laws of the host State, or investments not made in good faith, obtained for example through misrepresentations, concealments, or corruption”⁹⁷.

III. Handling Allegations of Corruption and Fraud in International Arbitration

Unlike a national court, international arbitral tribunals face unique challenges in addressing allegations of corruption and fraud. For example, in gathering evidence to support an allegation of fraud, an international arbitral tribunal may lack the subpoena power of a court to obtain evidence, depending on the jurisdiction where that evidence is located. Additionally, in an arbitral proceeding it is not always clear who bears the initial burden of proof—either in proving or refuting the allegation of corruption or fraud. Lastly, in ruling on an issue of corruption, an international tribunal needs to be aware of the laws of relevant countries and transnational public policy to render an enforceable award.

Given that issues of corruption continue to plague societies and international business transactions, an international arbitral tribunal must be able to handle the issue effectively since arbitration has become the primary method for resolving cross-border transactional disputes. As with many issues, if a party alleges corruption during an

⁹⁴ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, ¶ 111, (Dec. 8, 2000), reprinted in 41 I.L.M. 896, 917 (2002).

⁹⁵ ICC Case No. 1110 of 1963, Award, by Gunnar Lagergren, published in *Arb. Int'l* 1994, at 282 *et seq.*

⁹⁶ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶ 247 (Aug. 2, 2006).

⁹⁷ *Phoenix Action Ltd. v. Czech Republic*, ICSID Case n. ARB/06/5, Award (April 15, 2009).

arbitral proceeding, the tribunal has three options: (1) denying jurisdiction to hear the dispute; (2) hearing the allegation and ruling on it; or (3) leaving it unresolved.

1. Denying Jurisdiction to Hear the Dispute

An arbitral tribunal's first option is to deny its jurisdiction to hear the dispute if one party alleges corruption or fraud in procuring the contract. Historically, arbitral tribunals have taken this approach. In ICC Arbitration No. 1110/1963, Swedish Judge Gunner Lagergren ruled that, because the underlying contract at issue was procured through a bribe, the entire contract—including the arbitration clause—was invalid⁹⁸. Therefore, he declined jurisdiction over the matter⁹⁹. However, tribunals have shifted away from this approach and adopted a more proactive approach.

As Judge Lagergren realized, the ability to arbitrate, especially in a commercial arbitration, is based on two parties' mutual consent to arbitrate their dispute¹⁰⁰. The representation of this consent is often in a clause of a larger agreement, rather than a standalone agreement. However, the larger agreement can be what one party alleges was influenced by an act of corruption or fraud. If the tribunal voids the entire agreement as Judge Lagergren did in ICC No. 1110/1963, then it is declining its jurisdiction. This frustrates the purpose of arbitration because the parties would have to turn to a national court for a remedy, which would bring a host of other problems, such as bias, inefficiency, and difficulties in enforcement.

2. Hearing the Allegation and Ruling on It

In order to avoid the problem described above, international arbitral tribunals now adopt the separability doctrine, which posits that an agreement to arbitrate “is presumptively distinct and independent from the parties' underlying contract, and is supported by the separate consideration of the parties' exchange of promises to arbitrate”¹⁰¹. The principles behind this approach are (1) preserving the sanctity of

⁹⁸ ICC Case No. 1110 of 1963, Award, by G. Lagergren, published in *Arb. Int'l*, 1994, pp. 282 *et seq.*

⁹⁹ *Id.*

¹⁰⁰ G.B. Born, *International Commercial Arbitration: Commentary and Materials* (2d ed. 2001) at 2. (“[I]nternational arbitration is a consensual means of dispute resolution”).

¹⁰¹ *Id.* at 6.

the arbitration agreement and (2) allowing for the severability of the arbitration clause¹⁰². In such a scenario, the tribunal first will make a finding as to the corruption allegations. Then, if the tribunal makes a positive finding of corruption, it will decide what the impact of the bribery or corruption is on the arbitration clause and the underlying contract itself (*i.e.*, on the admissibility of the underlying commercial claims)¹⁰³.

National courts, such as those in the United States and the United Kingdom, have supported this position and encouraged arbitral tribunals to decide issues of corruption and fraud if the parties agreed to arbitrate¹⁰⁴. As a result, international arbitrators are becoming better versed in examining issues of corruption, and national courts have “accept[ed] the arbitrability of these issues of truly international public policy” and “for the most part confirm the arbitrators’ resolution of the issue without either attacking their jurisdiction or attempting to revise the solution they reached on the merits of the issue”¹⁰⁵.

Another example in the United Kingdom bolsters national courts’ willingness to let the arbitral tribunal rule on issues of corruption and fraud. In *Westacre Investments Inc. v. Jugoinport–SPDR Holding Co. Ltd.*, the losing party challenged the validity of an ICC award with the High Court of England and Wales¹⁰⁶. There were allegations that the underlying agreement contemplated bribing foreign officials¹⁰⁷. The arbitral tribunal found that it had jurisdiction to hear the bribery claim, but ultimately ruled that it was unsubstantiated¹⁰⁸. In deciding whether to enforce the ICC award, the High Court found it “necessary

¹⁰² D. Srinivasan et al, Effect of Bribery in international commercial arbitration, p. 135.

¹⁰³ *Id.* at 135–36.

¹⁰⁴ *Vid. Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519, n.14 (1974) (finding that the fraud exception to an arbitration clause “means that an arbitration or forum–selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.”) (emphasis added); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (“[We] resolved [this issue] in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator”).

¹⁰⁵ W.L. Craig, “The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration”, *Am. Rev. Int’l Arb.*, 21, 2010, pp. 243, 276–277.

¹⁰⁶ *Westacre Investments Inc. v. Jugoinport–SPDR Holding Co. Ltd.*, 1998 2 Lloyd’s Rep. 111, 114 (Q.B.).

¹⁰⁷ *Vid. id.*

¹⁰⁸ *Id.* at 117.

to consider both on the one hand the desirability of giving effect of the public policy against enforcement of corrupt transactions and on the other hand the public policy of sustaining international arbitration agreements”¹⁰⁹. Ultimately, the High Court ruled that the arbitral tribunal was correct in deciding it had jurisdiction because deciding an issue of corruption “involves determination of questions of fact, that is an everyday feature of international arbitration [and] if much weight were to be attached to that consideration it [would be] difficult to see that arbitrators would ever be accorded jurisdiction to determine issues of illegality”¹¹⁰.

Although ruling on allegations of corruption and fraud is the most preferred approach among arbitral tribunals and national courts, it does not come without issues. Before determining whether a party has engaged in a corrupt or fraudulent act, the tribunal must determine the applicable law for the dispute¹¹¹. As previously discussed, however, transnational public policy may be available to simplify this analysis.

However, other issues arise in handling these allegations. Notably, arbitral tribunals may be unable to compel the production of evidence relating to the allegation, presenting several challenges in asserting claims of corruption or fraud against the other party¹¹². Further, the arbitral tribunal must determine (1) the burden of proof and (2) the standard of proof. The difference between the two is that “the burden of proof defines which party has to prove what, in order for its case to prevail”, whereas “the standard of proof defines how much evidence is needed to establish either an individual issue or the party’s case as a whole”¹¹³. In this regard, there are no strict rules of evidence to which a tribunal must adhere in making its assessment, and tribunals have a broad discretion and range of flexibility to determine whether allegations of corruption and fraud have been proven¹¹⁴.

¹⁰⁹ *Id.* at 128–29.

¹¹⁰ *Id.*

¹¹¹ M. Pryles, “Reflections on Transnational Public Policy”, *J. Int. Arb.*, 24, 2007, p. 6 (commenting that the “applicable law will generally provide the appropriate result . . . when faced with an allegation that a contract is tainted by bribery.”).

¹¹² See F. Haugeneder & C. Liebscher, “Corruption and Investment Arbitration: Substantive Standards and Proof”, *Austrian Arb. Yearb.*, 2009, pp. 538, 555–556 (C. Klausegger et al. eds., 2009) (“Establishing corruption is, as a matter of fact, difficult.”).

¹¹³ *Id.* at ¶ 178.

¹¹⁴ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, ¶ 142 (Nov. 18, 2014).

A) Burden of Proof

Although tribunals do not have to follow strict rules of evidence, it is widely accepted that the party alleging corruption has the burden of proving its case, like they do with any other allegation levied against the opposing party¹¹⁵. As the tribunal in *Metal-Tech Ltd. v Uzbekistan*¹¹⁶ noted:

The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals. The International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the NAFTA have characterized this rule as a general principle of law. Consequently, as reflected in the *maxim actori incumbat probatio*, each party has the burden of proving the facts on which it relies¹¹⁷.

In the international commercial arbitration context, the principle also has been enshrined in Article 27(1) of the UNCITRAL Arbitration Rules which states that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence”¹¹⁸.

Several tribunals have stated that, given the seriousness of allegations of corruption and fraud and the impact such allegations have on the parties’ reputations, it is insufficient for a party to assert mere suspicions, insinuations, or bald allegations without presenting more¹¹⁹. As one tribunal noted:

¹¹⁵ M. Kazazi, *Burden of Proof and Related Issues*, Kluwer International 1996, pp. 369 ss.

¹¹⁶ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013).

¹¹⁷ *Id.* at ¶ 237. See also, e.g., *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 215 (Sept. 1, 2009) (“[T]he Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that ‘who asserts must prove’, and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.”); and *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, ¶ 4.873 (Sept. 19, 2013) (“The burden of proof is undoubtedly on the party alleging corruption”).

¹¹⁸ United Nations, Commission on International Trade Law, Model Law on International Arbitration (1985), Art. 27(1), U.N. Doc. A/40/17.

¹¹⁹ *Vid.*, e.g., *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, ¶¶ 20, (Dec. 1, 2005) (insinuating that a “success fee” paid to Claimant’s lawyers should be disregarded—explicitly and implicitly, except if properly and explicitly submitted to the tribunal, substantiated with a specific allegation of corruption and subject to proper legal and factual debate for the tribunal); *ECE Projektmanagement International GmbH and Kommanditgesellschaft*

Corruption is a serious matter and when it is alleged, a tribunal must weigh the evidence with care, both to see whether the allegation is made out (and if it is, to then determine the legal consequences that follow) and at the same time to safeguard those against whom corruption is alleged, if the allegations turn out to be unproven.¹²⁰

However, by their nature, corruption and fraud are secret acts and rely on disguise and deception—which is why they are hard to prove, even in domestic court. Because of this, it may be hard to uncover evidence in proving these acts. It is likely that a party other than the one making the allegation has better access to the evidence proving corruption. Further, international disputes, like an international commercial arbitration, present additional problems since even if there were adequate evidence, it could be difficult to obtain given its location and the lack of subpoena power by an arbitral tribunal.

In light of this, some commentators have suggested that it might be appropriate for tribunals to adopt the concept of shifting the burden of proof to the allegedly corrupt party, in order for that party to rebut a “reasonable indication” of corruption¹²¹. Others have argued for this burden-shifting approach because, if the party accused of corruption or fraud is actually innocent, it typically is capable of producing evidence exonerating itself without too much effort¹²². However, *The Rompetrol Group N.V. v. Romania*¹²³ tribunal rejected the burden shifting approach and concluded that “arguments of that kind confuse, unhelpfully, the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence”¹²⁴.

Additionally, the tribunal in *Azurix Corp. v. The Argentine Republic* rejected the notion that the party being accused of the illegal act is

PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic, PCA Case No. 2010–5, Award, ¶ 4.876 (Sept. 19, 2013) (“The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.”); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, ¶ 303 (April 23, 2012) (“Mere insinuations cannot meet the burden of proof which rests on the Claimants.”).

¹²⁰ See *ECE and PANTA* at ¶ 4.872.

¹²¹ K. Mills, “Corruption and Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto”, *Int'l Arb. L. Rev.*, 5(4), 2002, pp. 126, 130.

¹²² C. B. Lamm, H. T. Pham & R. Moloo, “Fraud and Corruption in International Arbitration”, *Liber Amicorum Bernardo Cremades*, Madrid, La Ley, 2010, pp. 699, 701.

¹²³ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, (May 6, 2013).

¹²⁴ *Id.* at ¶ 178.

in a better position to disprove that it committed such act¹²⁵. Thus, the concept of burden shifting in the context of corruption allegations has not been given much credence, although the difficulties in obtaining direct evidence of these deceptive acts persist. This has led some tribunals to accept and assess circumstantial evidence in making their determinations on the authenticity of corruption allegations¹²⁶.

B) Standard of Proof

It is generally accepted that a tribunal will conclude that a party's case has been proven on a balance of probabilities¹²⁷. In short, the tribunal requires proof that an allegation is *more likely than not* to be true¹²⁸. Although this standard is widely recognized and adopted, debate exists as to whether or not this standard is sufficient in the context of allegations of corruption and fraud. Specifically, some tribunals have articulated standards of proof that appear to be higher or more stringent than the usual standard, while others have declined to take this route.

The tribunal in *Metal-Tech Ltd. v. Uzbekistan*¹²⁹ stated that an allegation of corruption must be proved with "reasonable certainty"¹³⁰. In this case, Uzbekistan alleged that the investor made illegal payments to government officials when obtaining investment contracts. Metal-Tech's CEO and Chairman admitted during the hearing that the company had made some payments to alleged consultants, including an official of the Uzbekistan government and the brother of the State's Prime Minister, prior to the formation of the corporate investment entity¹³¹.

Based on those admissions, the tribunal initiated an investigation into the existence of corruption and made procedural orders requiring the investor to produce certain documents. Further, the tribunal held a

¹²⁵ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 215 (Sept. 1, 2009).

¹²⁶ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) (dismissing the claim, the tribunal found that the existence of several "red flags" of corruption on the investor's part were not satisfactorily explained).

¹²⁷ *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, ¶ 177 (July 28, 2015).

¹²⁸ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, ¶ 124 (July 26 2007) (espousing this as the "usual standard" of proof).

¹²⁹ *Metal-Tech Ltd. v. Uzbekistan*, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013).

¹³⁰ *Id.* at ¶ 243.

¹³¹ *Id.* at ¶ 240.

subsequent hearing where the CEO attempted to amend his testimony¹³².

Embracing the international community's "red flags" or indicators of corruption with respect to the use of a consultant to obtain a government contract, the *Metal-Tech* tribunal assessed the evidence of corruption before it¹³³, and found sufficient evidence to rule that corruption existed and violated Uzbekistan law in connection with the establishment of the investment¹³⁴. In particular, the tribunal considered the following: the amount of money paid by the investor; the fact that these payments were made regardless of services actually provided; the lack of professional qualifications on the part of the payees; the lack of transparency surrounding the payment arrangements; the significant connections of some of the payees with government officials responsible for the establishment of the investment; and Metal-Tech's failure to support the legitimacy of the creation of the investment via documents or credible testimony. All those factors led the tribunal to conclude with "reasonable certainty" that the investment had not been "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made"¹³⁵.

Other tribunals, however, have adopted a tougher standard for allegations of corruption and fraud, holding that evidence must be "clear and convincing" to make out a claim of corruption or fraud.

*EDF (Services) v. Romania*¹³⁶ dealt with EDF's joint venture with entities owned by the Romanian government. In its claim, EDF alleged that it suffered discriminatory treatment from the government because it had refused to comply with demands for bribes from senior government officials. Specifically, EDF alleged that the request for, and refusal to grant, the bribe was made in two private conversations.

¹³² *Id.* at ¶¶ 86–100.

¹³³ *Id.*, at ¶¶ 293–294 (considering "(1) the intermediary or 'adviser' has a lack of experience in the sector; (2) non-residence of an adviser in the country where the customer or the project is located; (3) no significant business presence of the adviser within the country; (4) an adviser requests 'urgent' payments or unusually high commissions; (5) an adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity; (6) an adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision.").

¹³⁴ *Id.*, at ¶¶ 372–373.

¹³⁵ *Id.*, at ¶ 373.

¹³⁶ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, (Oct. 8 2009).

In finding that the allegations were not founded, the tribunal adverted to a high standard of proof for corruption:

The heart of Claimant's case is that the contractual arrangements at the Otopeni airport were not extended beyond their ten-years term because Mr. Weil refused to pay a USD 2.5 million bribe to secure the extension, that the request for a bribe was obvious bad faith by Respondent in negotiating an extension, and was clearly impossible to reconcile with the legitimate and reasonable expectation of Claimant. Respondent flatly denies that such a request for a corrupt payment was made. In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. *The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.* The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing¹³⁷.

In *Fraport v. Philippines II*¹³⁸, the Philippine government argued that the opposing party was corrupt. The tribunal noted that due to the difficulty of proving corruption by direct evidence, the alleging party may rely on circumstantial evidence. However, the evidence, even if circumstantial, must be "clear and convincing" so as to "reasonably make-believe that the facts, as alleged, have occurred"¹³⁹. In that award, the tribunal found that the Respondents had failed to discharge this burden of proving corruption, though the tribunal did dismiss the claims on other grounds¹⁴⁰.

Finally, in *Siag v Egypt*¹⁴¹, Egypt objected to the tribunal's jurisdiction on the basis that one of the investors had not lost his Egyptian nationality as he may have been fraudulent in attaining his Lebanese nationality. The tribunal accepted the Claimant's submission that this allegation had to be held to a "heightened standard of proof" and applied the "clear and convincing" standard, explaining that this was

¹³⁷ *Id.* at ¶ 221 (emphasis added).

¹³⁸ *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, (Dec. 10, 2014).

¹³⁹ *Id.* at ¶ 479.

¹⁴⁰ *Id.*

¹⁴¹ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009).

higher than the ordinary standard of preponderance of evidence, and concluded that serious allegations such as fraud are held to a high standard of proof in most legal systems and in international proceedings¹⁴².

Nevertheless, other tribunals have declined to ossify this principle. For example, the tribunal in *Tokios Tokelés v. Ukraine*¹⁴³ declined to apply the standard, applying a balance of probabilities test instead¹⁴⁴. Similarly, in *Libananco Holdings Co. Ltd. v. Turkey*¹⁴⁵, the tribunal flatly rejected the Claimant's contention that allegations of fraud or serious wrongdoing demanded a higher standard of proof; rather, the tribunal noted that discharging the burden of proof may require the production of more persuasive evidence, in the case of a fact that is inherently improbable¹⁴⁶. In addition, in *Rompetrol*, the tribunal applied the usual standard of balance of probabilities.

Based on the foregoing, the lack of jurisprudential consensus on the standard of proof remains relevant for parties alleging or denying corruption and fraud in arbitration claims, and it appears that no preferred approach has emerged. Nonetheless, the above cases demonstrate that tribunals have been becoming more adept at handling allegations of corruption and fraud, even if applying different evidentiary burdens.

3. Leaving It Unresolved

Lastly, an international arbitral tribunal could ignore an allegation of corruption or fraud when one party raises it during the proceeding¹⁴⁷. However, this is the most dangerous approach as it leaves the tribunal's award susceptible to being unenforceable. It would be odd for a tribunal to ignore such an allegation because corruption and fraud contravene most countries' public policy.

If the tribunal decides to ignore an allegation, then the losing party can challenge the award's enforceability in a national court. In the

¹⁴² *Id.* at ¶¶ 325–326.

¹⁴³ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award (July 26, 2007).

¹⁴⁴ *Id.* at ¶ 124.

¹⁴⁵ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (Sept. 2, 2011).

¹⁴⁶ *Id.* at 125.

¹⁴⁷ *Vid.* T. H. Moran, *Combating Corruption Payments in Foreign Investment Concessions: Closing the Loopholes*, Extending the Tools 1 (2008) (describing the tribunal in *Metalclad v. Mexico*, where, “despite rampant rumors of corruption and pleadings about corrupt practices, the [t]ribunal simply chose not to address the issue of corruption.”).

United States, to invalidate an award for fraud, “[c]ourts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration”¹⁴⁸. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, the court concluded that the alleged fraud did not satisfy the test above and enforced the ICC award¹⁴⁹.

Although the court in *Karaha Bodas Co.* did not invalidate the award, a national court *could* refuse to recognize an award if the arbitral tribunal did not properly dispose of an allegation of corruption or fraud. Under the New York Convention, national courts can refuse to recognize and enforce an international commercial arbitration award if it runs afoul of the country’s domestic public policy¹⁵⁰. As discussed above, the international community and most countries’ domestic laws criminalize corrupt and fraudulent conduct, and therefore, where corruption or fraud is underlying an award, a national court could refuse to enforce it. However, most tribunals do not simply ignore an allegation. In fact, if the international arbitration is brought under ICC or LCIA rules, then the tribunal has a duty to try to ensure that the award is enforceable¹⁵¹. Nonetheless, if a tribunal ignores this directive then it is at risk for rendering an unenforceable award.

IV. Conclusion

Corruption and fraud are perilous to society. In a country where corruption is more common, the public becomes less trusting of governments, and companies risk losing business if they do not pay a

¹⁴⁸ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004).

¹⁴⁹ *Id.*

¹⁵⁰ New York Convention Art. V(2)(b); 9 U.S.C. § 207.

¹⁵¹ The language of the LCIA and ICC differ somewhat in this respect, but the general obligation of trying to render an enforceable award remains the same. Under the LCIA rules, the tribunal “shall act in the spirit of these Rules and shall make *every reasonable* effort to ensure that an award is legally enforceable”. LCIA Rules, Art. 32.2^o (emphasis added). In comparison, under the ICC, the standard is more demanding and requires that the tribunal “make *every* effort to make sure that the award is enforceable at law.” ICC Rules, Art. 35 (emphasis added).

bribe¹⁵². Fraudulent financial conduct can cripple a business—causing investors to lose money and the company’s employees to lose their jobs. These consequences also can impact the global economy, as it did during the Enron scandal. Because of the dangers of corrupt activities, a transnational public policy has emerged condemning corruption. As the tribunal in *World Duty Free Co. Ltd.* found: “[B]ribery . . . as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries”¹⁵³.

In spite of these laws, corruption is on the rise, especially in emerging economies in Latin America, Asia, and Africa¹⁵⁴. Although international arbitral tribunals have become more adept at handling allegations of corruption, they will likely need to become more proficient as these allegations continue to increase in spite of the global community’s desire to eliminate corruption.

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¹⁵² *Private Sector: Problem with Corruption*, Transparency International, available at http://www.transparency.org/topic/detail/private_sector (last visited Mar. 18, 2016) (“Almost a fifth of executives surveyed by Ernst & Young claimed to have lost business to a competitor who paid bribes.”).

¹⁵³ *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 43 (Oct. 4, 2006).

¹⁵⁴ *Vid. J. Poushter, Global worries about corruption are on the rise*, Pew Research, Dec. 4, 2014, <http://www.pewresearch.org/fact-tank/2014/12/04/global-worries-about-corruption-are-on-the-rise/>.

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