

Corruption in Arbitration— Law and Reality*

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I. Introduction: Context, Definitions, and Issues Considered

1. Corruption in international business is rife, and growing worse. On a scale from 0 (highly corrupt) to 10 (very clean), nearly three quarters of the 178 countries assessed in Transparency International's¹ Corruption Perceptions Index 2010² scored below five. Corruption levels around the world are perceived to have increased over the past three years.³ The scale of bribery in business today is described as staggering, and its consequences dramatic:⁴

"The scale and scope of bribery in business is staggering. Nearly two in five polled business executives have been asked to pay a bribe when dealing with public institutions. Half estimated that corruption raised project costs by at least 10 per cent. One in five claimed to have lost business because of bribes by a competitor. More than a third felt that corruption is getting worse.

*The consequences are dramatic. In developing and transition countries alone, corrupt politicians and government officials receive bribes believed to total between US\$20 and 40 billion annually – the equivalent of some 20 to 40 per cent of official development assistance. The cost is measurable in more than money. When corruption allows reckless companies to disregard the law, the consequences range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences."*⁵

2. It should therefore come as little surprise to anyone that corruption is internationally abhorred and vigorously denounced.⁶ There is a global convergence of legal rules, authorities, and opinions

¹ A global civil society organization concerned with combating corruption, raising awareness of its damaging effects, and developing measures to tackle it.

² "The 2010 Corruption Perceptions Index measures the perceived levels of public sector corruption in 178 countries around the world" by "drawing on different assessments and business opinion surveys carried out by independent and reputable institutions": see <http://www.transparency.org/policy_research/surveys_indices/cpi/2010> and the 2010 Corruption Perceptions Index Report.

³The 2010 Global Corruption Barometer.

⁴ See also Bernardo Cremades and David Cairns, "Transnational public policy in international arbitral decision-making: The cases of bribery, money laundering and fraud" in Kristine Karsten and Andrew Berkeley, *Arbitration, Money Laundering, Corruption and Fraud*, Dossiers- ICC Institute of World Business Law (September 2003) 65 at pp. 68-70, 77.

⁵ The 2009 Global Corruption Report Executive Summary Page XXV.

⁶ See for instance the following national laws and international instruments prohibiting corrupt practices: US Foreign Corrupt Practices Act (1977); Inter-American Convention against Corruption (1996); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); European Union Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Council Act of 26 May 1997); Council of Europe Criminal Law Convention on Corruption (1999); Council of Europe Civil Law Convention on Corruption (1999); European Union Council Framework Decision on Combating Corruption in the Private Sector (2003); African Union Convention on Preventing and Combating Corruption (2003); United Nations Convention Against Corruption (2003); ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005); and UK Bribery Act (2010). The most recent example of a national law criminalizing bribery is the UK Bribery Act 2010, which has significant extra territorial reach. Offences are committed when any act or omission which forms part of the offence takes place within the UK, or where any such act or omission by any person "closely connected" with the UK occurs outside the

condemning corruption, supporting the claim that there exists an international public policy,⁷ even a transnational public policy,⁸ against corruption.⁹ For this reason, issues of corruption may appear to be deceptively simple for tribunals and national courts to dispose of. However, the truth of the matter is quite the opposite. Arbitrations involving allegations of corruption throw up difficult factual and legal issues at practically every stage of the arbitral process. It is imperative that international arbitration practitioners have a firm grasp of how to approach these issues, especially since sectors of major importance for international arbitration¹⁰ (such as the construction, oil and gas, and mining industries¹¹) suffer from endemic corruption. This article seeks to clarify the “law” and, to the extent that they may differ, the “reality” in international arbitration relating to issues of corruption, and to propose possible theoretical and practical solutions to some of the existing controversies.

3. Before setting out a short introduction to these issues, it is necessary to clarify the meaning of “corruption” and “bribery”. “Corruption” is derived from the Latin word “*corruptus*”, meaning “to

UK. Persons “*closely connected*” with the UK include British citizens; UK residents; and bodies incorporated under the law of any part of the UK.

See further generally Carolyn B. Lamm, Hansel T. Pham, and Rahim Moloo, “Fraud and Corruption in International Arbitration”, in M.A. Fernandez-Ballesteros and David Arias, *Liber Amicorum Bernardo Cremades*, (La Ley grupo Wolters Kluwer) (2010) 699 at pp. 711-715; Cremades and Cairns *supra* note 4 at 68-70; and Richard Kreindler, “Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine” in Kaj Hober, Annette Magnusson; and Marie Ohrstrom, *Between East and West: Essays in Honour of Ulf Franke* (Juris)(2010) 309 (hereinafter “**Kreindler (Ulf Franke)**”) at p. 311 fn. 13 (for arbitral case law) and p. 312 fn. 17 (for other national laws prohibiting corruption).

⁷ The International Law Association International Arbitration Committee’s Interim Report on “Public Policy as a Bar to Enforcement of International Arbitral Awards” (2000) (hereinafter “**ILA Report (Public Policy)**”), reviewed the development of the concept of public policy and concluded that “*it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy*”.

⁸ An oft-quoted decision is Judge Lagergren’s award in ICC Case No. 1110 (1963), 10(3) Arb. Int’l 282 (“**ICC Case No. 1110 (Lagergren)**”), who observed at [20] that:

*“Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. **Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations.**”* (emphasis added)

See also *World Duty Free Company Limited v The Republic of Kenya* ICSID Case No. ARB/00/7, Award (October 4, 2006) (“**World Duty Free**”) at [157]:

*“In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, **this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.** Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*” (emphasis added)

⁹ *Supra* note 6. The differences between “international public policy”⁹ and “transnational public policy” are discussed below at [86] and [165].

¹⁰ Cremades and Cairns *supra* note 4 at p. 70.

¹¹ According to Transparency International’s 2011 Bribe Payers Index, which “*evaluates the supply side of corruption - the likelihood of firms from the world’s industrialised countries to bribe abroad*”, these are amongst the top five industry sectors in which foreign firms are likely to pay bribes to procure business. See also Peter Muchlinski, Federico Ortino & Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) (hereinafter “**Oxford Handbook**”) at p. 592 (“*By far the majority of [arbitral] cases [involving allegations of corruption] deal with infrastructure projects, like energy plants, telecommunication systems, or waste landfills... The next group in size terms concerns the purchase of armaments and the construction of military training facilities, followed by the exploitation of natural resources.*”)

break”, and encompasses all situations where “agents and public officers break the confidence entrusted to them.”¹² It is defined in the Oxford English Dictionary as the “*perversion or destruction of integrity in the discharge of public duties by bribery or favour; the use or existence of corrupt practices, esp. in a state, public corporation etc*”. The verb “bribe” is in turn defined as “*to influence corruptly, by a reward or consideration, the action of (a person), to pervert the judgment or corrupt the conduct by a gift*”.¹³ Recent commentary confirms that “[t]hese definitions correctly emphasize the essence of corruption in its legal sense”,¹⁴ and further notes that most modern states regard the definition of corruption as extending to include all persons who are induced to act corruptly in the discharge of their duties, whether in the public or private sectors.¹⁵

4. There are however in certain respects subtle and sometimes significant differences between the leading national and international legal regimes as to the type of conduct constituting “corruption” or “bribery”. For instance, facilitation payments (otherwise known as “speed” or “grease” payments) to foreign public officials, which are “*payment[s] made with the purpose of expediting or facilitating the provision of services or routine government action which an official is normally obliged to perform*”,¹⁶ are condemned under the UK Bribery Act 2010 and most other national laws,¹⁷ though they are not specifically prohibited under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“**OECD Convention**”),¹⁸ which leaves state parties to decide whether such payments are unlawful, and are expressly permitted (subject to defined limits) in certain major jurisdictions, most notably in the United States by virtue of the Foreign Corrupt Practices Act 1977 (“**FCPA**”), as well as in Australia, Canada, New Zealand, and South Korea. National and international anti-corruption laws also inevitably differ as to the precise elements of corrupt conduct,¹⁹ which are beyond the scope of this article to examine in detail; the reader is referred to other works for in-depth treatment of these laws.²⁰

¹² Colin Nicholls QC, Tim Daniel, Alan Bacarese, John Hatchard, *Corruption and Misuse of Public Office*, (Oxford University Press, 2ed., 2011) (hereinafter “*Corruption and Misuse of Public Office*”) at [1.01].

¹³ *Ibid.* at [1.02].

¹⁴ *Ibid.* at [1.03].

¹⁵ *Ibid.* at [1.03]. For rules and initiatives condemning and aimed at preventing private sector corruption, see for instance *ibid.* at [11.63] and [11.133] *et seq.* (discussing Article 12 UNCAC); [12.22] (discussing Article 21 UNCAC); [14.23] *et seq.* (discussing Articles 7-8 Council of Europe Criminal Law Convention on Corruption); [14.104] (discussing European Union Council Framework Decision on Combating Corruption in the Private Sector); [15.61] *et seq.* (discussing the Southern African Development Community Protocol against Corruption); [15.156] *et seq.* (discussing Framework for Commonwealth Principles of Promoting Good Governance and Combating Corruption); [17.129] (discussing Nigerian legislation); [17.140]-[17.146] (discussing Singaporean legislation); [17.28] (discussing Canadian legislation); and [18.111] (discussing South African legislation).

¹⁶ UK Law Commission Consultation Paper No. 185 (31 October 2007) Appendix F, para. F.5.

¹⁷ See *Corruption and Misuse of Public Office supra* note 12 at [4.120]-[4.121].

¹⁸ The Commentaries on the OECD Convention at [9] state:

“Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.”

¹⁹ Countries like United States, Canada, and Singapore for instance use the word “*corruptly*” in their anti-bribery legislation without statutory definition, and each jurisdiction has a different interpretation of the word: see *Corruption and Misuse of Public Office supra* note 12 at [16.36] *et seq.* (discussing the FCPA) and at [17.25] *et seq.* (discussing Canadian legislation); and Tan Boon Gin, *The Law on Corruption in Singapore: Cases and Materials* (Academy Publishing, 2007) at pp. 6-49 (discussing Singaporean legislation). Cf. the UK Bribery Act 2010, which abandons the provision that to be guilty of an offence a person must act “*corruptly*”, and replaces it with “*a model*

5. Putting aside the thorny issue of facilitation payments and other more subtle distinctions between the various anti-corruption regimes, international consensus on a broad definition of both public and private sector corruption²¹ can nevertheless be found in Articles 15,²² 16,²³ and 21²⁴ of the UN

based on an intention to induce a person to perform a function or activity improperly"; "[a] function is performed improperly if it is performed in breach of an expectation of good faith, impartiality, or is in breach of trust": see Sections 1-5 UK Bribery Act 2010 and *Corruption and Misuse of Public Office supra* note 12 at [4.05] *et seq.*

Jurisdictions are also likely to differ as to where the line should be drawn between bribery on the one hand, and "reasonable" or "bona fide" expenditure on corporate hospitality on the other: see *Corruption and Misuse of Public Office supra* note 12 at [4.132] *et seq.* and at [16.55].

See further Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, 2004) at p. 261.

²⁰ See for instance *Corruption and Misuse of Public Office supra* note 12; Sayed *ibid.*; Tan Boon Gin, *The Law on Corruption in Singapore: Cases and Materials* (Academy Publishing, 2007); Monty Raphael, *Blackstone's Guide to The Bribery Act 2010* (Oxford University Press, 2010); Jeffrey P. Bialos and Gregory Husisian, *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies* (Oceana Publications Inc., 1997).

²¹ Although public sector corruption has traditionally dominated countries' anti-corruption law-making agenda for many years, the last century has seen the criminalization of private sector bribery in most jurisdictions, and rightly so. Private sector corruption can be as deleterious as its public sector counterpart— "[t]he social harm of [private] commercial corruption is evident when it involves an inducement of a breach of the civil law duty of loyalty owed by employees, agents or fiduciaries", it undermines the economic interest of preserving free and fair competition between companies in national and international markets, and it creates a "a climate of illicit business behaviour that may undermine the rule of law". Moreover, due to market liberalization and the privatization of governmental functions, the private sector is larger than the public sector in many countries, which makes any distinction between the treatment of public and private sector bribery even more untenable in this day and age. See David Chaikin, "Commercial Corruption and Money Laundering: a Preliminary Analysis" 15(3) J.F.C. (2008) 269 at pp. 271-273. See further *supra* note 6, for examples of various national and international rules and initiatives condemning and aimed at preventing private sector corruption; and Transparency International's *Global Corruption Report 2009* which, having comprehensively reviewed anti-corruption measures in the private sector of 46 countries "representing all regions and levels of economic development", concludes at p. 165 that: "[t]here is evidence of a swathe of new legislation in all regions aimed at tackling private sector corruption, from the establishment of new anti-corruption agencies to the provision of whistleblower protection."

²² "Article 15. Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) *The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

(b) *The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."*

²³ "Article 16. Bribery of foreign public officials and officials of public international organizations

1. *Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

2. *Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties."*

Convention Against Corruption (“UNCAC”). There are 158 state parties to the UNCAC,²⁵ and its Articles 15, 16 and 21 are similar to the corresponding provisions of major international and national anti-corruption regimes, such as the Council of Europe Criminal Law Convention on Corruption²⁶ (“**COE Criminal Law Convention**”) (43 states have ratified or acceded to this Convention²⁷), the OECD Convention²⁸ (38 countries have adopted this Convention²⁹), and the FCPA³⁰. We thus adopt Articles 15, 16 and 21 UNCAC as part of our working definition of corruption for the purposes of this article.

6. Article 15(a) UNCAC (which applies to the bribery of both national and foreign public officials by virtue of Article 16(1) UNCAC) defines corruption in the *public* sector by the *payer* of a bribe as the act of (i) “intentionally” (ii) “promis[ing], offering or giving” (iii) “to... a [national or foreign] public official” (iv) “directly or indirectly” (v) “of an undue advantage” (vi) “for the official himself or herself or another person or entity” (vii) “in order that the official act or refrain from acting in the exercise of his or her official duties”.
7. Corruption by the *recipient* of a public sector bribe is similarly defined under Article 15(b) as the mirror image of the bribe payer’s corrupt act (but is only applicable to national, as opposed to foreign, public officials) as follows: (i) is replaced by “intentional”; (ii) is replaced by “solicitation or acceptance”; and (iii) is replaced by “**by**... a [national or foreign] public official” (emphasis added).
8. Corruption in the *private* sector by the *payer* and *recipient* of a bribe in Article 21 closely tracks the same linguistic formulae used in Articles 15(a) and 15(b). Essentially, “[t]he object of the [private sector bribe] is to influence the conduct of the person who receives the bribe— who will act in a manner which is favourable to the briber, and not give proper consideration to the interests of

²⁴ Article 21. *Bribery in the private sector*

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.”

²⁵ As of 25 November 2011.

²⁶ Compare Articles 15, 16, and 21 UNCAC with Articles 2, 3, 5, 7, and 8 COE Criminal Law Convention. For commentary, see *Corruption and Misuse of Public Office supra* note 12 at [14.11]-[14.24].

²⁷ As of 1 May 2011.

²⁸ Compare Article 16 UNCAC with Article 1 of the OECD Convention, which states:

“Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”

For commentary, see *Corruption and Misuse of Public Office supra* note 12 at [13.25] *et seq.*

²⁹ As of 21 December 2011.

³⁰ Compare Article 16 UNCAC with Sections 78dd-1(1)(a)(1),(2) and 78dd-(2)(a)(1)(2) (anti-bribery provisions in respect of issuers and domestic concerns); Sections 78dd-1(a)(3) and 78dd-2(a)(3) (anti-bribery provisions in respect of issuers and domestic concerns acting through intermediaries); and Sections 78dd-(3)(a)(1),(2) and (3) (anti-bribery provisions in respect of conduct by non-US persons within the US) of the FCPA. For commentary, see *Corruption and Misuse of Public Office supra* note 12 at [16.19] *et seq.*

his/her employer, principal, fiduciary or client.”³¹ Article 21(a) defines corruption by the payer of a bribe as the act of (i) “intentionally” (ii) “promis[ing], offering or giving” (iii) “directly or indirectly” (iv) “of an undue advantage” (v) “to any person who directs or works, in any capacity, for a private sector entity” (vi) “for the person himself or herself or for another person” (vii) “in order that he or she, in breach of his or her duties, act or refrain from acting”. Corruption by the recipient of a private sector bribe is similarly defined in Article 21(b), except that (i) is replaced by “intentional”; (ii) is replaced by “solicitation or acceptance”; and (v) is replaced by “by any person who directs or works, in any capacity, for a private sector entity” (emphasis added).

9. Further elucidation of each of these elements of corrupt conduct is beyond the scope of this article, though their general thrust is consonant with the popular meaning of corruption introduced above (at [3]) as being, generally speaking, “the misuse of entrusted power for private gain”.³²
10. There is yet another form of corruption described in Article 18 UNCAC as “trading in influence”,³³ which is more controversial, and will be the subject of further analysis in the course of this article. It suffices to mention at this juncture that the elements of trading in influence are similar to Articles 15 and 16, except that the offence involves a person having “real or supposed influence” over public bodies or officials, trading the “abuse” of such influence (as opposed to the payment of bribes), in return for an “undue advantage” from a person seeking this influence. We also include trading in influence as part of our working definition of corruption in this article.
11. We now introduce the issues of corruption which arise in international arbitration. Broadly speaking, one can distinguish between issues of corruption which arise at the *primary tribunal* level before the

³¹ Chaikin *supra* note 21 at pp. 270-271.

³² See Transparency International’s Frequently Asked Questions about Corruption, available at <http://www.transparency.org/news_room/faq/corruption_faq>.

³³ Article 18 UNCAC defines trading in influence as:

“(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person **abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage** for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person **abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.**” (emphasis added)

Compare Article 18 UNCAC with Article 12 of the COE Criminal Law Convention (see [5] above) (“Each Party shall adopt such legislative and other measures as may be necessary to establish a criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to all in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.”) **and** Article 4(1)(f) of the African Union Convention on Preventing and Combating Corruption (“1. This Convention is applicable to the following acts of corruption and related offences:... (f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;...”).

award is rendered, and those which arise thereafter if the award is challenged before *reviewing national courts*, which may be asked to set aside or refuse enforcement of the award.

12. Our discussion will first address the factual and legal issues encountered at the *primary tribunal* level, according to the rough chronological manner in which they are likely to arise in the course of the arbitration.
 - (a) Where the evidence discloses a *prima facie* suggestion of corruption, but neither party advances allegations of such wrongdoing, the question arises as to whether tribunals are entitled to investigate and inquire into the issue of corruption *sua sponte* (**Section II**).
 - (b) When all the evidence is before the tribunal (whether it is adduced by the parties or derived from the tribunal's *sua sponte* investigations), the tribunal will then have to make relevant findings of fact which may go towards establishing corrupt conduct. This gives rise to questions as to which party bears the burden of proving corruption, and the requisite standard of proof that must be discharged to establish corruption (**Section III**).
 - (c) In order to conclude that a party has committed a "corrupt" act and, if so, what legal consequences ensue, a tribunal must consider whether the established facts make out all the elements of the offence of corruption *under the applicable law*. In the first instance, the tribunal will look to the law chosen by the parties to govern their contract (or, in the absence of choice, the otherwise applicable proper law of the contract). However, not all cases can be resolved by simply applying the governing law of the contract. Mandatory laws or public policies of the place of performance or arbitral seat may provide that one or both parties had committed corrupt acts, or entered into their contract with corrupt intentions, and thus invalidate claims brought in connection with the parties' contract. Conversely, the law chosen by the parties to govern the contract may regard the same conduct to be *uncorrupt*, and thus uphold contractual and other related claims by the parties. While it is true that no jurisdiction will countenance the blatant provision of gratification to government officials³⁴ in order that they neglect their duties or perform them improperly,³⁵ different jurisdictions adopt contrasting attitudes to the propriety of "agency" or "intermediary" contracts— agreements under which an intermediary is engaged by a principal to assist in procuring for the latter public contracts or licenses and approvals to do business in specified countries— as national laws diverge on whether and in what circumstances such contracts conceal attempts to bribe or unduly influence public officials. Choice of laws analysis comes into play in such cases to determine whether mandatory laws or public policies which prohibit intermediary agreements override the parties' chosen law (**Section IV**).
 - (d) What legal consequences flow from a finding that one or both parties are guilty of corrupt dealings? We analyse below how a finding of corruption affects the tribunal's jurisdiction, as well as the arbitrability, admissibility, and the merits of the parties' claims (**Section V**).

³⁴ Besides Articles 15 and 16 UNCAC and Article 5 COE Criminal Law Convention (see [5] above), see in relation to the bribery of foreign public officials Article 1 OECD Convention; Sections 78dd-1, dd-2, and dd-3 FCPA; Section 6 UK Bribery Act 2010; and *Corruption and Misuse of Public Office supra* note 12 at [18.14] (discussing Brazilian legislation); [18.41] (discussing Chinese legislation); [18.97] (discussing Russian legislation); [18.113] (discussing South African legislation); [17.06] (discussing Australian legislation); and [17.30] (discussing Canadian legislation).

³⁵ See however *supra* note 19 and *infra* note 140.

- (e) A final matter for a tribunal to consider is whether arbitrators who have made a finding of corruption, or suspect its occurrence, are bound to disclose the relevant facts to the relevant authorities, and how this obligation squares with their duty to preserve the confidentiality of arbitral proceedings (**Section VI**).
 - (f) It should be noted that the above mentioned issues arise in both investment *treaty* and *contract* based arbitrations, with the exception of conflict of laws analysis in relation to intermediary agreements (**Section IV**), which is relevant only to contract based arbitrations.³⁶ This is due to the different applicable laws in these two types of arbitration.³⁷ In addition, as the source of the tribunal’s jurisdiction also differs, more difficult considerations arise in investment treaty based arbitrations than in contract based arbitrations, in relation to the legal consequences of a finding of corruption. A live issue in *treaty* based arbitration disputes is whether a host state can raise the defence of investor corruption to avoid liability for breach of investment protection standards, where the state participated in or condoned an investor’s corrupt acts, for instance, by soliciting and receiving bribes from the investor, or refusing to take action against the corrupt investor and complicit state officials.³⁸ This issue is beyond the scope of this article, which will only discuss the legal consequences of a finding of corruption (**Section V**) in relation to *contract* based arbitrations.
13. Finally, issues of corruption also arise at the setting aside and enforcement stages before *national courts*, when it is alleged that an arbitral award upholds a contract tainted by corruption (**Section VII**). Note that investment treaty-based arbitrations adjudicated under the ICSID Convention do not have to grapple with such setting aside and enforcement issues, since the Convention provides that ICSID arbitral awards are not subject to review by national courts.³⁹
 14. We begin our discussion with the first issue of corruption which a tribunal may encounter— whether the tribunal has the right and/or obligation to inquire into the existence of corruption *sua sponte*.

II. The Tribunal’s Right and Obligation to Inquire into Corruption Sua Sponte

³⁶ The issues arising from treaty based arbitrations are generally governed by public international law. Where municipal law is relevant because it is referred to in an investment treaty, the host state’s laws are usually identified as being applicable. See for instance the bilateral investment treaty between Spain and El Salvador, which was the foundation of the investor’s claim in *Inceysa Vallisoletana, S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (August 2, 2006) (see in particular [195] and [207] of the award). Accordingly, treaty based arbitrations do not generally require conflict of laws analysis to determine the applicable law.

³⁷ For a summary of the distinction between these two types of arbitration, see Bernardo Cremades, “Corruption and Investment Arbitration”, in Gerald Aksen, Karl-Heiz Bockstiegel, Michael J. Mustill, Paolo Michele Patocchi, Anne Marie Whitesell, *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner*, (2005) 203 (hereinafter “**Cremades (Robert Briner)**”) at pp. 210-213; and Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007) at [3.51]. For more in-depth discussion, see Rules 5, 6, and 10 and their commentary in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009).

³⁸ See generally Vale Columbia Center on Sustainable International Investment Open Society Justice Initiative Concept Paper on “International Investment Law & the Fight Against Corruption” (2009) at pp. 10-11; *Oxford Handbook supra* note 11 at pp. 596-597; and Cremades (*Robert Briner*) *ibid.* at p. 216.

³⁹ See Articles 53 and 54 ICSID Convention, and the limited grounds for annulling an ICSID award under Article 52, which differ from the New York Convention grounds for setting aside or refusing enforcement of commercial arbitration awards.

15. Parties' claims or defences may be *expressly* premised upon the other party's corrupt dealings, or their joint corrupt object underlying a contract in dispute (see further [32] below). A tribunal is clearly obliged to investigate and rule upon the existence and consequences of corruption in such case to resolve the parties' dispute. As Gary Born ("**Born**") correctly points out:

"...insofar as arbitrators are requested to make a binding arbitral award through an adjudicative process, either awarding monetary sums or declaratory relief, it is a vital precondition to the fulfillment of this mandate that they consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy... a tribunal is incapable of deciding that Party A is legally obligated to pay €100, or to hand over specified property, to Party B without considering public policy objections to the existence of such an obligation. Inherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to consider and resolve public policy (and other mandatory legal) objections." (emphasis added)⁴⁰

16. However, if neither party alleges corruption, but the evidence on record leads the tribunal to suspect that corrupt activities may have been afoot,⁴¹ it is less clear whether a tribunal may assume of its own accord an inquisitorial role to establish their occurrence and rule upon their consequences.⁴² An award could be at risk of being set aside⁴³ or refused enforcement⁴⁴ if arbitrators stray into *ultra petita* territory by enquiring into the existence of corruption and ruling upon its consequences, where such issues are not raised by the parties.⁴⁵ Paradoxically, if a tribunal declines to take the initiative in probing the existence of corruption, national courts reviewing a subsequent challenge to the award may be tempted to make their own enquiries to ascertain the existence of corruption, and uphold the challenge on public policy grounds should corruption be revealed.⁴⁶

⁴⁰ Gary B. Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009) at p. 2183.

⁴¹ As Cremades and Cairns note (*supra* note 4 at p. 79): "*allegations [of corruption] might not be explicitly made by either party, but, rather, enter into the arbitration by suspicion or innuendo as the proceedings progress, or the parties might acknowledge an element of corruption... but ask that the arbitral tribunal ignore it in deciding the dispute before it.*" The latter (more exceptional) scenario arose in ICC Case 1110 (Lagergren) *supra* note 8, in which both parties acknowledged that the object of a commission agreement included the bribery of Argentinian officials so that the respondent would be awarded a public contract, but nonetheless remained of the view that the commission agreement was valid and binding and requested the tribunal to decide the case without reference to the corrupt purpose of the agreement. See *infra* note 251 below for further discussion of this case.

⁴² Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed., 2009) (hereinafter "**Redfern and Hunter**") at [2.140].

⁴³ Article 34(2)(a)(iii) UNCITRAL Model Law states:

"34[...]

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

[...]

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;"

⁴⁴ Article 36(1)(a)(iii) UNCITRAL Model Law and Article V(1)(c) New York Convention provide for refusal of enforcement of an award on the same basis as setting aside of an award under Article 34(2)(a)(iii) UNCITRAL Model Law (*ibid*).

⁴⁵ See *Redfern and Hunter supra* note 42 at [2.140].

⁴⁶ An award may be set aside or refused enforcement on public policy grounds: Articles 34(2)(b)(ii) and 36 UNCITRAL Model Law and Article V(2)(b) New York Convention. As Cremades and Cairns *supra* note 4 observe at pp. 78-79:

17. Is the tribunal then stuck between a rock and a hard place? We think not. The argument that a tribunal exceeds its mandate by inquiring into issues of corruption *sua sponte* is not supported by legal principle or policy.
18. While an award may be challenged under Articles 34(2)(a)(iii) and 36(1)(a)(iii) UNCITRAL Model Law and Article V(1)(c) New York Convention on the basis that the tribunal has “*deal[t] with a dispute not contemplated by or not falling within the terms of the submission to arbitration*”, this provision is narrowly construed by state courts, which are loathe to find that a tribunal has exceeded its powers.⁴⁷ The general proposition that emerges from a distillation of various case law and commentary is that a tribunal will not be regarded as having exceeded its authority so long as the matters determined or the evidence relied upon in its award are *relevant* to resolution of the dispute submitted to the tribunal.
19. In *Minmetals Germany GmbH v Ferco Steel Ltd*,⁴⁸ Colman J. refused to sustain the respondent’s challenge under, *inter alia*, Section 103(2)(d) UK Arbitration Act 1996 (which is *in pari materia* with the aforementioned provisions of the New York Convention and UNCITRAL Model Law). The respondent resisted enforcement on the basis that the tribunal had exceeded its mandate by quantifying the claimant’s loss according to findings made in separate arbitration proceedings (regarding a subsale contract between the claimant and a third party, which was decided by the same tribunal), which neither claimant nor respondent had raised or submitted as evidence in their arbitration. Colman J. dismissed this argument, reasoning that a tribunal acts within its mandate so long as it relies on evidence which is *relevant* to the resolution of the *dispute submitted for determination* by the parties, even if such evidence had *not* been raised by either party:

“evidence derived from [the tribunal’s] own investigations... went to a central issue within the overall dispute referred to arbitration, namely what loss had been caused to [claimant] by [respondent’s] breaches of contract... ‘the scope of submission’ [within the meaning of Section 103(2)(d) UK Arbitration Act 1996]... falls to be defined by reference to the issues to be resolved by the arbitrators... [t]his head of objection to enforcement must therefore be rejected” (emphasis added).⁴⁹

“If a contract involves elements of bribery or money laundering, then the arbitral tribunal is the forum to evaluate the evidence and determine the implications of the bribery and money laundering for the claims and defences of the parties, under the contract and the applicable law. In practical terms, therefore, a court hearing an application for setting aside or for recognition and enforcement is much more likely to uphold an award, or not recognize and enforce an award, notwithstanding bribery or money laundering, where the issues of bribery or money laundering have been acknowledged and dealt within the award by the arbitral tribunal.” (emphasis added)

See below at [162]-[167] where corruption as a public policy bar to enforcement is discussed, and the different judicial attitudes towards the review of arbitral awards challenged on public policy grounds. Of particular relevance is the discussion at [151]-[161] regarding the “contextual review” approach.

⁴⁷ *Elite Inc. v. Texaco Panama Inc.*, 777 F.Supp. 289, 292 (S.D.N.Y. 1991); *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255 (2d Cir. 2003); Paris Court of Appeal’s Judgment of 10 March 1988 2 *Revue de l’Arbitrage* 269 (1989); Swiss Federal Tribunal’s Judgment of 19 December 2001 20(3) *ASA Bulletin* 493 (2002). See generally Born *supra* note 40 at pp. 2607-2608.

⁴⁸ [1999] 1 All ER (Comm) 315

⁴⁹ *Ibid.* at 325-326. See also *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, which held that an award cannot be refused enforcement under Article V(1)(c) of the New York Convention merely because the tribunal relies on a legal theory other than that argued by the parties (“*Cubic’s claim that the use of legal theories not presented by the parties precluded confirmation of the Award was rejected by the Ninth Circuit. See Ministry of Defense, 969 F.2d at 771. Under the*

20. Similarly, the Singapore Court of Appeal observed in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*⁵⁰ (interpreting its earlier decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank*⁵¹) that, in determining whether a tribunal exceeds its mandate in considering and deciding a particular matter, its relevance to the issues submitted by the parties to the tribunal for resolution is the key ingredient to be considered:

“In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, this court held (at [44]) that the court had to adopt a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Art 34(2)(a)(iii) of the Model Law. Specifically, it had to determine: (a) first, what matters were within the scope of submission to the arbitral tribunal; and (b) second, whether the arbitral award involved such matters, **or whether it involved ‘a new difference ... irrelevant to the issues requiring determination’**”⁵² and is thus “outside the scope of the submission to arbitration” (emphasis added).⁵³

21. Respected commentators are also in accord with this view. Born notes that “[A]n arbitral tribunal does not exceed its authority... [merely] by relying on arguments or authorities not raised by the parties to support their claims. Doubts about the scope of the parties’ submissions are resolved in most legal systems in favor of encompassing matters decided by the arbitrators.”⁵⁴ Emmanuel Gaillard and John Savage (“**Gaillard and Savage**”) also make the following relevant observations: “The arbitrators will also fail to comply with their brief by ruling *ultra petita* or, in other terms, by ruling on claims not made by the parties... [However,] [t]he fact that arbitrators may have based their decision on allegations or arguments which were not put forward by the parties does not amount to a failure to comply with their brief. They only fail to comply with their brief where they grant one of the parties more than it actually sought in its claims.”⁵⁵
22. Given that corrupt dealings by one or both parties can have a dispositive impact on the enforceability of claims submitted to the tribunal (the legal consequences of a finding of corruption are discussed at [89]-[100] below), and are therefore *relevant* to the resolution of the dispute between the parties, it stands to reason that consideration of issues of corruption falls well within the tribunal’s mandate, even if neither party raises corruption as part of its claim or defence and the tribunal conducts its own investigations into corruption *sua sponte*. In other words, the propriety of parties’ conduct—

Convention, a court is to determine ‘whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties’ pleadings’. Id. Respondents in Ministry of Defense objected to confirmation of that award ‘because the award [was] not based on the same legal theory as that stated in the pleadings’. The court found that the subject matter of respondent’s claim was ‘obvious[ly]’ the contracts between the parties and to the extent the ‘award resolves the claims and counterclaims connected with the two contracts it ... does not exceed the scope of the submission to arbitration’. Id. Comparing Ministry of Defense to this case, the Court finds that the subject matter of this dispute is the Service and Sales Contracts between Cubic and Iran. The ICC Award resolves the parties’ claims arising from these Contracts and the fact that the Award is not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it. ”

⁵⁰ [2011] SGCA 33.

⁵¹ [2007] 1 SLR(R) 597.

⁵² *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 at [30].

⁵³ *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 at [30]. See also Herbert Kronke, Patricia Nacimiento, Dirk Otto, and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) at p. 259.

⁵⁴ Born *supra* note 40 at p. 2608. See also Kronke, Nacimiento, Otto, and Port, *ibid.* at p. 265.

⁵⁵ See Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer Law International, 1999) (hereinafter “**Fouchard Gaillard Goldman**”) at [1631].

assessed in accordance with the applicable rules governing illegality and public policy— must necessarily be considered by the tribunal as *part and parcel of its mandate* to determine the parties’ claims, defences, and counterclaims, which therefore renders the existence of corrupt dealings by the parties a relevant matter for the tribunal to investigate and determine of its own accord. Arbitral case law affirms the legitimacy of such *sua sponte* investigation of corruption,⁵⁶ and as Richard Kreindler notes:

“illegality contentions going to the nullity of the main contract... even if initiated by the tribunal itself, should normally be deemed to ‘fall within the terms of the submission to arbitration’ ... [as] it has a core relevance to... public policy... [and] should be seen as necessarily falling within the terms of virtually any submission to arbitration... a tribunal-initiated investigation of illegality is not tantamount to ultra petita [as] [t]he tribunal comes to a legal conclusion as to the validity of the main contract, the claims under that contract... or the unmeritoriousness of the claims due to the invalidity of the contract... The Tribunal’s decision following on such self-initiated investigation can ‘fit’ into the claims and... defences already made.”⁵⁷

It is only “[w]here... a suspected or manifest illegality is **irrelevant** to the claims, defences... then the arbitrator should have no right or duty to engage in investigations and findings which are the province of the state criminal authorities.” (emphasis added)⁵⁸

23. Accordingly, a tribunal that does uncover evidence of corruption *sua sponte* and makes relevant consequent findings is not giving either party “*more than it actually sought in its claims*”,⁵⁹ defences, or counterclaims. Rather, it is rigorously and faithfully ascertaining whether it ought to uphold such claims, defences and counterclaims *which have been submitted to it for resolution*, by applying (as it should) the consequences of illegality which flow from a finding of corruption under the applicable law. Such a tribunal should therefore be safe from state courts’ accusations of having exceeded its authority. So long as due process concerns are met, in that arbitrators inform parties of the basis for their suspicions of corruption, and provide them with an opportunity to make submissions on the matter,⁶⁰ arbitrators are entitled (indeed obliged) to inquire into corruption and

⁵⁶ See the arbitral case law cited in Sayed *supra* note 19 at pp. 361-364, which generally declare that “*an arbitral Tribunal [has] authority to invoke and pronounce nullity [of a contract providing for corruption] by its own motion*”. Cf. ICC Case No. 6497 (1994) (which we disagree with for the reasons stated in this Section): “*The demonstration of the bribery nature of the agreement has to be made by the Party alleging the existence of bribes... A civil court, and in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth...*”

⁵⁷ Richard Kreindler, “Aspects of illegality in the formation and performance of contracts” (16th ICCA Congress, London, May 2002) (hereinafter “**Kreindler (Aspects of Illegality)**”) at pp. 252-253. See also Kreindler “Public Policy and Corruption in International Arbitration: A perspective for Russian Related Disputes” (2006) 72(3) *Arbitration* 236 (hereinafter “**Kreindler (Russian Related Disputes)**”) at pp. 245-246.

⁵⁸ Kreindler, “Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, etc.? The Arbitrator as Accomplice – Sham Proceedings and the Trap of the Consent Award” (CGD Working Group on Corrupt Payments, Washington, February 5, 2007) (hereinafter “**Kreindler (Arbitrator as Accomplice)**”) at p. 3.

⁵⁹ See Gaillard and Savage at [21] above.

⁶⁰ See *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 (“*Art. V of the [New York] Convention protects the requirements of natural justice reflected in the audi alteram partem rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcer has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Art. 26 of the CIETAC Rules by reference to which the parties had agreed to arbitrate provided: ‘...The arbitration tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.’ That, however, was not treated by the Beijing court as permitting the tribunal to reach its conclusions and make an award without first*”

compel the production of evidence or the submission of arguments if the parties refuse to be forthcoming, and make the relevant ruling on the basis of such inquiry.

24. The policy considerations favouring the tribunal's self-enquiry into suspicions of corruption are also clear.⁶¹ A tribunal is not "*solely a manifestation and instrumentalization of party autonomy*" which can ignore "*international goals of sanctioning illegality*".⁶² Tribunals must remain vigilant and alert to the possibility of corrupt dealings being hidden by one or both parties, otherwise they may become unwitting accessories to heinous acts "*more odious than theft*".⁶³ In this regard, it is important for tribunals to bear in mind that many arbitral jurisdictions are anxious to preserve the finality of arbitral awards, and generally refuse to disturb the tribunal's findings (see discussion at [106]-[194] below). This should doubly incentivise tribunals to properly investigate suspicions of corruption, so that their awards do not become a means for undeserving and unscrupulous parties to exploit minimal judicial intervention and thereby reap the benefit of their misdeeds.⁶⁴
25. However, a note of caution is in order: tribunals should only pursue the issue of corruption where there is some *prima facie* evidence of wrongdoing, and not "*every suspicious element in the execution or performance of the contract should set the tribunal off on an inquisitorial exercise of its own irrespective of the wishes of the parties*" (see [43] below for a discussion of the possible evidentiary indicia of corruption).⁶⁵ A *laissez-faire* attitude that closes its eyes to all evidence of corruption is as undesirable as an over-zealous approach to detecting corruption, which will bog down arbitral proceedings with unnecessary demands for information and explanation, at the expense of parties who are likely to be innocent of wrongdoing. This would compromise the institution of international arbitration as surely as ignoring compelling evidence of corruption would.
26. It would not be wise to propose any arbitrary threshold of evidence required to trigger *sua sponte* inquiries from the tribunal, as the matter is not simply one of evidence, but also one of

disclosing to both parties the materials which it had derived from its own investigations."); Cremades and Cairns *supra* note 4 at p. 83 ("*The party or parties suspected of bribery... must be fully informed of the tribunal's suspicions and allowed the time and opportunity to make a full response. They are entitled to know the basis of the allegations against them and should be granted an oral hearing if they so request.*"); and Kreindler (Arbitrator as Accomplice) *supra* note 58 at p. 2: "*the parties must be made aware of, and be given a reasonable opportunity to comment in particularized fashion on, the suspicion or evidence of illegality*".

⁶¹ Cremades and Cairns *supra* note 4 at pp. 80-81.

⁶² Kreindler "Approaches to the Application of Transnational Public Policy by Arbitrators" 6th IBA International Arbitration Day, Sydney (13 February 2003) at p. 15.

⁶³ *World Duty Free supra* note 8 at [173]. As Catherine Kessedjian, "Transnational Public Policy" in Albert Jan van den Berg, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 2006 Montreal Volume 13 (Kluwer Law International, 2007) at p. 863 notes:

"[A]rbitrators, as major actors in society, must be aware and alert and must recognize the cases in which fundamental norms are at stake. They must do their job in calling the parties' attention to the problem and asking them to discuss it fully. It would be a disservice to the parties, to the arbitration process and to society at large to say that arbitrators can only look at issues which have been posed by the parties. By doing so, they would become accomplice to the grossest violations of transnational public policy and fuel the debate against arbitration that has already started. In the arbitration process as in all dispute resolution mechanisms, the tribunal is faced with facts, circumstances, documents, testimonies and it is for the parties and the arbitrators together to formulate the issues at stake." (emphasis added)

⁶⁴ Cf. ICC Case No. 7047 (1994), which held that: "*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.*" (emphasis added) We disagree, for the reasons mentioned in this Section.

⁶⁵ Cremades and Cairns *supra* note 4 at p. 81,

proportionality, which would make the potential difficulty for parties to provide exculpatory explanations a relevant consideration. For example, even if there is only a slight suggestion of corruption, given the strong public policy considerations favouring a vigilant attitude against corruption, a tribunal may be justified in asking for an explanation from a party, if it should be relatively easy for that impugned party to provide evidence exculpating itself if it were innocent. What tribunals can do is to formulate tactful and discreet ways in which it may enquire into the possibility of corruption, at as little cost to the expeditious flow of proceedings as possible.⁶⁶ Ultimately, a sensible and flexible approach is needed, which balances the need for efficacious proceedings with tribunals' responsibilities to the administration of justice.

III. The Burden of Proving Corruption and the Requisite Standard of Proof

27. In international arbitration, it is axiomatic that each party bears the burden of proving the facts relied on in support of its claim or defence.⁶⁷ The standard of proof is often assumed to be a balance of probabilities, or, in other words, more likely than not.⁶⁸ Can there be any justification for departing from these basic propositions where corruption is sought to be established, given the limits of the tribunal's powers of investigation and compulsion, and given that those who participate in bribery and corruption often mask their activities with great ingenuity?⁶⁹ This is "*one of the most contentious problems of corruption cases in arbitral practice.*"⁷⁰
28. Some have suggested that a tribunal ought to make it easier for parties to establish the existence of corruption, by reversing the *burden* of proving corruption (i.e. requiring a party to *disprove* its involvement in corrupt activities, where *prima facie* evidence of corruption exists),⁷¹ and/or lowering the default balance of probability *standard* of proof. The reasons cited included the fact that a tribunal does not have the same subpoena and enforcement powers of a court to compel the production of evidence and, as one advocate of such an approach explains, "*like most crimes and*

⁶⁶ See Cremades and Cairns' suggestion (*supra* note 4 at p. 82): "*A tribunal concerned, for example, by the remuneration arrangements for a foreign agent can seek an explanation of those arrangements without suggesting they might have a corrupt purpose. A discreet request for further information, if properly used, should enable an arbitral tribunal to either eliminate a suspicion of illegal activity or to confirm the need for the possibility of bribery, money laundering or serious fraud to be raised explicitly with the parties.*"

⁶⁷ Article 27(1) UNCITRAL Arbitration Rules 2010; Born *supra* note 40 p. 1857; *Antoine Biloune v. Ghana Inv. Centre, Award on Jurisdiction and Liability* (27 October 1989), XIX Y.B. Comm. Arb. 11, 20 (1994); *Frederica Lincoln Riahi v. Islamic Republic of Iran, Concurring and Dissenting Opinion of J. Brower in Award No. 600-485-1* (27 February 2003), 37 Iran-US C.T.R. 158, ¶18 (2003) ("*It is axiomatic that the burden of proving a claim lies with the party presenting it*").

⁶⁸ Born *supra* note 40 at pp. 1857-1858.

⁶⁹ Constantine Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World", 25(1) ICSID Rev-FILJ 47 (2010) (hereinafter "**Partasides (ICSID Rev.)**") at [22]. See generally *Oxford Handbook* *supra* note 11 at pp. 604-605.

⁷⁰ *Oxford Handbook* *supra* note 11 at p. 604; Mohamed Abdel Raouf, "How Should International Arbitrators Tackle Corruption Issues?" 24(1) ICSID Rev-FILJ 100 (2009) at pp. 106-107; A. Timothy Martin, "International Arbitration and Corruption: An Evolving Standard," 1(2) TDM (May 2004).

⁷¹ In ICC Case No. 6497 (1994), the tribunal remarked that:

"The [party alleging corruption] has the burden of proof... [Such party] may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven (Article 8 of the Swiss Civil Code). However, such change in the burden of proof is only to be made in special circumstances and for very good reasons."

intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected..."⁷² In addition, the complainant often cannot produce direct physical or documentary evidence of corruption,⁷³ whose case must stand or fall based on the strength of its witnesses' oral testimony, which may have little to recommend itself over the wrongdoers' evidence.

29. *EDF (Services) Limited v Romania* ("**EDF**")⁷⁴ helpfully illustrates some of these difficulties encountered by parties attempting to prove corrupt conduct in international arbitration. In *EDF*, the investor alleged that it was the victim of senior Romanian officials' demands for bribes on two separate occasions, once at a parking lot of the Hilton Hotel in Romania, and again at a Romanian State Secretary's private residence. But, as Constantine Partasides ("**Partasides**") aptly questions, "*[h]ow do you fairly evaluate proof of a conversation in a car park and a living room?*"⁷⁵ In *EDF*, the investor could only rely on the testimony of its employees who allegedly received the bribe requests in its attempt to prove corruption by the respondent. This was countered by the respondent's witnesses' denials (these were the very persons accused of soliciting bribes), the lack of protest by the investor at the time the alleged solicitation of bribes occurred, and the absolving decision of the Romanian Anti-Corruption Authority.
30. The state of evidence was thus such that it was unlikely the investor successfully proved corruption on a balance of probabilities. The tribunal expressed sympathy for the investor's position, observing that "*corruption... is notoriously difficult to prove since, typically, there is little or no physical evidence*".⁷⁶ However, far from setting a more lenient standard of proof for the investor than the balance of probabilities standard, the tribunal raised the evidentiary bar, proclaiming that "*[t]he seriousness of the accusation of corruption.... demands clear and convincing evidence*"⁷⁷ (emphasis added). Unsurprisingly, it was held that the evidence adduced by the investor was "*far from being clear and convincing*".⁷⁸
31. This position reflects the prevailing arbitral practice of subjecting complainants of corruption to a high standard of proof: in a survey of arbitral case law on corruption, it was found that in just one out of twenty-five cases, a "*low*" standard of proof was applied, whereas in fourteen cases, a "*high*" standard of proof applied, which were variously described as "*certainty*", "*clear proof*", "*clear and convincing evidence*", and "*conclusive evidence*".⁷⁹ Other cases can be cited for the same proposition.⁸⁰ This standard of proof appears to approximate the "beyond reasonable doubt" standard in criminal law, in relation to which the UN Anti-Corruption Toolkit (2004)⁸¹ observes:

⁷² Karen Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto", ICCA Congress Series No. 11 (Kluwer, 2003) at p. 295.

⁷³ Matthias Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals", 5 Int'l Arb. Law Rev. 29 (2002).

⁷⁴ ICSID Case No. ARB/05/13, Award (October 8, 2009).

⁷⁵ Kyriaki Karadelis, "Corruption and the standard of proof", Global Arb. Rev. (26 July 2010).

⁷⁶ *EDF supra* note 74 at [221]

⁷⁷ *EDF ibid.* at [221].

⁷⁸ *EDF ibid.* at [221].

⁷⁹ See Antonio Crivellaro, "Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence" in in Kristine Karsten and Andrew Berkeley, *Arbitration, Money Laundering, Corruption and Fraud*, Dossiers- ICC Institute of World Business Law (September 2003) 109 at pp. 115-117.

⁸⁰ See ICC Case No. 6401 (1991) (*Westinghouse and Burns and Roe v Nat'l Power v Co and the Republic of Philippines*) ("*clear and convincing evidence amounting to more than a mere preponderance and cannot be justified by mere speculation.*"); *Dadras International v Iran (Iran-US Claims Tribunal)* (RLA-152), Award, dated 7 November 1995, in XXII Y.B.Comm. Arb. 504 (1997) ("*clear and convincing evidence'... [an] enhanced proof*

“... the nature of major corruption cases makes such a high burden of proof particularly difficult to meet. Senior officials actively engaged in corruption are often in a position to impede investigations and destroy or conceal evidence, and pervasive corruption weakens investigative and prosecutorial agencies to the point where gathering evidence and establishing its validity and probative value becomes problematic at best...”⁸²

32. Difficulties in proving corruption also often arise in private commercial arbitration disputes relating to “intermediary” or “agency” agreements. Brief digression from the issue of the standard and burden of proof is necessary to provide some background on these agreements. These are agreements under which an intermediary or agent (also variously known as “advisers”, “brokers”, “consultants”, “middlemen” or “representatives”⁸³) is engaged by his principal to assist in procuring for the latter a government contract or a license or permit to do business in a particular country.⁸⁴ They are popular with foreign firms which need intermediaries familiar with local laws and business customs in order to gain access to local markets.⁸⁵ The parties often include arbitration clauses, which has led to a significant number of arbitral awards on the subject.⁸⁶ Corruption on the part of the intermediary and/or the principal is often alleged, resulting in disputes which fall into one of the following three scenarios:

- (a) having procured the government contract or relevant approvals for his principal, the intermediary brings arbitration proceedings claiming his commission, which the principal refuses to pay on the ground that the intermediary had engaged in corrupt activities in performing the intermediary agreement, or the intermediary agreement is illegal or invalid as a contract providing for corruption;
- (b) following the intermediary’s failure to procure the government contract or relevant approvals, the principal brings arbitration proceedings to recover payments made to the intermediary, which the intermediary refuses to return on the ground that the intermediary agreement is illegal or invalid as a contract providing for corruption; or

requirement”); *Aryeh v Iran (Iran-US Claims Tribunal)* (RLA-145), 1997 WL 1175787 (“clear and convincing evidence”); *African Holdings Company of America Inc and Societe Africaine de Construction au Congo SARL v Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award (July 29, 2008) (“Irrefutable” evidence); *Oil Fields of Texas v Iran* (8 October 1986) 12 YB Comm Arb 292 (“If reasonable doubts remain, such an allegation [of corruption] cannot be deemed to be established” i.e. allegations of corruption must be proven beyond a reasonable doubt); and *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, (June 1, 2009) (“greater than the balance of probabilities but less than beyond reasonable doubt” or “clear and convincing evidence”).

⁸¹ The UN Anti-Corruption Toolkit is described in its foreword thus: “The Toolkit provides, based on the recently adopted UN Convention against Corruption, an inventory of measures for assessing the nature and extent of corruption, for deterring, preventing and combating corruption, and for integrating the information and experience gained into successful national anticorruption strategies.”

⁸² For an example of government suppression of reports on investigations into allegations of corruption, see Maziar Jamnejad, “World Duty Free v The Republic of Kenya: a Unique Precedent?” (summary of the Chatham House International Law discussion group meeting on 28 March 2007) at p. 15, available at <http://www.chathamhouse.org.uk/files/9129_il280307.pdf> (hereinafter “**Partasides (Chatham House)**”).

⁸³ See the *Wolf Committee Report on Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in BAE Systems plc— the Way Forward* (2008) (hereinafter “**Wolf Committee Report**”) at p. 25.

⁸⁴ See Sayed *supra* note 19 at pp. 191-192.

⁸⁵ See Scherer *supra* note 73 at p. 29.

⁸⁶ See for instance the arbitral awards cited in Scherer *ibid.* at pp. 37-40 and Crivellaro *supra* note 79 at pp. 119-144.

- (c) the state or state entity which awarded the government contract seeks a declaration (as claimant) that it was procured through corruption of its representatives by the principal's intermediary, and is therefore unenforceable or subject to rescission, or argues it is not liable (as respondent) on a claim brought by the principal for breach of contract (assuming that contract contains an arbitration clause).⁸⁷
33. Why is it the case that corruption on the part of the intermediary and/or the principal is often alleged? Intermediary agreements are usually drawn up in a fairly standard form, under which the intermediary undertakes to provide services which improve the chances of the principal obtaining a government contract, license, or permit.⁸⁸ For instance, the intermediary may be tasked with conducting market research, providing advice on local regulations, and negotiating or building relationships with government officials on his principal's behalf.⁸⁹ In exchange, the intermediary receives a commission which is calculated as a percentage of the value of the contract awarded to the principal, rather than the quality or quantity of the services provided.⁹⁰ The value of the awarded contract can be very large, and commission payments correspondingly substantial,⁹¹ hence the intermediary's remuneration may be out of proportion to the nature of the services which he renders.⁹² These potentially high rewards, coupled with the fact that the intermediary may not be reimbursed for his expenses, and may only be paid when his efforts (which may take place over a significant period of time⁹³) result in successful procurement of the desired contract, permit, or license, contributes to "*significant pressure [on the intermediary] to make a payment to a government official to 'ensure' success*".⁹⁴ Some intermediaries "*will be tempted, to obtain contracts with the aid of corrupt payments either with or without the knowledge or connivance of the company*".⁹⁵ Moreover, some intermediary agreements may require the intermediary to exercise his personal influence over public officials in order to procure a contract or government approvals for his principal on the best possible terms.
34. These elements of intermediary agreements may give rise to concerns that part of the commission paid to the intermediary is meant to be reimbursement for bribes paid to government officials, or that bribes were in fact paid, whether with or without the principal's consent. The intermediary may also exercise improper influence over government officials in order to procure a favourable result for his principal.⁹⁶ Depending on the applicable legal regime, intermediary agreements providing for the exercise of influence by the intermediary may be regarded as legitimate lobbying contracts,⁹⁷ or

⁸⁷ See Crivellaro *supra* note 79 at p. 113 and *Oxford Handbook supra* note 11 pp. 592-610.

⁸⁸ See Crivellaro *supra* note 79 at pp. 110-118.

⁸⁹ See the *TRACE Due Diligence Guidebook: Doing Business with Intermediaries Internationally* (2010), available at <https://secure.traceinternational.org/data/public/The2010TRACEDueDiligenceGuidebook-65418-1.pdf>, (hereinafter "*TRACE Due Diligence Guidebook*") at p. 5; *Woolf Committee Report supra* note 83 at p. 25; and Crivellaro *supra* note 79 at pp. 110-118.

⁹⁰ *Ibid.*

⁹¹ *Woolf Committee Report supra* note 83 at p. 25.

⁹² Crivellaro *supra* note 79 at p. 112.

⁹³ As long as 20 years in some cases, as noted in the *Woolf Committee Report supra* note 83 at p. 25.

⁹⁴ The *TRACE Due Diligence Guidebook supra* note 89 at p.5.

⁹⁵ *Woolf Committee Report supra* note 83 at p. 25.

⁹⁶ See the discussion below at [50]-[57] on the propriety of intermediary agreements under various national laws.

⁹⁷ See [53] and [57] below for a discussion on the English view of lobbying contracts. In ICC Case No. 7047 (1994), it was explained that an intermediary may engage in "lobbying" of government officials, so that they would award a contract to the intermediary's principal. Such "lobbying" was described as follows (Sayed *supra* note 19 at p. 352 fn. 1068):

"Lobbying for [Jugoinport]; let me explain to you that Kuwait is a small community, and the people who work in the Ministry of Defense or in Ministry of Finance, those are officers, and some of them, we go

corrupt contracts for the trading in influence (otherwise known as influence peddling⁹⁸ or trafficking in influence⁹⁹).¹⁰⁰ Laws “[c]riminalising trading in influence seeks to reach the close circle of the official or the political party to which he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power [but are not themselves decision-makers] and try to obtain advantages from their situation [by offering to misuse their influence on decision-makers in return for some form of benefit], contributing to the atmosphere of corruption.”¹⁰¹

35. The difficulty in proving corruption in connection with an intermediary agreement lies of course in demonstrating there was such impropriety involved or intended in the manner that the intermediary performed or was to perform the agreement.¹⁰² Aside from the problems already mentioned above that parties face in procuring evidence of corruption, one can also imagine how independent evidence necessary to corroborate a party’s allegations of corruption will “*have to come from the officials or politicians whom the intermediary has bribed, which is hardly likely when the bribe takers are likely to lay themselves open to the possibility of prosecution in their home countries.*”¹⁰³ Thus, some commentators have remarked that burden shifting (and presumably, the lowering of the burden of proof as well) is justifiable in adjudicating intermediary agreement disputes in which corruption is alleged, since “*the party accused of corruption is typically easily capable, if it is actually innocent of the allegations, of producing countervailing evidence (e.g., proof that an intermediary spent unusually large consulting fees on legitimate goods or services in support of the investment or proof that a nontransparent ownership structure is not meant to conceal wrongful activities).*”¹⁰⁴
36. In view of the high standard of proof imposed by tribunals, and the difficulty faced by parties in procuring evidence of corruption, there is considerable sympathy for those advocating lowering of the standard of proof or shifting the burden of proof to the impugned party. However, in our opinion, Partasides makes the soundest suggestion: that (i) there should be no shifting of the burden of proving corruption, as “*allegations of illegality must, like any other allegation, be proven*”; and (ii)

together to the beach, we are friends, we went to school together, they come to our house, we go to their house. We are a small community... everyone knows each other. Lobbying means that when you have been trying to sell your equipment for more than 10 or 12 years, I lobby for [Jugoimport] and convince the people in the committee face to face that why don't you try this M84, this is a very good tank, this is a tank which is virtually a T72 restructured from inside to meet your requirements? On the other side you would get a better buy from that, why don't you give a chance for them to do that? They are refusing, they don't want even to look at those products from those countries at all, they were concentrating on the Americans and Europeans; but lobbying means convincing the people to agree to have the chance for the Yugoslav [suppliers] to see their products and to test it, and if it goes through the test and the trial, they [i.e. the Yugoslav suppliers] will be the one who get the job. The other one, I also lobbied the Minister of Finance that Kuwait will really get benefit from that they will reduce their debts. This is a part of lobbying, gathering information for [Jugoimport]. It's not secret information to know what would be the number of tanks they want, how much ammunition they want, what would be the training procedures, what would be the best for the Yugoslav [tanks] to work, to bring their people to Kuwait, to bring the people? This is part of the lobbying.”

⁹⁸ See Sayed *supra* note 19 at p. 199.

⁹⁹ See Article 433-1 of the Criminal Code of France.

¹⁰⁰ See [10] and *supra* note 33.

See also Article 12 COE Criminal Law Convention.

¹⁰¹ Explanatory Report to the COE Criminal Law Convention at [64].

¹⁰² See discussion at [51]-[57] below.

¹⁰³ *Corruption and Misuse of Public Office supra* note 12 at [9.134].

¹⁰⁴ Lamm, Pham, and Moloo *supra* note 6 at p. 701.

tribunals should continue to apply the balance of probabilities standard when evaluating allegations of corruption.¹⁰⁵

37. Notwithstanding the fact that evidence of corruption is difficult to procure, we disagree with those who suggest that the tribunal should shift the *burden of proof* onto the impugned party, as it is too radical to depart from such a basic and widely accepted rule as the requirement that a party must prove the facts upon which it wishes to rely. This rule exists for good reason—to prevent parties from making baseless assertions and to secure the integrity of the fact finding process. It avoids the presumption that a fact exists when evidence is not sufficiently probative to demonstrate such. It is also, in a sense, a rule of natural justice and due process.¹⁰⁶ If this rule can be abridged in relation to proof of corruption, then by parity of reasoning there should be nothing to stop its application to other issues for which proof is difficult to obtain. This is not a slippery slope that international arbitration can afford to embark upon. Partasides cites the following passage from *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, which we regard as encompassing this non-derogable cardinal rule of law:

“The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. ... The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.

But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat.¹⁰⁷ (emphasis added)

38. Turning to the requisite *standard of proof* that a party must discharge to establish corruption, like Partasides, we think it should remain the balance of probabilities standard. It should certainly not be pegged at the beyond reasonable doubt standard in criminal law, since the tribunal is dealing with the consequences of corruption on a matter of *civil* liability.¹⁰⁸ A tribunal does not impose criminal sanctions, which renders it unnecessary and undesirable for it to proceed with the same degree of caution as a criminal court would apply in ascertaining the facts of the case before it. More importantly, given the difficulty in proving corruption, a criminal standard of proof would be almost impossible to satisfy and plays directly into the hands of unscrupulous parties, who can simply deny wrongdoing and exploit the high threshold of proof to avoid liability. The current trend of tribunals imposing such a high standard of proof (see [30] above) is thus regrettable.
39. If tribunals are to assess the existence of corruption on a balance of probabilities standard, should they go about this task in the same way it would determine more mundane matters, such as whether, for instance, words amounting to a contractual offer were conveyed by one party to another? The answer to this question is: *“it depends”*. The balance of probabilities standard should be understood

¹⁰⁵ See Partasides (Chatham House) *supra* note 82 at pp. 8-10.

¹⁰⁶ Cremades and Cairns *supra* note 4 at p. 83. However, to the extent that Cremades and Cairns argue for a higher standard of proof of corruption, we disagree for the reasons set out in this Section.

¹⁰⁷ *Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award (4 May 1999) at [219] and [220].

¹⁰⁸ Partasides (Chatham House) *supra* note 82 p. 14.

and applied in a nuanced fashion, which cannot be divorced from the particular circumstances of each case. To determine whether corruption is proved on a balance of probabilities, it is necessary to consider factors such as the seriousness of the allegations of corruption and their legal consequences if proven,¹⁰⁹ the inherent likelihood or unlikelihood of corruption in the specific circumstances of the case and, as Partasides suggests, the “*intrinsic difficulty of proving [corruption]*”.¹¹⁰

40. Hoffmann L.J. illustrates how the inherent unlikelihood of a particular alleged event may heighten the cogency of the evidence required to establish its occurrence: “... *some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.*”¹¹¹ Since in many cases, corruption will be inherently more unlikely than, for instance, words amounting to a contractual offer, it will therefore require more cogent evidence to establish. However, as Partasides rightly points out, this must be weighed with the interests of fairness, which require an arbitral tribunal to consider “*the challenge the parties before them face in substantiating their claims [of corruption] due to the circumstances of those claims... [and the need] to take account of the intrinsically difficult nature of demonstrating a bribe*”.¹¹² These factors may depress the strength of evidence of corruption required.
41. It should be noted that varying the quality of evidence required to prove corruption according to the above-mentioned factors does not entail departure from the balance of probabilities standard. As Richards L.J. explains: “[a]lthough there is a single civil standard of proof on the balance of probabilities, it is flexible in its application... the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”¹¹³
42. Under the rubric of this flexibly understood balance of probabilities standard, a tribunal may consider circumstantial evidence, as well as draw adverse inferences, in determining whether corruption has been proven by the complainant.
43. Under the applicable arbitration rules, a tribunal is usually conferred wide discretion to determine the admissibility, relevance, materiality and the weight of the evidence adduced.¹¹⁴ Accordingly, a

¹⁰⁹ As the House of Lords recently held in *In re Doherty (Original Respondent and Cross-appellant) (Northern Ireland)* [2008] UKHL 33: “*in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard... Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann’s example of the animal seen in Regent’s Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact.*” (emphasis added)

¹¹⁰ Partasides (ICSID Rev.) *supra* note 69 at [53].

¹¹¹ [2001] UKHL 47. Other common law jurisdictions have adopted the English approach: see for instance the leading Supreme Court of Canada decision in *Regina v Oakes* (1986) 26 DLR (4th) 200, and the Singapore Court of Appeal decision in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict* [2005] SGCA 27.

¹¹² Partasides (ICSID Rev.) *supra* note 69 at [55]-[56].

¹¹³ *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605.

¹¹⁴ See for instance Article 27(4) UNCITRAL Arbitration Rules 2010 and Article 9(1) IBA Rules on the Taking of Evidence in International Arbitration 2010.

tribunal may find indirect or circumstantial evidence to be sufficient proof of corruption.¹¹⁵ For instance, in ICC Case No. 8891 (1998), the indirect evidence of a corrupt intermediary agreement was observed to include the following: (i) intermediary's inability to provide proof of his execution of the contractually stipulated services; (ii) excessively high remuneration in relation to the type of services to be rendered; and (iii) remuneration assessed based on the value of the contract awarded to the principal (as opposed to the quantity or quality of services rendered).¹¹⁶ The list of "red flags" set out in the US Department of Justice's *Lay-Person's Guide to the FCPA*,¹¹⁷ the Woolf

¹¹⁵ For instance, in ICC Case No. 4145 (1984), even though the consultancy price of an intermediary agreement was "very high", the tribunal held that this alone was not sufficient circumstantial evidence to prove corruption. Cf. ICC Case No. 6497 (1994), where it was held that the "extremely unusual fee" of 33.33% gave rise to a "high degree of probability" that the intention of the intermediary agreement was to bribe government officials. See further generally *Oxford Handbook supra* note 11 at pp. 612-613.

¹¹⁶ See generally Scherer *supra* note 73 at pp. 31-36 (discussing in detail other circumstantial evidence which may indicate a corrupt intermediary agreement).

¹¹⁷ The US Department of Justice's *Lay-Person's Guide to the FCPA* states:

"The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "knowing" includes conscious disregard and deliberate ignorance. The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official." Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives... in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," i.e., unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer." (emphasis added)

See further World Compliance's "Navigating Through the FCPA, Debunking Myths White Paper" available at <<http://www.worldcompliance.com/en/resources/white-papers.aspx>>, which lists the following top thirty red flags:

"General Red Flags"

Flag 1: Your Company has received an "improper payment" audit in the past five years. Flag 2: A payment in a country with widespread corruption or history of FCPA violations occurring in that country. Countries that are considered to fit this category include some Middle Eastern and Asian countries, and much of the former Soviet Union and Africa. Flag 3: Widespread news accounts of payoffs, bribes, or kickbacks. Flag 4: The industry involved has a history of FCPA violations. These industries include defense, aircraft, energy, pharmaceutical/life sciences, and construction services.

Transaction-Specific Red Flags for Intermediaries

Flag 5: An agent, distributor, or joint venture partner refuses to provide confirmation of willingness to abide by the FCPA. Flag 6: Family or business ties of an intermediary with a government official. Flag 7: Bad reputation of the agent or rumors of prior improper payments or other unethical business practices by the intermediary. This is a key flag, and parties should document the good reputation and experience of the intermediaries they hire. Flag 8: Listing of agent on databases listing known corruption risks like the World Bank List of Debarred Firms or a database of corruption profiles. Flag 9: The intermediary requires that its identity not be disclosed. Flag 10: The potential foreign government customer recommends the intermediary. This could suggest a coordinated scheme to divide a payoff. Flag 11: The intermediary lacks the facilities and staff to perform the required services. This could suggest that the intermediary may be performing its job through corrupt payments rather than hard work. Flag 12: The intermediary has violated local law, even if the violation is not related to bribery. Flag 13: The intermediary wishes to use

Committee's *Report on BAE Systems*,¹¹⁸ and TRACE International's *Due Diligence Guidebook*,¹¹⁹ elucidate further circumstances which may indicate an intermediary's involvement in corrupt

anonymous subcontractors. Flag 14: Unusually large or frequent political contributions to a person or political party by the intermediary, which could suggest an arrangement for the direction of business to the intermediary. Flag 15: Insistence on the involvement of third parties who provide no value-added to the transaction. Flag 16: A proposed foreign partner is owned by a key government official or a close relative or linked to a state owned enterprise. Flag 17: Rumors of a silent partner in a joint venture, distributor, or agent that is not disclosed by the intermediary. Flag 18: The proposed relationship is not in accordance with local laws or regulations, including rules dictating when a government official can be involved in a business relationship. Flag 19: The intermediary attempts to assign its rights or obligations to another party. Flag 20: The intermediary has an unexplained breakup with another company, which could suggest the discovery of illegal conduct in that relationship.

Control-Based Red Flags for Intermediaries

Flag 21: A joint venture partner insists on maintaining two sets of books for tax or other purposes. Flag 22: An intermediary refuses to allow auditing of its books. Flag 23: An intermediary requests payment of inadequately documented or entirely undocumented expenses.

Payment Requests by Intermediaries

Flag 24: Payment of a commission that is at a level substantially above the going rate for agency work in a particular country. An excessive commission might suggest that a portion of the funds is going to a foreign official. Then again, your agent might just be greedy. Flag 25: Payment through convoluted means. If your agent asks for payment to a numbered account in the Bahamas, the DOJ or SEC could consider this failure to investigate culpable conduct under the FCPA. Flag 26: Over-invoicing (i.e., the intermediary asks you to cut a check for more than the actual amount of expenses). Flag 27: Requests that checks be made out to "cash" or "bearer," that payments be made in cash, or that bills be paid in some other anonymous form. Flag 28: Requests that payments be made to a third party. Flag 29: Payment in a third country, which suggests a plan to divide the commission in the third country away from government scrutiny. Flag 30: Requests for unusual bonuses, one-time success fees, or extraordinary payments."

¹¹⁸ For background on the *Wolf Committee Report* supra note 83, see *Corruption and Misuse of Public Office* supra note 12 at [5.110]-[5.112]. The *Wolf Committee Report* at p. 26 lists the following red flags:

"a history of corruption in the territory; an Adviser has a lack of experience in the sector and/or with the country in question; non-residence of an Adviser in the country where the customer or the project is located; no significant business presence of the Adviser within the country; an Adviser represents other companies with a questionable reputation; refusal by an Adviser to sign an agreement to the effect that he has not and will not make a prohibited payment; an Adviser states that money is needed to "get the business"; an Adviser requests "urgent" payments or unusually high commissions; 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; an Adviser requires payment of the commission, or a significant proportion thereof, before or immediately upon award of the contract by the customer to the company; an Adviser claims he can help secure the contract because he knows all the right people; an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision; an Adviser is recommended by a government official or customer; an Adviser arrives on the scene just before the contract is to be awarded; an Adviser shows signs that could later be viewed as suggesting he might make inappropriate payments, such as indications that a payment will be set aside for a government official when made to him; and/or there are insufficient bona fide business reasons for retaining an Adviser."

¹¹⁹ "TRACE is a non-profit membership association working to reduce bribery in transactions involving intermediaries including agents, representatives, consultants, distributors and subcontractors among others": see the *TRACE Due Diligence Guidebook* supra note 89 at p. 1. The *TRACE Due Diligence Guidebook* states that these red flags arise where an intermediary:

"Requests payment in cash or to a numbered account or the account of a third party; Request's payment in a country other than the intermediary's country of residence or the territory of the sales activity (especially if it is a country with little banking transparency); Requests payment in advance or partial-payment immediately prior to a procurement decision; Requests payment for extraordinary, ill-defined or last-minute expenses; Has an employee who simultaneously holds a government position; Has a family member

dealings, and also establish a principal's wilful blindness of the intermediary's corrupt intent if such circumstances were disregarded by the principal when it entered into the intermediary agreement (the latter will constitute corruption under certain legal regimes¹²⁰). The following have also been identified as potential indicia of corruption in general under the UNCAC¹²¹ and the OECD Convention¹²²: (i) the establishment of off-the-books accounts; (ii) the making of off-the-books or inadequately identified transactions; (iii) the recording of non-existent expenditures; (iv) the entry of liabilities with incorrect identification of their object; (v) the use of false documents; and (vi) the intentional destruction of bookkeeping documents earlier than foreseen by the law.¹²³ Where necessary, expert testimony can be adduced to assess these various indicia of corruption before a tribunal,¹²⁴ so that the tribunal may better determine their weight, and therefore whether corruption has been proven on a balance of probabilities.¹²⁵

44. In the exercise of its broad discretion in evaluating evidence of corruption, a tribunal may also draw adverse inferences¹²⁶ from an impugned party's failure, without sufficient justification, to provide evidence requested by the tribunal.¹²⁷ Commentators neatly summarise the position thus:

in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary's efforts; Refuses to disclose owners, partners or principals; Is owned by a government entity; Uses shell or holding companies or other unusual corporate structures that obscure ownership without credible explanation; Is specifically requested by a customer; Is recommended by an employee with enthusiasm out of proportion to qualifications; Has a business that seems understaffed, ill-equipped or inconveniently located to support the proposed undertaking; Has little or no expertise in the industry in which he/she seeks to represent his/her company; Is insolvent or has significant financial difficulties; Is ignorant or indifferent to local laws and regulations governing the region in question and the intermediary's proposed activities in particular; Identifies a business reference who declines to respond to questions or who provides an evasive response; Is the subject of credible rumors or media reports of inappropriate payments; or Is currently under investigation or has been convicted of previous violations of law."

¹²⁰ For instance, under the FCPA, "*'simple negligence' or 'mere foolishness' should not be the basis for liability. However... the so called 'head-in-the-sand' problem - variously described in the pertinent authorities as 'conscious disregard,' 'willful blindness' or 'deliberate ignorance' -- should be covered so that management officials could not take refuge from the act's prohibition by their unwarranted obliviousness to any action (or inaction), language or other 'signaling device' that should reasonably alert them of the 'high probability' of an FCPA violation*" (emphasis added): see the Legislative History House Report (1977), available at <<http://www.justice.gov/criminal/fraud/fcpa/history/>>.

¹²¹ See Article 12(3).

¹²² See Article 8(1).

¹²³ See also Cremades and Cairns *supra* note 4 at p. 81.

¹²⁴ See for instance Articles 20(3) and 20(4) of the ICC Rules, which provide that:

"3
*The Arbitral Tribunal may decide to hear witnesses, **experts appointed by the parties** or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.*

4
*The Arbitral Tribunal, after having consulted the parties, **may appoint one or more experts, define their terms of reference and receive their reports.** At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert appointed by the Tribunal."* (emphasis added)

¹²⁵ Lamm, Pham, and Moloo *supra* note 6 at p. 704.

¹²⁶ Adverse inferences are drawn by tribunals in other contexts as well. See for instance *Redfern and Hunter supra* note 42 at [6.129] fn. 81 ("*The Iran-US Claims Tribunal drew adverse inferences from the silence of a party in the face of alleged breach or non-performance of the contract when some complaint would have been expected and from failure of a party to mention a point in a contract or in contemporaneous correspondence consistent with their position in the arbitration.*") and *Born supra* note 40 at pp. 1855-1856 ("*Tribunals are permitted to rely on*

*“When deciding to draw adverse inferences, a tribunal must determine that: 1) the party requesting that an adverse inference be made has presented all relevant evidence in its possession and, in any event, has presented sufficient indicia of fraud or corruption to corroborate its allegations of illicit activity; 2) the party against whom the adverse inference is being made refuse to produce evidence, which it likely has access to and which it has been required to produce; 3) the inference being drawn in consistent with the facts in the record and logically related to the evidence being withheld.”*¹²⁸

45. The tribunal may also draw adverse inferences from a party’s failure or inability to adduce counter evidence where *prima facie* evidence of its involvement in corruption has been produced. The result of drawing such inferences may be to allow the tribunal to make a finding of corruption where the evidence is *otherwise* insufficient to meet the balance of probabilities standard.¹²⁹ Drawing of an adverse inference in this situation is different from reversing the burden of proof. An adverse inference only arises from a failure by the impugned party to adduce evidence, *which can be reasonably construed in the circumstances as an attempt to conceal corrupt activities*. It provides the party alleging corruption with an additional inferred fact to discharge its burden of proof, which burden remains on that party throughout the proceedings. On the other hand, a reversal of the burden of proof is effected upon mere provision of some *prima facie* evidence of corruption by the party alleging corruption, *even if there is no suspicious withholding of or refusal to adduce evidence by the impugned party*; the latter *thereafter* bears the burden of *disproving* corruption. One example of a case in which an adverse inference was drawn is ICC Case No. 3916 (1982). Here, the tribunal held that the impugned intermediary’s repeated refusal to disclose the “*personal actions*” taken to procure an Iranian public contract for his principal gave rise to the presumption that corrupt activities were being concealed.¹³⁰
46. The tribunal must however proceed with caution before drawing any adverse inference. An adverse inference should only be drawn if it is the natural inference from the facts, and dispositive effect given to it if it is so cogent or compelling that it tips the preponderance of evidence in favour of the existence of corruption. Silence can often be motivated by innocent reasons, and even if it gives rise to a suspicion of wrongdoing, it must be weighed against the weaknesses in the complainant’s case. It is not in every case that an adverse inference can *in itself* fill in crucial gaps in the evidence. For instance, there should have been no room for drawing an adverse inference on the facts of *EDF*,

presumptions or inferences regarding evidence. Examples include negative inferences drawn from a party's failure to produce obviously material documents or witnesses in its control, a party's failure to comply with disclosure orders, other types of procedural misconduct in the arbitration, the absence of contemporaneous objection to invoices or other correspondence, and the regularity of contemporaneous records.”

¹²⁷ See Article 9(5) IBA Rules on the Taking of Evidence in International Arbitration 2010:

“If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”

See also Lamm, Pham, and Moloo *supra* note 6 at pp. 704-706; and *Rockwell International Systems, Inc. v Government of the Islamic Republic of Iran* (1989) 23 Iran-US Claims Tribunal Rep. 150 (the tribunal observed in relation to Iran’s refusal to grant the claimant access to relevant documents in its possession that “*prima facie* evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty **and an inference from the evidence can be drawn.**” (emphasis added)).

¹²⁸ Lamm, Pham, and Moloo *supra* note 6 at p. 706.

¹²⁹ Partasides (ICSID Rev.) *supra* note 69 at [62]-[77].

¹³⁰ Partasides (Chatham House) *supra* note 82 at p. 10.

even if there was no counter-evidence adduced by the respondent to rebut the allegations of corruption against it. The tribunal noted that, given the inconsistencies and weaknesses in the claimant's evidence of corruption, "*the gaps in the [claimant's] story [of solicitation of bribes by the respondent] [were] very significant*".¹³¹ For example, when the principal witness for the claimant gave evidence that he had been informed of the identity of the person who solicited the bribe, he contradicted earlier denials made to the Romanian Anti-Corruption Authority that he did not know who that person was.¹³² Moreover, such evidence as to that person's identity was hearsay which, whilst admissible, was insufficient proof of the respondent's solicitation of the bribe.¹³³ Thus, even though the "*[r]espondent's witnesses' denials [of corruption] were also not clear and convincing*",¹³⁴ the claimant arguably could not have discharged its burden of proof even on the balance of probabilities standard.

47. To conclude, we agree with Partasides' view that tribunals should eschew the "*unthinking rigidity*"¹³⁵ of invariably applying a "*clear and compelling*" standard of proof once corruption is alleged. Different circumstances call for different demands as to the strength and quality of the evidence required to prove corruption to the tribunal's satisfaction. The balance of probabilities standard remains the compass, but it is to be flexibly understood and applied, so as to accommodate the specific circumstances of each case. Other devices, such as the drawing of adverse inferences and reliance on indirect indicia of corruption, assist tribunals in uncovering corruption which has been concealed from inspection. As Partasides points out, "*Tribunals will sometimes know what they are looking at, even if there are some missing pieces. In the right circumstances, they shouldn't hesitate to make the logical deduction simply because the allegation is serious.*"¹³⁶ It is of course cautioned that inferences must be justifiably drawn on the facts, and circumstantial evidence must carry sufficient weight to be probative of corruption. The fight against corruption must be balanced with the rights of the parties and the integrity of the fact finding process in international arbitration. While "*[i]n reality, many arbitrators will allow corruption allegations to colour their judgment without actually stating that that is the case, chiefly due to the evidential difficulties faced if they were explicit in their views*",¹³⁷ arbitrators must not succumb to this temptation, and instead remind themselves, as *Himpurna* emphasized, that mere "*Rumours or innuendo will not do*". Their duty is to decide cases by assessing the evidence in accordance with the law, and not mere suspicions based on equivocal evidence.

IV. Determining the Law Governing the Elements and Legal Consequences of Corruption: Conflict of Laws Analysis in Relation to Intermediary Agreements

48. In order to make a finding that a party has committed a "corrupt" act, and to determine the legal consequences which ensue, a tribunal must ascertain whether the established facts make out all the elements of the offence of corruption *under the applicable law*. In the first instance, the tribunal will look to the law chosen by the parties to govern their contract. Naturally, rational and sophisticated commercial parties will choose a law which upholds the validity of their contract— they will not

¹³¹ *EDF supra* note 74 at [224].

¹³² *EDF ibid.* at [223].

¹³³ *EDF ibid.* at [224].

¹³⁴ *EDF ibid.* at [227].

¹³⁵ Partasides (ICSID Rev) *supra* note 69 at [60].

¹³⁶ Constantine Partasides' "Proving Corruption in International Arbitration: A Balanced Standard for the Real World" (presented on 18 January 2011 in London at the British Institute of International and Comparative Law on "Impact of Bribery and Corruption on the International Arbitral Process") at [69].

¹³⁷ Partasides (Chatham House) *supra* note 82 at p. 14.

subject the contract to a law containing anti-corruption regulations or public policy considerations rendering the contract unenforceable. However, mandatory laws or public policies of the place of performance or arbitral seat may provide, contrary to the parties' chosen law, that one or both parties had committed corrupt acts, or entered into their contract with corrupt intentions.

49. Where such differences between the potentially applicable laws arise, conflict of laws analysis come into play to determine the law governing the existence and consequences of corruption. Of course, this scenario will almost never arise where outright bribery of government officials is in issue. No civilised country will tolerate such a clear case of corruption,¹³⁸ and therefore, regardless of the choice of law and substantive rules applied by the tribunal, the same result ensues:¹³⁹ a corrupt act will be deemed to have been committed or contemplated under the contract, and claims brought by a corrupt party will be dismissed (see [89]-[100] below for a discussion of the legal consequences of a finding corruption). This is a "false conflict" situation, which does not call for the tribunal to engage in conflict of laws analysis.
50. However, a "true conflict" can arise in disputes involving intermediary agreements which contemplate the exercise of personal influence over government officials.¹⁴⁰ It will be recalled that intermediary agreements are contracts under which an intermediary is engaged by his principal to assist in procuring for the latter a government contract or licenses and approvals to do business in a particular country (see [32] above). Intermediary agreements often provide that the seat of arbitration and the country whose law governs the contract is *not* the country awarding the contract or license. For instance, in *Omnium de Traitement et de Valorisation S.A. v Hilmarton Ltd*¹⁴¹ ("*Hilmarton*"), the intermediary agreement between a French corporation and an English intermediary was to be performed in Algeria (the intermediary was to negotiate with Algerian government officials to procure for the principal a construction contract in Algeria), but was governed by Swiss law, and provided for arbitration in Switzerland. The conflict between Algerian and Swiss law was evident in this case: anti-corruption regulations under Algerian law prohibited intermediation in government procurement, whereas Swiss law applied no such presumption against intermediary agreements (*Hilmarton* is discussed in more detail below at [71]).
51. *Hilmarton* demonstrates the potential for true conflict to arise in disputes involving intermediary agreements. Some countries, such as Algeria (the place of performance in *Hilmarton*), adopt a broad prophylactic rule prohibiting intermediary agreements *per se*,¹⁴² "*under the assumption that such [agreements] conceal corruption*",¹⁴³ in light of concerns (discussed above at [33]-[34]) that

¹³⁸ See [2] and [5] above. Cf. Kenyan local customs, discussed at [87] below.

¹³⁹ Born *supra* note 40 at pp. 2139-2140. See also Sayed *supra* note 19 at pp. 260-261.

¹⁴⁰ Conflict of laws analysis may also be necessary (whether or not an intermediary agreement is involved) where there are differences between the potentially applicable laws to the parties' dispute with respect to the precise elements of corrupt conduct amounting to public or private sector bribery (see *supra* note [19] and referenced text). Where such differences arise, the conflict of laws analysis set out in this Section is also generally applicable *mutatis mutandis*. Note, however, that these differences are bound to be less pronounced, as compared to the attitudes adopted by different jurisdictions towards the propriety of intermediary agreements (discussed in the following paragraphs).

¹⁴¹ [1999] 2 Lloyd's Law Rep. 222.

¹⁴² See generally Sayed *supra* note 19 at pp. 192-193 and 199, and *Oxford Handbook supra* note 11 at p. 607. Countries like Algeria, Libya and Saudi Arabia completely ban the use of intermediaries in the procurement of armament contracts (government entities only accept offers that come directly from suppliers and manufacturers). Other countries like Egypt, Kuwait, and Bahrain restrict the appointment of intermediaries to registered consultant firms or domestic citizens.

¹⁴³ Sayed *supra* note 19 at pp. 168-169.

intermediary agreements are intended for the bribery of, or the exercise of *improper* personal influence over, government officials, whether or not this is proven to have occurred or been intended by the parties. However, this is by no means a universal practice.¹⁴⁴ Many other jurisdictions, such as Switzerland (the seat of arbitration and the country whose law the parties chose to govern the intermediary agreement in *Hilmarton*), eschew a *per se* prohibition against intermediary agreements, and instead require demonstration that the parties in fact intended for the intermediary to bribe or otherwise exercise improper influence over public officials, or that the agreement was performed in this manner.

52. A number of legal regimes can be cited as adopting the latter position. For instance, Article 18 UNCAC,¹⁴⁵ Article 4(1)(f) of the African Union Convention on Preventing and Combating Corruption, and Article 12 COE Criminal Law Convention, only require state parties to criminalise the “*abuse*” or exercise of “*improper*” influence by an influence peddler. The Explanatory Report to Article 12 COE Criminal Law Convention further provides that: “[*i*]mproper” influence must contain a corrupt intent by the influence peddler: *acknowledged forms of lobbying do not fall under this notion.*”¹⁴⁶
53. A similar position prevails under English common law. In *Lemenda Trading Co. Ltd v African Middle East Petroleum Co. Ltd*¹⁴⁷ (“**Lemenda**”)— a case concerning an intermediary agreement under which the plaintiff was to procure for the defendant the renewal of an oil supply contract, through the use of its personal influence on various persons in Qatar— Philips J. recognised that, “*in certain circumstances the employment of intermediaries to lobby for contracts or other benefits is a recognised and respectable practice.*”¹⁴⁸ Referring to this comment in *Lemenda*, Jack J. in *Tekron Resources Ltd v Guinea Investment Co. Ltd.* explained that a representation agreement between the plaintiff and defendant, which required the plaintiff to conduct negotiations with the Government of Guinea in return for a commission, could not be held (as alleged) illegal and/or contrary to English or Guinean public policy, *merely* because it was contemplated that the plaintiff would use its personal influence in carrying out its obligations:

*“Mr Smouha submitted that there were **three reasons of public policy** why agreements such as the representation agreement should be considered to be contrary to public policy under English law. **The first was that, where an intermediary has a special personal relationship with an official, there is a risk that the official's decision will be affected. The second was that, where there is such a relationship, transparency may be lost. The third was that such an intermediary will inevitably be in a position of conflict because his desire to preserve his relationship will conflict with his duty to his client. I accept that these are valid considerations. They are not the***

¹⁴⁴ Some Gulf states in fact expressly permit or even mandate the use of local intermediaries in the procurement of public contracts: see Crivellaro *supra* note 79 at p. 112.

See generally Sayed’s (*supra* note 19) extensive discussion of the anti-corruption laws of various jurisdictions at pp. 190-230 and 348-353; *Oxford Handbook supra* note 11 at pp. 607-608 fn. 107.

See also *Shaikh Faisal t/a Gibca v Swan Hunter Singapore Pte Ltd* [1995] 1 SLR 394 (“**Swan Hunter**”), a case which concerned the appointment of an intermediary in the UAE to tender for a contract to supply military vehicles to the UAE armed forces. This case demonstrates that both Singapore and the UAE do not prohibit the use of intermediaries in tendering for government contracts *per se*. See further *infra* note 149.

¹⁴⁵ See *supra* note 33.

¹⁴⁶ Explanatory Report to the COE Criminal Law Convention at [65]. For an explanation of how lobbying works in practice, see *supra* note 97.

¹⁴⁷ [1988] 1 QB 448.

¹⁴⁸ *Lemenda ibid.* at 458. Cf. *Montefiore v. Menday Motor Components Co. Ltd.* [1918] 2 K.B. 241. For an explanation of how lobbying works in practice, see *supra* note 97.

only considerations. The question is whether they require that an intermediary who deals with an official, a minister, a government department and successfully builds a relationship of respect, of confidence, of trust, is to be barred from further dealings by the very fact of the relationship once it has been sufficiently established. There are, of course, advantages in officials dealing with persons whom they respect and can trust and in whom they have confidence.

[...]

In my view it would be a substantial extension of the ambit of public policy as established in the cases if I were to accept Mr Smouha's submission. It would prevent the use of intermediaries in numerous situations where their use is now well-established in commercial situations, whether or not a 'public' body is involved. It would also bring in a serious element of uncertainty as to where the line was to be drawn. At what point would an intermediary cease to be able to negotiate fresh transactions with a particular third party? What happens when a position of "influence" develops during a negotiation? The previous authorities which I have considered [which included the case of Lemenda] were concerned with what I may call the sale of influence and only influence, and in circumstances in which it could be considered that the use of the influence would involve some impropriety. I should not accept Mr Smouha's submission.” (emphasis added)¹⁴⁹

54. The same general principles appear applicable in civil law jurisdictions, which do not prohibit intermediary agreements *per se*. In its definition of “trafficking in influence”, Article 433-1 of the French Criminal Code refers to “abuse” of influence to obtain “contracts or any other favourable decision from a public authority or the government”. The tribunal in ICC Case No. 7664 (1996) thus noted that, under French law, an agreement for an intermediary to exercise corrupt influence over public officials is illegal, but “[w]e know that in international trade a lot of the big ticket operations are accompanied by contracts of commission stipulating that the agent shall have the obligation to intervene in favour of the conclusion or the performance of the contract. Such a contract does not involve, in its own logic, any defect affecting its validity.”¹⁵⁰ Likewise, applying Swiss law, the tribunal in ICC Case No. 7047 (1994) (whose award was the subject of the *Westacre Investments Inc. v Jugoimport-SDPR Holdings Co. Ltd.* (“*Westacre*”) proceedings in England¹⁵¹ and Switzerland¹⁵²) held that: “Lobbying as such is not an illegal activity. Lobbying by private

¹⁴⁹ [2003] EWHC 2577 (QB) at [99] and [101]. For Singaporean authority to the same effect, see *Swan Hunter supra* note 144 at [79], [88], and [93]:

“There is really **nothing wrong as such** in the use of agents. In fact, that is the manner in which transnational transactions are often carried out... It would be apparent that the fact situation in *Lemenda* is quite different from our present case. There the evidence clearly showed that the plaintiffs exercised **undue** influence on persons in authority; that was what was expected of the plaintiffs there... There is no evidence before me at all that there is such a public policy in Singapore which prohibits a foreign arms supplier from appointing a local agent in relation to a tender. **Nothing is submitted to me to show that it is in the public interest of Singapore to prohibit such appointments.**” (emphasis added)

¹⁵⁰ ICC Case No. 7664 (1996) at [66]. Translation of the award provided in Sayed *supra* note 19 at p. 353. Challenges to the award in Switzerland and France were initially dismissed, but after the respondent filed a complaint claiming fraud and conspiracy in France and resultant criminal proceedings revealed a fraudulent scheme carried out by the claimant to conceal evidence of corruption during the arbitral proceedings, the award was ultimately set aside in Switzerland (the seat of arbitration) and refused enforcement in France. The case is discussed further at [116] and [134] below.

¹⁵¹ [1999] 3 WLR 811.

¹⁵² See the Swiss Federal Tribunal’s Judgment of 30 December 1994, reviewed in Sayed *supra* note 19 at pp. 401-402.

enterprises to obtain public contracts in third countries is frequently carried on with active support from the state, as witnessed by numerous visits of heads of government or heads of state, who are normally accompanied by representatives of commercial enterprises from the visitor's country, in the hope that they will secure public contracts for their enterprises from the country they visit."¹⁵³

55. However, even these jurisdictions which eschew the adoption of a basic prohibition against intermediary agreements are liable to differ as to precisely where the line should be drawn between “*acknowledged [and legitimate] forms of lobbying*” on the one hand, and “*abuse*” or “*improper*” exercise of influence on the other. Such differences between the laws of these jurisdictions may also give rise to a “true conflict” situation requiring choice of law analysis.
56. Some jurisdictions are bound to take a more permissive attitude towards a broader range of lobbying practices than others. This is perhaps one of the main reasons why several state parties to the COE Criminal Law Convention have registered reservations to Article 12, which prohibits trading in influence (see [52] above). The Netherlands for instance has declared that it will not fulfil its obligation under Article 12, on the basis that “*certain forms of influence, whether financial or not, over decisions of public officials or politicians may be lawful [and] [i]t is only when the lobbying or attempt to exert influence results in the holding out the prospect of specific advantages to the public official(s) involved in the decision-making process, that the bounds of propriety over overstepped.*”¹⁵⁴ And as Abdulhay Sayed’s (“**Sayed**”) points out in drawing a distinction between corrupt and (what he terms) “*symbolic*” influence, a multitude of factors may be considered relevant in determining whether an intermediary agreement should be regarded as corrupt trading in influence, such as the nature of the influence exercised by the intermediary, and its compatibility with the public interest:

*“‘symbolic’ influence... relates to the situation of an intermediary who does not use corrupt means... in order to obtain favorable public decisions. Rather the intermediary attempts to use influence, understood in terms of a symbolic capital, which could be composed of **stature and respectability or recognized standing in society**, to obtain favorable public decisions. In appreciating symbolic influence, it would be appropriate to consider its **origin and direction**. **The origin of symbolic influence could include family relations with government officials, parasite friendship or business association with influential decision-makers** [in which case, the influence exercised is likely to be corrupt]. It could also include standing respectability in business circles as well as by State officials. **The direction of the symbolic influence played could either run against the public interest, or be compatible with such interest.**”* (emphasis added)¹⁵⁵

57. Any given jurisdiction may or may not take into consideration all or any of these factors. By way of example, the English common law view (set out in *Lemenda*) is that non-disclosure of the intermediary’s financial interest to the public official who is to be influenced is one factor which may militate in favour of finding “*abuse*” or “*improper*” exercise of influence by the intermediary. Philips J. thus held that “*it is generally undesirable that a person in a position to use personal influence to obtain a benefit for another should make a financial charge for using such influence,*

¹⁵³ 13(2) ASA Bulletin (1995) at p. 339. See further Sayed *supra* note 19 at pp. 350-351 discussing the application of Swiss law in the Swiss courts’ decisions in *Hilmarton Ltd v Omnium de Traitment et de Valorisation S.A.* and ICC Case No. 4145 (1983, 1984, 1986).

¹⁵⁴ *Corruption and Misuse of Public Office supra* note 12 at [14.27].

¹⁵⁵ Sayed *supra* note 19 at pp. 200.

particularly if his pecuniary interest will not be apparent.” (emphasis added)¹⁵⁶ Since, in that case, “*the influence was to be exerted in circumstances where it was essential that the person influenced should be unaware of Mr. Yassin's [the intermediary's] pecuniary interest [and] [t]he amounts at stake, both in terms of the value of the contract that it was hoped to obtain and the size of the commission to be earned by Mr. Yassin, were enormous*” (emphasis added),¹⁵⁷ the intermediary agreement was held to be contrary to English public policy. Another jurisdiction could conceivably adopt a different view or emphasise different factors.

58. It can thus be seen that jurisdictions may adopt differing attitudes to the propriety of intermediary contracts. The parties’ chosen law may not prohibit an intermediary agreement, whereas the laws or public policy rules of the place of performance or the arbitral seat may prohibit it absolutely, or may regard it as infected by impropriety which the chosen law disregards. In Sayed’s words, “[w]hat is at stake at present is the issue whether a mandatory law prohibiting corruption or intermediation in government procurement has such an overwhelming claim to apply, that a choice of foreign law becomes, so to speak, impossible in its presence... In other words, can the parties to a contract, which may raise allegations of corruption, choose a law precisely because it is indifferent to the kind of intermediary relationship embodied in the contract?” This issue will turn on: (i) the applicable conflict of laws rules; and (ii) the conditions prescribed by the applicable conflict of laws rules for the chosen law to be overridden by the law of the place of performance or the arbitral seat.

A. The Applicable Conflict of Laws Rules in International Arbitration

59. In international arbitration, there is considerable divergence in opinion as to the correct approach for determining the applicable conflict of laws rules.¹⁵⁸ This stems from the fact that, unlike national courts, arbitral tribunals do not have a “forum” as such, whose conflict of laws rules are automatically applicable.¹⁵⁹ Moreover, domestic arbitration legislation generally confer upon tribunals wide discretion to select “*the conflict of laws rules which it considers applicable*”.¹⁶⁰
60. National courts and arbitral awards increasingly reject the application of the seat’s conflict of laws rules, reasoning that international parties are guided by considerations of practical convenience in choosing the seat, and it therefore should not be given any importance in determining the law applicable to the substance of the dispute.¹⁶¹ One authority notes that “[t]he modern trend is to recognize that any perceived obligation to apply the choice of law rules of the seat stems from a false comparison of the seat of an arbitral tribunal with a judicial forum. A national court judge must apply the conflicts rules of the forum.... The international arbitrator's powers, on the other

¹⁵⁶ *Lemenda supra* note 147 at 457-458.

¹⁵⁷ *Lemenda ibid.* at 458. Applying this principle in *R v V* [2008] EWHC 1531 (Comm), Steel J. held (at [48]) that the intermediary agreement for the sale of the intermediary’s influence on the state owned entity was *not* in contravention of English public policy, because the agreement did *not* require the intermediary to exert its influence without the state owned entity’s knowledge of the intermediary’s financial interest.

¹⁵⁸ Born *supra* note 40 at pp. 2122-2138.

¹⁵⁹ See generally Born *supra* note 40 at pp. 2124-2126. See also Sayed *supra* note 19 at p. 264; *Fouchard Gaillard Goldman supra* note 55 at [1517]; Bernard Hanotiau, *What Law Governs the Issue of Arbitrability?* 12 *Arb. Int'l* 391 (1996) at pp. 396-97.

¹⁶⁰ Article 28(2) UNCITRAL Model Law. See to similar effect s. 46(3) English Arbitration Act 1996. See also generally Born *supra* note 40 at pp.2115-2117.

¹⁶¹ See Born *supra* note 40 at p. 2126 citing, *inter alia*, *Konkar Indomitable Corp. v. Fritzen Schiffsagentur und Bereederungs GmbH*, 1981 U.S. Dist. LEXIS 9637; *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Nav. SA* [1971] A.C. 572, 600 (House of Lords); ICC Case No. 2930 (1982); ICC Case No. 6527 (1991); and ICC Case No. 8113(1995).

hand, are derived from an arbitration agreement, and an arbitrator does not exercise public or institutional power in the name of the State.”¹⁶² Thus, tribunals have adopted different approaches in determining the applicable substantive law, which are not derived from the seat’s national conflict of laws rules, such as the “cumulative” application of all conflicts rules of states with a meaningful connection to the dispute; the application of “international” choice of law rules derived from non-national sources; and the application of the substantive law of the state with the closest connection to the dispute.¹⁶³

61. However, we prefer the approach suggested by Born, who persuasively argues that tribunals should continue to apply the seat’s national choice of law rules.¹⁶⁴ This approach still finds favour in arbitral and national case law,¹⁶⁵ and accords best with the intentions of international commercial parties, as it provides for the governing law to be determined by a *predictable and presumptively neutral set of conflicts rules*. As Born explains:

“... rational commercial parties desire predictability, certainty and neutrality with regard to the substantive law applicable to their dispute...Absent... an international instrument [such as the U.N. Sale of Goods Convention or the Rome Convention], however, there is as yet no sufficiently developed international conflicts regime to provide appropriate choice-of-law rules for application... Accordingly, in these circumstances, the next-best solution is application of a neutral, predictable national choice-of-law rule. Although there will be exceptions, the choice-of-law system of the arbitral seat presumptively provides a more plausible, sensible candidate for the choice of conflicts rules than any other system... the parties' agreement to arbitrate in a particular place carries with it an implied acceptance of aspects of the procedural law of the arbitral seat (in particular, the arbitration law of the arbitral seat, which will often be mandatorily applicable). The legal rules that are encompassed by this implied agreement should ordinarily extend, absent contrary indication, to basic procedural and “institutional” aspects of the dispute resolution process, such as choice-of-law rules. Further, the choice-of-law rules of the arbitral seat are presumptively neutral and objectively satisfactory to the parties (who have generally agreed upon the arbitral seat precisely because they regard it as neutral and acceptable). No less important, selecting the choice-of-law rules of the arbitral seat provides a simple, easily-administrable and highly-predictable rule. This avoids the uncertainty and potential arbitrariness of inquiry into what choice-of-law rules are “appropriate,” or what substantive law should be “directly” applied, as well as the uncertainties associated with the need to choose among a number of potentially-applicable conflicts systems... doing so

¹⁶² Laurence Craig, William Park, and Jan Paulsson, *International Chamber of Commerce Arbitration* (Oceana Publications, 3rd ed., 1998).

¹⁶³ See generally Born *supra* note 40 at pp. 2128-2138. See also Sayed *supra* note 19 at pp. 260-264.

¹⁶⁴ Except where there is evidence of contrary agreement by the parties, or some reason that application of the arbitral seat’s conflicts rules would be anomalous: see Born *supra* note 40 at p. 2142. See also generally Born at pp. 2114-2117 (surveying the conflicts rules applicable to international arbitration under various national arbitration statutes).

¹⁶⁵ See the awards and decisions cited by Born *supra* note 40 at pp. 2127-2128 at fns. 95 and 99, and pp. 2190-2191 at fn. 395, in particular ICC Case No. 7262 (1996), in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 *Recueil des Cours* 9, 231 (2001) (selection of Swiss arbitral seat “indicate confidence of the parties in the Swiss legal system”); and ICC Case No. 8619 (1997), in Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 *Recueil des Cours* 9, 230 n.230 (2001) (“It can be reasonably argued that the parties who fail to explicitly agree on an applicable substantive law, but agree on arbitration at a specified place pursuant to specified arbitration rules and procedures ... **impliedly also agree – or at least impliedly accept a determination to that effect – on the conflict of laws rules of the law of the jurisdiction in which the place of arbitration is located**” (emphasis added)).

introduces unnecessary and damaging uncertainty into the choice-of-law process, which objectively rational commercial parties would never have intended.” (emphasis added)¹⁶⁶

B. Conflict of Laws Considerations Determining Whether the Law of the Place of Performance or the Seat of Arbitration Overrides the Parties’ Chosen Law

62. Having ascertained that the applicable conflict of laws rules are those of the seat, the tribunal should then have regard to these rules to determine whether the circumstances call for the parties’ chosen law to be overridden by the laws or public policy rules of the place of performance, or that of the seat.
63. Let us recall that we are dealing with an intermediary agreement, which is valid under the chosen law, but illegal or contrary to public policy under the law(s) of the place of performance and/or the seat. While respect for party autonomy and freedom of contract requires that the parties’ choice of law be upheld in most cases,¹⁶⁷ conflict of laws rules of developed legal systems impose reasonable limits on party autonomy and allow the chosen law to be overridden under prescribed circumstances. Common candidates which may replace the parties’ chosen law are the law of the place of performance and the arbitral seat.

(i) Law of the Place of Performance

64. Oftentimes, the parties and the intermediary agreement will have little or no connection with the jurisdiction that supplies the chosen law. They are instead more closely connected to the place of performance. Some jurisdictions provide that public policy considerations expressed through mandatory laws or *lois de police* of the place of performance can override the chosen law if they have a sufficiently close relationship to the parties’ dispute.¹⁶⁸
65. Mandatory laws are defined as “*imperative provision[s] of law which must be applied to an international relationship irrespective of the law that governs that relationship... a matter of public policy... so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws*”.¹⁶⁹ Whether a given rule is considered mandatory depends on the proper construction of its nature, purpose, and scope.¹⁷⁰ For instance, in ICC Case No. 7047 (1994) (the award in this case gave rise to the challenge proceedings in *Westacre*,¹⁷¹ which is discussed below at [122]), the tribunal declared that a Circular issued by the Kuwaiti Ministry of Defence (“**MoD**”) against the respondent, which prohibited the use of intermediaries by the respondent in the procurement of contracts with the MoD,¹⁷² was merely

¹⁶⁶ Born *supra* note 40 at 2140-2142. See also Born at 2127-2128.

¹⁶⁷ See generally Sayed *supra* note 19 at 163 and *Oxford Handbook supra* note 11 at 607.

¹⁶⁸ See generally Born *supra* note 40 at pp. 2172-2173 and Sayed *supra* note 19 at pp. 261-262. See for instance Articles 9(2), 9(3), 16, and 21 of the Rome I Convention; Article 11 Inter-American Convention on the Applicable Law to International Contracts; Article 16 Hague Convention on the Law Applicable to Agency; and Section 178 American Restatement on Conflict of Laws (reproduced in Sayed *supra* note 19 at pp. 254-255).

¹⁶⁹ Pierre Mayer, “Mandatory rules of law in international arbitration” 2 *Arb. Int’l* 274 (1986) at 275.

¹⁷⁰ See generally James Fawcett & Janeen Carruthers, *Cheshire, North & Fawcett, Private International Law* (Oxford University Press, 14th ed., 2008) (hereinafter “*Cheshire and North*”) at pp. 728-741; and Born *supra* note 40 at pp. 2186-2193.

¹⁷¹ *Supra* note 151.

¹⁷² The terms of the Circular are set out in Sayed *supra* note 19 at p. 268 fn. 840.

a “contractual condition imposed by one contracting party— MoD— on the other party— the [respondent]”, and thus did not amount to a foreign mandatory law.¹⁷³ As Sayed explains:

“... it was clear that the no-commission requirement [imposed by the MoD] did not express generally applicable rules, but was rather put forward during the negotiation process. They also were not justified by a general policy of fighting corruption in government procurement. Rather they appeared reactive. This has undermined their imperative pretense. In contrast, it may be argued that where a general law prohibiting intermediation practice is carried by a legislative intent to combat bribery, and is backed by a collection of sanctions suggesting a high degree of interest in determining the nature of the relationship under consideration, it would be more likely for it to be qualified as mandatory.”¹⁷⁴

66. An example of a choice of law rule providing for application of mandatory laws of the place of performance is Article 9(3) of the Rome I Regulation.¹⁷⁵ Article 9(3) permits discretionary application of the “overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed”, having regard to their “nature and purpose and to the consequences of their application or non-application.”¹⁷⁶ “Overriding mandatory provisions” are in turn defined in Article 9(1) as: “provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”
67. Similar effect is given to mandatory laws under Article 19(1) of the Swiss Private International Law Act of 1987 (“PILA”), which provides for application of a “closely connected” foreign mandatory law over the law chosen by the parties (or the otherwise applicable proper law) if a party’s “legitimate and manifestly preponderant interests” so require:

“Art. 19

VII. Taking into account of mandatory provisions of foreign law

¹⁷³ 13(2) ASA Bulletin (1995) at p. 330.

¹⁷⁴ Sayed *supra* note 19 at pp. 270-271.

¹⁷⁵ The Rome I Regulation is based on and replaces the Rome Convention on the Law Applicable to Contractual Obligations 1980. Although Article 1(2)(e) of the Rome I Regulation provides that “arbitration agreements” are “excluded from the scope of this Regulation”, “this only affects the clause itself; the remaining clauses in the contract will be within the scope of the [Rome I Regulation] and judges and arbitrators will have to apply the rules under the [Rome I Regulation] to them.”: Cheshire and North *supra* note 170 at pp. 684-685. In the same vein, Born *supra* note 40 at p. 2113 notes that the Rome Convention (and by extension, the Rome I Regulation) can be applied to international arbitrations seated in Contracting States:

“Most arbitral tribunals seated in a Contracting State have considered that the Rome Convention is potentially applicable, in the same manner as a national choice-of-law rule, to determine the substantive law applicable to contractual obligations. Commentators have also generally assumed the Convention’s applicability in international arbitrations sited in Contracting States, albeit without detailed analysis. In principle, the Rome Convention should be applied in international arbitration in the same manner that national choice-of-law rules are applied. That is because the Convention is a form of national choice-of-law rule, applicable to courts within Contracting States, which therefore possesses the same status vis-à-vis international arbitral tribunals seated within those states as an otherwise applicable national conflicts system or a substantive rule of law.”

¹⁷⁶ See also Sayed’s (*supra* note 19) comments on the Rome Convention at pp. 263-264; and Cheshire and North *supra* note 170 at p. 739.

1 If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by this Code may be taken into account if the circumstances of the case are closely connected with that law.

2 In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.” (emphasis added)

68. Swiss arbitral tribunals have applied Article 19 PILA in the context of intermediary agreement disputes, and held that mandatory rules of law contained in a law other than that chosen by the parties (for brevity, we refer to such rules as “**foreign mandatory rules**” or “**foreign mandatory laws**”), which prohibit the use of intermediaries *per se*, do not give rise to sufficiently “*legitimate and manifestly preponderant*” interest, or may not be sufficiently “*closely connected*” with the parties’ dispute, for them to supersede the parties’ chosen law.¹⁷⁷ Reasons given include the fact that these foreign mandatory rules serve the host state’s narrow domestic interests¹⁷⁸ as opposed to the “*fundamental interests of the individual or of the human community*”;¹⁷⁹ the parties were not citizens of the jurisdiction applying these foreign mandatory rules; or the intermediary agreement was not performed in that jurisdiction.¹⁸⁰
69. Swiss courts have since held that Article 19 PILA does not apply to international arbitration,¹⁸¹ because Article 187 PILA “*constitutes in itself the entire private international law or conflict of laws system applicable to arbitral tribunals having their seat in Switzerland*”,¹⁸² and obliges Swiss arbitral tribunals to apply the chosen law of the parties as follows: “[*t*]he arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law

¹⁷⁷ See the “*Jurgen Dohm Award*” (1989) 11(2) ASA Bulletin 216 (1993), reviewed in Sayed *supra* note 19 at pp. 271-272.

¹⁷⁸ The Swiss Federal Tribunal has for instance described the Algerian prohibition against intermediation in government procurement in its Judgment of 17 April 1990 (*Omnium de Traitement et de Valorisation S.A. v Hilmarton Ltd*) as being overly protectionist, because “[*t*]he Algerian provision at issue **prohibits all intervention of intermediaries in the conclusion of a contract, even in the absence of bribes, traffic in influence or doubtful activities; the prohibition is, therefore too broad and protectionist, aimed at guaranteeing a state monopoly on foreign trade**” (emphasis added): see Sayed *supra* note 19 at p. 241. Note that the Federal Tribunal did not make this observation in the context of discussing Article 19 PILA, though it nevertheless serves to illustrate the point: see Sayed *supra* note 19 at pp. 236-243.

¹⁷⁹ *Oxford Handbook supra* note 11 at p. 608.

¹⁸⁰ See the *Jurgen Dohm Award supra* note 177.

¹⁸¹ See the Swiss Federal Tribunal’s Judgment of 30 December 1994 13(2) ASA Bulletin (1995) at 222.

¹⁸² Gabrielle Kaufmann-Kohler and Blaise Stucki, *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer Law International, 2004) at p. 116. See also Loukas Mistelis, *Concise International Arbitration* (Kluwer Law International, 2010) at p. 946 (“*this special conflict of laws rule for international arbitration [in Article 187 PILA] is to be interpreted autonomously and excludes the applicability of the conflict of laws rules that are contained in the other chapters of the PILA and that are addressed to the state courts [such as Article 19 PILA].*”); and Stephen Berti, *International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute* (Kluwer Law International, 2000) at p. 486 (Pierre Karrer’s chapter states as follows: “*Article 187 [PILA] embodies conflict of laws rules which leave no room for the direct application of the first eleven chapters of the [PILA] [which includes Article 19 PILA]. The latter apply only to Swiss state courts, a fact which is frequently overlooked outside Switzerland. The provisions of the first eleven chapters of the [PILA] apply by analogy only when this is made necessary by the specific nature of international arbitration.*”)

*with which the action is most closely connected.*¹⁸³ Nevertheless, the Swiss Federal Tribunal has held on more than one occasion that an arbitral tribunal must apply European Competition Law rules to determine the validity of a contract, even if the parties have chosen Swiss law as the contract's governing law.¹⁸⁴ This suggests that arbitrators must still apply foreign mandatory rules under Article 187 PILA, though it remains controversial what preconditions must be satisfied before such rules may be allowed to override the parties' chosen law.¹⁸⁵ Some commentators have argued that Article 19 PILA should be applied "*by analogy*".¹⁸⁶ Hence, like Article 19 PILA, a foreign mandatory law which is sought to be applied over the parties' chosen law must have a close connection with the dispute and "*objectives [which] ... appear to be worthy of protection*" (the latter condition presumably approximates the "*legitimate and manifestly preponderant*" requirement in Article 19 PILA);¹⁸⁷ however, *unlike* Article 19 PILA, such foreign mandatory law need not be compatible with Swiss public policy (referred to in Article 19 PILA as "*Swiss legal concepts*"), so long as it does not contravene transnational public policy (since the requirements of Article 19 PILA must be adapted for application in the context of *international* arbitration).¹⁸⁸ Other commentators instead favour a "*stricter requirement*", *viz* that foreign mandatory law should only be applied in the case where "*the parties choose a law devoid of interventionist [i.e. foreign mandatory] norms for the sole purpose of evading interventionist norms which would otherwise have been applicable*" (emphasis added).¹⁸⁹ This principle of conflict of laws is also referred to as *fraus legis* or *fraude a la loi* (discussed in greater detail at [75]-[76] below).¹⁹⁰ Accordingly, although it appears to be incontrovertible that tribunals seated in Switzerland can take into account mandatory laws of the place of performance in determining the enforceability of the parties' contract/intermediary agreement, even though it is valid under the chosen law, it remains an open question what circumstances justify such derogation from party autonomy.

70. English common law conflicts rules, which are generally applicable in the common law Commonwealth countries¹⁹¹ (but less so in the UK, where they have been overtaken by European conflicts rules such as the Rome I Regulation), disregard mandatory laws of the place of performance in favour of the parties' chosen law, subject to a number of limited exceptions.¹⁹² The principal exception (relevant in the context of intermediary agreement disputes) was established in *Foster v Driscoll*:¹⁹³ a contract governed by English law will not be enforced, if the common

¹⁸³ See further *Beta SA v Alpha International Corporation* (1989) 9(3) ASA Bulletin 239 (1991) as discussed in Sayed *supra* note 19 at pp. 269-270; and Jean-Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd ed., 2007).

¹⁸⁴ See for instance the Swiss Federal Tribunal's Judgments of 28 April 1992 10(3) ASA Bulletin 368 (1992) and 8 March 2006 24(3) ASA Bulletin 550.

¹⁸⁵ Mistelis *supra* note 182 at p. 948.

¹⁸⁶ Kaufmann-Kohler and Stucki *supra* note 182 at pp. 127-128; Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage International: Droit et pratique a la lumiere de la LDIP* (Schulthess, 2006) at [661]-[662].

¹⁸⁷ Kaufmann-Kohler and Stucki *supra* note 182 at p. 128. See for example ICC Case No. 9333 (1998) (reviewed in Sayed *supra* note 19 at pp. 272-273), which "*questioned the existence of a strong and legitimate interest for the FCPA to apply to the contract under consideration*".

¹⁸⁸ Kaufmann-Kohler and Rigozzi, *supra* note 186 at [662]. See further Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts* (1999) at pp. 63-64.

¹⁸⁹ Berti *supra* note 182 at p. 514; Poudret and Besson *supra* note 183 at pp. 302 and 615.

¹⁹⁰ *Ibid.* See further Mistelis *supra* note 182 at p. 948.

¹⁹¹ However, it should be noted that "*there has been increasing variations across common law countries in the specific choice of law rules developed*": Yeo Tiong Min, 6(2) *Halsbury's Laws of Singapore: Conflict of Laws* (Lexis Nexis, 2009) at [75.250].

¹⁹² Sir Lawrence Collins, *Dicey, Morris and Collins on The Conflict of Law*, (Sweet & Maxwell, 14th ed., 2006) (hereinafter "*Dicey, Morris and Collins*") at [32-140].

¹⁹³ [1929] 1 KB 470.

intention of the parties in entering into the contract was to perform, in a foreign and friendly country, an act which is illegal under the law of that country.¹⁹⁴ Thus, the parties' contract (governed by English law) to import whisky into the United States, contrary to the American prohibition laws in force at the time, was unenforceable. Although a case has yet to arise which is directly on point,¹⁹⁵ commentators are of the view that “*the result doubtless would have been the same if the contract had been governed by a foreign law [a law other than common law], according to which the contract had been enforceable.*”¹⁹⁶ There is also strong (albeit *obiter*) suggestion that the *Foster v Driscoll* rule extends to cases where only *one* party has the *unilateral* intention to commit an illegality under the law of the place of performance, in which case that party (but not the innocent party) cannot enforce the contract.¹⁹⁷ Such illegality at the place of performance is seen as requiring considerations of comity of nations and public policy to be taken into account, which are weighty enough to justify holding the contract unenforceable, contrary to the parties' chosen law.¹⁹⁸ Accordingly, tribunals applying common law conflicts rules will not enforce intermediary agreements entered into by parties with the common intention of contravening anti-corruption laws at the place of performance, nor will it uphold claims by a party having a unilateral intention to contravene such laws, whatever the governing law of the intermediary agreement.¹⁹⁹

71. This much was alluded to by the English High Court in *Hilmarton*.²⁰⁰ In *Hilmarton*, *Omnium de Traitement (“OTV”)* resisted enforcement of the award on the basis that it upheld an intermediary agreement which was illegal under the law of the place of performance. Under the agreement, *Hilmarton* was to negotiate with Algerian government officials to procure for OTV a construction contract in Algeria. In return, if *Hilmarton* succeeded in obtaining the construction contract for OTV,

¹⁹⁴ Where there is no intention to violate foreign law which is *not* the law of the place of performance, “*the mere fact that a contract... involves the doing of something which [such foreign law] prohibit[s]... will not invalidate the contract, unless the prohibition forms part of the governing law*”: *Dicey, Morris and Collins supra* note 192 at [32-240]. See further *Dicey, Morris and Collins* at [32-142] fn. 51.

However, the position is not settled as to whether illegality under the law of the *place of performance* overrides the parties' chosen law and renders the contract unenforceable, *in the absence of a common intention to commit such illegality*. In *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (“**Ralli Bros**”), a contract governed by English law was, after formation of the contract, rendered illegal at the place of performance (Spain) due to the issuance of a Spanish decree which imposed maximum limits for the payment of freight on jute. These maximum limits were exceeded by the contractually stipulated payment amount. The court refused to enforce the contract due to the supervening illegality at the place of performance. After *Ralli Bros*, there has been “*frequent dicta attributing decisive effect to illegality by the law of the place of performance*”, regardless of the governing law of the contract or whether illegality was initial or supervening. However, there is no direct authority on point, and it has been vigorously argued by experts in the field of common law conflict of laws that “*such an approach is contrary to principle, and not dictated by the authorities*”: *Cheshire and North supra* note 170 at pp. 759-760; *Dicey, Morris and Collins supra* note 192 at [32-144]-[32-147] and [32-151]. On this view, the rule set out in *Ralli Bros* “*was not a principle of the conflict of laws at all, but merely an application of the English domestic rules with regard to the discharge or suspension of contractual obligations by supervening illegality*”: *Dicey, Morris and Collins* at [32-147]. It is outside the scope of this paper to further discuss the status of the *Ralli Bros* rule under common law.

¹⁹⁵ There have only been *obiter* remarks that an English court will *not* enforce a contract which the parties *intend* to perform illegally under the law of the place of performance, even if the contract is governed by *foreign* (as opposed to English) law, and is enforceable under such foreign law: see for instance *Royal Boskalis Westminster N.V. v Mountain 1* QB 674 [1999] at p. 692.

¹⁹⁶ *Cheshire and North supra* note 170 at p. 742 fn. 651. See also *Dicey, Morris and Collins supra* note 192 at [32-241].

¹⁹⁷ See *Royal Boskalis Westminster N.V. v Mountain 1* QB 674 [1999] at p. 692.

¹⁹⁸ *Cheshire and North supra* note 170 at p. 742; *Dicey, Morris and Collins supra* note 192 at [32-238]-[32-241].

¹⁹⁹ Cf. the contrary approach under the Rome I Regulation, which regards the parties' intentions to be irrelevant: see [76] below.

²⁰⁰ *Supra* note 141.

Hilmarton was entitled to be paid a commission of 4% of the total contract value on an instalment basis. OTV stopped making payments after half of Hilmarton's commission had been paid. Hilmarton sought to recover the remainder of its commission in arbitration proceedings held in Switzerland. The first tribunal observed that intermediary agreements for the procurement of public contracts, such as that between OTV and Hilmarton, were illegal under Algerian law. Since contravention of the Algerian prohibition against intermediary agreements (which was aimed at fighting corruption in general) also breached Swiss conception of good morals, the tribunal held that the intermediary agreement was null and void under its Swiss governing law, and dismissed Hilmarton's claim. However, the first tribunal's award was set aside by the Swiss Federal Tribunal in its Judgment of 17 April 1990, on the basis that the Algerian prohibition was "*too broad and protectionist*", prohibiting to the detriment of the parties' freedom of contract "*all intervention of intermediaries in the conclusion of a contract, even in the absence of bribes, traffic in influence or doubtful activities*",²⁰¹ whereas Swiss law regarded intermediary agreements to be perfectly valid and lawful, so long as they were entered into for non-corrupt purposes.

72. Following annulment of the award, a second tribunal was constituted, which found the intermediary agreement to be valid, and ordered OTV to pay the balance of Hilmarton's commission. When the second tribunal's award was presented for enforcement in England, the High Court dismissed OTV's challenge and enforced the award. The court made the following observation regarding the operation of the *Foster v Driscoll* rule in the context of intermediary agreements:

"It may well be that an English arbitral tribunal, chosen by the parties, and applying English law as chosen by the parties, would have reached a different result (than that reached by the Swiss tribunal). It may well be that such a tribunal would have dismissed Hilmarton's claim, applying the full rigour of the principle stated by Viscount Simonds in Regazzoni v K.C. Sethia [a case applying the Foster v Driscoll rule] thus:

'... whether or not the proper law of the contract is English law, 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 the State.'

I should add that in applying this principle it is immaterial whether the contract itself is governed by English or foreign law."(emphasis added)²⁰²

73. We can conclude from the foregoing discussion that the conditions to be satisfied for the mandatory laws of the place of performance to override the parties' chosen law vary, depending on which conflicts rules the tribunal is applying. We therefore disagree with the unqualified statement that "[i]nternational arbitrators should accept that, in order to establish the legality or validity of an agency agreement submitted to them, they cannot simply disregard the mandatory legal provisions of the [place of performance]".²⁰³ That is a question to be resolved by the applicable choice of law rules: if they reject the application of mandatory laws of the place of performance, then the chosen law must prevail. For instance, mandatory laws of the place of performance which prohibit

²⁰¹ Sayed *supra* note 19 at p. 241.

²⁰² *Supra* note 141 at 224.

²⁰³ Crivellaro *supra* note 79 at p.118. See also the arguments in Sayed *supra* note 19 at pp. 258-259 ((i) "*since national legal systems have conceded to giving greater autonomy to Arbitrators in the discharge of their adjudicatory functions, they expect, in return, that sensitive national policies as enacted in mandatory laws are taken into due consideration and applied by Arbitrators*"; (ii) "*Arbitrators have all interest in lending favourable ears to such national mandatory laws, since systematic failure to do so might jeopardize general national support of the autonomy of arbitration*"; (iii) "*an Arbitrator has an obligation to render enforceable awards*").

intermediary agreements as such are unlikely to be given effect under an “*analogous application*” of Article 19 of the Swiss PILA by a tribunal (see [67]-[69]). On the other hand, there is a higher chance that the *Foster v Driscoll* rule will give effect to these mandatory laws.

74. It is often said by way of counter argument that a tribunal will fail in its duty to render an enforceable award if foreign mandatory laws are ignored, since the award will be refused enforcement on public policy grounds, if it is sought to be enforced in the jurisdiction which prescribes these foreign mandatory laws.²⁰⁴ Tribunals do indeed have a duty to render an enforceable award,²⁰⁵ but they are not compelled to render a *universally* enforceable award,²⁰⁶ because the tribunal has the equally important duty of deciding the parties’ dispute in accordance with the correct legal principles (including choice of law principles).²⁰⁷ Born rightly argues that: “...***it is the conflicts rules applicable to the parties’ dispute – and not the unilateral definitions of foreign legal systems – which must define the circumstances in which a choice-of-law clause will be overridden ... This may, in exceptional cases, produce an award that is not enforceable in the foreign state whose mandatory rules are not applied. This result is more tolerable, however, than an award that is based on the application of the “wrong” legal rules, particularly where those rules purport to apply by virtue of an exorbitant jurisdictional claim.***”²⁰⁸ (emphasis added)
75. So far, we have limited our discussion to conflicts rules which provide that the parties’ chosen law may be overridden *to the extent* of its inconsistency with mandatory laws of the place of performance. In certain cases, conflicts rules may even provide for *complete* displacement of the chosen law by the law of the place of performance. Under common law, the law with which the dispute is most closely connected applies in replacement of the chosen law, where the choice of law is not bona fide or legal, or is contrary to public policy.²⁰⁹ The test for what constitutes a choice of law which is not bona fide or legal, or is contrary to public policy, is narrowly circumscribed— it is not satisfied merely because the contract has no objective connection with the law chosen by the parties; what is required is that the *sole intention* of the parties in choosing the governing law was to evade the objective proper law (i.e. the law most closely connected to the parties’ dispute).²¹⁰ This is largely similar to the doctrine of *fraude a la loi* in French private international law, which applies to

²⁰⁴ Article V(2)(b) New York Convention provides that: “*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a)... (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*” (emphasis added) See generally Kronke, Nacimiento, Otto, and Port *supra* note 53; and Bernard Hanotiau and Olivier Caprasse, “Public Policy in International Commercial Arbitration” in *Enforcement of Arbitration Agreements and International Arbitral Awards* (2008) 787 at 793-794.

²⁰⁵ The tribunal’s duty to render an enforceable award is expressly stipulated in Article 35 ICC Rules and Article 32.2 LCIA Rules. It may also be an implied duty which all tribunals must discharge, taking into account the underlying objectives of the New York Convention.

²⁰⁶ The public policy ground for refusing enforcement of an award under the New York Convention refers to the public policy of the country where the award is sought to be enforced. Accordingly, contravention of the public policy of a country *other than* the country of enforcement does *not* justify refusal of enforcement. *Cf.* contravention of public policy at the seat of arbitration, which may result in the award being set aside at the seat of arbitration: in such case, Article V(1)(e) of the New York Convention provides that the award may be refused enforcement *in all other countries*. See the discussion below at [79] and *infra* note 223.

²⁰⁷ See for instance ICC Case No. 4219 (unpublished) and *Chambre de Commerce et d’Industrie de Geneve (CCIG) Award of 23 February 1988*, which refused to apply the law of the place of performance over the parties’ chosen law. See also ICC Case No. 8459 (1997), which refused to apply the US FCPA over the parties’ choice of Swiss law.

²⁰⁸ Born *supra* note 40 at p. 2192.

²⁰⁹ See *Vita Foods Products Inc v Unus Shipping Co. Ltd. (In Liquidation)* [1939] AC 277 (“*Vita Foods*”).

²¹⁰ *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148.

invalidate a choice of law if it is the “*product of a fraudulent scheme designed to use the principle of party autonomy to choose a ‘complacent’ law, for the sole purpose of escaping the application of ‘disturbing’ mandatory provisions*”.²¹¹

76. Thus, a bad faith choice of law by the parties, solely to evade mandatory laws of the place of performance (typically, the law most closely connected to intermediary agreement dispute), may justify a tribunal applying doctrines of *fraude a la loi* to disregard the chosen law in favour of the law of the place of performance. It is of interest to note that, by way of contrast, the Rome I Regulation regards the parties’ subjective motives to be immaterial,²¹² choosing instead to uphold the chosen law of the parties, *subject to* mandatory laws of the country connected with “*all other elements relevant to the situation [other than the law chosen by parties]*”.²¹³ This limitation on the parties’ choice of law “*will stop many cases of evasion of the law [caught by French and common law principles of fraude a la loi][footnote: but not necessarily all cases...], although it goes wider than this and it will ensure that [, for instance, in the case of an entirely German contract which contains an exemption clause,] any German controls on exemption clauses apply even if the parties have chosen French law for some perfectly legitimate reason, such as the fact that this is the applicable law under some related contract between the parties.*” (emphasis added)²¹⁴

(ii) Law of the Arbitral Seat

77. Tribunals must also conduct choice of law analysis to determine whether the arbitral seat’s laws or public policy rules override the parties’ chosen law and invalidate their intermediary agreement.²¹⁵
78. Under common law conflicts rules, the stipulations of the parties’ chosen law are not usually overridden by illegality under the law of the forum,²¹⁶ since the forum usually has little or no connection to a contract governed by foreign law and to be performed in a foreign jurisdiction.²¹⁷ The exception is where local rules of illegality constitute forum mandatory rules applicable to the contract, regardless of the law chosen by the parties.²¹⁸ Article 9(2) Rome I Regulation similarly provides that “*the overriding mandatory provisions of the law of the forum*” may be applied to the parties’ dispute (see [66] above for the definition of “*overriding mandatory provisions*”).
79. Turning to the forum’s public policy rules (as opposed to mandatory laws), they typically do not override the chosen law under conflicts rules, unless the dispute has a sufficiently close connection with the forum,²¹⁹ or the public policy contravened is of a fundamental moral nature.²²⁰ For instance, Article 21 of the Rome I Regulation provides for the parties’ chosen law (or the otherwise applicable proper law) to be superseded by the forum’s public policy rules if the chosen law “*is manifestly incompatible with the public policy (ordre public) of the forum*”.²²¹ Taking care not to apply a law which violates the arbitral seat’s fundamental public policy concerns (or mandatory laws) ties in

²¹¹ Sayed *supra* note 19 at p. 169.

²¹² *Cheshire and North supra* note 170 at pp. 696.

²¹³ Article 3(3) Rome I Regulation.

²¹⁴ *Cheshire and North supra* note 170 at pp. 695-697.

²¹⁵ See generally Born *supra* note 40 at pp. 2186-2189.

²¹⁶ *Vita Foods supra* note 209; *Akai Pty Ltd v People’s Insurance Co. Ltd.* [1998] 1 Lloyd’s Rep 90.

²¹⁷ See Born *supra* note 40 at p. 2187 and fn. 381.

²¹⁸ *The Hollandia* [1983] 1 AC 565; *Block Bros Realty Ltd v Mollard* (1981) 122 DLR (3d) 323.

²¹⁹ Born *supra* note 40 at p. 2187 fn 382; *Cheshire and North supra* note 170 at pp. 142 and 741.

²²⁰ See *Cheshire and North supra* note 170 at pp. 142-146.

²²¹ See *Cheshire and North ibid.* at pp. 741-743.

neatly with the tribunal's duty to render an enforceable award, as courts of the arbitral seat can base their decision to set aside arbitral awards upon contravention of the same notion of public policy,²²² which in turn allows courts elsewhere to refuse enforcement of the annulled award pursuant to Article V(1)(e) of the New York Convention.²²³

80. Similar rules apply under common law,²²⁴ though it provides an additional third ground for the forum's public policies to override the chosen law.²²⁵ The case of *Lemenda*²²⁶ illustrates the operation of this third ground.²²⁷
81. In *Lemenda*, the plaintiff entered into an agreement with the defendant to procure for the latter renewal of an oil supply contract from the state owned national oil corporation of Qatar. Under the agreement, the plaintiff was to use its influence on Qatari officials to procure renewal of the contract and, in return, it would receive a commission of 30 US cents per barrel of oil. The oil supply contract (governed by Qatari law) was renewed, and the plaintiffs claimed for its commission under the intermediary agreement (governed by English law). Under Qatari law, such intermediary agreements to influence public officials was contrary to public policy.
82. The court held that the intermediary agreement was unenforceable. It drew a distinction between rules of public policy which, if infringed, "*the English court will not enforce... whatever the proper law of the contract and wherever the place of performance*", and other principles of public policy, which are "*purely domestic*".²²⁸
83. The former type of public policy, which may be referred to as international public policy,²²⁹ is defined as "*some moral, social or economic principle so sacrosanct in English eyes as to require its*

²²² This is discussed further below at [163]-[165]. See generally Kreindler (Arbitrator as Accomplice) *supra* note 58 at p. 2; Kreindler, "Approaches to the Application of Transnational Public Policy by Arbitrators" 6th IBA International Arbitration Day, Sydney, 13 February 2003 (hereinafter "**Kreindler (Transnational Public Policy)**") at p. 5; and Tom Toulson, "Illegality and public policy: are the English courts getting it wrong?", *Global Arb. Rev.* (18 October 2010).

²²³ Article V(1)(e) of the New York Convention provides that a court may refuse recognition or enforcement of an award where: "*The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*" (emphasis added) An award which has been set aside due to its contravention of the international public policy of the *arbitral seat* can be refused enforcement in all other countries (on the Article V(1)(e) ground), whereas awards which contravene the public policy of the *place of performance* will typically only be refused enforcement by the courts at the place of performance (since the public policy exception to enforcement in Article V(2)(b) applies only where the public policy of the *place of enforcement* is contravened). The arbitrator's duty to render an enforceable award thus requires him to give greater deference to contravention of public policy at the arbitral seat, as opposed to the place of performance (see also the discussion at [74] above regarding contravention of public policy at the place of performance). *Cf.* Dana Freyer, "The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration", in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May, 2008) 757 at 757-786, which notes that some countries like France do not view the annulment of an award at the seat of arbitration as a bar to enforcement.

²²⁴ *Cheshire and North supra* note 170 at pp. 142-146 and 741.

²²⁵ See *Dicey, Morris and Collins supra* note 192 at [32-238].

²²⁶ *Supra* note 147.

²²⁷ For another case applying the principles of *Lemenda ibid.* in the context of an intermediary agreement, see *Swan Hunter supra* note 144.

²²⁸ *Lemenda ibid.* at 459.

²²⁹ Not to be confused with transnational public policy which, unlike international public policy, is not tied to a particular national view of public policy: see [86] and [165] below.

*maintenance at all costs and without exception.*²³⁰ It is similar to the kind of national interests preserved in Article 21 Rome I Regulation, which allows courts to disregard foreign law if to apply it would be “manifestly incompatible with the public policy (*ordre public*) of the forum”.

84. *Lemenda* noted that it was contrary to English public policy “founded on general principles of morality” to enforce the intermediary agreement, it being “generally undesirable that a person in a position to use personal influence to obtain a benefit for another should make a financial charge for using such influence, particularly if his pecuniary interest will not be apparent [which was the case on the facts]” (see [57] above).²³¹ However, since such public policy was “purely domestic”²³² to English law (i.e. it was not *international* public policy), its contravention was not by itself sufficient to bar enforcement of a contract performed outside England.
85. In order to find that the intermediary agreement was unenforceable, the court had regard to the attitude of the country of performance towards the parties’ intermediary agreements. In this case, Qatar (the place of performance) had the *same* public policy as England, and deemed the contract contrary to public policy. The court held that, even though the intermediary agreement was only contrary to English domestic public policy, “international comity combines with English domestic public policy to militate against enforcement”.²³³ In other words, under common law conflicts rules, an intermediary contract which contravenes the public policy of *both* the place of performance and the forum will not be enforced, even if the public policy in question is not international public policy (note that it is controversial whether this ground for applying the arbitral seat’s *domestic* public policy over the parties’ chosen law can be invoked where the contract is *not* governed by common law²³⁴).

C. The Relevance of Transnational Public Policy in Conflict of Laws Analysis

86. Tribunals must apply the law which is determined to be applicable according to the foregoing analysis (be it the parties’ chosen law or some other foreign mandatory law or public policy), unless it is contrary to transnational public policy.²³⁵ Transnational public policy refers to “fundamental rules of natural law, principles of universal justice, *ius cogens* in public international law, and the general principles of morality accepted by... ‘civilised nations’”.²³⁶ In contrast to international public policy, transnational public policy is not tied to any particular national legal system’s view of public policy, but rather, refers to values shared by civilized nations.²³⁷ Transnational public policy overrides national laws that may otherwise be applicable pursuant to the relevant conflict of laws

²³⁰ *Cheshire and North supra* note 170 at p. 140.

²³¹ *Lemenda supra* note 147 at 458 and 461.

²³² *Lemenda ibid.* at 459.

²³³ *Lemenda ibid.* at 459.

²³⁴ The *Lemenda ibid.* principle was originally stated in terms of a contract governed by English law. However, Waller L.J.’s interpretation of *Lemenda* (in *Westacre supra* note 151 at 824-825) in the context of his discussion of a contract governed by *Swiss* law may be read as implying that the *Lemenda* principle is applicable even to a contract not governed by English law. It should be noted that, although Waller L.J. was the dissenting judge in *Westacre*, the majority—Mantell L.J. and Sir David Hirst—agreed with his interpretation of *Lemenda*.

²³⁵ ICC Case No. 7047 (1994); *Wena Hotels Ltd v The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (December 8, 2000); ICC Case No. 3916(1982).

²³⁶ ILA Report (Public Policy) *supra* note 7. See generally Hanotiau and Caprasse *supra* note 204 at 794-796.

²³⁷ See further [165] below.

rules.²³⁸ In the commercial arbitration context, it is correct to give effect to transnational public policy, since failure to do so would breach the international public policy of, and render the award unenforceable in, most jurisdictions around the world.²³⁹

87. Outright bribery aimed at subverting state officials' proper discharge of their duties is clearly a violation of transnational public policy (arguably, private sector bribery likewise contravenes transnational public policy for the reasons discussed above²⁴⁰).²⁴¹ Thus, the tribunal in *World Duty Free Company Limited v The Republic of Kenya*²⁴² ("**World Duty Free**") gave short shrift to the claimant's contention that bribes paid to a former Kenyan President and other high-level public officials (to procure a contract to run duty-free operations in Kenya's international airports) were lawful as they were sanctioned under local Kenyan custom:²⁴³

*"It is... unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy or the foreign applicable law chosen by the contractual parties for their transaction... The Tribunal would likewise have been minded to decline in the present case to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy."*²⁴⁴

88. However, laws prohibiting intermediary agreements which contemplate the exercise of influence over government officials do not reflect transnational public policy, given the significant differences between jurisdictions regarding the propriety of such agreements.²⁴⁵ Parties thus cannot mount contravention of transnational public policy as an argument to escape from their obligations under these intermediary agreements, so long as they are valid under the parties' chosen law, and any mandatory laws of the place of performance or arbitral seat which prohibit them do not override the parties' chosen law (according to the relevant conflicts rules).

V. The Legal Consequences of a Finding of Corruption

89. We had earlier mentioned that disputes arising out of intermediary agreements fall into one of the following three cases: (i) having procured the government contract or relevant approvals for his principal, the intermediary brings arbitration proceedings claiming his commission; (ii) following the intermediary's failure to procure the government contract or relevant approvals, the principal brings arbitration proceedings to recover payments made to the intermediary; or (iii) the state or state entity which awarded the government contract seeks a declaration (as claimant) that it was procured through corruption of its representatives by the principal's intermediary, and is therefore unenforceable or subject to rescission, or argues it is not liable (as respondent) on a claim brought by the principal for breach of contract (assuming that contract contains an arbitration clause). It should

²³⁸ Kreindler (Transnational Public Policy) at pp. 8-13; Berthold Goldman, "*La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*", 106 J.D.I. (Clunet) 475, 483 (1979); Born *supra* note 40 at p. 2197.

²³⁹ Lamm, Pham, and Mooloo *supra* note 6 at pp. 708-709. See also Andrea Menaker, "The Determinative Impact of Fraud and Corruption on Investment Arbitrations", 25(1) ICSID Rev-FILJ 67 (2010) at 72.

²⁴⁰ See *supra* note 21.

²⁴¹ See [2] and [5] above.

²⁴² *Supra* note 8.

²⁴³ The claimant investor argued that the alleged US\$2 million bribe to the former Kenyan President was made under the "*Harambee*" system of "*mobiliz[ing] resources through private donations for public purposes*" and was therefore legally justified: see *World Duty Free supra* note 8 at [110].

²⁴⁴ See *World Duty Free ibid.* at [170]-[172].

²⁴⁵ Discussed at [50]-[58] above.

be noted that the third scenario can also arise between private parties and/or in the absence of an intermediary agreement, for instance, where a contracting party *itself* (rather than its intermediary) bribes the agent of the other private contracting party in order to procure the contract.

90. This Section provides a brief sketch of the general legal consequences of a finding of corruption in these three scenarios, all of which arise in the context of *contract*-based arbitrations. As noted above (see [12]), a different and more complicated scenario arises in the context of *investment treaty*-based arbitrations, which we do not address here as it is outside the scope of this article.

A. The Tribunal's Jurisdiction and the Arbitrability of Issues of Corruption

91. It is now well-settled that the separability presumption²⁴⁶ retains its full vigour even where corruption taints the contract underlying an arbitration agreement. In *Fiona Trust & Holding Corporation v Privalov* ("**Fiona Trust**"),²⁴⁷ the House of Lords explained the operation of the separability doctrine thus: "*The principle of separability... means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement.*" Since the allegation that the contract in *Fiona Trust* was procured by corruption could only be said to relate to the main contract, but not the arbitration agreement *in particular*,²⁴⁸ the arbitration agreement was found to be valid, and court proceedings were stayed in favour of arbitration. Other jurisdictions and the majority of arbitral case law have applied the separability presumption in the same manner.²⁴⁹

²⁴⁶ See Article 16(1) UNCITRAL Model Law; Article 6(4) ICC Rules; Article 23(1) UNCITRAL Arbitration Rules 2010.

²⁴⁷ [2007] UKHL 40.

²⁴⁸ See *Fiona Trust & Holding Corporation v Privalov* *ibid.* at [19]:

*"In the present case, it is alleged that the main agreement was in uncommercial terms which, together with other surrounding circumstances, give rise to the inference that an agent acting for the owners was bribed to consent to it. But that does not show that he was bribed to enter into the arbitration agreement. It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been. Mr Butcher QC, who appeared for the owners, said that but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement. But that is in my opinion exactly the kind of argument which section 7[UK Arbitration Act 1996] was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and **the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.**"* (emphasis added)

²⁴⁹ See for instance Swiss Federal Tribunal's Judgment of 2 September 1993 (*National Power Corporation (Philippines) v Westinghouse (USA)*); *Oxford Handbook* *supra* note 11 at pp. 611-612 fn. 127 (citing ICC Case No. 3916 (1982), ICC Case No. 4145 (1983), and ICC Case No. 5622 (1988)); Crivellaro *supra* note 79 at p.117 (citing Case No. 6474 (1992)); ICC Case No. 5943 (1990); and ICC Case No. 6248 (1990). See generally Redfern and Hunter *supra* note 42 at [2.89]-[2.100], and [5.96]; Born *supra* note 40 at pp. 382-384; Kreindler (Aspects of Illegality) *supra* note 57; and Kreindler (Russian Related Disputes) *supra* note 57.

92. In addition, it is widely recognised in modern times that issues of corruption are arbitrable.²⁵⁰ The contrary ruling in Judge Lagergren’s award in ICC Case No. 1110 (1963),²⁵¹ and certain idiosyncratic court decisions,²⁵² are not followed.
93. Accordingly, in all of the three scenarios mentioned above (see [89]), a tribunal will almost invariably find that it has jurisdiction, and any issues of corruption in dispute are arbitrable. It follows that the tribunal is entitled and obliged to adjudicate the parties’ disputes— it can receive evidence and arguments from the parties relating to corruption and/or investigate corruption *sua sponte* (if necessary), and then rule on its existence and consequences under the applicable law.²⁵³ The following sub-section discusses how a finding of corruption affects the admissibility and merits of the corrupt party’s claims.

B. The Admissibility and the Merits of the Claim

94. Issues of admissibility and the merits are determined by the applicable law selected by choice of law analysis (discussed above at [48]-[88]).
95. Most national systems of law draw a distinction between contracts that are *procured by* corruption, and contracts that *provide for* corruption (such joint intention to commit corrupt acts under the contract may be expressly stipulated or may, as is more commonly the case, remain unwritten). Contracts *procured by* corruption are merely voidable at the instance of the innocent party,²⁵⁴

²⁵⁰ Born *supra* note 40 at p. 804-805; Crivellaro *supra* note 79; Kreindler (Aspects of Illegality) *supra* note 57; ICC Case No. 4145 (1983 and 1984); ICC Case No. 6286 (1991).

²⁵¹ In ICC Case No. 1110 (Lagergren) *supra* note 8, Judge Lagergren declined jurisdiction in an arbitration concerning a claim by an intermediary for commission in respect of his engagement to bribe Argentinean officials in order to procure a government contract for his principal. Judge Lagergren stated that: “*parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes*”. It was previously thought that Judge Lagergren declined jurisdiction because he regarded the arbitration agreement as having been tainted by the corruption, which would have meant that he had incorrectly failed to give effect to the separability presumption. However, it has been clarified that Judge Lagergren’s decision was actually based on the non-arbitrability of a corrupt agreement, since the “*the arbitration agreement in ICC Case No. 1110 in fact truly constituted a wholly separate and independent agreement drawn up for the purpose of the reference after the dispute had arisen*”: see Wetter, “Issues of Corruption before International Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No 1110” 10 *Arb Intl* 277 (1994); and *Redfern and Hunter supra* note 42 at [2.137] fn. 203.

²⁵² See for instance the Pakistani decisions of *The Hub Power Company (HUBCO) v Pakistan WAPDA PLC* 2000 SC 841 and *Société Générale Surveillance S.A. v Islamic Republic of Pakistan* (3 July 2002) 28 *YB Comm. Arb.* 1312 (2003). These decisions are reviewed in *Oxford Handbook supra* note 11 at pp.602-603.

²⁵³ *Redfern and Hunter supra* note 42 at [2.138]-[2.139].

²⁵⁴ See for instance the discussion of English law in *World Duty Free supra* note 8 at [164] (citing *Panama & South Pacific etc. v. India etc. Works Company* (1875) 10 Ch. App. 515; *Armagas v. Mundogas* [1986] 1 A.C. 717; and *LogicRose Ltd v. Southend United Fc Ltd* [1988] 1 WLR 1256).

See also the COE Criminal Law Convention, which requires European member states to provide for civil remedies relating to, *inter alia*, contracts tainted by corruption, and which likewise draws a distinction between contracts *procured by*, and contracts *providing for*, corruption. Article 8(2) of the Convention provides that: “*Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.*” On the other hand, for contracts which provide for corruption, Article 8(1) provides that: “*Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.*”

whereas contracts which *provide for* corruption may be considered null and void.²⁵⁵ The difference between the two is that a voidable contract is “*intrinsically valid*” until the innocent party takes positive steps to set it aside, whereas a contract which is null and void need not be set aside, as it is from the outset regarded as “*entirely ineffectual*”.²⁵⁶

96. For instance, under English common law, an innocent party is *not* compelled to set aside a voidable contract, and may choose to “*keep the contract alive and enforce it according to its terms*”.²⁵⁷ If the innocent party continues with the enforcement and performance of the voidable contract, with knowledge of the circumstances rendering the contract voidable, it may lose the right thereafter to rescind the contract.²⁵⁸ Assuming the innocent party instead decides to set aside a voidable contract procured by corruption, “*it is no bar to avoidance of [such a] contract that the innocent party may previously have committed a breach of that contract.*”²⁵⁹ After rescission of the contract, *restitutio in integrum* may be claimed to restore the parties to the position they would have occupied if the contract had not been performed. However, *restitutio in integrum* does not require the victim of corruption to return to the corrupt party the bribe paid to the victim’s agent; the victim is entitled to recover the bribe from its agent and keep it.²⁶⁰
97. These rules governing voidable contracts determine whether a party which has been induced to enter into a contract through corruption of its agent can rescind the contract in the third scenario mentioned above (see [89]). *World Duty Free v Kenya* provides an example of a contract which was voidable because it was procured by corruption, and was eventually set aside by the victim of corruption, Kenya. The investor in *World Duty Free* was an Isle of Man corporation known as World Duty Free Company Ltd. It initiated ICSID arbitration against Kenya pursuant to an arbitration clause in a contract to run duty-free operations in Kenya’s international airports in Nairobi and Mombasa, alleging that Kenya had breached the contract by, *inter alia*, appointing a receiver over its operations. During the proceedings, the investor filed a memorial in which the investor admitted to paying a US\$2 million “*personal donation*” to Mr Daniel arap Moi, then President of Kenya, “*in order to be able to do business with the Government of Kenya*”.²⁶¹ The tribunal had no doubt that this was a bribe to obtain the contract.²⁶² Consequently, it held that, under

²⁵⁵ See for instance Article 8(1) COE Criminal Law Convention *supra* note 254.; Article 20 of the Swiss Federal Code of Obligations (OR); Section 134 of the German Civil Code (BGB). On the Swiss Federal Code of Obligations, see F. Dessemontet and T. Ansay, *Introduction to Swiss Law* (Kluwer/Schulthess, 3rd ed., 2004) at p. 109. See further the Explanatory Report to Article 8(1) of the COE Criminal Law Convention (noting that: “*in most European countries, the contract the cause of which is illegal is null and void.*”); and *Oxford Handbook supra* note 11 at pp. 600 and 609 (in particular, the arbitral awards cited at p. 609 fn. 114).

Cf. the contrary position under English law: see Nelson Enonchong, *Illegal Transactions* (LLP Ltd, 1998) (hereinafter “**Enonchong (Illegal Transactions)**”) at p. 31; Nelson Enonchong, “Effects of Illegality: A Comparative Study in French and English Law” 44(1) ICLQ 196 (1995) (hereinafter “**Enonchong (Comparative)**”); and H.G. Beale, *Chitty on Contracts* (Sweet & Maxwell, 30th ed., 2008) (hereinafter “**Chitty**”) at [16-010] (“*illegal contracts are not devoid of legal effect, but the ex turpi causa maxim entails that no action on the contract can be maintained*” (emphasis added)).

²⁵⁶ See Lord Mustill’s Expert Legal Opinion in *World Duty Free supra* note 8 at [164].

²⁵⁷ See Lord Mustill’s Expert Legal Opinion in *World Duty Free ibid.* at [164].

²⁵⁸ See Lord Mustill’s Expert Legal Opinion in *World Duty Free ibid.* at [164].

²⁵⁹ *World Duty Free ibid.* at [183]. See also *Barry v. Stoney Point Canning Co.* (1917) 55 SCR 51.

²⁶⁰ *World Duty Free ibid.* at [186] (citing *LogicRose Ltd v. Southend United Fc Ltd* [1988] 1 WLR 1256). See also *Chitty supra* note 255 at [29-156] and *Oxford Handbook supra* note 11 at p. 601.

²⁶¹ *World Duty Free supra* note 8 at [66].

²⁶² *World Duty Free ibid.* at [136].

English law (the governing law of the contract²⁶³), the contract was voidable at the instance of Kenya, as the contract had been procured through corruption of its agent.²⁶⁴ Moreover, Kenya had not waived its right to rescind the contract, since Kenya formally gave notice of its avoidance of the contract in its counter-memorial, soon after its former President's acceptance of the bribe from the investor came to light in the investor's memorial.²⁶⁵ The contract was properly set aside, and as a result, the investor's claim for breach of contract was dismissed.²⁶⁶

98. As for contracts which *provide for* corruption, without either party having to take any steps to set it aside, courts will not enforce the contract, nor will the courts provide any other non-contractual (e.g. restitutionary) remedies arising out of the contract.²⁶⁷ Such contracts, as mentioned above, may be regarded to be null and void for illegality under the applicable law.²⁶⁸ Moreover, the parties are precluded from maintaining any claims founded upon the contract (whether contractual or restitutionary in nature) by the equitable maxims *ex turpi causa non oritur actio* or *nemo auditur turpitudinem suam allegans* (an unlawful or morally reprehensible act cannot serve as the basis of an action in law) and *in pari delicto potior est conditio possidentis* (where the parties are both blameworthy, the defendant has the stronger position).²⁶⁹ These maxims are expressions of the "Clean Hands Doctrine",²⁷⁰ which bars a claimant's claims due to its illegal or improper conduct in relation to those claims. Claims tainted by wrongdoing therefore will not succeed, and the loss lies where it falls. As the Clean Hands Doctrine can be traced back to Roman law, it is also applicable under the law of many civil law jurisdictions.²⁷¹ It operates, conceptually speaking, as a procedural bar to the *admissibility* of a claim.²⁷²
99. Where the applicable law reflects these principles, an agreement between a principal and his intermediary for the latter to corruptly procure a benefit from a third party is not enforceable, nor can

²⁶³ There was some controversy as to whether English or Kenyan law applied owing to contradictory choice of law provisions in the contract, but the tribunal did not need to decide between either governing law clause, since Kenyan law was in all material aspects the same as English law with regard to the issues in dispute between the parties. See *World Duty Free supra* note 8 at [158]-[159].

²⁶⁴ *World Duty Free ibid.* at [164] and [182].

²⁶⁵ *World Duty Free ibid.* at [182]-[183].

²⁶⁶ See *World Duty Free ibid.* at [128], and [182]-[185].

²⁶⁷ *Chitty supra* note 255 at [16-007].

²⁶⁸ See [95] and *supra* note 255 and the referenced text.

²⁶⁹ *Holman v. Johnson* (1775) 1 Cowp. 341; *Harry Parker v. Mason* [1940] 2 K.B. 590.

The Clean Hands Doctrine applies to both contractual and non-contractual claims: see generally Gerhard Dannemann, "Illegality as Defence Against Unjust Enrichment Claims" (2000) Oxford U Comparative L Forum 4, available at <ouclf.iuscomp.org> (discussing the Clean Hands Doctrine in the context of restitutionary claims); Enonchong (*Illegal Transactions supra* note 255 (discussing the Clean Hands Doctrine in the context of, *inter alia*, contractual, restitutionary, and proprietary claims); Kreindler (*Ulf Franke supra* note 6 at pp. 321-322 (citing *inter alia*, Section 242 German Civil Code (BGB) and the Californian decisions *Camp v Mangels* 35 Cal. App. 4th 620 and *Bain v Doctro's Co.* 222 Cal. App. 3d 1048); Enonchong (Comparative) *supra* note 255; and William Swadling, "The Role of Illegality in the English Law of Unjust Enrichment" 2000) Oxford U Comparative L Forum 4, available at <ouclf.iuscomp.org>.

²⁷⁰ Lamm, Pham, and Moloo *supra* note 6 at pp. 723-726; Kreindler (*Ulf Franke supra* note 6 at pp. 318-319).

²⁷¹ Dannemann *supra* note 269 (citing the Czech and Slovak Civil Code of 1992). See also Kreindler (*Ulf Franke supra* note 6 at pp. 317-318 (citing, *inter alia*, ss. 242 and 817(2) of the German Civil Code (BGB)) and Lamm, Pham, and Moloo *supra* note 6 at p. 728.

²⁷² See *World Duty Free supra* note 8 at [160] and [181]; Dannemann *supra* note 269 (the *nemo auditur turpitudinem suam allegans* and *ex turpi causa non oritur action* maxims are "procedural and, technically speaking, not a defence but a limitation in making a claim."); Kreindler (*Ulf Franke supra* note 6 at pp. 323-327; Lamm, Pham, and Moloo *supra* note 6 at pp. 723-726.

money or property transferred under such an agreement form the subject of a claim.²⁷³ Thus, a corrupt intermediary which has fulfilled its duties under an intermediary agreement cannot claim his commission from the equally corrupt principal (the above-mentioned first scenario: see [89]), for *in pari delicto potior est conditio possidentis*— the defendant principal has the stronger position. Neither can a corrupt principal recover advance payments made to an equally corrupt intermediary, even if the latter fails to procure the contract or relevant government approvals for the principal under the illegal intermediary agreement (the above-mentioned second scenario: see [89]). Reasoning along these lines was employed in cases like ICC Case No. 6248 (1990) (addressing the first scenario) and ICC Case No. 5943 (1990) (addressing the second scenario).²⁷⁴

100. However, if only the intermediary intends to perform the intermediary agreement illegally, and the principal is unaware of such intention, the latter can still bring claims founded upon the contract (whether contractual or restitutionary in nature), for in such case the contract remains lawful—“*the fact that one party intends to perform the contract in an illegal way does not make the contract itself completely illegal*”— and the principal is not *in pari delicto* (more accurately, he is not in any way *in delictum*).²⁷⁵ Thus, an innocent principal may be able to recover payments made to a corrupt intermediary if, after entering into a valid intermediary agreement, the principal discovers that the intermediary has bribed public officials in a bid to procure a contract or relevant government approvals for the principal (the above-mentioned second scenario: see [89]).²⁷⁶

VI. Whether Arbitrators have a Duty or the Right to Report their Suspicions of Parties' Corrupt Activities to the Authorities

101. A final matter to consider at the primary tribunal level is whether arbitrators have the obligation to report to relevant regulatory authorities corruption which come to their attention in the course of an arbitration²⁷⁷ and, if so, whether this would be a violation of their obligation to maintain the confidentiality of the proceedings.²⁷⁸

²⁷³ *Chitty supra* note 255 at [16-010] and [16-177]. See for instance *Apthorp v Neville* (1907) 23 TLR 575 and *Parkinson v College of Ambulance Ltd* [1925] 2 K.B. 1.

²⁷⁴ These cases are helpfully summarized in Crivellaro *supra* note 79 at pp. 128-130. Other relevant cases include ICC Case No. 3913 (1981); ICC Case No. 3916 (1982); ICC Case No. 6497 (1994); ICC Case No. 8891 (1998).

²⁷⁵ Enonchong (*Illegal Transactions*) *supra* note 255 at pp. 292-293 and 297-299 and *Chitty supra* note 255 at [16-011]. For comparative law analysis, see Dannemann *supra* note 269 and Enonchong (Comparative) *supra* note 255.

²⁷⁶ Assuming the main contract or relevant government approvals have not yet been procured, the principal may terminate the intermediary agreement owing to the intermediary's breach of contract (lawful performance of its obligations being impliedly, if not expressly, required under the intermediary agreement: see Kim Lewison, *The Interpretation of Contracts* at [7.11]), and bring an action for money had and received to recover any advance payments made to the intermediary on the basis of total failure of consideration: see *Chitty supra* note 255 at [12-026], [16-011], [24-50], and [29-054]-[29-059]. Alternatively, if the main contract or relevant government approvals are initially procured, but are subsequently rescinded by the government owing to the intermediary's corruption of its officials (see *Armagas Ltd v Mundogas SA* [1986] AC 717 at 744-745), the principal may thereafter bring a claim for damages arising out of the intermediary's breach of contract. See further Enonchong (*Illegal Transactions*) *supra* note 255 .

²⁷⁷ Raouf *supra* note 70 at pp. 119-120; Cremades and Cairns *supra* note 4 at pp. 84-85.

²⁷⁸ It is uncontroversial that any implied obligation of confidentiality applicable to the parties also extends to the tribunal: see Michael Hwang and Katie Chung, “Protecting Confidentiality and its Exceptions— The Way Forward?” in ICC Bulletin, *Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice Special Supplement* (2009) at p. 40. See generally the International Law Association International Arbitration

102. Any duty of disclosure can only arise from national legislation to which the tribunal members are subject.²⁷⁹ Such duty overrides any express or implied obligation of confidentiality.²⁸⁰ For instance, anti-money laundering regulations (which often work hand-in-hand with anti-corruption legislation^{281,282}) may impose on arbitrators an obligation to report his or her reasonable suspicions of a party's corrupt activities, and exempt them from liability for any breach of confidentiality obligations. Singaporean anti-money laundering legislation is apparently couched in broad enough terms to have such effect (although, to our knowledge, no case has ever applied it in this context, nor has any arbitrator reported his or her suspicions of corruption aroused from hearing a case).²⁸³
103. The relevant anti-money laundering legislation in Singapore is the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) (“SCA”). Section 39(1) SCA imposes a duty of disclosure on a person who knows or has reasonable grounds to suspect that certain property may represent the proceeds of, was used in connection with, or is intended to be used in connection with criminal conduct.²⁸⁴ “Property” is widely defined as “money and all other property, movable or immovable, including things in action and other intangible or incorporeal property”,²⁸⁵ which could include contracts obtained through the bribery of government officials.

Committee’s Report on “Confidentiality in International Commercial Arbitration” (2010) (hereinafter “**ILA Report (Confidentiality)**”) at pp. 5-8 and 20-22.

²⁷⁹ Cremades and Cairns *supra* note 4 at p. 85.

²⁸⁰ See for instance Sections 23D(1) and 23D(8)-(9) of the Australia International Arbitration Act 1974 (taking into account amendments up to Act No. 5 of 2011). See generally ILA Report (Confidentiality) *supra* note 278 at pp. 5-8 and 20-22; and Michael Hwang and Katie Chung, “Defining the Indefinable: Practical Problems of Confidentiality in Arbitration”, 26(5) J. of Int’l Arb. 609 (2009) at 622.

²⁸¹ For instance, Article 13 COE Criminal Law Convention against Corruption requires State Parties to criminalise the conduct referred to in Article 6(1) and (2) of the COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, when the predicate offence consists of any of the offences contained in Articles 2-12 COE Criminal Law Convention against Corruption: see *Corruption and Misuse of Public Office supra* note 12 at [14.29]. As noted in Chaikin *supra* note 21 at p. 270:

“Corruption and money laundering often occur together, with the presence of one reinforcing the other. Corruption generates billions of dollars of funds that will need to be concealed through the money laundering process. At the same time, corruption contributes to money laundering activity through payment of bribes to persons who are responsible for the operation of AML systems. The close linkage between corruption and money laundering suggests that policies that are designed to combat both crimes will be more effective.”

²⁸² See general Cremades and Cairns *supra* note 4 at pp. 70-75.

²⁸³ Cf. international conventions and other initiatives which merely recommend that countries adopt measures to encourage the reporting of bribery, without specifying that these measures should include the imposition of a legal duty to report suspicions of knowledge of corrupt activities: see for instance Article 39(2) UN Convention Against Corruption and Articles III (iv) and IX (i) and (iii) OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

²⁸⁴ Section 39(1) Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) (“SCA”) reads as follows:

“39. Duty to disclose knowledge or suspicion (1) Where a person knows or has reasonable grounds to suspect that any property: (a) in whole or in part, directly or indirectly, represents the proceeds of; (b) was used in connection with; or (c) is intended to be used in connection with, any act which may constitute drug trafficking or criminal conduct, as the case may be, and the information or matter on which the knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment, he shall disclose the knowledge or suspicion or the information or other matter on which that knowledge or suspicion is based to a Suspicious Transaction Reporting Officer as soon as is reasonably practicable after it comes to his attention.”

²⁸⁵ Section 2(1) SCA *ibid*.

“*Criminal conduct*” is also couched in broad terms as including, for instance, bribery in relation to both local and foreign government contracts.²⁸⁶ Thus, for instance, if an arbitrator sitting in Singapore has reasonable suspicions that a party bribed a foreign government official in order to procure a government contract *outside* Singapore (the contract and bribery of the foreign government official would constitute “*property*” and “*criminal conduct*” respectively under the SCA), it appears that Section 39(1) imposes on him the obligation to report such suspicions to the relevant Singapore authorities. Failure to do so is grounds for a conviction and a fine.²⁸⁷

104. If disclosure is made pursuant to Section 39(1) SCA, Section 39(6) immunizes the arbitrator from any breach of the obligation of confidentiality.²⁸⁸ Institutional rules also recognise compulsion of law as an exception to the duty of confidentiality. The 2010 SIAC Rules for instance provide that parties or arbitrators may disclose matters relating to an arbitration “*in compliance with the provisions of the laws of any State which are binding on the party making the disclosure*”.²⁸⁹ The WIPO Rules similarly provide that the duty of confidentiality is binding on the parties and arbitrators “*except to the extent... required by law*”.²⁹⁰

105. It should also be noted that, even if there is no legal compulsion for an arbitrator to disclose corrupt activities, disclosure *of his or her own accord* to the relevant authorities may fall under the public interest or interests of justice exceptions to confidentiality.²⁹¹ Thus, for instance, it has been held that

²⁸⁶ See Section 2(1) SCA *supra* note 284. The definition of “*criminal conduct*” includes both “*serious offence*” and “*foreign serious offence*”. “*Foreign serious offence*” is in turn defined as “*an offence... against the laws of, or of a part of, a foreign country... and the act or omission constituting the offence or the equivalent act or omission would, if it had occurred in Singapore, have constituted a serious offence.*” “*Serious offence*” is defined as, *inter alia*, the offences specified in the Second Schedule, which includes “*Bribery in relation to Government contracts*” and “*Bribery of Member of Parliament*” under Sections 10 and 11 of the Singapore Prevention of Corruption Act (Cap. 241).

²⁸⁷ Section 39(2) SCA *ibid*.

²⁸⁸ Section 39(6) SCA *ibid*. provides that:

“(6) Where a person discloses in good faith to a Suspicious Transaction Reporting Officer —
(a) his knowledge or suspicion of the matters referred to in subsection (1) (a), (b) or (c); or
(b) any information or other matter on which that knowledge or suspicion is based,
the disclosure shall not be treated as a breach of any restriction upon the disclosure imposed by law, contract or rules of professional conduct and he shall not be liable for any loss arising out of the disclosure or any act or omission in consequence of the disclosure.”

²⁸⁹ Article 35.2(d) Arbitration Rules of the Singapore International Arbitration Center.

²⁹⁰ Article 76(a) WIPO Arbitration Rules. See also Articles 73-75 WIPO Arbitration Rules.

²⁹¹ See for instance the exceptions to the duty of confidentiality imposed by recent arbitration legislation enacted in countries such as: (i) **Australia** (Section 23G(1) of the Australia International Arbitration Act 1974 (taking into account amendments up to Act No. 5 of 2011) reads: “*A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings... if: (a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed...*” (emphasis added)); (ii) **New Zealand** (Section 14E(2) of the New Zealand Arbitration Act 1996 (reprinted as at 1 January 2011) reads: “*The High Court may make an order [allowing a party to disclose any confidential information] only if— (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed...*” (emphasis added)); and (iii) **Scotland** (Rule 26(1) of the Scottish Arbitration Rules reads: “*(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure— ... (c) is required —... (iii) in order to enable any public body or office-holder to perform public functions properly, (e) is in the public interest, (f) is necessary in the interests of justice...*” (emphasis added)). See generally ILA Report (Confidentiality) *supra* note 278 at pp. 16-17 and 20-22.

a party's disclosure to regulatory authorities of documents relating to an arbitration providing evidence of the commission of dishonest and fraudulent acts, was not a breach of that party's implied duty of confidentiality in arbitration.²⁹² In principle, the same exception should also apply to arbitrators.

VII. The Judicial Scrutiny of Corruption-Tainted Arbitral Awards at the Setting Aside and Enforcement Stages

106. When a tribunal renders an award upholding an allegedly corrupt agreement, the award is often challenged by the losing party in national courts on public policy grounds.²⁹³
107. Article V(2)(b) of the New York Convention and Article 36 of the UNCITRAL Model Law enshrine the public policy of the forum as grounds upon which arbitral awards may be refused *enforcement* by the courts. They provide that: "*Recognition and enforcement of an arbitral award may also 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.*" (emphasis added)
108. In similar terms, Article 34(2)(b)(ii) of the UNCITRAL Model Law provides for the *setting aside* of an award on grounds of public policy: "*An arbitral award may be set aside by the court specified in*

However, not all jurisdictions recognize an obligation of confidentiality in the absence of express provision in national arbitration laws or Parties' arbitration agreements for arbitral proceedings to be kept confidential. Disclosure of matters relating to arbitrations seated in these jurisdictions, in the absence of express agreement by the parties to preserve the confidentiality of the arbitration proceedings, will not give rise to breach of confidentiality. Hence, there is no need for a party, which has disclosed to the relevant authorities matters relating to an arbitration supporting its suspicion of corruption, to plead any public interest or interests of justice exception to confidentiality, it not being bound by any obligation of confidentiality in the first place. See generally Born *supra* note 40 at pp. 2262-2264 (noting that countries like Sweden and the United States do not recognize an implied duty of confidentiality).

²⁹² *AAY and others v AAZ* [2009] SGHC 142. See also Hwang and Chung *supra* note 280 at 625-626; and Michael Hwang and Nicholas Thio, "A Contextual Approach to the Obligation of Confidentiality in Arbitration in Singapore: An Analysis of the Decision of the High Court in *AAY and others v AAZ*" (due for publication in 2012).

²⁹³ Here, we are referring to challenges on the basis of *substantive* public policy, which "*goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award*", as opposed to *procedural* public policy, "*which goes to the process by which the dispute was adjudicated*": ILA Report (Public Policy) *supra* note 7 at p. 17. It is uncontroversial that an award will be refused enforcement or set aside if there was corruption on the part of a tribunal member as a violation of procedural public policy, there being an international consensus in this regard: ILA Report (Public Policy) at p. 24. Such violations of procedural public policy will therefore not be the focus of this paper. Australia, New Zealand, India and Zimbabwe for instance have enacted modified versions of the UNCITRAL Model Law which provide that the public policy grounds of enforcement and setting aside of awards includes the case where "*the making of the award was induced or affected by fraud or corruption*": ILA Report (Public Policy) at pp. 24-25. Similarly, in Singapore, Section 24(a) of the International Arbitration Act provides that "*Notwithstanding Article 34 (1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34 (2) of the Model Law, set aside the award of the arbitral tribunal if (a) the making of the award was induced or affected by fraud or corruption...*" The Ontario Court of Appeal in *Corporacion Transnacional de Inversiones SA de CV v. STET Int'l SpA*, 49 O.R.3d 414 (2000) is also described as having held that the "*public policy exception applies when an award offends local principles of justice and fairness in a way attributable to another jurisdiction's procedural or substantive rules or tribunal ignorance or corruption*": Born *supra* note 40 at p. 2851 fn 703.

article 6 only if: ... the court finds that: ... the award is in conflict with the **public policy** of this State.” (emphasis added) Most developed national arbitration statutes are broadly similar to the UNCITRAL Model Law in this regard.²⁹⁴

109. The leading arbitration jurisdictions interpret the grounds for setting aside of awards in conformity with the corresponding New York Convention grounds for refusal of enforcement.²⁹⁵ It is therefore unnecessary to draw any distinction between the concept of public policy under the setting aside and enforcement regimes, as the extent of the court’s scrutiny of international arbitration awards is the same regardless where the award is made.²⁹⁶

A. The Competing Considerations: Balancing the Finality of Arbitral Awards and the Forum’s Fundamental Public Policy Concerns

110. A court “may” set aside or refuse enforcement of an award if a party successfully establishes any one of the stipulated grounds under the New York Convention and UNCITRAL Model Law (see [107]-[108] above). Hence, even if contravention of public policy is made out, it is not mandatory for the court to annul the award or refuse to enforce it. The court has the discretion to determine the nature of forum public policy violation which warrants interference with the award.

111. In exercising this discretion, there is a tension between respecting the finality of arbitral awards on the one hand, and policing the forum’s other public policy concerns on the other. Respect for the finality of arbitral awards serves a number of functions: it prevents the relitigation of issues already determined in arbitration; encourages predictability in the resolution of disputes through international arbitration; and preserves the principle of comity of nations.²⁹⁷ However, public policy covers a broader array of state interests extending beyond these policy goals underlying preservation of award finality. For present purposes, the most relevant manifestation of public policy in direct tension with award finality is the prohibition against agreements considered contrary to good morals or public order, such as contracts for corruption and bribery.²⁹⁸ National courts are understandably loathe to enforce, by upholding arbitral awards, agreements which may be repugnant to the forum’s fundamental moral values, and which undermine fair competition as well as integrity in public administration.

112. When a reviewing court is asked to set aside or refuse enforcement of an award, on the basis that the award allegedly upholds a contract tainted by corruption, two issues arise: (i) whether the award’s findings of fact and/or law should be re-examined by the court; and (ii) whether the award, based on the tribunal’s or the court’s findings of facts and/or law (as the case may be), should be refused enforcement on public policy grounds. These are the two issues discussed below.

²⁹⁴ Born *supra* note 40 at pp. 2566-2567.

²⁹⁵ See generally Born *ibid.* at pp. 2552; 2556-2560; 2827-2863. The latest jurisdiction to

²⁹⁶ The Singapore Court of Appeal recently affirmed this principle in *AJU v AJT* [2011] SGCA 41 at [37]-[38]. This case is discussed further below at [126]-[133].

²⁹⁷ *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc* 373 U.S. 614 (1985); *Re an arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthur Pte. Ltd* [1996] 1 SLR 34; ILA Report (Public Policy) *supra* note 7 at pp. 15-17.

²⁹⁸ Other manifestations of public policy include mandatory laws/*lois de police* (Mayer *supra* note 169 at 275: “an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship... a matter of public policy... so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws”); fundamental principles of law (such as the principle of good faith and *pacta sunt servanda*); and rules of natural justice. See generally ILA Report (Public Policy) *supra* note 7 at pp. 17-30.

B. The Competing Judicial Attitudes Regarding the Permissible Extent of Court Review of Tribunals' Findings of Fact and Law

113. A tribunal may issue an award finding that corruption has not been proven by the complainant (Section III above), or that the applicable law does not deem either party to have engaged in corrupt activities (Section IV above). Alternatively, the tribunal may issue an award without considering the possibility of corruption, since neither party had pleaded corruption as part of its case (Section II above). The common element between these awards is that there is no finding of illegality or corruption. Parties dissatisfied with the award often apply to set aside or resist enforcement on the basis that the tribunal did not properly consider the evidence of corruption put before it, that evidence of corruption was only discovered after the close of arbitral proceedings, or that the tribunal wrongly identified or applied the law governing issues of corruption.
114. There is a remarkable degree of variation, not only between jurisdictions, but also between different courts *within* certain jurisdictions, regarding the permissible extent of court review of a tribunal's findings. The tension between award finality and public policy manifests itself in three competing judicial attitudes towards the scrutiny of awards, *viz*: (i) minimal review; (ii) maximal review; and (iii) contextual review.²⁹⁹

(i) Minimal Review

115. Courts which conduct minimal review show a great degree of deference to the findings made by the tribunal in its award.³⁰⁰
116. First, the court will refrain from reviewing the tribunal's identification and application of the law. The Swiss case of *Thomson-CSF v Frontier AG*³⁰¹ and the US case of *Northrop Corporation v Triad Financial Establishment*³⁰² ("*Northrop v Triad*") exemplify this aspect of minimal review.
117. We start with the former— *Thomson-CSF v Frontier AG*. In its Judgment of 28 January 1997, the Swiss Federal Tribunal dismissed an application to set aside the arbitral tribunal's award in ICC Case No. 7664 (1996) (briefly mentioned at [54] above),³⁰³ which enforced commission payments due under an intermediary agreement between Frontier AG and Thomson-CSF (Thomson-CSF later became Thalès, but to avoid confusion, we refer to it throughout this article as Thomson-CSF). Under the agreement, which was governed by French law, Frontier AG as intermediary was to assist Thomson-CSF in completing its sale of six *Lafayette*-class frigate warships to Taiwan. The parties had entered into the intermediary agreement on 19 July 1990, after the French government, owing to China's objections to the sale of the frigates to Taiwan, withdrew its authorisation for the transaction. In 1991, the French government dropped its opposition and re-authorised the deal, which allowed Thomson-CSF to sign a contract with Taiwan for the sale of the frigates, worth approximately USD 2.5 billion. A year later, in 1992, Frontier AG brought arbitration proceedings in Switzerland, claiming that Thomson-CSF failed to pay its commission due under the intermediary

²⁹⁹ Sayed *supra* note 19 at pp. 391-421.

³⁰⁰ See generally Hanotiau and Caprasse *supra* note 204 at 811-815.

³⁰¹ Swiss Federal Tribunal's Judgment of 28 January 1997 16(1) ASA Bulletin 118 (1998).

³⁰² 593 F. Supp. 928 (1984).

³⁰³ Swiss Federal Tribunal's Judgment of 28 January 1997 16(1) ASA Bulletin 118 (1998) at p. 130.

agreement. One of the issues in dispute was the nature of the services envisaged under the intermediary agreement. Frontier AG contended that the purpose of the agreement was to engage the services of one Mr Kwan, who was to use his connections in China to overcome Chinese officials' objections to the sale of the frigates through legitimate lobbying activities. In contrast, Thomson-CSF argued that Mr Kwan was engaged to neutralise the French veto on the sale through corrupt influence peddling in France. The arbitral tribunal found, on the basis of its evaluation of the evidence presented in the case, that Mr Kwan was engaged exclusively to overcome China's objections to the sale, but through methods which did not amount to corrupt influence peddling. It thus ordered Thomson-CSF to pay the commission owed to Frontier AG under the intermediary agreement.

118. This award was challenged by Thomson-CSF before the Swiss Federal Tribunal. One of the grounds of challenge was that the arbitral tribunal had failed to correctly apply Article 178 of the old French penal code. The argument pressed by Thomson-CSF was that Article 178 prohibited *all* agreements for the influence of public officials, which should have rendered invalid the intermediary agreement between the parties, since its purpose as found by the arbitral tribunal was to influence Chinese officials to retract their objections to the sale. The court dismissed this argument, holding that "*It is a challenge according to which the arbitral authority has badly applied the law on the substance ("error in iudicando"). But this challenge, even if it is founded (which is not the case in the present matter), would not justify the setting aside of the award*".³⁰⁴ This case, which has come to be referred to as the "frigates-to-Taiwan" saga, was also litigated in France. We examine its facts and the French proceedings in greater detail later below. It suffices to say at this point that the Swiss Federal Tribunal's decision in 1997 was not the end of the matter, in Switzerland as well as in France.

119. Turning to the US Ninth Circuit Court of Appeals decision in *Northrop v Triad*, the court similarly upheld an American Arbitration Association award enforcing payments of commissions to the claimant intermediary, who was to assist the respondent principal in the sale of military equipment and related support services to Saudi Arabia. The tribunal held, *inter alia*, that the respondent was not excused from performing the intermediary agreement under Californian law (the governing law of the contract), notwithstanding the promulgation of a Saudi Arabian decree prohibiting the use of intermediaries with respect to arms sales to the Saudi Arabian government.³⁰⁵ The court noted in relation to the permissible scope of judicial review on matters of law that: "*The arbitrators' conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the Arbitrators; the Arbitrators carefully considered and decided them in a lengthy written opinion. To now subject these decisions to de novo review would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid.*"³⁰⁶ The Ninth Circuit Court of Appeals also observed that "*the mere error of interpretation of California law would not be enough to justify refusal to enforce the Arbitrators' decision*".³⁰⁷

³⁰⁴ Sayed *supra* note 19 at p. 400. Note that the Swiss Federal Tribunal's Judgment of 17 April 1990 annulling the first *Hilmarton* award (see [71] above) on the basis of the tribunal's incorrect application of the applicable Swiss law came at a time when the Swiss courts favoured maximal review. See Sayed's explanation as to how the enactment of the Swiss Private International Law Act of 1987 led to a change in Swiss judicial attitudes towards the scrutiny of arbitral awards (Sayed *supra* note 19 at pp. 394-396).

³⁰⁵ The facts of *Northrop v Triad* *supra* note 302 are explored in greater detail in Sayed *supra* note 19 at pp.246-250.

³⁰⁶ *Northrop v Triad* *ibid.* at 1269.

³⁰⁷ *Northrop v Triad* *ibid.* at 1269.

120. Second, a court which adopts a minimal review approach will generally refrain from re-opening a tribunal's findings of fact. The Swiss Federal Tribunal in *Thomson-CSF v Frontier AG* (see [117] above) thus rejected a further argument by the respondent that the arbitral tribunal had relied on “*non-existent evidence*” in coming to its conclusion in the award that Mr Kwan was engaged solely to overcome Chinese opposition to the sale of the frigates (rather than to neutralise the French government's veto on the sale through the exercise of corrupt influence on French officials), reasoning that “*it was not within its authority to review the facts of the case or the way the award proceeded in weighing evidence*” since “*a critique on the appreciation of evidence [by the arbitral tribunal] is a critique of purely appellate nature, that could not be admitted*”.³⁰⁸
121. Does this mean that a minimal review court will always take the award's findings of fact and law as they stand, lock, stock, and barrel, in deciding whether to uphold a public policy challenge to an award? Case law has identified three limited instances in which the minimal review approach will allow a re-examination of the tribunal's findings.
122. *First*, the court may re-open the tribunal's findings of fact only if the challenging party adduces *fresh* evidence of illegality, which “*is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the [arbitration] hearing*”.³⁰⁹ Fresh evidence may be more precisely defined as evidence which “*was not available or reasonably obtainable... at the time of the hearing of the arbitration*”.³¹⁰ In contrast to *fresh* evidence, neither *new* evidence (evidence which is not fresh, since it could have been obtained during the arbitral proceedings, but was not presented to the tribunal), nor evidence which had been submitted to but rejected by the tribunal,³¹¹ will be considered by a minimal review court. The first instance³¹² and Court of Appeal³¹³ decisions in *Westacre* illustrate this aspect of minimal review.
123. The claimant, Westacre, entered into an intermediary agreement (governed by Swiss law) with the respondent, Jugoimport (a Yugoslavian state-owned company, formerly an agency of the Federal Secretariat of National Defence of Yugoslavia), to assist the latter in obtaining contracts for the sale of M-84 tanks and related equipment to the Kuwaiti Ministry of Defence (“**Sales Contract**”), in consideration of substantial commission payments (“**Intermediary Agreement**”). After Westacre obtained the Sales Contract for Jugoimport, the latter refused to pay the promised commission, whereupon Westacre commenced ICC arbitration to recover its commission. The arbitration was seated in Switzerland. During the arbitration, Jugoimport alleged that Westacre had bribed Kuwaiti officials in order to obtain the Sales Contract for Jugoimport, and argued that Westacre's claim for its commission should therefore be denied. The tribunal held that Jugoimport had failed to provide sufficient evidence of corruption to prove its allegations; hence, the intermediary agreement was valid, and Jugoimport was ordered to pay the promised commission to Westacre.
124. When the award was presented for enforcement in England, Jugoimport challenged the award, raising the same argument. This time, however, Jugoimport attempted to introduce new evidence not put before the tribunal, by way of an affidavit (referred to in the court's judgment as the “**Affidavit**”) alleging that Westacre was being used as a vehicle by Kuwaiti government officials to

³⁰⁸ Sayed *supra* note 19 at p. 399.

³⁰⁹ Colman J. at first instance in *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd* [1998] 3 WLR 770 at 810 and Waller L.J. in his Court of Appeal decision in *Westacre supra* note 151 at 828.

³¹⁰ *Ibid.*

³¹¹ Nelson Enonchong, “The Enforcement of Foreign Arbitral Awards based on Illegal Contracts” LMCLQ (2000) 495 (hereinafter “**Enonchong (Enforcement)**”) at pp. 504-505.

³¹² *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd* [1998] 3 WLR 770 (first instance).

³¹³ *Supra* note 151.

receive bribes under the Intermediary Agreement, and that Westacre's witnesses gave false evidence at the arbitration hearing to conceal such corruption. Mantell L.J. (with whom Sir David Hirst agreed) simply held that: "[t]he allegation [of bribery] was made, entertained and rejected [by the Tribunal]... **in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.**" (emphasis added)³¹⁴

125. The majority clearly shared the concerns expressed by Colman J. at first instance, who declared that there exists the "*strongest conceivable public policy*" against re-opening arbitral awards' findings of fact, hence the rule that they may only be disturbed upon production of fresh evidence:

"By [attempting to introduce the Affidavit in order to prove perjury committed at the arbitration hearing] the defendants, in effect, invite the enforcement court to retry issues of fact which the arbitrators had before them and which they had to and did determine. If the public policy defence... extended to this ground, it would present an open invitation to disappointed parties to relitigate their disputes by alleging perjury and a major inroad would be made into the finality of [New York] Convention awards..."

As regards arbitrations, there is the strongest conceivable public policy against re-opening issues of fact already determined by the arbitrators. That is the policy which... it is now accepted, prohibits investigation by the courts... of the weight of the evidence before the arbitrator in order to disturb findings of fact... The introduction of fresh evidence in order to disturb an English award is subject to requirements similar to those relating to the introduction of fresh evidence to challenge an English judgment... the fresh evidence must be of sufficient cogency and weight to be likely to have influenced the arbitrator's conclusion and the evidence must not have been available or reasonably obtainable at the time of the hearing. The principles of finality and justice are nicely balanced by that rule. The authorities do not suggest that any different rule applies to English arbitrations in those cases where it is alleged that the consequence of permitting fresh evidence to be adduced would be that evidence given at the hearing by the successful party could be shown to have been perjured." (emphasis added)³¹⁵

126. The *second* case which justifies minimal review interference with a tribunal's findings is where the tribunal errs in its identification or interpretation of the forum's public policy. If (and only if) such error of law leads the tribunal to uphold a contract repugnant to the forum's *international* public policy, the award can be set aside or refused enforcement by the court. This was part of the holding in the eagerly anticipated Singapore Court of Appeal case of *AJU v AJT*.³¹⁶

127. The facts were as follows. AJU, a Thai company whose principal business was the production of television programmes, and AJT, a British Virgin Islands company, were parties to a contract enabling AJU to stage an annual tennis tournament in Bangkok for a term of five years. Disputes arose out of the contract, which led to the commencement by AJT of arbitration proceedings against AJU. In the course of arbitration proceedings, AJU lodged a complaint of fraud against AJT's sole director and shareholder and AJT-related companies with the Special Prosecutor's Office of Thailand, alleging forgery of a document providing that an AJT-related company held the rights to organize the tennis tournament. The Thai police commenced investigations against the alleged

³¹⁴ See also Enonchong (Enforcement) *supra* note 311 at p. 510.

³¹⁵ *Supra* note 312 at 804 and 808.

³¹⁶ [2011] SGCA 41. The Swiss Federal Tribunal's Judgment of 28 January 1997 in *Thomson-CSF v Frontier AG* can be interpreted as standing for the same proposition. See commentary on the case in Sayed *supra* note 19 at pp. 400-401.

offenders on charges of fraud, forgery, and use of a forged document. Under Thai law, fraud is a compoundable offence, whereas forgery and use of a forged document are non-compoundable offences. The discontinuance of proceedings in relation to non-compoundable offences rests in the hands of the Thai Public Prosecutor; hence, withdrawal of a complaint in relation to such offences will not necessarily cause the termination of criminal proceedings or investigations.

128. While the Thai authorities' investigations were underway, the parties negotiated and entered into a settlement agreement governed by Singapore law (the "**Concluding Agreement**"). Under the Concluding Agreement, AJT would terminate the arbitration upon receiving evidence of the withdrawal, discontinuance, or termination of the criminal proceedings in Thailand, and in return, AJU was required to pay AJT US\$470,000 as final settlement of the arbitration. Subsequently, AJU withdrew its complaint and paid the settlement sum in full. The Thai authorities in turn issued a cessation order for the charge of fraud and, citing insufficient evidence, a non-prosecution order for the forgery charges. However, AJT still refused to terminate the arbitration, taking the view that AJU had failed to comply with the Concluding Agreement, as Thai criminal investigations into the forgery charges could still be reactivated by the production of additional evidence.
129. AJU applied to the tribunal to terminate the arbitration, and AJT responded by challenging the validity of the Concluding Agreement on the ground of, *inter alia*, illegality, arguing that it was an agreement between the parties to stifle the prosecution in Thailand of the forgery charges in contravention of Thai law, and accordingly, contrary to the public policy of Thailand and Singapore. AJT also argued that the non-prosecution order was procured by AJU through bribery and/ or corruption of the Thai authorities. The issue of the validity of the Concluding Agreement was submitted to the tribunal, which rendered an interim award terminating the arbitration, as it found that the Concluding Agreement was valid and enforceable, and that AJU did not obtain the non-prosecution order through bribery of the Thai authorities.
130. AJT sought to set aside the interim award on public policy grounds, arguing before the High Court that the Concluding Agreement was illegal as an agreement to stifle the prosecution of non-compoundable forgery charges in Thailand, and that the non-prosecution order had been procured through bribery and/ or corruption of the Thai authorities. Proceeding on the basis that this was "*an appropriate case*" for the court to intervene and re-open the tribunal's findings on the legality of the Concluding Agreement, the High Court re-evaluated the evidence relating to AJT's allegations of illegality, and concluded that the Concluding Agreement was illegal under its governing law (Singaporean law) and the law of the place of performance (Thai law), as it was an agreement between the parties to stifle the prosecution of non-compoundable offences under Thai law. The High Court, however, dismissed AJT's allegations that AJU had procured the non-prosecution order through bribery and/or corruption of the Thai authorities.
131. AJU appealed the High Court's decision, which the Court of Appeal overturned on the basis that the High Court had erred in re-opening the tribunal's findings of fact.³¹⁷ The Court of Appeal's reasoning indicated its endorsement of the minimal review approach (though there is more than

³¹⁷ The Singapore Court of Appeal at [71] of its judgment also disapproved of *Rockeby biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155 ("**Rockeby**"), which had cited the High Court decision in *AJT v AJU* [2010] 4 SLR 649 approvingly, and held that "[i]n deciding the issue of illegality, [the court has] the power to examine the facts of the case afresh." See the authors' review of *Rockeby* in Michael Hwang and Kevin Lim, "*Rockeby biomed Ltd v. Alpha Advisory Pte Ltd AS*, High Court, Originating Summons No 1206 of 2010, 22 June 2011: A Contribution by the ITA Board of Reporters" (Kluwer Law International, 2011))

meets the eye to this, which we reserve for later discussion at the end of this Section: see [190]-[194] below).

132. After setting out the two divergent approaches in England—that adopted by the *Westacre* majority on the one hand, and Waller L.J.’s more “*interventionist*” two-stage test in *Soleimany v Soleimany*³¹⁸ (“*Soleimany*”) (see [152]-[156] below) on the other—the Court of Appeal held that it was the *Westacre* majority’s approach (endorsing Colman J.’s first instance judgment³¹⁹) which was consonant with the legislative policy of “*giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral award*”.³²⁰ In this regard, the Court of Appeal drew a distinction between errors of *law* relating to the forum’s public policy on the one hand, and errors of *fact* on the other. The Court of Appeal held that the public policy exception in Article 34(2)(b)(ii) of the UNCITRAL Model Law only permits setting aside of awards for errors of *law* as to *what constitutes Singapore’s international public policy*. It reasoned as follows:

“...the law [governing the Concluding Agreement] applied by the Tribunal was Singapore law... the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn whether or not the Concluding Agreement is illegal... the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality...”

... It is a question of law what the public policy of Singapore is. An arbitral award can be set aside if the arbitral tribunal makes an error of law in this regard... Thus, in the present case, if the Concluding Agreement had been governed by Thai law instead of Singapore law, and if the Tribunal had held that the agreement was indeed illegal under Thai law (as [AJT] alleged) but could nonetheless be enforced in Singapore because it was not contrary to Singapore’s public policy, this finding – viz, that it was not against the public policy of Singapore to enforce an agreement which was illegal under its governing law – would be a finding of law which, if it were erroneous, could be set aside under Art 34(2)(b)(ii) of the Model Law...” (emphasis added)³²¹

It is implicit that the “*public policy*” which the Court of Appeal referred to in the above passage was *international* as opposed to *domestic* public policy, for earlier in its judgment, the court observed that public policy under the UNCITRAL Model Law grounds for setting aside and refusal of enforcement has “*an international focus*”,³²² and “*must involve either ‘exceptional circumstances ... which would justify the court in refusing to enforce the award’ ... or a violation of ‘the most basic notions of morality and justice’.*”³²³

133. Turning to findings of fact by the tribunal, the Court of Appeal held in contrast that, even if they are made in error, they are nevertheless “*final and binding on both parties*”,³²⁴ which mirrors the holding of the English Court of Appeal in *Westacre*, and the Swiss Federal Tribunal in *Thomson-CSF v Frontier AG* (see [124] and [120] above respectively). However, the Court of Appeal in *AJU v AJT* also (correctly) took care not to couch this principle in absolute terms, holding that a tribunal’s

³¹⁸ [1998] 3 WLR 811.

³¹⁹ *Supra* note 312.

³²⁰ *AJU v AJT supra* note 316 at [60].

³²¹ *AJU v AJT ibid.* at [62] and [67].

³²² *AJU v AJT ibid.* at [37].

³²³ *AJU v AJT ibid.* at [38].

³²⁴ *AJU v AJT ibid.* at [70] read with [69].

findings of fact can be subject to court review in the limited circumstances “*where there is fraud, breach of natural justice or some other recognised vitiating factor*”.³²⁵

134. The *third* instance in which a minimal review court may re-open an award’s findings of fact is thus the existence of these vitiating factors pointed out in *AJU v AJT*. Although they were not present in *AJU v AJT*, fraud was in issue the *second* time that the *Thomson-CSF v Frontier AG* case went before the Swiss Federal Tribunal in 2009. This was more than a decade after the Federal Tribunal first dismissed Thomson-CSF’s application to set aside the award (see [117] above). In the interim, French criminal investigations had revealed a fraudulent scheme orchestrated by persons associated with Frontier AG to conceal the corrupt object of the intermediary agreement from the tribunal. Following release of the French criminal investigations’ findings, Thomson-CSF submitted a petition for revision of the award, which the Federal Tribunal granted in its judgment dated 6 October 2009, pursuant to Article 123(1) of the Federal Statute on the Federal Tribunal.³²⁶ The Federal Tribunal held that the requirements of Article 123(1) were satisfied, as the tribunal’s decision had been materially influenced by the commission of a serious criminal offence under Swiss law (i.e. procedural fraud), which was established by the French criminal investigation’s findings. The Federal Tribunal accordingly set aside the award and remanded the case back to the original arbitral tribunal, or to a new arbitral tribunal constituted under the ICC rules.
135. It should be noted that “revision” of an arbitral award, the substance of which has become *res judicata*, is an exceptional remedy under Swiss law, and is relatively unknown to most other national arbitration laws.³²⁷ Article 123(1) of the Federal Statute on the Federal Tribunal also does not appear to impose a *fresh* evidence requirement circumscribing the fraud exception,³²⁸ as required by the *Westacre* majority (see [124] above), and probably most other minimal review courts. Nevertheless, a challenge brought in similar circumstances as the *Thomson-CSF v Frontier AG* case will doubtless be upheld by minimal review courts in ordinary setting aside or enforcement proceedings, since criminal proceedings establishing fraud *after* the termination of arbitration proceedings surely constitute *fresh* evidence of fraud unavailable during the arbitration.

(ii) Maximal Review

136. We now turn to the other end of the spectrum of judicial review approaches— maximal review. Maximal review may be described as “*total scrutiny of the award both as a matter of fact and of law*”³²⁹ which is applied by courts “*jealous in preserving certain national values and policies*”.³³⁰

³²⁵ *AJU v AJT supra* note 316 at [65].

³²⁶ See generally Antonio Rigozzi and Elisabeth Leimbacher, “The Swiss Supreme Court Refits the Frigates” 27(3) *Journal of International Arbitration* 307 (2010).

³²⁷ See Rigozzi and Leimbacher, *ibid.* at pp. 310-315; and Georg von Segesser and Schellenberg Wittmer, “Federal Tribunal Revises Award Influenced by Fraud” *Kluwer Arbitration Blog* (23 October 2009) available at <<http://kluwerarbitrationblog.com/blog/2009/10/23/piercing-the-corporate-veil-effect-on-the-arbitration-clause-and-jurisdiction/>>.

³²⁸ Article 123(1) of the Federal Statute on the Federal Tribunal does not on its face require the petitioner to adduce fresh evidence, so long as he demonstrates that the tribunal’s decision “*has been influenced to the petitioner’s detriment by a crime or a felony*”. Cf. Article 123(2), which establishes a second ground for revision, which is where “*the petitioner discovers, after the decision is rendered, relevant facts or conclusive evidence which he could not rely upon during the previous proceedings*”. See Rigozzi and Leimbacher *supra* note 326 at p. 311.

³²⁹ Sayed *supra* note 19 at p. 406.

³³⁰ Sayed *supra* note 19 at p. 393. See further Hanotiau and Caprasse *supra* note 204 at 805-811.

137. The Paris Court of Appeal decision in *European Gas Turbines SA v Westman International Ltd*³³¹ (“*Westman*”) exemplifies the maximal review approach.³³² In this case, a French company, Alsthom Turbines a Gaz SA (“*Alsthom*”) (Alsthom later became European Gas Turbines, but to avoid confusion, we refer to it throughout this article as Alsthom), entered into an intermediary agreement with Westman International Ltd (“*Westman*”), under which Westman was to promote Alsthom’s gas turbines so that it would obtain special prequalification status for a petrochemical project in Iran. In the event of special prequalification, Westman was to give Alsthom all useful information and advice to help secure for it a contract with the Iranian authorities for the supply of gas turbines on the best possible terms. In return for Westman’s services and to cover its expenses, Alsthom was to pay Westman a commission, which was to be fixed by mutual agreement before submission of Alsthom’s bid for the supply contract. The intermediary agreement was governed by French law and provided for ICC arbitration. After obtaining prequalification status, and the supply contract, Alsthom refused to pay Westman the agreed commission. Westman brought arbitration proceedings, claiming a 6% commission. Alsthom’s defence was that the agreement was made for the illegal purpose of exercising corrupt personal influence over, and to pay bribes to, foreign government officials. The tribunal held that there was insufficient evidence to prove that the intermediary agreement’s purpose was to carry out the alleged illegal activities, and ordered Alsthom to pay Westman’s commission, basing its calculations on evidence provided by Westman, which detailed the expenses it incurred in performing its obligations under the agreement.
138. Alsthom resisted enforcement of the award in France, alleging that: (i) Westman had committed perjury by certifying it had incurred expenses when this was untrue; and (ii) such fraud had concealed the corrupt nature of the intermediary agreement. In support of its contentions, Alsthom relied on new documents showing that there were no records of Westman’s alleged expenses, which Alsthom could have obtained during the arbitral proceedings, but did not raise before the tribunal.³³³ The Court held, on the basis of, *inter alia*, these new documents, that Westman had committed perjury, and set aside the award on this ground alone. As the new documents did not themselves establish evidence of a corrupt agreement, the second ground (corruption) for setting aside the award failed.
139. The *Westman* judgment demonstrates several aspects of maximal review. First, findings of fact and law can be reviewed *de novo*. Not only non-application, but bad application of law by the tribunal can be re-examined.³³⁴ Furthermore, the court can conduct extensive re-ascertainment and re-evaluation of the facts.³³⁵ As *Westman* held, the court is entitled to “*scrutinize the award... both as a matter of law and fact on all elements specifically justifying the application or non-application of the international public policy rule*” (emphasis added) and “[t]o decide otherwise would lead, in effect, to deprive the control of the judge of all efficacy, and therefore, of all its rationale.”³³⁶ The court therefore proceeded to “*investigate all available evidence in detail. It conducted its investigation independently, and proceeded in the weighing of the evidence without reference to the award.*”³³⁷ Second, a reviewing court with a maximal review predisposition may consider evidence

³³¹ Paris Court of Appeal Judgment of 30 September 1993, XX Y.B. Comm. Arb. 198 (1995).

³³² See ILA Report (Public Policy) *supra* note 7 at p. 32.

³³³ Enonchong (Enforcement) *supra* note 311 at p. 514 notes that: “*the evidence was not fresh evidence since the documents were based on the accounts of Westman, which were presumably available at Companies House from 1985 to 1991, so that they could have been presented to the arbitrators before the award was signed in March 1992.*”

³³⁴ Sayed *supra* note 19 at pp. 407-408.

³³⁵ *Ibid.* at pp. 407-408.

³³⁶ *Ibid.* at p. 409. See also Hanotiau and Caprasse *supra* note 204 at 805.

³³⁷ Sayed *ibid.* at p. 409.

which could reasonably have been obtained during the arbitral proceedings, but was not raised by the challenging party (i.e. evidence which is new, but not fresh), such as the new documents Alstom relied on to demonstrate Westman's fraud.³³⁸ Third, although this was not specifically made clear in *Westman*, the broad principle of “total control”³³⁹ laid down in the court's *dicta* strongly suggest that the court's power to conduct *de novo* review of the facts extended even to contentions of fact which had been rejected by the tribunal (i.e. evidence which is neither new nor fresh).

140. In line with *Westman*, the Paris Court of Appeal again demonstrated its predilection for maximal review when the award in the “frigates-to-Taiwan” case— the case which the Swiss Federal Tribunal had first declined to set aside in its Judgment of 28 January 1997 in *Thomson-CSF v Frontier AG* (see [117] above)— was presented for enforcement in France. Dramatic twists in the case were destined to ensue in France. On 4 September 1996, an enforcement order of the award was rendered by the Paris Tribunal of First Instance, which Thomson-CSF appealed. Thomson-CSF also filed a criminal complaint on 26 February 1997, alleging that one Mr Sirven, who was “*behind the veil of Frontier AG*”,³⁴⁰ had committed fraud in the presentation of evidence in the arbitration proceedings by fabricating Mr Kwan's involvement to conceal a sophisticated scheme of corruption. The Paris Attorney General requested an investigation of attempted fraud, and a number of persons, including Mr Sirven and Mr Kwan, were placed under investigation. On appeal before the Paris Court of Appeal, Thomson-CSF requested that relevant documents in the criminal investigation file be transmitted to the Court, and that proceedings be suspended pending release of the criminal investigation's findings, and a final decision on the criminal charges.
141. Both requests were granted by the Paris Court of Appeal in its judgments of 10 September 1998 and 7 September 1999.³⁴¹ In the former judgment, the court reasoned, in very similar terms as its judgment in *Westman*, that “[t]he power recognized to the arbitrator in international arbitration to appreciate the legality of a contract under rules of international public policy and to sanction illegality by pronouncing nullity, requires... the control exercised by the annulment or the *exequatur* judge, on the ground of public policy violation... the ability to appreciate **all elements of facts and law** allowing notably to justify the application of the rule of international public policy, and, in the affirmative, to measure the legality of the contract.” (emphasis added)³⁴² It should be noted that the Paris Court of Appeal was not applying the fraud exception to non-interference with a tribunal's findings of fact under the *minimal* review approach, since the court ordered the stay when criminal investigations had just commenced, and had yet to uncover *fresh* evidence of fraud,³⁴³ a necessary prerequisite to trigger the exception (see [122] above). Moreover, the court clearly indicated in the above-cited *dictum* that it was entitled and obliged to conduct total and comprehensive review of the tribunal's findings, *so long as the award is challenged on any international public policy ground* (whether on the basis of procedural fraud, corruption, or otherwise), and regardless whether there was sufficient evidence of fraud at the time the challenge was brought. Thus, the Paris Court of Appeal effectively conducted a *de novo* review of the merits, by allowing the transmittal of relevant documents in the criminal investigation file to the enforcement proceedings, and then staying the case pending the conclusion of the criminal investigations.

³³⁸ Enonchong (Enforcement) *supra* note 311 at p. 514.

³³⁹ Sayed *supra* note 19 at pp. 408-409.

³⁴⁰ Rigozzi and Leimbacher *supra* note 326 at p. 308.

³⁴¹ Sayed *supra* note 19 at p. 410.

³⁴² Sayed *supra* note 19 at p. 410.

³⁴³ See in particular the Paris Court of Appeal's Judgment of 7 September 1999, which observed that “*it would be premature to assert the existence of fraud... while the magistrates have not completed their investigations*”.

142. Like the Paris Court of Appeal in *Thomson-CSF v Frontier AG* and *Westman*, other European national courts also apply the maximal judicial review approach, such as “*the Court of First Instance of Brussels [as well as the Court of Appeals of Brussels]³⁴⁴, the Higher Court of Dusseldorf and the Court of Appeal of The Hague [which] have all taken the position that they have the power to review awards without any limitation*”.³⁴⁵
143. However, during the course of the 11 year-long criminal investigations in the “frigates-to-Taiwan” case, French judicial attitudes towards the review of arbitration awards were to undergo a paradigm shift. In two cases concerned with challenges to awards on the ground of antitrust public policy violation, the French courts firmly relinquished the *maximal* review approach in *Westman* and *Thomson-CSF v Frontier AG* for the *minimal* review approach. The seminal Paris Court of Appeal Judgment of 18 November 2004 in *SA Thalès Air Defense v. GIE Euromissile* (“*Euromissile*”) marked this rather abrupt shift in judicial attitudes.³⁴⁶ *Euromissile* drew upon an unpublished *Cour de Cassation* decision of 21 March 2000³⁴⁷ to hold that the permissible extent of the court’s review of awards on the public policy ground was limited to cases where it is demonstrated that there is “*manifest, actual and specific*”, or in other words, “*flagrant, real and concrete*” (“*flagrante, effective et concrete*”), violation of international public policy.³⁴⁸ The word “*manifest*” or “*flagrant*” in this test is key. It has been interpreted to mean that “[*t*]he task of a reviewing court is to **take the award as it is** [*and*] *not to rewrite it*” (emphasis added),³⁴⁹ or to “*conduct a re-examination [of the merits]... in the absence of a manifest violation*”.³⁵⁰ In other words, the court “*will only determine whether the award... in light of the factual and legal elements that were adopted by the arbitrator, violates public policy*” (emphasis added), and any review on public policy grounds should be “*limited... [and should not] second guess the award on the merits of the disputes [or] readjudicate the case on matters of facts and law... with a new, deep and extensive investigation or discussion*”.³⁵¹ The *Cour de Cassation* in *SNF SAS v Cytec Industries BV* (4 June 2008) (“*Cytec*”) subsequently adopted the same approach as *Euromissile*.³⁵²
144. There is no room to argue that awards challenged for upholding contracts providing for corruption should be treated differently and be subjected to more intensive scrutiny than contracts which violate European Competition Law (as in *Cytec* and *Euromissile*), on the basis the international public policy violation resulting from the former is more serious than the latter. In *M Schneider Schaltgeratebau und Elektroinstallationen GmbH v. CPL Industries Ltd.* (10 September 2009) (“*M Schneider*”), the parties entered into a contract under which CPL Industries was to assist M Schneider in the negotiation and performance of public tender contracts in Nigeria. The contract

³⁴⁴ See the Brussels Court of Appeals’ Judgment of 22 June 2009 in *Cytec Industries BV v SNF SAS*, discussed in DLA Piper’s International Arbitration Newsletter (13 August 2009), available at <<http://www.dlapiper.com/cytec-v-snf-judgment-the-end-of-a-belgian-french-dispute/>> .

³⁴⁵ Pierre Mayer, “The Second Look Doctrine: The European Perspective” 21 *Am. Rev. Int’l Arb.* 201 (2010) (“**Mayer (Second Look)**”) at pp. 204-205.

³⁴⁶ Thomas Webster, “Review of Substantive Reasoning of International Awards by National Courts: Ensuring One-Stop Adjudication” 23(3) *Arb. Int’l* 431 (2006) at p. 438; Dominique Hascher and Beatrice Castellane, “French Case Law Annual Report” *Paris Journal of International Arbitration* 2010-4; Emmanuel Gaillard, “Extent of Court Review of Public Policy” 237(65) *N.Y. Law Journal* (5 April 2007).

³⁴⁷ Gaillard *ibid.*

³⁴⁸ Gaillard *ibid.*; Hascher and Castellane *supra* note 346.

³⁴⁹ Hascher and Castellane *ibid.*

³⁵⁰ Mayer (Second Look) *supra* note 345 at p. 205.

³⁵¹ Roland Ziade and Charles-Henri De Taffin, “Note - 26 November 2009, Paris Court of Appeals” 2(4) *Int’l J. Arab Arb.* 138 (2010) at pp. 149-151.

³⁵² Hascher and Castellane *supra* note 346.

required CPL Industries to provide M Schneider with access to “*the wide connections of the eminent members of CPL Industries’ board of directors in Nigeria*”.³⁵³ Moreover, the contract was signed by the daughter of the President of Nigeria, herself a public servant, using a false name.³⁵⁴ The sole arbitrator nevertheless decided that the evidence presented was insufficient to prove corruption, and issued his award accordingly. The Paris Court of Appeal (the same court which decided *Westman* and *Thomson-CSF v Frontier AG*) also dismissed M Schneider’s application to set aside the award on grounds of violation of international public policy, citing reasons which indicated its adoption of minimal judicial review.³⁵⁵ The court held that it was not permissible for M Schneider to raise before the court arguments which had already been rejected by the arbitrator, or to contest the arbitrator’s detailed examination of the facts concluding that there was insufficient evidence of corruption, as a reviewing court was not supposed to re-visit the merits of an award absent a “*blatant, actual and concrete*” violation of public policy. The court also rejected M Schneider’s argument that the award should be set aside because the arbitrator had made a finding of fraud but failed to draw the appropriate legal consequences therefrom: this argument relied on facts which M Schneider was aware of during the arbitration but failed to raise before the arbitrator, and thus was not a permissible ground for setting aside the award. Accordingly, not only did the Paris Court of Appeal reject any suggestion that it should re-examine the merits of the award *de novo*, it also indicated that *fresh* (and not merely new) evidence was required to justify interference with the tribunal’s findings.

145. The final resolution of *Thomson-CSF v Frontier AG* (which had been stayed in 1999) before the Paris Court of Appeal reinforces the French courts’ currently prevailing minimal judicial review approach, in line with *M Schneider*, *Cytec*, and *Euromissile*. Following an 11 year-long criminal inquiry, Thomson-CSF’s allegations of procedural fraud were vindicated by the French examining magistrate’s findings released on 1 October 2008.³⁵⁶ It was revealed that: (i) the true purpose of the intermediary agreement between Thomson-CSF and Frontier AG was to exercise corrupt influence over the French Foreign Minister, Roland Dumas, in order to overcome the French veto against the sale of the frigates; and (ii) to conceal this fact from the tribunal and mislead it into awarding the commission payments to Frontier AG, Mr Sirven had orchestrated the fabrication of evidence relating to Mr Kwan’s lobbying activities in China, which did not in fact take place. Frontier AG recommenced proceedings before the Paris Court of Appeal on 28 April 2009, arguing that the award ought to be enforced by the court, notwithstanding the revelations from the criminal investigation, because the court was limited to ascertaining the award’s compatibility vis-à-vis international public policy *based on the tribunal’s factual findings*—which were that the intermediary agreement envisaged legitimate lobbying activities in China, rather than corrupt influence peddling in France.³⁵⁷ Unsurprisingly, this argument failed. Relying on the criminal investigation’s findings, the Paris Court of Appeal refused enforcement of the award in its Judgment of 1 July 2010, on the basis that the award had been procured through procedural fraud.³⁵⁸ Reading this judgment together with the *M Schneider*, *Cytec*, and *Euromissile*, it appears that French courts now draw a distinction between the treatment of challenges to awards where “*a fraud which has*

³⁵³ Dennis Bensaude and Jennifer Kirby, “A View From Paris— December 2009” 24(12) Mealey’s Int’l Arb. Rep. (December 2009) at p. 8.

³⁵⁴ Recall the above discussion on the red flags at [43] above which may indicate a high probability that an intermediary will or has conduct(ed) corrupt dealings.

³⁵⁵ Bensaude and Kirby *supra* note 353; and Raed Mounir Fathallah, “Corruption in International Commercial and Investment Arbitration: Recent Trends and Prospects for Arab Countries” 2(3) Int. J. Arab Arb. (2010) at pp. 82-83.

³⁵⁶ In an order abandoning prosecution of the case, due to the death of Mr Sirven, and closing investigations due to national security reasons.

³⁵⁷ Hascher and Castellane *supra* note 346

³⁵⁸ See Bernard Audit, “Note - 1er juillet 2010, Cour d’appel de Paris (Pôle 1 - Ch. 1)” 4 Revue de l’Arbitrage (2010) 863 at pp. 866-867.

been influential on the arbitrator's decision" has been proven, and those where such proof is lacking. Where fraud is proven, *"the Court will be led into a re-examination of the facts of the case"*, whereas *in the absence of proof*,³⁵⁹ it *"reverts to applying the rule according to which it cannot conduct a substantive review of the award [absent a 'manifest, actual and specific' breach of international public policy]"*.³⁶⁰ This position is consistent with the minimal review approach's general resistance to judicial interference with an arbitral award's findings, *subject to the fraud exception* (see [134] above).

146. Accordingly, the French courts no longer take a maximal review approach towards public policy challenges to arbitral awards, whereby the *"State judge entirely appropriates the dispute in the way it was submitted to the Arbitrator"*.³⁶¹ If the same facts as *Thomson-CSF v Frontier AG* in 1999 were to arise before the French courts, they probably will not stay proceedings pending criminal investigations as the Paris Court of Appeal first did, since a *"manifest"* or *"flagrant"* breach of international public policy could not have been discerned, nor was there fresh evidence of fraud, at the material time. Although not all French commentators are convinced by the merits of this minimal review approach,³⁶² *"[French judicial] precedent is now well established"* in its favour.³⁶³
147. The position in Australia is less certain.
148. In the New South Wales Supreme Court case of *Corvetina Technology Ltd v Clough Engineering Ltd*³⁶⁴ (*"Corvetina"*), the defendant resisted enforcement of the award, on the basis that it upheld a contract (governed by English law) which was illegal under the law of the place of performance (Pakistan), and contravened both Australian and Pakistani public policy. In the course of the enforcement proceedings, the plaintiff sought an order that no discovery be ordered in the defendant's favour, until it was determined whether the defendant was entitled to rely on evidence of illegality which had been rejected by the arbitrator. McDougall J. dismissed the plaintiff's application, holding that:

"it is open in principle to a defendant, in the position of the present defendant, to seek to rely on illegality, pursuant to s 8(7)(b) [of the Australia International Arbitration Act 1974³⁶⁵], or its equivalent, even if the illegality was raised before and decided by the arbitrator... The very point of provisions such as s 8(7)(b) is to preserve to the court in which enforcement is sought, the right to apply its own standards of public policy in respect of the award. In some cases the inquiry that it required will be limited and will not involve detailed examination of factual issues. In other cases, the inquiry may involve detailed examination of factual issues. But I do not think that it can be said that the court should forfeit the exercise of the discretion... There is, as the cases have recognised, a balancing consideration. On the one hand, it is necessary to ensure that the mechanism for enforcement of international arbitral awards under the New York Convention is not frustrated. But, on the other hand, it is necessary for the court to be master of

³⁵⁹ It should be noted that the earlier decisions of the Paris Court of Appeal in 1998 and 1999 (see [141] above) were not couched in these circumscribed terms.

³⁶⁰ Hascher and Castellane *supra* note 346

³⁶¹ Sayed *supra* note 19 p. 408.

³⁶² See in particular Mayer (Second Look) *supra* note 345 at p. 205, and the commentary cited in Ziadé and De Taffin *supra* note 351 at p. 148.

³⁶³ Ziadé and De Taffin *ibid.* at p. 147.

³⁶⁴ [2004] NSWSC 700 (29 July 2004).

³⁶⁵ Section 8(7)(b) of the Australia International Arbitration Act 1974 provides that: *"In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that: (a)... or (b) to enforce the award would be contrary to public policy."*

its own processes and to apply its own public policy. The resolution of that conflict, in my judgment, should be undertaken at a final hearing and not on an interlocutory application.” (emphasis added)³⁶⁶

Corvetina thus appeared to adopt the maximal review approach, insofar as it endorsed the Australian courts’ broad “*discretion*” to conduct a “*detailed examination of factual issues*” (and, presumably, findings of law as well), and permitted discovery of documents even if they had been put before the arbitrator (which effectively allowed the defendant to re-argue evidence of illegality that had been dismissed by the arbitrator).

149. However, the Federal Court of Australia in *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd*³⁶⁷ (“*Uganda Telecom*”) has cast doubt on *Corvetina*, at least in view of the 2010 amendments to the Australian International Arbitration Act 1974. In relation to the challenging party’s argument that the tribunal’s assessment of general damages was excessive, because it had failed to consider certain costs and expenses incurred, Foster J. held that: “*The time for [the challenging party] to have addressed this matter was during the arbitration proceedings in accordance with the timetable laid down by the arbitrator. It chose not to do so at that time. It cannot do so now ... Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.*” (emphasis added)³⁶⁸ The judge explained his reasoning as follows:

***“In the United States, the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied. It has not been seen as giving a wide discretion to refuse to enforce an award which otherwise meets the definition of foreign arbitral award under the [New York] Convention... courts in the United States have held that there is a pro-enforcement bias informing the Convention... A more conservative approach has sometimes been taken in Australia... In Corvetina Technology Ltd v Clough Engineering Ltd [here, Foster J. cited parts of the Corvetina judgment, including the passage reproduced above at [148]]... Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award which was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases... To the extent that McDougall J might be thought to have taken a different approach, I would respectfully disagree with him.*”** (emphasis added)³⁶⁹

150. While *Uganda Telecom* did not directly address the Australian courts’ entitlement to re-examine a tribunal’s findings of *fact*, its narrow interpretation of Section 8(7)(b) of the Australian International Arbitration Act, in line with the “*pro-enforcement bias*” of the New York Convention, and its rejection of arguments of *law* which could have been but were not raised before the tribunal, suggest an attitude of minimal judicial review, which demands new, if not fresh evidence to overturn a tribunal’s findings of fact, contrary to the position adopted in *Corvetina*. It remains to be seen how future case law will resolve this apparent conflict between *Corvetina* and *Uganda Telecom*.

³⁶⁶ *Supra* note 364 at [14] and [18].

³⁶⁷ [2011] FCA 131 (22 February 2011).

³⁶⁸ *Ibid.* at [133].

³⁶⁹ *Ibid.* at [127] and [129]-[132], .

(iii) Contextual Review

151. Contextual review is the third and final category of judicial approaches towards the scrutiny of arbitral awards. It occupies an intermediate position between minimal and maximal review in terms of the deference accorded to the findings of a tribunal.
152. The leading form of contextual review was suggested *obiter* in *Soleimany*.³⁷⁰ In *Soleimany*, the court refused to enforce an award rendered by the Beth Din (a Jewish rabbinical court which applies Jewish law), which upheld a contract between two Iranian merchants for the smuggling of Persian carpets out of Iran. This was accomplished through the bribery of diplomats, who were to use their diplomatic baggage to transport the carpets through customs and out of the country.³⁷¹ The Beth Din acknowledged that the contract was illegal under Iranian law, but held that “*any purported illegality would have no effect on the rights of the parties*” under the applicable Jewish law.³⁷²
153. At the enforcement stage, the court had no difficulty in refusing enforcement of the award for contravention of English public policy. This was not a case where the court had to re-open the tribunal’s findings in order to discover the commission of an illegality. Rather, by the tribunal’s own acknowledgement, the contract was a wholly illegal enterprise under Iranian law. The award could thus be set aside without further inquiry, since it incontrovertibly upheld a contract which an English court would not enforce on grounds of public policy
154. Nevertheless, Waller L.J., who delivering the court’s judgment in *Soleimany* (his lordship was also the dissenting judge in the subsequent Court of Appeal decision in *Westacre*), went on to discuss how a court ought to approach an award which did *not* find any illegality underlying the parties’ contract:

“In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator’s award. Only if he decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality.” (emphasis added)³⁷³

The above *dicta* set out a two-stage test for the review of an arbitral award. Under this approach, if there is “*prima facie evidence*” of illegality, the reviewing court should first conduct a preliminary enquiry (short of a “*full scale trial*”) to see if the award should be given “*full faith and credit*”

³⁷⁰ *Supra* note 318.

³⁷¹ See *Soleimany ibid.* at 815. See also *Corruption and Misuse of Public Office supra* note 12 at [9.124].

³⁷² *Soleimany ibid.* at 819.

³⁷³ *Soleimany ibid.* at 824.

("Stage 1").³⁷⁴ If so, then the award will be upheld by the court. If not, then the court should proceed to conduct a full scale enquiry to determine the issue of illegality ("Stage 2").

155. Waller L.J. made clear that in assessing whether there was illegality (under either Stage 1 or Stage 2), the court was not limited to considering fresh or new evidence; it may even consider evidence that had been put before the tribunal.³⁷⁵ While this liberal consideration of all evidence, even that which was examined by the tribunal, echoes the maximal standard of review (as adopted in *Westman* and *Corvetina*), the conduct of a preliminary inquiry, instead of a full scale re-examination at first instance, demonstrates greater deference to the findings of the tribunal, in line with the minimal standard of review. The *Soleimany* approach is thus properly characterised as an intermediate contextual standard of review, which falls short of either the minimal or maximal standards of review.

156. The questions posed in the *Westacre* judgment (see [154] above) are some of the matters to be considered at Stage 1, in order to determine whether the award should be subject to the full scale enquiry in Stage 2. These factors have been conveniently restated by Sayed as follows:

"(1) Available evidence of legality and illegality;

(2) The way the Arbitrator reached his or her conclusion of illegality;

(3) The degree of competency of the Arbitrator;

*(4) The way arbitration was conducted. Care must be taken to verify whether the award was procured by fraud, collusion or bad faith."*³⁷⁶

157. Waller L.J. took the opportunity of developing this list of matters further, holding in his subsequent dissenting judgment in *Westacre*, that the court should also consider the "nature of the illegality" as a Stage 1 factor. In fact, this factor was considered by Colman J. at first instance, but he did not find that it militated in favour of re-opening the tribunal's findings of fact:

"... the defendants... seek to use the public policy doctrine to conduct a re-trial on the basis of additional evidence of illegality when it was open to them to adduce that evidence before the arbitrators. Such an exercise would appear to be clearly in conflict with the principles of issue estoppel... However, in deciding whether to permit enforcement of the award the court has to consider whether the public interest in preventing the enforcement of corrupt transactions

³⁷⁴ Enonchong (Enforcement) *supra* note 311 at p. 506.

³⁷⁵ This can be discerned from *Soleimany's* (*supra* note 318) departure from Colman J.'s first instance judgment in *Westacre supra* note 312 (issued before the Court of Appeal's decision in *Soleimany*). In Colman J.'s first instance *Westacre* judgment, the state of the authorities was summarised as standing for six propositions, the sixth of which was that (*supra* note 312 at 794-795): "[i]f the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, **on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.**" (emphasis added) Waller L.J. in *Soleimany* disapproved of Colman J.'s sixth proposition as follows: "But, in an appropriate case [the court] may inquire, as we hold, into an issue of illegality even if an arbitrator had jurisdiction and has found that there was no illegality. We thus differ from Colman J., **who limited his sixth proposition to cases where there were relevant facts not put before the arbitrator.**" (emphasis added)

³⁷⁶ Sayed *supra* note 19 at p. 415.

outweighs the public interest in sustaining the principle of nemo debet bis vexari which underlies the issue estoppel... On the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading... In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices... However, although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking. On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption... (emphasis added)³⁷⁷

158. Waller L.J. came to the opposite conclusion from Colman J. His lordship disagreed with Colman J.’s assessment of “*the appropriate level of opprobrium at which to place commercial corruption*”, holding that “*the principle against enforcing a corrupt bargain of the nature of this agreement, if the facts in M.M.’s affidavit [i.e. the “Affidavit” not put before the Tribunal, which Jugoimport attempted to introduce as evidence before the Court] are correct, is within that bracket recognised by Phillips J in Lemenda... as being based on public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world. I believe it important that the English court is not seen to be turning a blind eye to corruption on this scale*” (emphasis added).³⁷⁸ On this basis, Waller L.J. held that Stage 1 review had shown that the award should *not* be given full faith and credit, and therefore, review of the award should proceed to Stage 2.
159. Unsurprisingly, the majority in *Westacre* (which preferred the minimal review approach: see [122] above) was not impressed with Waller L.J.’s two-stage test. Mantell L.J. (with whom Sir David Hirst agreed) expressed significant reservations regarding the two-stage test, saying that “*I have some difficulty with the [two-stage test] and even greater concerns about its application in practice*”.³⁷⁹ Their lordships did not elaborate on the reasons for their concerns, but in the more recent UK High Court case of *R v V*,³⁸⁰ Steel J. followed the *Westacre* majority, and had no difficulty explaining their reservations as follows: “*The difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go. This must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference).*” (emphasis added)³⁸¹
160. Notwithstanding their opposition to the two-stage test, perhaps in deference to their dissenting brother Judge, Mantell L.J. and Sir David Hirst proceeded to conduct a Stage 1 enquiry (*obiter*). Their lordships however did not regard Waller L.J.’s consideration of the “*nature of the illegality*” at Stage 1 appropriate (see [157] above), but confined their Stage 1 evaluation to the factors listed in *Soleimany*, which did not include the “*nature of the illegality*”. They regarded the “*nature of the illegality*” as a Stage 2 factor “*to be taken into account as part of the balancing exercise between the competing public policy considerations of finality and illegality*”.³⁸² These two versions of Stage 1—one applied by Waller L.J. in his dissenting *Westacre* judgment, and the other by the *Westacre* majority—made a difference, as the majority came to the opposite conclusion from Waller L.J. in

³⁷⁷ *Supra* note 312 at 798-800.

³⁷⁸ *Westacre supra* note 151 at 833-834.

³⁷⁹ *Westacre ibid.* at 835.

³⁸⁰ [2008] EWHC 1531 (Comm).

³⁸¹ *Ibid.* at [30].

³⁸² *Westacre supra* note 151 at 835.

their Stage 1 analysis.³⁸³ Applying Stage 1 of the *Soleimany* two-stage test, Mantell L.J. observed that: “*First, there was evidence before the Tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award.*”³⁸⁴ Accordingly, it was held that there was no justification to conduct a full scale enquiry under Stage 2, even if the two-stage test should be applied.

161. Which of the above approaches strikes the best balance between award finality and public policy? Before we can answer this question, the type of public policy violation required to trigger the public policy ground for setting aside and refusal of enforcement of awards must first be considered.

C. The Public Policy Ground for Setting Aside or Refusal to Enforce a Corruption-Tainted Arbitral Award

162. After a reviewing national court has decided it ought to take the tribunal’s findings at face value, or alternatively, has re-examined the tribunal’s findings and come to its own conclusions on any illegality or corruption perpetrated by the parties, it must decide if upholding the award will give rise to such an egregious contravention of public policy, that it ought to set it aside or refuse enforcement on public policy grounds. So as to give due respect to the finality of arbitral awards, most leading arbitral jurisdictions construe the public policy exception narrowly, and recognise that it is only in cases where there has been a clear violation of *fundamental* rules of public policy that an award should be set aside or refused enforcement.³⁸⁵ The distinction drawn between *international* and *domestic* public policy differentiates those cases where judicial intervention is warranted, from cases where the courts ought to uphold the award.

(i) Two Classes of Public Policy: Domestic Public Policy and International Public Policy

163. The New York Convention and most national legislation simply refer to “*public policy*” as a ground for setting aside or refusing to enforce an award, without qualifying or defining the term.³⁸⁶ Public policy has been said to be notoriously difficult to define, although reference can be made to a number of broad formulations which have obtained international usage and currency. Public policy has been defined as including the “*the forum state’s most basic notions of morality and justice*”;³⁸⁷ “*a rule which is basic to public or commercial life*”;³⁸⁸ “*some moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception*”;³⁸⁹ and “*the fundamental economic, legal, moral, political, religious and social standards of every State... those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception.*”³⁹⁰ The violation of public policy engender consequences which have been

³⁸³ Enonchong (Enforcement) *supra* note 311 at p. 507.

³⁸⁴ *Westacre supra* note 151 at 835. Steel J. in *R v V supra* note 380 adopted substantially similar reasoning in the case before him.

³⁸⁵ Born *supra* note 40 p. 2625.

³⁸⁶ ILA Report (Public Policy) *supra* note 7 at pp. 11-12.

³⁸⁷ *Parsons & Whittemore Overseas Co., Inc. v Société Générale de l’Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974).

³⁸⁸ Bundesgerichtshof, 12 July 1990 - III ZR 174/89, NJW 1990 at p. 3210.

³⁸⁹ Peter North and James Fawcett, *Cheshire and North’s, Private International Law* (Butterworths, 13th ed., 1999) at p. 123.

³⁹⁰ Julian Lew, *Applicable Law in International Commercial Arbitration* (Oceana, 1978) at p. 532.

variously described as “*injurious to the public, or against the public good*”;³⁹¹ “*wholly offensive to the ordinary reasonable and fully informed member of the public*”;³⁹² or “*contradict[ory] [to] the [forum’s] idea of justice in a fundamental way*”.³⁹³

164. In order to resolve the tension between the finality of arbitral awards and public policy, many jurisdictions construe the public policy exception narrowly, requiring violation of *international* public policy to justify setting aside or refusal to enforce an award.³⁹⁴ In *Westacre*, for instance, the court referred to the distinction drawn in *Lemenda* between international public policy— “*rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance*”— and “*English domestic public policy*”, and held that only violation of the former can justify interference with an award.³⁹⁵ This explains why, in *Soleimany*, the English Court of Appeal refused to enforce the award upholding a contract for smuggling carpets out of Iran— such a contract contravened one of those rules of public policy, “*which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance*”. It did not matter that the contract was valid under its governing law, nor that award finality was sacrificed, since the fundamental public policy interests against enforcement of such a contract for illegal smuggling overrode any countervailing considerations. In contrast, in *Hilmarton* (see [71] above), the contract for the purchase of influence in Algeria, which was illegal under Algerian law (the law of the place of performance), but valid under the governing Swiss law, was nonetheless enforced by the English High Court, since such contracts at most violated English domestic public policy, rather than international public policy.³⁹⁶
165. It is important to clarify that international public policy is not a transnational principle. As mentioned above,³⁹⁷ truly transnational public policy is even more restrictively defined, “*comprising fundamental rules of natural law, principles of universal justice, jus cogens in public international*

³⁹¹ *Egerton v Brownlow* (1853) 4 HLC 1.

³⁹² *Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v Ras Al Khaimah National Oil Company* [1987] 2 Lloyd’s Rep. 246 at 254.

³⁹³ Bundesgerichtshof, 12 July 1990 - III ZR 174/89, NJW 1990 at p. 3210.

³⁹⁴ ILA Report (Public Policy) *supra* note 7 at pp. 13-14. See also Hanotiau and Caprasse *supra* note 204 at 789-791.

³⁹⁵ *Westacre supra* note 151 at 824. In *Westacre*, the majority agreed with the following passage in Waller L.J.’s judgment, which observed a distinction between domestic public policy and international public policy, and held that only violation of the latter could justify interference with an award (*supra* note 151 at 824-825):

“What in my view *Lemenda* decided was (1) *there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic [see 459C]; (2) contracts for the purchase of influence are not of the former category; thus (3) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy...*

*... albeit the award is not isolated from the underlying contract [for the purchase of influence], it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that **the underlying contract [for the purchase of influence], on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance...** It is legitimate to conclude that there is nothing which offends English public policy if an Arbitral Tribunal enforces a contract [for the purchase of influence] which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.”* (emphasis added)

³⁹⁶ See *Hilmarton supra* note 141 at 224-225.

³⁹⁷ See [86].

law, and the general principles of morality accepted by... 'civilised nations'".³⁹⁸ In contrast, international public policy "is not more than public policy as applied to foreign awards and its content and application remains subjective to each State."³⁹⁹ Gaillard and Savage thus refer to breach of "the **French** conception of international public policy or, in other words, the set of values a breach of which could not be tolerated by the **French** legal order, even **in international cases.**" (emphasis added),⁴⁰⁰ as the basis for setting aside or refusing to enforce awards in France. The International Law Association similarly defines international public policy according to the enforcing state's national interests:

"The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; and (iii) the duty of the State to respect its obligations towards other States or international organisations." (emphasis added)⁴⁰¹

(ii) Whether Corruption Violates International Public Policy

166. The international condemnation of corruption has never been more pronounced. The body of legal rules and authorities that have emerged over the past two decades make it almost inconceivable for any court to now deny that corruption contravenes international public policy, perhaps even transnational public policy.⁴⁰² Already, in 1963, Judge Lagergren was (probably ahead of his time) ready to declare in ICC Case No. 1110 (1963) that: "corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."⁴⁰³ Three decades later, the Paris Court of Appeal in *Westman* recognised the then mounting international concern regarding corruption in international trade and commerce, with its pronouncement that: "[a] contract having as its aim and object a traffic in influence through the payment of bribes is... contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community."⁴⁰⁴ More recently, the tribunal in *World Duty Free* concluded its extensive discussion of international conventions and case law on corruption⁴⁰⁵ with the following observation: "in light of domestic laws and international conventions relating to corruption, and in light of the decisions

³⁹⁸ ILA Report (Public Policy) *supra* note 7. See generally Hanotiau and Caprasse *supra* note 204 at 794-796.

³⁹⁹ ILA Report (Public Policy) *supra* note 7.

⁴⁰⁰ Fouchard Gaillard Goldman *supra* note 55 at [1648].

⁴⁰¹ Recommendation 1(e) of the International Law Association International Arbitration Committee's Final Report on "Public Policy as a Bar to Enforcement of International Arbitral Awards" (2002) (hereinafter "**ILA Final Report (Public Policy)**").

⁴⁰² See *supra* note 6; James Barratt and Hayley Ichilcik, "Bribery and International Arbitration", in *The European & Middle Eastern Arbitration Review 2011* (Law Business Research, 2010) 9 at pp. 10-11; 38 ILA Final Report (Public Policy) *ibid.*; Lemenda *supra* note 147 at 520; *Oscanyan v Arms Co* 103 U.S. 261 at 277; Paris Court of Appeal's Judgment of 30 September 1993 (*Westman supra* note 331).

⁴⁰³ The ILA Report (Public Policy) *supra* note 7 reviewed the development of the concept of public policy, and concluded that "it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy".

⁴⁰⁴ ICC Case No. 1110 (Lagergren) *supra* note 8 at [20].

⁴⁰⁵ *Supra* note 331 at [6].

⁴⁰⁵ *World Duty Free supra* note 8 at [138]-[157].

taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States".⁴⁰⁶

167. It is therefore surprising that, notwithstanding the universal denunciation of corruption, the English courts have been reluctant to find that corruption contravenes *international* public policy. Such reticence can be discerned from Colman J.'s and Sir David Hirst's judgments in *Westacre*, which were followed by Steel J. in *R v V*.⁴⁰⁷ As mentioned above (see [157]), Colman J. at first instance in *Westacre*, held that the public policy of sustaining the finality of arbitral awards outweighs the public policy in discouraging corruption. It was impliedly suggested that this was because the latter did not fall within the category of international public policy, since "*although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking*".⁴⁰⁸ On this basis, Colman J. did not permit re-examination of the tribunal's finding against corruption, in spite of new evidence indicating that the intermediary agreement contemplated the payment of bribes to Kuwaiti government officials. On appeal, Sir David Hirst (representing one half of the majority in *Westacre*) said that Colman J. had attached the correct opprobrium to corrupt dealings, and thus held that, even if the court were to re-examine the tribunal's findings and determined that the intermediary agreement was tainted by corruption, the court would still enforce the award, since corruption— not "*[standing] in the scale of opprobrium quite at the level of drug-trafficking*"— did not contravene international public policy.⁴⁰⁹ In *R v V*, a relatively recent case decided in 2008, Steel J. held that he was bound to follow "*the majority in Westacre [which had] accepted that Colman J had accorded 'an appropriate level of opprobrium' at which to place commercial corruption*",⁴¹⁰ and thus refused to uphold the public policy challenge to an award enforcing an intermediary agreement allegedly tainted by corruption. One may quibble with Steel J.'s suggestion that *both* Mantell L.J. and Sir David Hirst (in his words, "*the majority in Westacre*") accepted that the appropriate level of opprobrium was attached to corruption, since Mantell L.J. did not expressly comment on the matter in his judgment. However, even if we put aside Mantell L.J.'s decision, the above-mentioned English case law demonstrates that there nevertheless stands two High Court judgments by Colman J. and Steel J. (in *Westacre* and *R v V* respectively), and a majority Court of Appeal opinion by Sir David Hirst (in *Westacre*), which suggest that even a finding of corruption is in itself an insufficient ground to sustain a challenge to an award.
168. We submit that, if a similar case were to arise again before the English courts, they should decline to adopt the views expressed in these troubling precedents. As Waller L.J. recognised in *Westacre*, "*the principle against enforcing a corrupt bargain...is... based on public policy of the greatest importance and almost certainly recognised in most jurisdictions throughout the world*",⁴¹¹ and it is "*important that the English court is not seen to be turning a blind eye to corruption on this*

⁴⁰⁶ *World Duty Free supra* note 8 at [157].

⁴⁰⁷ *Supra* note 380.

⁴⁰⁸ *Supra* note 312 at 798-800.

⁴⁰⁹ Sir David Hirst held that (*supra* note 151 at 835-836):

"I also would dismiss this appeal for the reasons given by Mantell L.J.... I would only add that, had the second question [the question whether, in Mantell L.J.'s words: "if successful in proving the assertions set out in the affidavit of Miodrag Milosavljevic, should the English court enforce the award?"] arisen, I would have answered it in favour of the plaintiff for the same reasons as those given by Colman J. [1999] Q.B. 740, 771 D-773E. Colman J struck the correct balance, and, in doing so (contrary to Waller LJ's view) gave ample weight to the opprobrium attaching to commercial corruption".

⁴¹⁰ *Supra* note 380 at [32].

⁴¹¹ *Supra* note 151 at 833.

scale”.⁴¹² Especially in view of the recently enacted UK Bribery Act 2010, which signalled the UK Parliament’s intention to stamp out corrupt practices both at home and abroad, it is submitted that future case law is likely to vindicate Waller L.J.’s dissenting judgment.⁴¹³

(iii) Whether Contracts for the Sale of Influence Violate International Public Policy

169. A more controversial issue is whether (and in what circumstances) intermediary agreements requiring the intermediary to exercise personal influence on third parties should be regarded as corrupt trading in influence, and are thus contrary to international public policy. Differences between jurisdictions can be detected in this regard.

170. As mentioned above (see [51]), at one end of the spectrum, some jurisdictions adopt a broad prophylactic rule prohibiting intermediary agreements, “*under the assumption that such [agreements] conceal corruption*”. In these jurisdictions, such intermediary agreements presumably violate national conceptions of international public policy.

171. However, other jurisdictions have concluded that holding contracts for the sale of influence contravene public policy, without proof of impropriety, would fly against the face of commercial reality, and needlessly proscribes lobbying activities which do not undermine the transparency of public procurement procedures (see [51]-[57] above). The question is whether the parties intended for the intermediary to exercise some form of *improper* influence over public officials; it is only such intermediary agreements which are prohibited. One commentator thus observes that: “*Many countries do not ban contracts with such lobbyists, influence peddlers, or ‘agents d’influence’ as long as no money or other advantage flows directly or indirectly to a public official [and no improper influence is exercised over the public official]. In fact, it stands to reason that influence is the main stock in trade of any agent. Only a foolish principal would retain an agent without influence. Agents may have acquired influence as a result of longstanding professional experience, through the force of their personality, by their standing in society or through their respected expertise.*”⁴¹⁴ Differences between jurisdictions are nevertheless likely to arise as to the factors (as well as the relative weight to be attached to these factors) which taint an intermediary agreement with impropriety, with the result that it may be regarded as corrupt trading in influence, and therefore contrary to international public policy (see [51]-[57] above).

172. In view of these divergences between jurisdictions, it will be necessary to determine in each case—where an award upholding an alleged contract for corrupt trading in influence is challenged as being contrary to international public policy—whether the law of the reviewing national court prohibits intermediary agreements *per se*, or otherwise deems the necessary elements of impropriety to have been made out. In this regard, the anomaly is again to be found in English common law: even where an intermediary is engaged to “*abuse*” or “*improperly*” exercise his influence in the principal’s favour, such an intermediary agreement (as held in *Lemenda*) only contravenes English *domestic* public policy,⁴¹⁵ which is an insufficient ground to set aside or refuse enforcement of an award. This position dovetails with the holding in *Westacre* that even contracts providing for “*hard*” corruption through bribery of government officials do not contravene English international public policy (see

⁴¹² *Supra* note 151 at 834.

⁴¹³ See generally Kyriaki Karadelis, “How should we deal with dishonest behaviour in arbitration?”, *Global Arb. Rev.* (7 May 2010).

⁴¹⁴ Scherer *supra* note 73 at p. 30.

⁴¹⁵ See *Lemenda supra* note 147, and Waller L.J.’s observations on *Lemenda* in *Westacre* (reproduced at *supra* note 395).

[167] above). We submit that Article 18 UNCAC and other legal regimes' prohibition of trading in influence (see [52] and [54] above) provide a good case for arguing that contracts for the *abuse* of influence should have the same opprobrium attached to them as contracts for the payment of bribes, and accordingly, in the present day and age (especially given the advent of the UK Bribery Act 2010), both should be regarded as corrupt contracts which contravene English international public policy.⁴¹⁶

D. The Appropriate Standard of Review

173. To conclude this Section, we return to the earlier question posed: what should be the permissible extent of court review of a tribunal's findings of fact and law? Does the maximal, minimal, or contextual standard of review strike the best balance between award finality and public policy? And if contextual review is to be preferred, should courts apply the *Soleimany/Westacre* majority two-stage test, or the modified two-stage test in Waller L.J.'s *Westacre* dissenting opinion?

(i) The Weakness of the Minimal Standard of Review

174. Some may scoff at the maximal standard of review, given its blatant disregard for the finality of arbitral awards and its underlying policy goals (see [111] above). However, the minimal review approach can similarly be criticised for ignoring other fundamental public policy considerations, such as the public policy against enforcing morally repugnant contracts for corruption. This tension between arbitral award finality and anti-corruption public policy throws into stark relief the relative merits of the minimal and maximal review approaches, and no case illustrates this better than the "frigates-to-Taiwan" affair, which spawned the Swiss and French challenge proceedings in *Thomson-CSF v Frontier AG*. The contrasting judicial review approaches adopted, and the attendant consequences of each approach, demonstrate the pitfalls of minimal review.

175. It will be recalled that, applying minimal review, the award was initially upheld by the Swiss Federal Tribunal in 1997. However, after French criminal investigations revealed that the tribunal had been misled by the fraudulent scheme perpetrated by Mr Sirven to conceal evidence of the corrupt intermediary agreement, the Federal Tribunal was forced to grant Thomson-CSF's petition for revision of the award in 2009 (see [134] above). The Federal Tribunal was thus put in the awkward position of having to set aside and remand the case back to the arbitral tribunal, almost 13 years after it had first dismissed Thomson-CSF's application to set aside the award.

176. It must be emphasised as part of the background context of this case that Thomson-CSF never had to satisfy the award rendered against it, notwithstanding its initial failure to set the award aside in Switzerland, and that this was purely fortuitous. It appears that Thomson-CSF's assets were in France, not Switzerland, so Frontier AG did not enforce the award in Switzerland, even after Thomson-CSF had failed in its bid to set aside the award. And, as we have seen from our examination of French case law, the judicial attitude in France at the time was in favour of maximal review; hence the Paris Court of Appeal's stay of enforcement proceedings pending the conclusion

⁴¹⁶ Notwithstanding the UK's reservation to Article 12 COE Criminal Law Convention (which requires state parties to criminalise corrupt trading in influence), on the basis that: "*The conduct referred to in Article 12 is covered by United Kingdom law in so far as an agency relationship exists between the person who trades his influence and the person he influences. However not all of the conduct referred to in Article 12 is criminal under United Kingdom law. Accordingly, in accordance with Article 37, paragraph 1, the United Kingdom reserves the right not to establish as a criminal offence all of the conduct referred to in Article 12.*" (emphasis added) (see the United Kingdom's reservations contained in a *Note verbale* dated 9 December 2003, available at <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=173&CM=&DF=&CL=ENG&VL=1>>)

of criminal investigations, which prevented satisfaction of the award. Consequently, in these circumstances, contravention of Swiss international public policy against the enforcement of contracts for corrupt influence peddling effectively remained inchoate. This may explain why the Swiss Federal Tribunal seemed unagitated in setting aside the award, so long after having initially declined to set it aside, and did not find occasion to comment on the merits of minimal review.

177. However, one can postulate many cases in which the losing party will not be as fortunate as Thomson-CSF was, and will be forced for legal and practical reasons to satisfy the award against it. Had such been the case in *Thomson-CSF v Frontier AG* (for instance, if Thomson-CSF had assets in Switzerland), the Swiss courts would have assisted Frontier AG in perfecting its claims brought upon the corrupt contract, and the contravention of Swiss international public policy against corruption would have acquired a more real and tangible complexion. It may even have been irreversible, notwithstanding later discovery of the corrupt purpose of the contract, and the Swiss Federal Tribunal's power of revision. For instance, if the award against Thomson-CSF had been enforced in Switzerland or France, and Frontier AG later became insolvent in the 13 year interim period before release of the French criminal investigation's findings (in fact, Frontier AG was in liquidation at the time that Thomson-CSF's petition for revision was brought before the Swiss Federal Tribunal), revision before the Federal Tribunal would have come too late to alleviate the damage done to Swiss (and French) public policy and morality. Consequences such as these could perhaps have provoked a rethinking of the minimal review approach.
178. In contrast to the Swiss Federal Tribunal, the Paris Court of Appeal stayed its decision on the challenge to the award pending completion of criminal investigations into the facts, thus effectively allowing a maximal *de novo* review of the merits (see [140] above). This decision was ultimately vindicated by the findings of the criminal investigations. As noted by Sayed: "*full scrutiny in matters of corruption... displaces the evaluation of corruption to the State which has the interest and the resources to pursue meaningful examination... the State judge [applying a maximal review approach may] ultimately [be] better equipped to grasp duplicity and, for that matter, unmask it using the full potential of the State's investigatory resources.*"⁴¹⁷
179. This contrast between the French and Swiss courts' respective initial treatment of the *Thomson-CSF v Frontier AG* case highlights the fatal weakness of the minimal standard of review: barring the existence of fresh evidence of procedural fraud, which will usually be impossible for victims of corruption to procure, under almost no circumstances will an award be capable of review at the setting aside or enforcement stage, no matter how corrupt the services performed under the contract were in reality (as was the case in *Thomson-CSF v Frontier AG*), nor how unreliable the tribunal's findings may have been.⁴¹⁸ It should also be borne in mind that fraud and corruption are often intertwined—corrupt claimants are likely to commit perjury, and may even fabricate evidence, so as to conceal from the tribunal the true purpose of the corrupt contract, or its corrupt method of performance. Where such artifice is involved in the procurement of an award, it becomes even more unlikely that corruption will be caught by the coarse net cast by the minimal review approach. Admittedly, the maximal standard of review entails too much of a departure from the policy goals underlying award finality. However, the correct approach cannot be as *laissez-faire* as minimal review, which leaves courts open to shameless exploitation by wily and unscrupulous claimants seeking judicial assistance to enforce their corrupt schemes and other nefarious wrongdoing. As commentators correctly point out, "*it cannot be accepted that arbitration may be a means to*

⁴¹⁷ Sayed *supra* note 19 at pp. 410-412.

⁴¹⁸ There should of course be no condemnation of the tribunal's findings in *Thomson-CSF v Frontier AG*, as the errors of fact made were the product of Mr Sirven's skilful deception of the tribunal.

circumvent [fundamental] public policy rules”;⁴¹⁹ or that “*arbitration [should] become an attractive means of circumventing public policy rules*”.⁴²⁰ A better balance must thus be struck between award finality and fundamental public policy considerations, than is provided under either the minimal or maximal standards of review.

(ii) The Superiority of the Contextual Standard of Review

180. It naturally remains to consider Waller L.J.’s two-stage contextual review, which we suggest best balances award finality with the forum’s fundamental public policy values. The argument that “*arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances*”⁴²¹ is persuasive. Examination of the available evidence of corruption, the way in which the arbitrators reached their conclusion of legality, their competence, and the manner in which the arbitration was concluded, is appropriate *on a summary enquiry basis* at Stage 1, to see if eyebrows should be raised. Stage 1 strikes a desirable balance between award finality and public policy. It does not unduly impinge on the finality of the tribunal’s findings, by providing a half-way house between full-scale maximal review and almost non-existent minimal review. As Waller L.J. pointed out in *Soleimany*: “*We do not for one moment suggest that the judge should conduct a full scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid.*”⁴²² Yet, at the same time, suspicious circumstances that imply the existence of corruption are given due regard at Stage 1; if such circumstances are compelling enough, a progression to Stage 2 is then surely preferable to Nelsonian indifference.
181. Postulating how contextual review may have operated in a case like *Thomson-CSF v Frontier AG* illustrates its superiority. For instance, had assessment of the Stage 1 factors mentioned above led the Swiss Federal Tribunal to Stage 2, the fraud perpetrated on the arbitral tribunal by Mr Sirven *could* have been discovered. Of course, it is possible that a Stage 1 review may have failed to detect Mr Sirven’s surreptitious and skilful deception of the tribunal (though consideration of the nature of the illegality at Stage 1 may nevertheless trigger Stage 2: we discuss this in greater detail at [186] below). After all, the enquiry at Stage 1 is only conducted on a summary basis, and not with the same rigour as the French criminal inquiry or maximal review. But the risk that fraud and corruption committed in cases like *Thomson-CSF v Frontier AG* will go undetected is a necessary evil, so that a *balance* can be struck between award finality and the forum’s fundamental public policy values—the *raison d’être* of the contextual review approach—which must be preferable to prioritising one to the *complete* exclusion of the other. Moreover, contextual review presents a *significantly higher possibility* of uncovering fraud and corruption as compared to minimal review, if not in the same circumstances as in *Thomson-CSF v Frontier AG*, than at least in many other cases where the likelihood of detecting wrongdoing is greater. The minimal review approach is much more likely to leave partially-concealed wrongdoing, and possibly even palpable or near palpable wrongdoing, undetected, exposing courts to an unacceptably high risk of becoming unwitting accessories to corrupt dealings and other forms of illegality. Fundamental public policy values, including those as important as anti-corruption public policy, ought *not* to be sacrificed at the altar of arbitral award finality in this manner, as if award finality constitute a super public policy value overshadowing all others. There is no doubt that the New York Convention’s pro-enforcement policy is important, but that does not mean it trumps, for instance, the multitude of international conventions, national laws,

⁴¹⁹ Hanotiau and Caprasse *supra* note 204 at 804.

⁴²⁰ Mayer (Second Look) *supra* note 345 at p. 207.

⁴²¹ *Per* Waller L.J. in *Soleimany supra* note 318 at 824.

⁴²² *Ibid.*

and commercial initiatives committed to eradicating corruption in international trade and business. Award finality and fundamental public policy must be balanced, and it is contextual review which is most consonant with this ethos.

182. One objection to the two-stage test raised by the *Westacre* majority and Steel J. in *R v V* was that Stage 1 is difficult to apply in practice. As Steel J. argued: “*The difficulty with the concept of some form of preliminary inquiry is of course assessing how far that inquiry has to go. This must be all the more so where R does not seek to deploy any new evidence (let alone evidence not available at the time of the original reference).*” (emphasis added)⁴²³ However, in our opinion, this concern is overstated.
183. First, it is limited only to evidentiary matters. Other factors considered at Stage 1 will not be affected by the same ambiguity, such as the competence of the arbitrators, and the existence or non-existence of procedural defects in the arbitration.
184. Second, and more important, a clear enough distinction can be drawn between the preliminary enquiry in Stage 1 and the full-scale review in Stage 2 to address Steel J.’s concern that Stage 1 may easily collapse into Stage 2. Clearly, for instance, the court should not at Stage 1 permit discovery in favour of the party alleging corruption, as the New South Wales Supreme Court did in *Corvetina* (see [148] above). The court should also avoid taking a fine-tooth comb through every single shred of evidence and analysis in the award. If suspicions regarding the veracity of the award cannot be raised except by lengthy submissions and complex argumentation, the court should accord full faith and credit to the award, and not proceed to a full scale enquiry at Stage 2. In other words, if the award’s lack of credibility cannot be reasonably easily perceived, i.e. deep and elaborate analysis of the case is required to impugn the award, or the challenging party’s submissions are susceptible to argument one way or the other, then Stage 2 should not be triggered. Broad guidelines such as these, coupled with a common-sense approach, should suffice to prevent Stage 1 from collapsing into Stage 2. It is neither possible nor desirable to establish more detailed rules governing the extent of inquiry at Stage 1, as they will only unduly fetter the court’s discretion, and prevent it from effectively balancing finality and public policy in the various factual matrices that may arise. Adopting this approach, fears that the more intrusive nature of contextual review (as compared to minimal review) will undermine the attractiveness of arbitration as a dispute resolution mechanism are not well-founded. As one commentator notes⁴²⁴: “*A reasonable review of arbitral awards does not make arbitration less attractive, or even less efficient. It only affects those whose sole motive for seeking arbitration is to circumvent public policy rules.*”⁴²⁵
185. If courts are minded to adopt Waller L.J.’s two-stage test, certain miscellaneous details need to be worked out.
186. First, there are two versions of Waller L.J.’s two-stage test to choose from, one proposed in *Soleimany*, and the other in his dissenting judgment in *Westacre*. We think that the latter is superior. As his lordship argued in *Westacre*, because the court cannot be “*seen to be turning a blind eye to corruption*” of significant scale,⁴²⁶ the *nature* of the illegality should be added to the Stage 1 factors set out in *Soleimany*. No mischief would be caused by its consideration at Stage 1, in that, even if the allegations of illegality are serious, they will not alone outweigh the other factors to be considered at

⁴²³ *Supra* note 380 at [30].

⁴²⁴ Not specifically with reference to contextual review, but the argument is nevertheless applicable.

⁴²⁵ Mayer (Second Look) *supra* note 345 at p. 207.

⁴²⁶ *Westacre supra* note 151 at p. 834.

Stage 1 and mandate a full re-hearing at Stage 2. If the tribunal was, for instance, conducted by “*high calibre I.C.C. arbitrators and duly determined by them*”⁴²⁷ (borrowing Colman J.’s words), and there is nothing to suggest collusion or bad faith by the parties, a court can and must reject any attempt to interfere with the award, no matter how serious the allegations of illegality are. Stage 2 will not come into play in such a case. The seriousness of illegality may, however, be a decisive factor in those cases where a summary Stage 1 review indicates that all other factors are evenly balanced. Where all may not have been right with the award, the egregiousness or non-egregiousness of the illegality is an appropriate factor to take into consideration in determining whether the balance ought to tip towards or away from a Stage 2 enquiry. If the alleged illegality is grave (such as in *Thomson-CSF v Frontier AG*, where it was alleged that the intermediary agreement involved corrupt influence peddling of massive scale targeting the French Foreign Minister, one of the most senior officials in the French government), but other factors are evenly balanced, a court should satisfy itself as to the absence of illegality before enforcing the award, in case the allegations of illegality or corruption are proven right at Stage 2. Conversely, there should be no warrant for a court to proceed to Stage 2 where the illegality is *not* grave, but other factors are evenly balanced— in such case, finality is respected, without an undue risk of condoning significant illegality.

187. There is a further practical argument for consideration of the nature of the alleged illegality at Stage 1. Nelson Enonchong (“**Enonchong**”) rightly points out how doing so promotes procedural efficiency:

*“...much time and effort will be saved if the seriousness of the illegality is determined at the stage of the preliminary enquiry rather than at the end of the second stage. Since enforcement would normally be refused only if the illegality [contravenes international public policy], it means that, under the majority approach in Westacre, the court could go through the whole process of the preliminary enquiry, allow the defendant to challenge the arbitrator’s findings of fact on the issue of illegality, and conclude upon the evidence that the defendant has established that there was illegality, only to arrive in the end at the decision that the illegality established is not sufficiently offensive to warrant refusal to enforce the award and that therefore the award will be enforced after all... if it is decided early at the preliminary enquiry whether or not the alleged illegality is not sufficiently serious so that the award will be enforceable even if the illegality is established, there will be no point in going on to the second stage. The matter will end there. No time and effort will then be wasted going through the rest of the preliminary enquiry, much less the full enquiry.”*⁴²⁸

188. Second, it may be questioned whether Waller L.J. was correct to suggest that, in assessing whether there is illegality (under Stage 1 or Stage 2), the court is not limited to considering fresh or new evidence, and can even consider evidence that had been submitted to and ruled upon by the tribunal (see [155] above). Conversely, the majority in *Westacre* preferred to insist on *fresh* evidence as the only justification for interference with the award (see [124] above). We agree with Enonchong that Waller L.J.’s view is “*too extreme and threatens too much the principle of finality. Yet, if that view is to receive some rehabilitation so that more weight is given to finality, the correction ought not to go too far in the opposite direction.*”⁴²⁹ Hence, in the spirit of balancing award finality and public policy, Colman J.’s intermediate approach of restricting the court’s intervention to cases where “*there is new, though not necessarily fresh, evidence*” should be applied.⁴³⁰

⁴²⁷ *Supra* note 312 at 800.

⁴²⁸ Enonchong (Enforcement) *supra* note 311 at p. 509.

⁴²⁹ Enonchong (Enforcement) *ibid.* at pp. 510-511.

⁴³⁰ Enonchong (Enforcement) *ibid.* at p. 510.

(iii) The Standard of Review Applied by “Minimal” Review Courts in Reality: A Hark Back to Contextual Review?

189. We conclude with some important observations on the minimal review approach adopted by certain courts. Paradoxically, despite some minimal review courts’ mantra-like repetition of the award finality principle (e.g. “[findings made in an award] are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factors”⁴³¹), their judgments often betray an unwillingness to whole-heartedly embrace it and relinquish control over the merits as required. For instance, when the Swiss Federal Tribunal first refused to set aside the award in *Thomson-CSF v Frontier*, it went through the evidence which the arbitral tribunal relied on (for its conclusion that the object of the intermediary agreement was to conduct legitimate lobbying activities to procure the sale of the frigates), and acquiesced with the tribunal’s evaluation of the evidence.⁴³² This was in spite of the court holding that “it was not within its authority to review the facts of the case or the way the award proceeded in weighing evidence” since “a critique on the appreciation of evidence [by the arbitral tribunal] is a critique of purely appellate nature, that could not be admitted” (see [120] above). If the non-interference ethos of minimal review was respected in substance, instead of form, then all that the court should have been competent to express a view upon was the existence or non-existence of vitiating factors, and errors of law relating to the interpretation of Swiss international public policy.
190. Seemingly taking a leaf out of the Swiss Federal Tribunal’s book, in *AJU v AJT*, the Singapore Court of Appeal saw fit to dedicate three substantial paragraphs to an examination of the composition and competence of the tribunal to determine the issue of illegality under Singapore law,⁴³³ and the veracity of the tribunal’s construction of the allegedly corrupt Concluding Agreement (the court examined its language and the surrounding factual circumstances),⁴³⁴ despite repeatedly exhorting thereafter the principle that an arbitral award’s findings are not subject to review absent vitiating factors and error of law regarding Singapore’s international public policy.⁴³⁵
191. The court justified its examination of these matters on the basis that it cannot ignore the sort of “palpable and indisputable illegality” present in the case of *Soleimany*.⁴³⁶ However, with respect, the court appears to have misunderstood the holding in *Soleimany* and, in particular, why there was “palpable and indisputable illegality” in that case. There was “palpable and indisputable illegality” in *Soleimany* because, as the English Court of Appeal held, it was “dealing with a[n] [award] **which finds as a fact that it was the common intention [of the contracting parties] to commit an illegal act, but enforces the contract.**” (emphasis added)⁴³⁷ In those circumstances, there was no need for

⁴³¹ *AJU v AJT supra* note 316 at [65].

⁴³² See Sayed’s (*supra* note 19) review of the case at pp. 399-400 (“In effect, not only did the Court describe the way the award reached its conclusion, but it also acquiesced with the approach as well as with the conclusion drawn from the available evidence”).

⁴³³ *AJU v AJT supra* note 316 at [61].

⁴³⁴ *AJU v AJT ibid.* at [63] and [64].

⁴³⁵ *AJU v AJT ibid.* at [65] and [66] and [68]-[69].

⁴³⁶ *AJU v AJT ibid.* at [64].

⁴³⁷ *Soleimany supra* note 318 at 821. Ironically, *AJU v AJT ibid.* at [47] also cited this *dictum* from *Soleimany*, but appeared to overlook its significance in the subsequent critical portions of the judgment.

See further Waller L.J.’s judgment in *Soleimany* at 815:

“By the award made by the Beth Din on 23 March 1993, it is recited that ‘the plaintiff purchased quantities of carpets and exported them, illegally, out of Iran.’ (Our emphasis.) There is further recognition of the illegal activities in Iran in other parts of the award. For example, in relation to quantum

the English Court of Appeal to disturb or review the tribunal's findings in the award, in order to justify refusal of enforcement. The tribunal had found as a fact that the contract was for the illegal smuggling of carpets out of Iran, and therefore the English Court of Appeal could simply (and did) rely on such finding to refuse enforcement of the award.⁴³⁸ *In contrast*, the award challenged before the Singapore Court of Appeal in *AJU v AJT* found as a fact that there was *no* common intention under the Concluding Agreement to commit any kind of illegality. The court's argument that it was entitled under the minimal review approach to examine matters such as the tribunal's competence and construction of the Concluding Agreement, in order to check for the sort of "*palpable and indisputable illegality*" present in *Soleimany*, therefore appears somewhat contrived.

192. We think that this was more likely once again a case of a minimal review court not quite accepting its own mantra that an award's findings are not subject to review on the merits.⁴³⁹ The court's conclusion that "*this was not an appropriate case for the Judge to reopen the Tribunal's finding that the Concluding Agreement was valid and enforceable*" (emphasis added),⁴⁴⁰ *only after* having considered matters like the tribunal's competence, its findings of fact, and its construction of the Concluding Agreement,⁴⁴¹ is more reminiscent of Stage 1 of Waller L.J.'s two stage test, rather than the minimal review approach in substance. As Waller L.J. said in *Soleimany*, at Stage 1, the court should ask questions such as:⁴⁴²

- (a) "[i]s there anything to suggest that the arbitrator was incompetent to conduct such an inquiry?" (note *AJU v AJT*'s consideration of the tribunal's competence, for instance, the fact

it is recognised that 'By the very nature of the illicit enterprise, few records were kept . . .' In assessing profits the award disallows the full sum claimed by the plaintiff on the basis, inter alia, that no allowance has been made for "smugglers' fees." (emphasis in original in underlined text; emphasis added in bold) and at 818-819:

*"we are dealing with a case where it is **apparent from the face of the award** that (i) the arbitrator rejected the plaintiff's case that he had exported carpets purchased by himself which had then been sold by his father on his behalf; and (ii) **the arbitrator was dealing with what he termed an illicit enterprise under which it was the joint intention that carpets would be smuggled out of Iran illegally.**"* (emphasis added)

⁴³⁸ See [152]-[153] above; and *Soleimany supra* note 318. at 823-824:

*"So we turn to the enforcement stage, on the basis (as we have already concluded), that the arbitrators had jurisdiction... it is in our view inconceivable that an English court would enforce an award made on a joint venture agreement between bank robbers, any more than it would enforce an agreement between highwaymen... Where public policy is involved, the interposition of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it... The reason, in our judgment, is plain enough. The court declines to enforce an illegal contract... The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it... It may be that the plaintiff can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the *lex fori*. **The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none...** In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. **We do not propound a definitive solution to this problem, for it does not arise in the present case. So far from finding that the underlying contract was not illegal, the Dayan in the Beth Din found that it was.**"* (emphasis added)

⁴³⁹ In a different context, see Michael Hwang and Su Zihua, "Egregious Errors and Public Policy: Are the Singapore Courts too Arbitration Friendly?" in Yeo Tiong Min, Hans Tjio, and Tang Hang Wu, *SAL Conference 2011: Developments in Singapore Law Between 2006 and 2010, Trends and Perspectives* (Academy Publishing, 2011).

⁴⁴⁰ *AJU v AJT supra* note 316 at [64].

⁴⁴¹ *AJU v AJT ibid.* at [62]-[64].

⁴⁴² *Soleimany supra* note 318 at 824.

that “the Tribunal consisted of experienced members of the local [Singapore] Bar; and... decided the issue of illegality according to Singapore law”⁴⁴³);

- (b) “if there is *prima facie* evidence from one side that the award is based on an illegal contract... [i]s there evidence on the other side to the contrary?” (note *AJU v AJT*’s acquiescence to the tribunal’s findings of fact regarding the absence of illegal intention underlying the Concluding Agreement⁴⁴⁴); and
- (c) “[i]f the arbitrator expressly found that the underlying contract was not illegal... is it a fair inference that he did reach that conclusion?” (note *AJU v AJT*’s examination of, and agreement with, the tribunal’s construction of the terms of the Concluding Agreement⁴⁴⁵).

As should be evident from the above, all the matters considered by *AJU v AJT* fell within the Stage 1 factors which Waller L.J. proposed *obiter* in *Soleimany*. Not only that, they were examined in the manner that Stage 1 enquiry ought to be conducted, i.e. on a summary review basis short of (in Waller L.J.’s words) a “full-scale trial of those matters in the first instance”.⁴⁴⁶

193. One can derive the “sense [from a reading of these judgments] that [some self-proclaimed minimal review courts may subscribe to the view that their version of] minimal judicial review ought to be backed by a supporting summary examination of the merits so as to show that placing full faith and credit in the challenged parts of the award would not be problematic from the point of view of the inference of facts or the application of the law”.⁴⁴⁷ This is, to our minds, an implicit endorsement of contextual review, owing to an instinctual recognition of the need to preserve fundamental public policy values alongside the policy goals of respecting award finality. Some of these courts have perhaps not yet fully grasped all the implications of the minimal review approach, and if put to the test— i.e. when a hard case arises where there are compelling circumstances suggesting that an award is tainted by serious illegality, but it cannot be set aside or refused enforcement under the minimal review approach (in our view, neither *AJU v AJT* nor *Thomson-CSF v Frontier AG* were hard cases)— we suggest that their dedication to the minimal review cause will be sorely challenged. As Sayed astutely queries: “What if the policy of maintaining minimal judicial review was asserted in a case where the summary examination of the merits would suggest erroneous application of law or inference of facts? Would minimal judicial review be maintained or summary examination be sacrificed?”⁴⁴⁸ What if, for instance, in *AJU v AJT*, contrary to the court’s conclusions on the matter, the tribunal’s competence, findings of fact, and construction of the Concluding Agreement, were all suspect, and disclosed the possibility of, rather than “palpable and indisputable”, corruption or illegality?
194. It will be interesting to observe how the courts will resolve such a case. We think that some of them may well concede the merits of Waller L.J.’s two-stage test— whether explicitly, or under the guise of checking for “palpable and indisputable illegality”— and find that they have before them “an appropriate case” to re-open the tribunal’s findings. Legal intuition, if nothing else, surely cannot accept that arbitral award finality reigns supreme to the exclusion of all other public policy values,

⁴⁴³ *AJU v AJT supra* note 316 at [61].

⁴⁴⁴ *AJU v AJT supra* note 316 at [63]-[64].

⁴⁴⁵ *AJU v AJT ibid.* at [64].

⁴⁴⁶ *Soleimany supra* note 318 at 824.

⁴⁴⁷ Sayed *supra* note 19 at p. 404.

⁴⁴⁸ Sayed *supra* note 19 at p. 404.

nor allow the interposition of arbitration proceedings and awards to conceal and legitimise corruption or other reprehensible wrongdoing by parties.

VIII. Conclusion

195. We summarise our conclusions as follows:

- (a) *Sua sponte* investigations of corruption by a tribunal fall within its mandate or authority, if the existence of corruption is relevant to the resolution of the dispute submitted to it (which will almost always be the case).
- (b) The burden of proving corruption lies on the party alleging corruption. In order for a tribunal to make a finding of corruption, that party must discharge the balance of probabilities standard of proof. This evidentiary standard must be flexibly understood— in determining whether it has been discharged, factors such as the intrinsic difficulty of proving corruption, and the inherent likelihood or unlikelihood of corruption in the specific circumstances of the case, should be taken into account. Applying this evidentiary standard, tribunals may also consider various indicia and circumstantial evidence of corruption, and/or draw adverse inferences from an impugned party’s failure to produce documents (when so ordered) or exculpatory evidence.
- (c) Choice of law analysis is usually required when dealing with intermediary agreement disputes. Where foreign mandatory laws or rules of public policy at the place of performance or seat of arbitration prohibit an intermediary agreement, contrary to the parties’ chosen law, whether they override the chosen law is a matter to be determined in accordance with the arbitral seat’s national conflicts rules. However, any law deemed applicable to the parties’ dispute under the arbitral seat’s conflicts rules must yield to transnational public policy against corruption, to the extent of any incompatibility between the two.
- (d) If a tribunal makes a finding of corruption, it nevertheless has jurisdiction over the parties’ dispute, and is entitled to adjudicate issues of corruption as they are arbitrable. Contracts *procured by* corruption must generally be set aside by the victim of corruption in order for it to avoid its obligations thereunder (it may lose its right to do so if it elects to keep the contract alive with knowledge of such corruption), whereas claims arising out of contracts *providing for* corruption are deemed unenforceable or inadmissible without parties having to set it aside. However, generally speaking, one party’s unilateral intention to commit corrupt acts in performing a contract will not preclude the other innocent party from making claims arising out of the contract.
- (e) National legislation (in particular, anti-money laundering legislation) may require arbitrators to report to the relevant authorities corruption which comes to their attention in the course of an arbitration. Such obligation overrides any express or implied duty of confidentiality. Even if an arbitrator is not subject to any such disclosure *obligation*, reporting of corrupt activities *on the arbitrator’s own accord* may fall under the public interest or interests of justice exceptions to confidentiality.
- (f) There are two aspects to the judicial scrutiny of (allegedly) corruption-tainted awards. First, it must be determined to what extent national courts ought to defer to tribunals’ negative findings of corruption. Should the court take a tribunal’s findings at face value, or should it investigate further and come to its own conclusions on the existence of corruption, and if so, to what extent? There is no unanimity between jurisdictions on this issue. They can be split into

three camps— the minimal, contextual, and maximal review camps— maximal review courts having the greatest proclivity to interfere with an award’s findings, and minimal review courts having the least. We have argued that contextual review is superior, as it strikes the best balance between award finality and other fundamental public policy values of the forum, such as anti-corruption public policy. The second aspect of judicial scrutiny of awards requires a court to determine whether, if the party/parties are guilty of corruption or other forms of impropriety (on the basis of the tribunal’s or the court’s findings, as the case may be), such conduct is egregious enough to warrant setting aside or refusal of enforcement of the award on public policy grounds. Most leading arbitral jurisdictions distinguish between *international* and *domestic* public policy. Only contravention of the former justifies the setting aside or refusal of enforcement of an award. With the exception of countries like the UK, there is near universal agreement that “hard” corruption violates international public policy, though the position is more complicated with respect to contracts for the sale of influence, since there is significant divergence between jurisdictions as to whether and in what circumstances such contracts amount to corrupt influence peddling.

196. This article has sought to demonstrate that, in international arbitration, there is much more than meets the eye to a simple allegation or evidentiary suggestion of corruption. The issues that arise are diverse, running the entire gamut of the arbitral process. Consequently, the law on these issues is immense. And to make matters more complicated, they are not always easy to negotiate, partly because they give rise to tensions between weighty matters of public policy, which jostle with each other for primacy. For instance, one misstep in the tribunal’s evidentiary or conflict of laws analysis can make a world of difference to the ultimate resolution of the parties’ dispute at the primary tribunal level, and this will have further knock-on effects at the setting aside and enforcement stages. To put it bluntly, parties, as well as the broader interests of justice, will often pay dearly for tribunals’ mistakes on issues of corruption, given the dispositive impact that a finding or non-finding of corruption will have on the merits, and the fact that many aggrieved parties will not be fortunate enough to get a second chance for redress before national courts.
197. That said, the responsibility for just and effective adjudication of issues of corruption, within the context of the global fight against the scourge of corruption, cannot rest entirely with the tribunal. Parties have as important a role to play in ensuring that the tribunal is properly briefed on these issues, and must make the correct tactical decisions in the prosecution of their case, with sensitivity for the way courts handle public policy challenges. For instance, any and all evidence of corruption which can reasonably be obtained, ought to be submitted to and highlighted before the tribunal, instead of being held back, for as we have seen, some courts are unsympathetic to parties seeking to relying on stale evidence to substantiate their claims of corruption. In line with the ethos of balancing award finality with equally fundamental anti-corruption public policy values, courts should also consider intensifying, if they subscribe to minimal review, or de-intensifying, if they prefer maximal review, their respective approaches to the scrutiny of corruption-tainted awards.
198. It remains to conclude this article by teasing out what has been implicit in some of our discussions: that the “reality” of judicial and arbitral practice relating to certain issues of corruption sometimes clashes incongruously with the theoretical disposition of the “law” on the subject. For example, there is the anomalous view in recent English decisions that corruption-tainted awards do not violate English international public policy, notwithstanding universal, and the common law’s historical,⁴⁴⁹ condemnation of corruption. Also, there is the sense that some “minimal” review courts, which

⁴⁴⁹ As held in *R v Charles Hildyards Thornton Whitaker* [1914] 3 KB 1283: “the common law... abhors corruption.”

purportedly accord maximum deference to the tribunal's findings, are in reality on the cusp of the more intrusive contextual review approach. We have suggested that in a difficult case, the present reality could transform into express positive law for future cases. Turning to arbitral practice, one may question whether, in a case where corruption has not been proven to the requisite legal standard of proof, an arbitrator with lingering doubts may in reality allow them to colour his or her conduct of and views on the parties' dispute. Special care must be taken by the arbitrator to avoid being consciously or unconsciously affected by rumours or innuendo; through the quality of their submissions, parties may also be able to play a part in tackling this problem. In addition, it is an open question to what extent law enforcement authorities have an interest in prosecuting arbitrators for failure to disclose suspicions of corruption, or whether it is even practically possible given the confidentiality that often shrouds arbitral proceedings, notwithstanding arguably clear anti-money laundering legislation, which may suggest that they are under such a duty of disclosure. We are unaware of any arbitrator coming forward to report to the authorities his or her suspicions of corruption aroused from hearing a case, and this *status quo* looks set to continue, pending further guidance on this grey area.