I. Introduction

International commercial arbitration “has become so widespread that it is a primary method for dispute resolution of transnational contracts.”\(^1\) The United States Supreme Court has recognized that “[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.”\(^2\) Arbitration’s prevalence is increasing in regions that previously were hostile to adopting the practice.\(^3\) With the increasing popularity, arbitral tribunals are becoming more efficient and fluent in analyzing issues that courts historically have handled. Specifically, international arbitral institutions have had to learn to address allegations of corruption and fraud. This paper sets out the current legal regime in place to combat corruption and fraud and explains how international arbitration tribunals handle such allegations.

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

Corruption and fraud are not topics that are unfamiliar to those engaged in cross-border transactions—they are global problems. However, corruption and fraud are more common in


\(^3\) Doak Bishop, *The United States’ Perspective Toward International Arbitration with Latin American Parties*, Int’l L. Practicum, Autumn 1995, at 63, 65 (“Several Latin American countries have amended their domestic legislation to facilitate the commercial arbitration process, providing for the enforceability of an arbitration clause, the use of a foreigner as arbitrator and, in general, creating a climate that is more hospitable to the process of international commercial arbitration.”).
certain regions, such as Latin America, Asia, and Africa; and lawyers and business people engaged with these regions need to be mindful of corruption and fraud issues in the international arbitration context. In Latin America, it can be common for public officials to encourage, or at least expect, bribes from foreign business executives in exchange for lucrative government contracts or more favorable regulations. These public officials recognize the pervasiveness of bribery in their countries and, therefore, expect illicit payments when negotiating and transacting business with foreigners because it has become so customary. Further, public officials, especially in the developing world, usually receive lower salaries than business people in their country or government officials elsewhere and, therefore, justify the bribe as “compensation . . . for their [otherwise] inadequate salaries.” Given the expectation of a bribe, foreign business people often claim that an illegal payment is necessary to obtain or retain business in these countries. In some countries, a bribe will open doors to business opportunities and reduce that company’s tax liability.

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

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

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

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

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


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


11 Altamirano, supra note 10, at 495 (“Investment is reduced because of the high cost of bribes. Investors view bribery as a private tax on their investment [and] tend to shy away from jurisdictions with high rates of private taxation.”) (internal quotation omitted); see also 15 U.S.C. § 78ff(a) (2009).
Further, the more corrupt a government is, the less trusting the population is of that government. One can see this by looking at Latin America, given the region’s higher perception of corruption. A United Nations Development Program study found that the majority of Latin America’s population distrusts its government and has lost faith in its ability to govern effectively and make their lives more prosperous. Former U.S. Assistant Secretary of State of Hemispheric Affairs, Otto Reich, remarked that studies estimated the societal cost of corruption in Latin America at “$6000 per man, woman, and child” in a region where “one third of [the population] live[s] on $2 a day.”

Fraud, like corruption, is similarly perilous to society. In 2001, Enron, once the sixth largest energy company in the world, crumbled due to the fraudulent activities of its executives. Its stock value plummeted within months of the allegations. However, the collapse of Enron and its loss in stock value were not the only casualties—many lower-level employees lost their jobs and life-savings. Similar to Enron, a Spanish stamp company and its parent company, Afinsa, faced dozens of class-action lawsuits and a U.S. Securities and Exchange Commission investigation for alleged fraud in 2006. The company promised investors annual returns of 6% to 10% for investing in its stamp collections. Meanwhile, the stamps sold for pennies online and were essentially worthless. Nearly 190,000 people lost money due to the fraudulent scheme, and the company’s executives faced prison sentences of nearly two decades.

Enron and Afinsa are not anomalies. Ten percent of large companies lose over $100 million per year to fraud. Additionally, there is no indication that fraudulent conduct is decreasing since the early 2000s. From 2007 to 2011, the amount of pending corporate fraud

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16 Id.
18 Id.
19 Id.
21 Survey Finds Corporate Fraud Impacts 80 Percent of Businesses Worldwide, The Economist Intelligence Unit, Kroll Inc., 2007 WL 4054825.
cases pursued by the U.S. Federal Bureau of Investigation’s Financial Crimes Section increased every year. This type of conduct impacts not only the economy where the fraud occurred, but the world economy as well. The former European Commission said: “The corporate scandals of recent years and the fallout that they created underlined how interdependent our economies really are. It is our job as regulators to come up with frameworks that, to the extent possible, bring about financial stability and reduce the risk of contagion of financial crises.”

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

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

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

Some international arbitral tribunals have relied on transnational public policy in the past. In World Duty Free Co. Ltd. v. Republic of Kenya, there was a dispute over a contract procured by a $2 million bribe. The tribunal noted that “bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries.” The tribunal affirmed that “bribery is contrary . . . to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld . . . .”

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24 World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 142 (Oct. 4, 2006) (“[T]he Tribunal first notes that bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries.”).
27 W. Laurence Craig, The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration, 21 AM. REV. INT’L ARB. 243, 258 (2010) (“Where the agreement between the parties does not posit an applicable law to the dispute, modern arbitration rules give wide and flexible powers to the arbitrators to choose the applicable law.”).
28 World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 43 (Oct. 4, 2006).
29 Id. at ¶ 142. It is important to note that international arbitral tribunals have made a distinction between investments procured through corruption, which results in a lack of arbitral jurisdiction, and investments operated
Similarly, in *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, El Salvador argued that a businessman was not entitled to the protections of the El Salvador-Spain BIT because his investment was the result of making fraudulent representations during the bidding process. The tribunal noted that giving effect to fraudulent acts would violate transnational public policy by “sanctioning illegal acts and their resulting effects.” Also, in ICC Arbitration Case No. 1110/1963, the tribunal said that “it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.”

Further, in the international commercial arbitration context, it is not only beneficial for the tribunal to look at transnational public policy, but also essential. Transnational public policy represents the unity of most countries’ public policies. If a tribunal issues an award that contravenes transnational public policy, then it likely contravenes an individual country’s public policy where the award will be enforced. Under the New York Convention, a national court is entitled to refuse recognition and enforcement of the award if the decision contravenes its public policy. Similarly, the UNCITRAL Model Law, which has been adopted as law in several countries and U.S. states, allows a national court to set aside awards that violate that country’s public policy. “[C]ommentators have highlighted that ‘[a]ny tribunal owes an obligation to the international community to apply international public policy’ and that ‘nothing can acquit a tribunal of its mandate to apply public policy.’”

(continued…)

through corruption, which does not affect the jurisdiction of the tribunal. See, e.g., Veteran Petroleum Ltd. (Cyprus) v. Russian Federation, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014, ¶ 1354 (finding unpersuasive the “contention that [jurisdiction] must be denied to an investor not only in the case of illegality in the making of the investment but also in its performance”) (emphasis in original).


*Id.* at ¶ 247.


Arbitral tribunals must endeavor to render an enforceable award. If the tribunal’s decision is not mindful of transnational public policy and consequently delivers an unenforceable award, then it renders the arbitral proceeding pointless and undermines international commercial arbitration as the preferred dispute resolution for foreign parties. It is thus imperative that tribunals examine transnational public policy in reaching their decisions.

But where does an international tribunal look to determine if some rule of transnational public policy has evolved? There are several sources that may be relevant to such an inquiry.

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

The FCPA imposes both criminal and civil penalties, and U.S. prosecutors have sought both civil and criminal penalties for violators. In 2001, an employee of a U.S.-based investment company received a two and half year prison sentence and a $60,000 fine when a federal court found that he offered a bribe to Costa Rican officials to obtain concessions for a land development project. The FCPA is generally regarded as one of the most robust domestic anti-corruption laws in the world.

Similarly, in 2010, the United Kingdom enacted the Bribery Act, which also is considered “among the strictest legislation internationally on bribery.” The law applies to both individuals and companies and requires companies to show that they have adequate procedures in place to prevent bribery. Also, like the FCPA, the UK Bribery Act has extraterritorial reach and applies to United Kingdom companies operating abroad, as well as foreign companies

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37 See LCIA Rules, Art. 32.2 and ICC Rules, Art. 35.
39 Foley & Haynes, supra note 41, at 28.
40 Id.
41 Id.
42 15 U.S.C. § 78ff(a) (2009). Individuals who violate the FCPA are subject to fines of up to either: (1) $250,000 per violation or (2) twice the amount of economic gain realized from the illegal payment.
43 15 U.S.C. § 78ff(a) (2009). An individual can be imprisoned for up to 5 years for each violation.
44 United States v. King, 351 F.3d 859, 862 (8th Cir. 2003).
operating in the United Kingdom. In addition to the United Kingdom, Brazil recently enacted a similar comprehensive anti-corruption law. The Brazilian law imposes a strict liability standard and requires certain Brazilian companies to adopt anti-corruption compliance programs. Further, over the past couple of decades, several other countries, including Argentina, Colombia, France, Italy, South Korea, and Spain have enacted forceful penalties for those engaged in corrupt acts. To the extent the law of any of these countries is applicable or relevant to the arbitration in question, it should be considered.

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

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

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57 Financial Crimes Report to the Public, Fiscal years 2010-2011, FBI, available at https://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011 (“[In addition to the FBI, these agencies include the SEC, U.S. Attorney’s Offices (USAO), CFTC, FINRA, USPIS, and the IRS, among others, serving as force multipliers to more effectively address the securities and commodities fraud threat.”).
helps coordinate with national authorities in the European Union where a case of financial fraud is alleged.  

In the United Kingdom, Parliament adopted the Proceeds of Crime Act 2002, which provides for criminal penalties of imprisonment and fines, as well as civil penalties for money laundering and other fraudulent financial related activities. Similarly, France has a strict anti-money laundering law that it enacted in 1996.

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

Following the OECD’s Anti-Bribery Convention, the United Nations General Assembly adopted the United Nations Convention Against Corruption (“UNCAC”) in 2003. The UN recognized that corruption was “no longer a local matter but a transnational phenomenon that affects all societies and economies” and thus was convinced that “international co-operation to prevent and control it [was] essential.” Like the OECD’s Convention, UNCAC “requires

59 Id.
61 French Law No. 96-392 of May 13, 1996.
63 Article 1, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization of Economic Co-operation and Development, Adopted by the Negotiating Conference on 21 Nov. 1997 (requiring countries to establish that offering a bribe, or being “complicit[] in, including incitement, aiding and abetting, or authorization of an act of bribery,” is a criminal offense).
countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law.”

UNCAC obligates countries to cooperate with each other in limiting corruption, including prevention, investigation, and prosecution of offenders. “Countries are also required to undertake measures.. [to] support the tracing, freezing, seizure and confiscation of the proceeds of corruption.”

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

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

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

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70 Id.
71 Id.
73 Id. at Art. VII.
74 Id. at Preamble.
75 Id.
77 Id.
80 APEC is a forum of 21 Pacific Rim member countries.
region. And in 2014, the APEC members adopted the Beijing Declaration on Fighting Corruption.

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

For example, the World Bank established the Oversight Committee on Fraud and Corruption. The World Bank also adopted the first Uniform Framework for Preventing and Combating Fraud and Corruption along with the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the International Monetary Fund. Further, in 2010, the five regional development banks signed a cross-debarment agreement, which provided that entities barred by one bank will be sanctioned for the same misconduct by the other banks.

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

Finally, in 1989, the Financial Action Task Force (“FATF”) was established at the G-7 Summit in order to combat money laundering. FATF began with sixteen member counties, but today has thirty-seven members. FATF attempts to set standards and promote legal, regulatory, and operational measures for combating fraudulent activities, such as money laundering, terrorist financing, and other threats “to the integrity of the international financial

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82 Id.
85 Id.
86 Id.
88 Id.
89 About: History of the FATF, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING (FATF), available at http://www.fatf-gafi.org/about/historyofthefatf/.
90 Id.
system."\(^91\) FATF monitors the progress of its member countries in addressing these issues and "works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse."\(^92\)

The final important source to consider in determining if transnational public policy exists is the body of existing arbitral decisions. In this context, several international arbitral tribunals have recognized a global consensus against corruption. As noted above, in *World Duty Free v. Republic of Kenya*, the tribunal was "convinced that bribery is contrary . . . to transnational public policy."\(^93\) In another international arbitration, the tribunal concluded that corruption is against "international *bones mores*."\(^94\) In ICC Arbitration No. 1110/1963, the international tribunal stated that "[c]orruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations."\(^95\)

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

### III. Handling Allegations of Corruption and Fraud in International Arbitration

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

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

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\(^91\) *About: Who We Are*, FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING (FATF), available at http://www.fatf-gafi.org/about/.

\(^92\) *Id*.

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


\(^95\) ICC Case No. 1110 of 1963, Award, by Gunnar Lagergren, published in ARB. INT’L 1994, at 282 et seq.


\(^97\) *Phoenix Action Ltd. v. Czech Republic*, ICSID Case n. ARB/06/5, Award (April 15, 2009).
three options: (i) denying jurisdiction to hear the dispute; (ii) hearing the allegation and ruling on it; or (iii) leaving it unresolved.

** (i) Denying Jurisdiction to Hear the Dispute 

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

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

** (ii) Hearing the Allegation and Ruling on It 

In order to avoid the problem described above, international arbitral tribunals now adopt the separability doctrine, which posits that an agreement to arbitrate “is presumptively distinct and independent from the parties’ underlying contract, and is supported by the separate consideration of the parties’ exchange of promises to arbitrate.” The principles behind this approach are (1) preserving the sanctity of the arbitration agreement and (2) allowing for the severability of the arbitration clause. In such a scenario, the tribunal first will make a finding as to the corruption allegations. Then, if the tribunal makes a positive finding of corruption, it will decide what the impact of the bribery or corruption is on the arbitration clause and the underlying contract itself (i.e., on the admissibility of the underlying commercial claims).

National courts, such as those in the United States and the United Kingdom, have supported this position and encouraged arbitral tribunals to decide issues of corruption and fraud if the parties agreed to arbitrate. As a result, international arbitrators are becoming better

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99 Id.
101 Id. at 6.
102 D. Srinivasan et al, Effect of Bribery in international commercial arbitration, at 135.
103 Id. at 135–36.
104 See Scherk v. Alberto-Culver Co., 417 U.S. 506, 519, n.14 (1974) (finding that the fraud exception to an arbitration clause “means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.”) (emphasis added); see also Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (“[W]e resolved [this issue] in favor of the separate
versed in examining issues of corruption, and national courts have “accept[ed] the arbitrability of these issues of truly international public policy” and “for the most part confirm the arbitrators’ resolution of the issue without either attacking their jurisdiction or attempting to revise the solution they reached on the merits of the issue.”

Another example in the United Kingdom bolsters national courts’ willingness to let the arbitral tribunal rule on issues of corruption and fraud. In *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.*, the losing party challenged the validity of an ICC award with the High Court of England and Wales. There were allegations that the underlying agreement contemplated bribing foreign officials. The arbitral tribunal found that it had jurisdiction to hear the bribery claim, but ultimately ruled that it was unsubstantiated. In deciding whether to enforce the ICC award, the High Court found it “necessary to consider both on the one hand the desirability of giving effect of the public policy against enforcement of corrupt transactions and on the other hand the public policy of sustaining international arbitration agreements.” Ultimately, the High Court ruled that the arbitral tribunal was correct in deciding it had jurisdiction because deciding an issue of corruption “involves determination of questions of fact, that is an everyday feature of international arbitration [and] if much weight were to be attached to that consideration it [would be] difficult to see that arbitrators would ever be accorded jurisdiction to determine issues of illegality.”

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

However, other issues arise in handling these allegations. Notably, arbitral tribunals may be unable to compel the production of evidence relating to the allegation, presenting several challenges in asserting claims of corruption or fraud against the other party. Further, the arbitral tribunal must determine (1) the burden of proof and (2) the standard of proof. The difference between the two is that “the burden of proof defines which party has to prove what, in enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”).

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107 See *id*.
108 *Id.* at 117.
109 *Id.* at 128–29.
110 *Id*.
111 Michael Pryles, *Reflections on Transnational Public Policy*, 24 J. INT. ARB. 6 (2007) (commenting that the “applicable law will generally provide the appropriate result . . . when faced with an allegation that a contract is tainted by bribery.
order for its case to prevail”, whereas “the standard of proof defines how much evidence is needed to establish either an individual issue or the party’s case as a whole.” In this regard, there are no strict rules of evidence to which a tribunal must adhere in making its assessment, and tribunals have a broad discretion and range of flexibility to determine whether allegations of corruption and fraud have been proven.  

(1) Burden of Proof

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

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

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

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

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113 Id. at ¶ 178.
114 Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award, ¶ 142 (Nov. 18, 2014).
115 MOTJABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES 369 (Kluwer International 1996).
116 Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013).
117 Id. at ¶ 237. See also, e.g., Azurix Corp. v. the Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 215 (Sept. 1, 2009) (“[T]he Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that ‘who asserts must prove’, and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.”); and ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtsundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic, PCA Case No. 2010-5, Award, ¶ 4.873 (Sept. 19, 2013) (“The burden of proof is undoubtedly on the party alleging corruption.”).
119 See, e.g., International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion of Thomas Widale, ¶ 20, (Dec. 1, 2005) (insinuating that a “success fee” paid to Claimant’s lawyers should be disregarded—explicitly and implicitly, except if properly and explicitly submitted to the tribunal, substantiated with a specific allegation of corruption and subject to proper legal and factual debate for the tribunal); ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtsundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic, PCA Case No. 2010-5, Award, ¶ 4.876 (Sept. 19, 2013)
Corruption is a serious matter and when it is alleged, a tribunal must weigh the evidence with care, both to see whether the allegation is made out (and if it is, to then determine the legal consequences that follow) and at the same time to safeguard those against whom corruption is alleged, if the allegations turn out to be unproven.120

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

In light of this, some commentators have suggested that it might be appropriate for tribunals to adopt the concept of shifting the burden of proof to the allegedly corrupt party, in order for that party to rebut a “reasonable indication” of corruption.121 Others have argued for this burden-shifting approach because, if the party accused of corruption or fraud is actually innocent, it typically is capable of producing evidence exonerating itself without too much effort.122 However, The Rompetrol Group N.V. v. Romania123 tribunal rejected the burden shifting approach and concluded that “arguments of that kind confuse, unhelpfully, the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence.”124

Additionally, the tribunal in Azurix Corp. v. The Argentine Republic rejected the notion that the party being accused of the illegal act is in a better position to disprove that it committed such act.125 Thus, the concept of burden shifting in the context of corruption allegations has not been given much credence, although the difficulties in obtaining direct evidence of these

(continued…)

(“The mere existence of suspicions cannot, in the absence of sufficiently firm corroborative evidence, be equated with proof.”); Jan Oostergetel and Theodora Laurentius v. Slovak Republic, UNCITRAL, Final Award, ¶ 303 (April 23, 2012) (“Mere insinuations cannot meet the burden of proof which rests on the Claimants.”).
120 See ECE and PANTA at ¶ 4.872.
123 The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award, (May 6, 2013).
124 Id. at ¶ 178.
125 Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, ¶ 215 (Sept. 1, 2009).
deceptive acts persist. This has led some tribunals to accept and assess circumstantial evidence in making their determinations on the authenticity of corruption allegations.126

(2) Standard of Proof

It is generally accepted that a tribunal will conclude that a party’s case has been proven on a balance of probabilities.127 In short, the tribunal requires proof that an allegation is more likely than not to be true.128 Although this standard is widely recognized and adopted, debate exists as to whether or not this standard is sufficient in the context of allegations of corruption and fraud. Specifically, some tribunals have articulated standards of proof that appear to be higher or more stringent than the usual standard, while others have declined to take this route.

The tribunal in Metal-Tech Ltd. v Uzbekistan129 stated that an allegation of corruption must be proved with “reasonable certainty.”130 In this case, Uzbekistan alleged that the investor made illegal payments to government officials when obtaining investment contracts. Metal-Tech’s CEO and Chairman admitted during the hearing that the company had made some payments to alleged consultants, including an official of the Uzbekistan government and the brother of the State’s Prime Minister, prior to the formation of the corporate investment entity.131 Based on those admissions, the tribunal initiated an investigation into the existence of corruption and made procedural orders requiring the investor to produce certain documents. Further, the tribunal held a subsequent hearing where the CEO attempted to amend his testimony.132

Embracing the international community’s “red flags” or indicators of corruption with respect to the use of a consultant to obtain a government contract, the Metal-Tech tribunal assessed the evidence of corruption before it,133 and found sufficient evidence to rule that corruption existed and violated Uzbekistan law in connection with the establishment of the

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126 Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) (dismissing the claim, the tribunal found that the existence of several “red flags” of corruption on the investor’s part were not satisfactorily explained).
127 Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶ 177 (July 28, 2015).
128 Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, ¶ 124 (July 26 2007) (espousing this as the “usual standard” of proof).
129 Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3, Award (Oct. 4, 2013).
130 Id. at ¶ 243.
131 Id. at ¶ 240.
132 Id. at ¶¶ 86-100.
133 Id., at ¶¶ 293–294 (considering “(1) the intermediary or ‘adviser’ has a lack of experience in the sector; (2) non-residence of an adviser in the country where the customer or the project is located; (3) no significant business presence of the adviser within the country; (4) an adviser requests ‘urgent’ payments or unusually high commissions; (5) an adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity; (6) an adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer’s decision.”).
investment.  In particular, the tribunal considered the following: the amount of money paid by the investor; the fact that these payments were made regardless of services actually provided; the lack of professional qualifications on the part of the payees; the lack of transparency surrounding the payment arrangements; the significant connections of some of the payees with government officials responsible for the establishment of the investment; and Metal-Tech’s failure to support the legitimacy of the creation of the investment via documents or credible testimony. All those factors led the tribunal to conclude with “reasonable certainty” that the investment had not “implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made.”

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

**EDF (Services) v. Romania** dealt with EDF’s joint venture with entities owned by the Romanian government. In its claim, EDF alleged that it suffered discriminatory treatment from the government because it had refused to comply with demands for bribes from senior government officials. Specifically, EDF alleged that the request for, and refusal to grant, the bribe was made in two private conversations. In finding that the allegations were not founded, the tribunal adverted to a high standard of proof for corruption:

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

In **Fraport v. Philippines II**, the Philippine government argued that the opposing party was corrupt. The tribunal noted that due to the difficulty of proving corruption by direct evidence, the alleging party may rely on circumstantial evidence. However, the evidence, even if

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134 Id., at ¶¶ 372–373.
135 Id., at ¶ 373.
136 EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, (Oct. 8 2009).
137 Id. at ¶ 221 (emphasis added).
circumstantial, must be “clear and convincing” so as to “reasonably make-believe that the facts, as alleged, have occurred.”¹³⁹ In that award, the tribunal found that the Respondents had failed to discharge this burden of proving corruption, though the tribunal did dismiss the claims on other grounds.¹⁴⁰

Finally, in Siag v Egypt,¹⁴¹ Egypt objected to the tribunal’s jurisdiction on the basis that one of the investors had not lost his Egyptian nationality as he may have been fraudulent in attaining his Lebanese nationality. The tribunal accepted the Claimant’s submission that this allegation had to be held to a “heightened standard of proof” and applied the “clear and convincing” standard, explaining that this was higher than the ordinary standard of preponderance of evidence, and concluded that serious allegations such as fraud are held to a high standard of proof in most legal systems and in international proceedings.¹⁴²

Nevertheless, other tribunals have declined to ossify this principle. For example, the tribunal in Tokios Tokelès v. Ukraine¹⁴³ declined to apply the standard, applying a balance of probabilities test instead.¹⁴⁴ Similarly, in Libananco Holdings Co. Ltd. v. Turkey,¹⁴⁵ the tribunal flatly rejected the Claimant’s contention that allegations of fraud or serious wrongdoing demanded a higher standard of proof; rather, the tribunal noted that discharging the burden of proof may require the production of more persuasive evidence, in the case of a fact that is inherently improbable.¹⁴⁶ In addition, in Rompetrol, the tribunal applied the usual standard of balance of probabilities.

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

(iii) Leaving It Unresolved

Lastly, an international arbitral tribunal could ignore an allegation of corruption or fraud when one party raises it during the proceeding.¹⁴⁷ However, this is the most dangerous approach as it leaves the tribunal’s award susceptible to being unenforceable. It would be odd for a

¹³⁹ Id. at ¶ 479.
¹⁴⁰ Id.
¹⁴¹ Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award (June 1, 2009).
¹⁴² Id. at ¶¶ 325–326.
¹⁴³ Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Award (July 26, 2007).
¹⁴⁴ Id. at ¶ 124.
¹⁴⁵ Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Award (Sept. 2, 2011).
¹⁴⁶ Id. at 125.
¹⁴⁷ See Theodore H. Moran, Combating Corruption Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools I (2008) (describing the tribunal in Metalclad v. Mexico, where, “despite rampant rumors of corruption and pleadings about corrupt practices, the [t]ribunal simply chose not to address the issue of corruption.”).
tribunal to ignore such an allegation because corruption and fraud contravene most countries’
public policy.

If the tribunal decides to ignore an allegation, then the losing party can challenge the
award’s enforceability in a national court. In the United States, to invalidate an award for fraud,
“[c]ourts apply a three-prong test to determine whether an arbitration award is so affected by
fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud
must not have been discoverable upon the exercise of due diligence before or during the
arbitration; and (3) the person challenging the award must show that the fraud materially related
to an issue in the arbitration.” 148 In Karaha Bodas Co. v. Perusahaan Pertambangan Minyak
Dan Gas Bumi Negara, the court concluded that the alleged fraud did not satisfy the test above
and enforced the ICC award. 149

Although the court in Karaha Bodas Co. did not invalidate the award, a national court
could refuse to recognize an award if the arbitral tribunal did not properly dispose of an
allegation of corruption or fraud. Under the New York Convention, national courts can refuse to
recognize and enforce an international commercial arbitration award if it runs afoul of the
country’s domestic public policy. 150 As discussed above, the international community and most
countries’ domestic laws criminalize corrupt and fraudulent conduct, and therefore, where
corruption or fraud is underlying an award, a national court could refuse to enforce it. However,
most tribunals do not simply ignore an allegation. In fact, if the international arbitration is
brought under ICC or LCIA rules, then the tribunal has a duty to try to ensure that the award is
enforceable. 151 Nonetheless, if a tribunal ignores this directive then it is at risk for rendering an
unenforceable award.

IV. Conclusion

Corruption and fraud are perilous to society. In a country where corruption is more
common, the public becomes less trusting of governments, and companies risk losing business if
they do not pay a bribe. 152 Fraudulent financial conduct can cripple a business—causing
investors to lose money and the company’s employees to lose their jobs. These consequences
also can impact the global economy, as it did during the Enron scandal. Because of the dangers
of corrupt activities, a transnational public policy has emerged condemning corruption. As the

(5th Cir. 2004).
149 Id.
151 The language of the LCIA and ICC differ somewhat in this respect, but the general obligation of trying
to render an enforceable award remains the same. Under the LCIA rules, the tribunal “shall act in the spirit of these
Rules and shall make every reasonable effort to ensure that an award is legally enforceable.” LCIA Rules, Art. 32.2
(emphasis added). In comparison, under the ICC, the standard is more demanding and requires that the tribunal
“make every effort to make sure that the award is enforceable at law.” ICC Rules, Art. 35 (emphasis added).
152 Private Sector: Problem with Corruption, Transparency International, available at
surveyed by Ernst & Young claimed to have lost business to a competitor who paid bribes.”).
tribunal in *World Duty Free Co. Ltd.* found: “[B]ribery . . . as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries.”\footnote{153}{World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 43 (Oct. 4, 2006).}

In spite of these laws, corruption is on the rise, especially in emerging economies in Latin America, Asia, and Africa.\footnote{154}{See Jacob Poushter, *Global worries about corruption are on the rise*, PEW RESEARCH, Dec. 4, 2014, available at http://www.pewresearch.org/fact-tank/2014/12/04/global-worries-about-corruption-are-on-the-rise/} Although international arbitral tribunals have become more adept at handling allegations of corruption, they will likely need to become more proficient as these allegations continue to increase in spite of the global community’s desire to eliminate corruption.