Ius Comparatum – Global Studies in Comparative Law

Michael Joachim Bonell
Olaf Meyer *Editors*

The Impact of Corruption on International Commercial Contracts

Springer

Ius Comparatum - Global Studies in Comparative Law

Volume 11

More information about this series at http://www.springer.com/series/11943

Academie Internationale de Droit Compare
International Academy of Comparative Law

Michael Joachim Bonell • Olaf Meyer
Editors

The Impact of Corruption on International Commercial Contracts

Springer

Editors
Michael Joachim Bonell
UNIDROIT
Rome, Italy

Olaf Meyer
Centre of European Law and Politics
University of Bremen
Bremen, Germany

ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum - Global Studies in Comparative Law
ISBN 978-3-319-19053-2 ISBN 978-3-319-19054-9 (eBook)
DOI 10.1007/978-3-319-19054-9

Library of Congress Control Number: 2015948375

Springer Cham Heidelberg New York Dordrecht London

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Preface

The fight against corruption is certainly among the most urgent tasks in our globalizing world. So far, this fight has been led primarily by means of criminal law. The consequences of corruption under contract law, on the other hand, have long been neglected. We argue that this reticence is unjustified, that contractual remedies have the potential to affect the perpetrators of corrupt agreements just as severely as criminal prosecution, and that civil law is destined to play an important role in combating corruption in the future.

This volume contains the national reports from the 19th International Congress of Comparative Law that took place in Vienna from 20 to 26 July 2014. The reporters have been asked to describe the enforceability of contracts tainted by corruption from the perspective of their domestic law. The result is a rich compilation of case law and doctrinal discussions, including developments at the international level such as the latest edition of the UNIDROIT Principles of International Commercial Contracts.

The editors would like to thank everybody involved in the preparation of the manuscript. We also thank Springer International for including this volume in the series *Ius Comparatum – Global Studies in Comparative Law*.

Rome, Italy — Michael Joachim Bonell
Bremen, Germany — Olaf Meyer
March 2015

Contents

About the Authors

Padideh Ala'i is a professor of law and the director of the Humphrey Fellowship Program at American University, Washington College of Law (WCL) in Washington D.C. Professor Ala'i specializes in areas of international economic law and comparative legal traditions. She teaches the law of the World Trade Organization (WTO) and writes in the areas of history and free trade, international efforts to combat corruption, transparency and good governance. In 2005 and 2009 Professor Ala'i was the director of WCL's International Legal Studies Program (ILSP) that attracts students from over 60 different countries. Professor Ala'i received her J.D. from Harvard Law School in 1988 and from 1988 to 1997 was in private legal practice with law firms of Jones Day and Reichler, Milton & Medel (merged subsequently with Foley Hoag) where she specialized in international arbitration, international litigation in US courts on behalf of foreign governments, US banking regulation as well as international business transactions.

Michael Joachim Bonell teaches at the University of Rome I "La Sapienza" and is a consultant to the International Institute for the Unification of Private Law (UNIDROIT). A representative of Italy to the United Nations Commission for International Trade Law (UNCITRAL), he has participated in a number of diplomatic conferences for the adoption of international uniform law instruments. He is the chairman of the working group for the preparation of the various editions of the UNIDROIT Principles of International Commercial Contracts, was a member of the Commission for European Contract Law and an advisor to the Study Group for a European Civil Code. Professor Bonell has acted as a sole arbitrator or chairman in several cases involving transnational commercial disputes. He is the author of several publications, including *An International Restatement of Contract Law* (3rd edn, 2005) and *The UNIDROIT Principles in Practice* (2nd edn, 2006). He is also editor in chief of UNILEX – a database of international legal sources relating to the CISG and UNIDROIT Principles.

Michael Furmston has been teaching law since 1957. He has held tenured posts in Birmingham, Belfast, Oxford, Bristol and Singapore and visiting positions in Australia, Belgium, France and Italy. He has written books on the law of contract, contract formation, privity of contract, commercial law and construction law. He has ten children and played chess for Great Britain in two correspondence Chess Olympiads.

Francesca Gesualdi is an associate at Cleary Gottlieb, based in the Milan office. Her practice focuses on domestic and international litigation and arbitration. She graduated, summa cum laude, from the Law School of the University of Milan in 2002. While at law school, she was a visiting student at U.C. Berkeley, Boalt Hall School of Law, on a scholarship granted by the University of Milan. In 2006, she received an LL.M. from Harvard Law School on a Fulbright scholarship. Ms. Gesualdi has been a member of the Bar in Milan since 2006 and a member of the New York Bar since 2011. She is a member of the Italian Society of International Law.

Eugenio Hernández-Bretón is the dean of the School of Law and Political Science of Universidad Monteávila, Caracas. He is also vice president of the Academy of Political and Social Sciences of Venezuela and honorary member of the American Association of Private International Law (ASADIP).

Marko Kairjak has been part-time lecturer for crimes against property and white-collar crimes in Tartu University since 2007. From 2013, he is visiting lecturer for the Estonian Business School for Finance, Ethics and Law (Tallinn and Helsinki). From 2011 to 2014 he was the head of the Estonian Ministry of Justice expert group on the revision of economic offences. Since 2008, Marko is a member of the Estonian Bar Association and attorney-at-law at Law Firm VARUL (Tallinn), where he heads the Banking and Finance and Compliance practice group.

Joshua Karton is an assistant professor in the law faculty of Queen's University, Canada, where he teaches contracts, commercial law and international arbitration. Professor Karton holds a B.A. in International Relations and Humanities from Yale (2001), a J.D. from Columbia Law School (2005), and a Ph.D. in International Law from Cambridge (2011). Before embarking on an academic career, he practiced in commercial litigation and arbitration at a major New York law firm.

Christa Kissling studied law at the law faculty of the University of Berne, Switzerland, where she also worked after graduation initially as a research and teaching assistant at the Department for Civil Law and completed her doctorate (Dr. iur.) in 2005 summa cum laude. Since 2002 she has been working as a researcher and senior researcher at the European Centre of Tort and Insurance Law (ECTIL), Vienna, Austria. In 2014/2015 – while on leave from ECTIL – she worked for a year as a senior researcher at the Institute for European Tort Law of the Austrian

Academy of Sciences and the University of Graz (ETL), Vienna, Austria. She is currently working on her habilitation.

Xandra E. Kramer is professor of law at Erasmus University Rotterdam. She specializes in European civil procedure, global litigation and conflict of laws and takes an interest in empirical and policy-oriented legal research. She has published numerous books and articles, including private international law aspects of corruption. She has been a visiting professor at different foreign universities. She is a regular advisor to the European Parliament and the European Commission. She is deputy judge in the District Court of Rotterdam.

Richard H. Kreindler is a partner based in the Frankfurt office of Cleary Gottlieb. Mr. Kreindler's practice focuses on international arbitration and litigation, including commercial and construction arbitrations, investor-state disputes under public international law and transnational litigation matters. He received a doctorate in law (Dr. iur.) from the University of Münster in 2005, a magister from the University of Munich in 1982, a J.D. from Columbia University in 1985 and an A.B. from Harvard University in 1980. Mr. Kreindler is an honorary professor at the University of Münster, Germany. He is also a Fellow and Chartered Arbitrator of the Chartered Institute of Arbitrators in London and a member of the New York and Paris Bars. Mr. Kreindler has published several treatises and over 400 other publications and lectures on international arbitration, litigation and compliance/anti-corruption issues.

Lars Bo Langsted is a full professor of criminal law and tort law at Aalborg University, Dept. of Law. He is also head of the newly established International Economic Crime and Cybercrime Research Centre (IECC), Aalborg University, and is the author of several books and articles, national as well as international, primarily within criminal law and tort law.

Peter Damsholt Langsted is an attorney-at-law at Bech-Bruun Law Firm, one of Denmark's leading law firms with approximately 515 employees. Peter works with mergers and acquisitions and general commercial contract law. He also teaches commercial law at Copenhagen Business School.

Luís de Lima Pinheiro is full professor at the School of Law of the University of Lisbon, teaching conflict of laws, introduction to the study of law, civil law and international business law, in the J.D., LL.M. and Ph.D. courses. He is author of many textbooks, essays and articles on the subjects of conflict of laws, comparative law, international business law, international commercial arbitration, commercial and maritime law and civil law.

Qiao Liu obtained his D.Phil. in law from the University of Oxford. He is currently an associate professor in the TC Beirne School of Law, University of Queensland (Australia). Prior to joining the school in 2007, Qiao was a lecturer at the University

of the West of England (Bristol) since 2005. He has also taught part time at the University of Leicester and the Shanghai Institute of Foreign Trade. He was a visiting scholar at the Harvard Law School from July to August 2012 and is an adjunct professor of comparative law at the School of Law of Xi'an Jiaotong University (China).

Claudia Madrid Martínez is a professor at Universidad Central de Venezuela and Universidad Católica Andrés Bello. She is also vice president for Academic Affairs of the American Association of Private International Law (ASADIP) and vice president of the Venezuelan Association of Private Law.

Abiola O. Makinwa is a faculty member of the International and European Law programme of the Hague University of Applied Sciences and a member of the Committee of Experts of Transparency International (Netherlands Chapter). Her book, *Private Remedies for Corruption: Towards an International Framework* (Eleven International Publishing, 2013), focuses on the role of private actors in the fight against corruption. In 2013, Abiola was awarded an EU OLAF Hercule II Grant to research European Perspectives on Negotiated Settlements for Corruption Offences.

Paola Mariani is associate professor of international law, and she is in charge of EU law and private international law courses at Bocconi University in Milano. Currently she is visiting researcher at King's College London. International fight against corruption is one of her fields of research, and she has published frequently in this area.

Yseult Marique is lecturer in law at the University of Essex (United Kingdom). She is interested in the development of administrative European law, the enforcement of government contracts and the regulation of ethical behaviour in public authorities. Yseult holds a law degree from the Université libre de Bruxelles (ULB), a postgraduate degree in law from the Vrije Universiteit Brussels (VUB) and a Ph.D. from the University of Cambridge.

Olaf Meyer is senior research fellow at the Centre of European Law and Politics at the University of Bremen. He holds a Ph.D. from the University of Münster and an M.St. from Oxford University. Olaf studies corruption from the perspective of international commercial law. In particular, he searches for effective private law remedies in cases of corruption with a view to strengthen victims' rights and to open a second front against corrupt individuals, thereby supplementing the means of criminal prosecution. He has also edited the book *The Civil Law Consequences of Corruption* (Nomos, 2009).

Tjakie Naudé is professor of private law at the University of Cape Town, South Africa. Her main fields of interest are the law of contract, including specific

contracts, consumer protection and comparative law. She is a co-author of the *Commentary on the Unidroit Principles of International Commercial Contracts* edited by Stefan Vogenauer.

Maksymilian Pazdan is a full professor of law at the Koźmiński University in Warsaw and the emeritus professor at the University of Silesia in Katowice. He served as a dean of the law faculty (1978–1989) and the rector (1990–1996) of the latter. Professor Pazdan is a leading Polish authority on civil law, conflict of laws and international commercial arbitration. He published numerous books, articles and other works in these areas. For many years he has been a member of the Codification Committee, having worked on various legislative projects, including in particular the new Act on Private International Law of 2011, of which he was the main author. He regularly serves as an arbitrator in both domestic and international disputes.

Xiang Ren is a Ph.D. candidate in the School of Law, Xi'an Jiaotong University, China. She works as editorial assistant for the *Chinese Journal of Comparative Law* (published by Oxford University Press).

Jenna-Dawn Shervill is a 2015 J.D. candidate at Queen's University. She holds a B.A. (honours with distinction) from Queen's University and an M.A. from the Norman Paterson School of International Affairs at Carleton University. Prior to law school, Jenna worked in programme management and policy analysis with the International Labour Organization, the Canadian Government and a national non-governmental organization.

Sergey Usoskin graduated from the St. Petersburg State University (honours) and University College London (LL.M., distinction). He is a member of the Russian bar and practices at a major Russian law firm, where he focuses on arbitration and cross-border disputes as well as public international law matters.

Jiří Valdhans is research associate at the Department for International and European Law at the Faculty of Law of Masaryk University. His areas of specialization include private international law, international commercial law and arbitration. His recent research focuses in particular on noncontractual obligations with a foreign element. He publishes in the Czech Republic and abroad.

Matthias Weller holds the chair of civil law, civil procedure and private international law at EBS Law School, EBS University for Business and Law (www.ebs.edu), Wiesbaden, Germany. He is the director of the EBS Law School Research Center for Transnational Commercial Dispute Resolution and the academic director of the EBS Law Term on Transnational Commercial Law. In 2011, he completed his postdoc senior fellowship at the Institute for Foreign and Private International and Commercial Law at the University of Heidelberg. His dissertation of 2005 on the public policy control of international choice-of-court agreements

was awarded two prizes. In 1999/1998 he held the Joseph Story Fellowship at the Harvard Law School. In 1994/1995 he was the student scholar of the exchange programme between the Universities of Heidelberg and Cambridge and studied law at St. John's College. He held scholarships from the German National Scholarship Foundation both as a student of law and as a doctoral student.

Maciej Zachariasiewicz is a lecturer in the Civil Law Department of the Koźmiński University Law School. His academic interests are related to international commercial arbitration, private international law, comparative law as well as the European Union law. Mr Zachariasiewicz has published a number of journal articles and other publications in both Polish and English. He is a member of the Arbitration Committee of the Lewiatan Arbitration Court in Warsaw and a national correspondent to UNCITRAL with respect to the Vienna Sales Convention (CISG). Mr Zachariasiewicz also practices law with ADP Popiołek Adwokaci i Doradcy Law Firm in Katowice, Poland.

Chapter 1
The Impact of Corruption on International Commercial Contracts – General Report

Michael Joachim Bonell and Olaf Meyer

Abstract Corruption is recognized as one of the major obstacles to the development of international trade today. There seems to be consensus that curbing corruption is a task too big to be met by criminal law alone and that other branches of law have to contribute their part as well. Thus, where contracts are tainted with corruption, there are genuine issues of contract law at stake that need to be decided with a view to effectively protecting victims and at the same time deterring potential wrongdoers. In this report, we shall take a look at contracts providing for bribery as well as the contracts that have been procured by the payment of bribes. The analysis is tailored toward commercial contracts, including also contracts with state-owned enterprises. It shows that, interestingly, different jurisdictions have taken quite different approaches as to whether these contracts can be enforced in court. A second though related problem is whether the wrongdoers, after they have performed their part of the deal, should be punished by denying them restitutionary remedies for their investment.

1.1 Introduction

Corruption is generally considered one of the greatest enemies of international trade. Where corruption runs rampant, fair players are prevented from accessing the market and performance and quality are excluded from competition by those who use bribery as a means of acquiring contracts. It is a problem of vast magnitude: according to a frequently quoted World Bank study, an estimated USD1 trillion

M.J. Bonell (✉)
UNIDROIT, Via Panisperna, 28, 00184 Rome, Italy
e-mail: mj.bonell@unidroit.org

O. Meyer
Centre of European Law and Politics, University of Bremen, Universitätsallee GW 1, 28359 Bremen, Germany
e-mail: o.meyer@uni-bremen.de

M.J. Bonell, O. Meyer (eds.), *The Impact of Corruption on International Commercial Contracts*, Ius Comparatum - Global Studies in Comparative Law 11,
DOI 10.1007/978-3-319-19054-9_1

in bribes are paid each year.[1] Corruption is said to increase the total cost of doing business globally by up to 10 % and the cost of procurement contracts in developing countries by up to 25 %. This means that for the EU alone approximately EUR120 billion, or 1 % of its GDP, is lost to corruption every year.[2]

The international community has therefore undertaken serious efforts to tackle the problem of corruption; the topic has been of the highest priority since the mid-1990s. Countless sets of rules have mushroomed up from this movement, establishing anti-corruption as a new, independent branch of law. At the peak of this complex regime is a series of international treaties, which have since been ratified by many of the world's leading industrial nations.[3] These conventions are supplemented by domestic anti-bribery legislation, with well-known examples being the US Foreign Corrupt Practices Act (FCPA)[4] and the UK Bribery Act.[5] The legislative landscape is further complemented by a number of non-governmental initiatives – such as from NGOs, professional organisations or multinational corporations – which use their own rules, recommendations and codes of conduct to strengthen the fortifications against corruption.[6] Anti-corruption is therefore nothing less than a prime example of a transnational legal development in which the rules set at international, national and non-governmental level are constantly intertwining with one another.

So far, criminal law has been the weapon of choice for combating corruption. The majority of the international sets of rules contain the central obligation that Member States punish the payment of bribes and related crimes. In particular, the territorial scope of domestic criminal law has been expanded by shifting the focus of attention from the country where the corrupt incident occurred to the supply side of corruption, ie the home country of the bribe-giver. The OECD, aiming to create a level playing field in the international business environment, has declared this tenet (whose origins are in the American FCPA) to be the general principle of its

[1] D Kaufmann, 'Myths and Realities of Governance and Corruption' (2005–2006) *World Economic Forum Global Competitiveness Report* 81, 83.

[2] *Fighting Corruption in the EU, Communication from the European Commission*, 6 June 2011, COM(2011) 308 final.

[3] In particular, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, the Inter-American Convention Against Corruption of 1996, the Convention on Corruption involving Officials of the European Communities of 1997, the Council of Europe Criminal Law Convention on Corruption and the Council of Europe Civil Law Convention on Corruption, both of 1999, the African Union Convention on Preventing and Combating Corruption of 2003, and the United Nations Convention against Corruption of 2003.

[4] Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1 et seq.).

[5] Bribery Act 2010 (c.23).

[6] See, eg, the ICC Rules on Combating Corruption (2011), the ICC Guidelines on Agents, Intermediaries and Other Third Parties (2010), as well as the PACI Principles for Countering Bribery, issued by the World Economic Forum in 2004. The 2010 version of the UNIDROIT Principles of International Commercial Contracts also tackles the topic of corruption.

anti-bribery convention.[7] However, practical experience has shown that criminal law alone cannot cope with this difficult task; other branches of law must also contribute to achieving this joint objective. Combating corruption has therefore become an en vogue topic in many areas of law such as tax law[8] and employment law,[9] as well as in optimizing public procurement rules,[10] in corporate governance,[11] and in arbitration.[12]

One branch of the law whose role in tackling corruption has thus far been underestimated is general contract law.[13] Agreements of a contractual nature are present in many different forms of corruption. In light of the immense economic value embodied in international commercial contracts it is surprising that such little attention has been paid to the legal analysis in this area. Many national reports bemoan the rarity of reported court cases – or even the complete lack thereof – on the civil law aspects of corruption in their respective countries.[14] And yet there are two questions that immediately spring to mind: firstly, the question of using efficient civil law remedies to provide optimal protection to the victims of corruption; and

[7]The majority of the national reports are from OECD member states that have since transposed the anti-bribery convention into their national law; the legislative measures for CANADIAN law are currently in preparation. CHINA and SINGAPORE (both of which are not members of the Convention) prohibit the bribery of foreign public officials. In contrast, a corresponding rule is apparently missing in VENEZUELA, where prosecution only takes place with respect to acts against domestic public officials.

[8]See, eg, the OECD Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 2009.

[9]Here, special mention should be made of the protection of whistleblowers. *Cf* also the ICC Guidelines on Whistleblowing.

[10]See for instance the OECD Principles for Enhancing Integrity in Public Procurement of 2009.

[11]The introduction of the "adequate procedures" defence in sec 7(2) UK Bribery Act 2010 has caused the discussion to reach new heights.

[12]From the vast amount of literature confer only RH Kreindler, 'Legal Consequences of Corruption in International Investment Arbitration: An Old Challenge with New Answers' in L Lévy and Y Derains (eds), *Liber Amicorum en l'honneur de Serge Lazareff* (Paris, Editions Pedone, 2011) 383 ff; A Sayed, *Corruption in International Trade and Commercial Arbitration* (The Hague, Kluwer, 2004); C Albanesi and E Jolivet, 'Dealing with Corruption in Arbitration: A Review of ICC Experience' (2013) 24 *ICC Int'l Ct Arb Bull (Spec Suppl)* 27 ff, each with further references.

[13]For earlier comparative research see O Meyer (ed), *The Civil Law Consequences of Corruption* (Baden-Baden, Nomos, 2009); AO Makinwa, *Private Remedies for Corruption – Towards an International Framework* (The Hague, Eleven, 2012).

[14]In the CZECH report J Valdhans mentions one claim under competition law that ultimately failed at last instance. For ESTONIA, M Kairjak also refers to just one court decision. According to the ITALIAN report by P Mariani, decisions dealing with the civil law consequences of corruption are "*very few*" in Italy. The POLISH reporters M Pazdan and M Zachariasiewicz, too, bemoan the "*surprising scarcity*" of published case law in this matter. The PORTUGUESE (L de Lima Pinheiro) and VENEZUELAN reporters (E Hernández-Bretón and C Madrid Martínez) were not aware of a single court judgement on the civil law consequences of corruption in their respective countries.

secondly, the broader question of the role of contract law in the prevention of corruption, ie whether and to what extent the contract law regime can deter potential offenders from corruptive behaviour.

The consequences of bribery for the contracts concerned are primarily decided in accordance with the applicable domestic contract law. There have been few efforts to harmonise this area of law at international level; the Civil Law Convention on Corruption[15] of the Council of Europe represents the only set of rules so far that has focused entirely on the contractual aspects of corruption. However, for the most part these rules are limited to a general framework which grants the Member States considerable leeway in their respective transpositions and leaves many of the key questions unanswered.

Only rarely can special private law provisions on corruption be found in national legal systems. For instance, the US Racketeer Influenced and Corrupt Organizations Act (RICO) grants treble damages in particular instances of corruption.[16] In KENYA, Art 51 of the Anti-Corruption and Economic Crimes Act of 2003 provides that: "A person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered". Also, in several jurisdictions private law rules on corruption can be found in the national legislation on unfair competition.[17]

However, the analysis of contracts tainted by corruption takes place usually within the framework of general contract law. Illegality and immorality, fraud and mistake, collusion and restitution are among those rules that immediately spring to mind. This area of law is known to vary considerably from country to country, and moreover, it is generally perceived as very complicated and embedded with public policy considerations.[18] How does one then get past these boundaries which impede a discussion on the most appropriate remedies in international corruption cases?

[15]The Civil Law Convention is not self-executing, but requires implementing legislation. It has to date been ratified by 35 countries. See further W Rau, 'The Council of Europe's Civil Law Convention on Corruption' in O Meyer (ed), *The Civil Law Consequences of Corruption* (Baden-Baden, Nomos, 2009) 21 ff.

[16]18 U.S. Code § 1964(c). The FCPA, on the other hand, does not give a private right of action.

[17]*Cf* for POLAND, Art 12 u.z.n.k.; for the CZECH REPUBLIC, sec 2983 of the New Civil Code; for SWITZERLAND, Arts 4a, 13 UWG.

[18]The drafters of the CISG famously excluded matters of validity altogether from the Convention, since they deemed them too controversial to achieve uniform rules. See *Uncitral Yb* VIII (1977) at 93. However, the UNIDROIT Principles and the PECL have since approached this topic.

1.2 Corruption and International Commercial Contracts

1.2.1 On Defining Corruption

The worldwide unanimity when it comes to condemning corruption is deceiving, as there is no uniform understanding about what the term corruption means. There are indeed a near infinite number of actions that could in everyday language be branded as "corrupt"; yet, at a legal level an entirely different analysis may be needed in each instance. Defining its own subject matter is thus one of the greatest challenges facing the anti-corruption movement.[19] Each concept of corruption has to overcome different obstacles: firstly, the national borders – what may be unproblematic in one area of the world may in fact trigger severe punishment in others; secondly, inter-disciplinary boundaries – corruption is not just a legal topic but is also heavily researched in other scientific disciplines; finally, the intra-disciplinary boundaries – the perspective varies between the different branches of the law, and a working definition that fits the discussion of the criminal law aspects of corruption may thus be unfit for the purposes of private law, tax law or public procurement.

Instead of attempting to provide an abstract definition of corruption for specific aspects of private law, we will instead examine which instances of bribery are typically encountered by courts and arbitral tribunals in relation to international commercial contracts. The starting point is the following (fictitious) scenario:

> Contractor A of country X enters into an agreement with intermediary B ("the Commission Agreement") under which B, for a commission fee of USD1,000,000 would pay, on behalf of A, USD10,000,000 to C, a high-ranking procurement advisor of D, the Minister of Economics and Development of country Y, in order to induce D to award A the contract for the construction of a new power plant in country Y ("the Main Contract"). B pays C the USD10,000,000 bribe and D awards the main contract to A.

1.2.2 A Basic Model of Corruption

In its simplest form, a typical corrupt exchange can be seen as a triangular relationship between a principal, his agent and a bribe-giver. The selection of a principal-agent model as a starting point is not by accident, but reflects the prominent standing this model has held in the research on corruption since the 1970s.[20] This model is especially suitable for the analysis of the private law side of corruption, as it allows for the clearest depiction of the legal relationships between

[19] For an overview of different definitions of corruption see M Johnston, 'Keeping the Answers, Changing the Questions: Corruption Definitions Revisited' in U von Alemann (ed), *Dimensionen politischer Korruption* (Wiesbaden, VS Verlag für Sozialwissenschaften, 2005) 61 ff; J Gardiner, 'Defining Corruption' in AJ Heidenheimer and M Johnston (eds), *Political Corruption*, 3rd edn (New Brunswick, Transaction Publishers, 2002) 25 ff.

[20] See, for instance, S Rose-Ackerman, *Corruption – A Study in Political Economy* (New York, Academic Press, 1978); R Klitgaard, *Controlling Corruption* (Berkeley, University of California

the different actors. This is because such a triangular structure between principal, agent and bribe-giver also corresponds to a triangular contractual relationship in private law.

The base of the triangle is formed by the relationship between the principal and his agent. This particular relationship can take many shapes in the modern business world; an agent can be, for instance, an employee in the procurement department, but also the CEO of a large multi-national company. The terms used here are understood in a broad context. In the aforementioned example, C is the agent and the Ministry D (where he is employed and which becomes party to the contract with bribe-giver A) is his principal. The connecting factor in all situations is that the agent acts for his principal when negotiating with the third party and should therefore decide not to his own advantage, but rather in the interest of his principal. The principal-agent relationship is therefore characterised by a strong fiduciary element.[21]

The third party (A) infringes on this fiduciary relationship by secretly affording the agent with an undue advantage, which need not be in monetary form but can encompass everything that the recipient considers valuable and suitable to cause him to undermine his loyalty: jewellery, invitations to expensive trips, even immaterial assets such as honorary titles or granting sexual favours.[22] In return for such items, the agent breaches his fiduciary duty by ensuring that the bribe-giver receives preferential treatment with respect to the contract with the principal. This preferential treatment can consist of receipt of the tender, which under fair competition would have otherwise been given to another competitor; alternatively, it can also be used in instances in which the bribe-giver would have nonetheless gained the tender, yet the bribe was paid in order to obtain better conditions.

Under this model it is therefore possible to distinguish between contracts *providing for* corruption and contracts *procured by* corruption. For the purpose of this report we shall refer to the contract providing for corruption between bribe-giver and bribe-taker as the "bribe agreement"; the contract between the principal and the bribe-giver that has been procured by corruption is referred to as the "main contract". Although one could say that both contractual relationships are tainted with corruption, they are not necessarily subject to the same legal consequences. The following shall focus particularly on the enforceability of both of these contracts. In contrast, questions of compensation for corruption – though likewise immensely important in practice – must unfortunately be left aside.[23]

Press, 1988); J Lambsdorff, *The Institutional Economics of Corruption and Reform* (Cambridge, Cambridge University Press, 2007) 63 ff.

[21] See the definition given by Lord *Templeman* in *Attorney General for Hong Kong v Reid* [1994] 1 AC 324: "*A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust*".

[22] In *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003), the defendant allegedly bribed Korean public officials with sexual favours in a weapons deal. Another case is mentioned by AO Makinwa and XE Kramer in their DUTCH report.

[23] On damages see OECD/The World Bank, *Identification and Quantification of the Proceeds of Bribery: Revised edition* (Paris, OECD Publishing, 2012).

1.2.3 Advanced Concepts of Corruption in International Commercial Cases

Instances of corruption in practice are often much more complex than can be expressed with a simple three-person framework like the one just introduced. Corruption is a topic that features a multitude of variations and is often connected with additional problems that, although not necessarily present in all instances of bribery, must nevertheless be borne in mind in the abstract search for appropriate legal consequences in the relationship between the parties to a bribe.

1.2.3.1 The Use of Intermediaries

The first additional problem concerns the manner and form in which the bribe is paid. In international trade it is likely that the relevant parties will not know each other personally and will therefore not be sure whether they can trust one another. It goes without saying that the bribe-giver cannot openly approach his business partner's agent and offer him a bribe. Rather, the illegality of these activities requires that the bribe results from a careful and subtle approach. Accordingly, negotiations concerning bribery often feature intermediaries (like B in the example) in order to ease the transaction.[24] Such middlemen often appear as "consultant" or "broker" for their employer.[25] Consulting services are common in international trade and can be a sensible approach, for instance with respect to the political or economic situation in the target country or with respect to regional customs and practices. However, amongst the herd of consultants are black sheep whose main or sole activity consists of funnelling bribes to influential people. These people have at their disposal both the political contacts as well as the know-how for such covert transactions.

The legal structure of this exchange often follows the same pattern: A hires B to initiate the conclusion of a contract with D. The precise activities expected of him are described only very superficially in the consultancy agreement.[26] The intermediary usually receives a generous contingency fee for his services – it is an open secret between the parties that parts of this fee will be forwarded as bribes

[24] See OECD Working Group on Bribery in International Business Transactions, 'Typologies on the Role of Intermediaries in International Business Transactions', final report 2009; OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials (Paris, OECD Publishing, 2014) 8.

[25] A Crivellaro, 'Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence' in K Karsten and A Berkeley (eds), *Arbitration – Corruption, Money Laundering and Fraud* (Paris, ICC Publication 651, 2003) 109 ff; AA Wrage, *Bribery and Extortion* (Westport, Praeger Security International, 2007) 78 ff; V Khvalei, 'Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption' (2013) 24 *ICC Int'l Ct Arb Bull (Spec Suppl)* 15 ff.

[26] Suspicious, superficial paraphrasing of the tasks expected of the consultant is correctly considered a "red flag" for a corrupt basis of the agreement.

to influential persons on the opposite side.[27] The contracting company will often not want to know the details in order to be able to claim plausible deniability and thereby protect itself from prosecution.

1.2.3.2 The Victims of Corruption

Furthermore, it is to be noted that, contrary to a widespread cynical view, corruption is by no means a "victimless crime". Quite in contrast, many bear the brunt of its consequences. The direct effect is felt first by the principal, who often pays an inflated price for the contract with the bribe-giver. In the aforementioned example A would not resort to bribery if he could not gain an advantage that would be at least equal the payment of the bribe to C.[28] In practice the resulting loss is probably even much greater than the amount paid as a bribe.

However, the financial loss to the principal is typically not the end of the story: corruption also has indirect negative effects on further parties. If (as in the example) D is a state or a government contractor, it has to cover its additional costs resulting from the inflated price through tax increases or by deducting the amount from other important infrastructure projects. On the other hand, where the victim is a private business, the additional costs will usually fall within the principal's price calculation and will thereby be passed on to its customers; the price of the products will increase. In both cases, the costs of corruption will thus ultimately be borne by everyone.

A further group of victims can be said to be the competitors of the bribe-giver who, due to the illicit payment made by their rival, have lost the chance to acquire the main contract with the principal for themselves. Market survival depends on at least occasional success in acquiring contracts, as otherwise one quickly loses a position on the market. If there is no chance for bidders to acquire contracts through honest competition, they are then left with the choice between just two undesirable alternatives: either to voluntary retreat from the market or to enter the competition for the highest bribe. This dilemma forms the basis for why particular sectors have such great problems in containing widespread corruption after it has initially occurred.[29]

Because of this situation it is to be expected that the competitors observe with particular criticism the question of the enforceability of a contract that has been purchased via bribes. If the law does not punish the bribe-giver but instead

[27]Therefore, Art 2 of the ICC Rules on Combating Corruption (2011) provides that any payment made to an intermediary should represent no more than an appropriate remuneration for legitimate services rendered by him.

[28]*Hovenden* v *Millhoff* [1903] All ER 848, per *Smith* LJ: "*If a vendor bribes a purchaser's agent, of course the purchase money is loaded by the amount of the bribe. It cannot be denied*."

[29]The Bribe Payers' Index, most recently issued by Transparency International in 2011, provides an overview of the spread of corruption in different industry sectors.

allows him to retain the contract, it sends a devastating signal to all other market participants to equally resort in the future to such illegal methods. The situation is further complicated by the lack of sufficient protection in the form of damages claims for competitors; there are practically no court decisions in which a competitor has successfully claimed compensation from his corrupt rival.[30]

1.2.3.3 Shareholder Lawsuits

Ultimately, corruption can also create considerable harm on the bribe-giver's side. It is easy to overlook that a bribe-giver is not necessarily an economic unity, but, as in the case of a multinational enterprise, can encompass a number of different interest groups. A possible example is that, despite explicit company policy to the contrary, an overambitious manager pays a bribe to secure a contract; then the company and its shareholders are also victims of this corruption if, after the crime has been discovered, the affected contract falls through and, moreover, the prosecution leads to a severe fine.[31] This internal conflict of interests forms the background for the current boom of anti-corruption compliance, which aims at reducing the risk of liability through organisational measures.

A relatively new problem is posed by the question of how the liability for these types of damages can be achieved vis-à-vis the company's shareholders. In this respect the focus of the international discussion has thus far been on US law. A 2010 report by Reuters refers to 37 such proceedings within a 4-year period, 26 of which were settled out of court.[32] Here the claimants were seeking compensation for the (in some cases extensive) decline in share price, which was linked to investigations resulting from the American Securities and Exchange Commission's allegations of bribery.[33] An in-depth discussion of the legal circumstances cannot take place here, but nonetheless is to be considered that a decision in contract law on the effectiveness of the main contract creates additional and so far unresolved questions on the liability for the resulting losses.

---

[30] On remedies for competitors in case of bribery see ES Burger and MS Holland, 'Why the Private Sector is Likely to Lead the Next Stage in the Global Fight against Corruption' (2006) 30 *Fordham Int'l L J* 45 ff.

[31] Penalties in the amount of hundreds of millions USD are no longer a rarity in American proceedings based on the FCPA. In 2008, Siemens settled with the US authorities for a record-breaking USD800,000,000 in fines and disgorgement.

[32] The report can be found at http://www.reuters.com/article/2010/11/01/us-bribery-lawsuits-idUSTRE6A04CO20101101. P Ala'i in her US report discusses some recent civil actions that took place after a firm's disclosure of an FCPA-related investigation. The CANADIAN report by J Karton and JD Shervill mentions pending class actions in the courts of Ontario and Quebec.

[33] See, for the correlation between corruption and share value, S Eicher, 'When Shareholders Lose (or Win) through Corruption' in S Eicher (ed), *Corruption in International Business* (Burlington, Gower, 2009) 31, 42 ff; Wrage (n 25), 71.

1.3 Contracts Providing for Corruption

1.3.1 Invalidity of Agreements to Pay a Bribe

The bribe agreement between an agent and a bribe-giver takes place in the shadows of the corruption triangle. The light cast on the other contractual relationships within the triangle means that they are concluded in an open environment, whereas the illegality of the bribe agreement requires darkness to cover the conspiracy and secrecy of the negotiations in which the bribe-giver and agent come together, as well as the subsequent exchange of the benefits.

It is clear that the law must not serve to protect crooks in the performance of their corrupt intentions. Contracts providing for corruption are therefore unenforceable in any court of law. This applies not only to the direct promises of bribes from A to C but also to the commission agreement between A and the intermediary B, so far as the actual task is to arrange the payment of bribes. In terms of the extent of the level of abjection of these contracts, there is no difference. Despite some national variations in the dogmatic underpinnings of nullity[34] there appears to be universal agreement with respect to the outcome. One can thus identify the nullity or unenforceability of contracts providing for corruption as a transnational principle of law.[35]

This principle is clearly expressed in Art 8(1) Civil Law Convention on Corruption: "Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void". In a similar vein, the Trans-Lex Principles, a scientific project administered at the University of Cologne that sees itself as a systematic collection of principles of transnational commercial law, provides that: "Contracts based on or involving the payment or transfer of bribes ("corruption money", "secret commissions", "pots-de-vin", "kickbacks") are void".[36]

It can be observed at national level that the justification for rendering bribe agreements null and void is mainly based on two approaches that are closely related with each other, namely the arguments of illegality and immorality. The concept of illegality is coupled with the notion that a transaction cannot be enforced when it violates mandatory statutory prohibitions. There can be no doubt that the criminal law provisions that penalize corruption represent such statutory prohibitions, as the actions required to perform the bribe agreement are exactly those that trigger liability under criminal law. The immorality argument, on the other hand, is much broader and can play an independent role to set aside a contract in cases of corruption if the contract at issue exceptionally slips through the criminal law net, for instance because the legal system does not prohibit the payment of bribes

[34]For a general overview of the different concepts of illegality see MJ Bonell, 'The New Provisions on Illegality in the UNIDROIT Principles 2010' (2011) *Unif L Rev* 517 ff.

[35]O Meyer, 'The Formation of a Transnational Ordre Public against Corruption: Lessons for and from Arbitral Tribunals' in S Rose-Ackerman and P Carrington (eds), *Anti-Corruption Policy* (Durham, Carolina Academic Press, 2013) 237 et seq. This result is confirmed by all national reports.

[36]http://www.trans-lex.org, Principle No IV.7.2(a).

abroad or particular forms of influence peddling. The overview of the different legal systems does however show that there is not always a sharp dogmatic distinction between illegality and immorality, but rather that both grounds for nullity are given alongside one another and often at the same time.[37]

It can be observed that the various legal systems offer different approaches towards rendering the bribe agreement null and void. In the Romanic legal family the effectiveness of the bribe agreement fails due its illegal and immoral *cause*.[38] Other legal systems expressly state that contracts are void if they are illegal, or contrary to public order, or violate common moral principles.[39] Under the Common Law there appears to be more leeway in deciding the individual case on the grounds of violation of public policy. That being said, here, too, the courts will generally deem a bribe agreement unenforceable.[40]

There is no difference of outcome with respect to whether widespread corruption is present in one part of the world, even if paying bribes is considered necessary in a special area in order to do business. Although it indeed may sometimes be possible to consider regional customs when assessing the immorality and illegality of a contract – for instance when it comes to the accepted boundaries for gifts or hospitality – this does not at all mean that widespread corruption in a country could legitimise the payment of bribes per se. All national reporters responded negatively to the question of whether the contract between A and B could be effective under the exceptional circumstance that B's task to facilitate the bribery of public officials constitutes a generally accepted business practice in that country.

Parties to these contracts are of course aware that they cannot rely on the court to enforce their expectations. There have in fact been instances in which one of the parties took advantage of this in order to defraud the other, for example by paying him with counterfeit money.[41] However, usually there are more or less stable extra-legal enforcement measures that give sufficient motivation to the parties to adhere to their – legally invalid – promises. For instance, they may hope to repeat the lucrative exchange of favours if they prove trustworthy to their partners the first time, or they are simply afraid of their retaliation.[42]

---

[37] In DENMARK there is no tradition to distinguish between a contract being *contra legem* and being *contra bonos mores*. Both principles are set out side by side in s 5-1-2 of the Danish Law. In the UNITED STATES, "contracts unenforceable on grounds of public policy" is seen as the general concept, and "illegal contracts" are just one specific example for this category.

[38] See the reports for CANADA (QUEBEC), ITALY and VENEZUELA.

[39] The invalidity of the bribe agreement can be obtained by this means in, for instance, CHINA, the CZECH REPUBLIC, DENMARK, ESTONIA, GERMANY, the NETHERLANDS, POLAND, PORTUGAL, the RUSSIAN FEDERATION, SOUTH AFRICA and SWITZERLAND.

[40] See the reports for CANADA, ENGLAND, SINGAPORE and the USA.

[41] J Lambsdorff and B Frank, 'Corrupt Reciprocity – Experimental Evidence on a Men's Game' (2011) 31 *Int'l Rev L Econ* 116.

[42] For an economic analysis of the self-enforcing nature of the bribe agreement see J Lambsdorff and SU Teksoz, 'Corrupt Relational Contracting' in J Lambsdorff, M Taube and M Schramm (eds), *The New Institutional Economics of Corruption* (London, Routledge, 2005) 138 ff.

Nonetheless, the parties often give their transactions a legal gloss by using mock agreements in order to justify the flow of cash. For example, the agent receives a highly lucrative "consultancy agreement" even though he is not to actually provide any consultancy services. Such a method is often used in engaging intermediaries because their written contracts foresee, in principle, the provision of legitimate services such as consultancy or lobbying. Arbitral tribunals have already had to decide on several cases in which an intermediary sought payment of his commission for facilitating the main contract and the bribe-payer then invoked the nullity of their agreement because it actually aimed at the payment of bribes.[43] The claims for payment have so far always been rejected in all instances in which the arbitral tribunal was convinced that the contract with the intermediary actually served to camouflage corrupt enterprises.[44]

The invalidity of the bribe agreement is to be taken into account *ex officio* by the court. The parties cannot waive its application, as the invalidity is not ordered for their protection but rather for the protection of greater common values that cannot be disposed of by agreement. Such an approach is also applicable in arbitral proceedings where the tribunal must acknowledge the invalidity of the contract even if neither of the parties had pleaded this aspect. This was the situation in the well-known *Lagergren* award, in which the sole arbitrator rejected the claim from a contract for the bribery of Argentine public officials.[45]

Anyone can invoke the invalidity of a contract providing for corruption, including the parties to the agreement themselves. This means that the bribe-giver can refuse to pay the intermediary the commission for the acquisition of the desired contract, referring to its corrupt nature. Some authors and arbitrators have expressed their discomfort with this result. They perceive the benefit to the bribe-giver as being doubly unfair, as he not only betrays the other party to the main contract by bribing his agent, but he also obtains the main contract without having to pay the intermediary if the consultancy contract is voided.[46] Thus, the law seems to work

[43]See, for instance, ICC Case No 9333 (final award), (2011) 19 *ASA Bull*, 757 ff; ICC Case No 6497 (final award), (1999) XXIVa *YbCA* 71 et seq.

[44]See the report by RH Kreindler and F Gesualdi; MA Raouf, 'How Should International Arbitrators Tackle Corruption Issues?' (2009) 24 *ICSID Review – Foreign Investment Law Journal* 116, 127.

[45]ICC Case No 1110, (1994) 10 *Arb Int*, 282 ff. On the question whether the claim should be dismissed on procedural or substantive grounds, see RH Kreindler, 'Aspects of Illegality in the Formation and Performance of Contracts' in AJ van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions*. ICCA Congress Series No 11 (The Hague, Kluwer, 2003) 209, 226 ff.

[46]ICC Case No 6497 (n 43) 71, 72. *Cf* furthermore Cour de Justice Geneva, 17 November 1989, (1994) XIV *YbCA* 214 ff; the court found it "*utterly shocking*" that the bidder stopped making payments to the intermediary as soon as he got his desired contract. Intentions to bribe were not found in this case, however.

to the advantage of the most dishonest of all parties.[47] However, economists have shown that undermining the trust between bribe-payer and intermediary is appealing because neither side can then have faith in receiving their counter-performance. This ability to deprive the other party of its expectations has the desirable effect of destabilising a potentially corrupt relationship.[48] The Paris Cour d'appel rightly recognised this when it decided:

> The parties' awareness of the immoral or illicit aim of the contract, required by jurisprudence, is not meant (whatever its actual consequences may be) to lessen the rigor of the sanction of nullity; on the contrary, it aims at reinforcing it by protecting the contracting party who has nothing to reproach himself with as to the conclusion of the contract; the application of the above-mentioned adage aims at preventing performance of an immoral or illicit contract by depriving the party which first executes it of all protection.[49]

The invalidity of a commission agreement because of intended bribery is to be distinguished from the situation in which a client employs an intermediary and later refuses to pay the promised commission because the use of intermediaries is generally prohibited in the country in which the main contract is to be procured. Several countries have in fact provided for such a general prohibition as a means of preventing corruption. In *OTV v Hilmarton*[50] the claimant had procured a contract in Algeria for the defendant even though Algerian law prohibited the use of intermediaries. However, the procurement contract was subject to Swiss law and thus presented the arbitrator with the question of whether the Algerian prohibition was relevant to this contract. This is clearly a conflict of laws problem, namely with regard to the application of overriding mandatory provisions of a third country.[51] The respective national conflict rules often grant the court some discretion whether to consider the foreign laws in the individual case. In this respect the national reports differ as to whether a general prohibition of intermediaries, without evidence of a corrupt purpose of the contract, deserves acknowledgment independent of the applicable law.[52]

---

[47] *Cf* ICC Case No 6497 (n 43), at 72: "*By the way, the result of such nullity is not necessarily equitable. The enterprise having benefited from the bribes (ie, having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organised the payment of the bribes. The nullity of the agreement is generally only beneficial to the former, and thus possibly inequitable. But this is legally irrelevant*".

[48] Lambsdorff (n 20), 144 ff.

[49] Cour d'appel Paris, (1995) XX *YbCA* 198, 202.

[50] ICC Case No 5622, *Hilmarton Ltd v Omnium de Traitement et de Valorisation*, (1994) XIX *YbCA* 105 ff.

[51] For the courts in the EU Member States, the applicable conflict rule can be found in Art 9(3) Rome I Regulation.

[52] The GERMAN reporter M Weller, for instance, would give effect to such a prohibition as a legitimate means of tackling corruption, whereas L de Lima Pinheiro in his PORTUGUESE report considers the absolute prohibition of intermediaries as unreasonable and would not enforce it when it is not part of the applicable law. In his report for SINGAPORE, M Furmston denies that a simple

1.3.2 Restitution of the Bribe – The Illegality Defence

The invalidity of the bribe agreement does however give rise to the further question of the fate of those elements of the agreement that have already been performed. The unwinding of an illegal contract falls within the realm of restitutionary remedies. As a general principle, something that has been received on the basis of a legally void contract has to be returned.[53] According to this notion it thus appears that the invalidity of the agreement could allow A to demand the return of the bribery payment from C or from the intermediary B.

However, domestic law contains an important exception to this principle of restitution, namely the venerable maxim *ex turpi causa non oritur actio*. In other words, the parties to the contract should not receive the return of their performance if the invalidity of the contract results *contra legem* or *contra bonos mores*. The legal system's disapproval of the illicit contract is thus not extinguished by the failure of claims for performance, but continues on the level of unjust enrichment. The roots of this illegality defence can be traced back to Roman law, though it has since grown to feature different extents of rigorousness and numerous exceptions in the various legal systems.[54]

The payment of bribes represents a very clear case of *causa turpis*, and the majority of legal systems do in fact exclude the bribe-giver's claim to reimbursement.[55] For instance, the ENGLISH national report refers to a case in which the payment of a bribe to an Indian public official did not lead to the conclusion of the desired contract; the claim for reimbursement of the money paid as a bribe failed due to the illegality defence.[56] In GERMAN law this rule has been codified in sec 817 Sentence 2 BGB; here, the courts have also rejected claims for reimbursement of bribes.[57]

---

local prohibition on the use of intermediaries – ie without allegations of bribery – would make a contract illegal under the law of Singapore.

[53]The DUTCH report holds, in this respect, a unique position as it considers it possible for the restitution to fail when the bribe-taker has performed his part of the agreement and has procured the contract for the bribe-payer. In this instance reasonableness and fairness would demand to leave the performances where they have fallen, as otherwise the recipient would receive no remuneration for his performance.

[54]For a comparative overview see K Zweigert and H Kötz, *Introduction to Comparative Law* (Oxford, Clarendon Press, 1998) § 39 III; P Schlechtriem, *Restitution und Bereicherungsausgleich in Europa Vol I* (Tübingen, Mohr Siebeck, 2000) 216 ff.

[55]The exclusion of restitution due the *ex turpi causa* rule is generally supported by the national reporters for ENGLAND, ESTONIA, GERMANY, ITALY, SINGAPORE, SOUTH AFRICA, SWITZERLAND and VENEZUELA. The national reports for QUEBEC, DENMARK, the USA and the UNIDROIT PRINCIPLES support this approach only on a case to case basis after considering the individual facts. In contrast, the reimbursement of the bribe can, in principle, be demanded in the CZECH REPUBLIC, POLAND, PORTUGAL and the NETHERLANDS.

[56]*Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB), at 118.

[57]The GERMAN report quotes OLG Karlsruhe, (2007) *Blutalkohol* 49 ff.

1.3.2.1 Reasons for Excluding Restitution

At first glance it would appear that the exclusion of repayment in instances of bribery leads to an absurd result: the corrupt agent does not have to return the bribe to the bribe-giver, and as such, it seems that the law rewards him for his corruptibility. The invalidity of the bribe agreement therefore appears to present him with no disadvantages if he has already received the bribe. In contrast, the bribe-giver is doubly punished, as the law denies him the enforcement of the corrupt agreement as well as the reimbursement of the bribe.

However, the approach does require further explanation, as the striking imbalance between the parties is certainly intentional: the party who performs first is faced with the risk of the entire loss of its performance. In turn, there is no incentive for his contractual partner to fulfil his part of the agreement, as he does not need to expect either claims for performance or reimbursement; he can thus breach the agreement without fear of consequence. Both parties have reason for doubting the honesty of their partners in crime, as both will have already demonstrated that they are willing to use illegal means to cheat their joint contractual partner, namely the principal. However, they nonetheless have to trust each other, because the law offers no protection to their agreement. The one-sided distribution of the economic risk of advance performance thus illustrates that the law intends to undermine the relationship of trust between two potentially corrupt parties.

A further reason for the failure of the claim for restitution can also be given: it would surely be unsatisfactory if the bribe-giver could rely on the assistance from the court in seeking to undo illegal payments. Excluding the claim for repayments thus protects the integrity of the courts, which dishonest parties should not be allowed to use as an instrument to facilitate their wrongdoings.[58] In other words, the law does not help those who venture outside of the law, or as the great English humourist AP Herbert translated the *ex turpi causa* rule: "*A dirty dog will get no dinner from the Courts*".[59]

1.3.2.2 Room for Exceptions

The illegality defence in cases of corruption can be said to be basically sound law. It is based on the clean hands maxim as well as on specific preventative considerations. However, most jurisdictions will not enforce the rule with absolute rigor but give the judge room to take into consideration all the circumstances of an individual case. The question thus arises of whether in cases of corruption there could be exceptional circumstances that argue for the restitution of bribery payments.

---

[58]This aspect has been emphasized by PD Langsted and LB Langsted in the report for DENMARK and by E Hernández-Bretón and C Madrid Martínez for VENEZUELA.

[59]AP Herbert, *Uncommon Law – Being sixty-six Misleading Cases revised and collected in one volume* (Reprint, London, Methuen, 1979) at 335.