The Role of Public Policy in International Dispute Resolution: Example Addressing Corruption in International Arbitration

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**Introduction**

International arbitration as a means of international dispute resolution has been used for a long time. As one commentator noted: “commercial arbitration must have existed since the dawn of commerce.”\(^1\) Unfortunately, another side of commercial transactions – corruption – has also been around for many years.\(^2\) Correspondingly, arbitral tribunals while resolving the commercial and investment disputes often have to deal with the issues involving corruption.

Corruption in international commercial relationships is rife and growing worse. Its consequences are severe and dramatic. “Bribery and corruption in the value chain are a persistent challenge and more destructive than previously understood...When corruption allows reckless companies to disregard the law, the consequences range from water shortages in Spain, exploitative work conditions in China or illegal logging in Indonesia to unsafe medicines in Nigeria and poorly constructed buildings in Turkey that collapse with deadly consequences.”\(^3\) It is therefore logical that corruption is internationally abhorred and denounced by all civilized nations. Over the last several years a number of states have acceded to multilateral conventions condemning illegal contracts, bribery of public officials and other forms of corruption.\(^4\)

Accordingly, there is unaniimity on the issue that corruption violates main concerns of international public policy. Violation of the fundamental public policy concerns has long been the ground for setting aside or refusing the recognition/enforcement of the arbitral awards.

For these reasons, one can conclude that corruption - a phenomenon of business transactions, which manifestly contravenes international public policy - must always operate as the bar to the enforcement of corruption tainted contracts and/or awards. However, the reality is quite opposite. An observation on international dispute resolution practice shows that there is consistent perplexity whether some forms of corrupt dealings could be deemed as inevitable

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and expedient commercial instruments despite the belief that corruption is destructive and has long term adverse effects on the fair competition.\(^5\) Disputes involving allegations of corruption throw up complex legal and factual issues at every stage of arbitration. As a consequence, judicial and arbitral practice in regards with corruption is far from uniform.

The purpose of the paper is to illustrate how public policy defense operates on different stages of international arbitration, including the post-award stage when the decisions rendered by arbitral tribunals are challenged in national courts. We will, particularly, address the issue of corruption as a one specific example of the public policy violation, analyze how this issue is judged in international arbitration and try to propose some possible theoretical and practical solutions for the controversies which are still problematic and actual at the present time.

In the paper initially will be provided the definition of the public policy doctrine and distinctions will be drawn between its different levels: national, international and transnational public policies. We will then adhere to the issue how corruption is condemned internationally and underline the generally accepted opinion that it even contravenes the transnational public policy. In order to provide the guidance for the reader why corruption cannot always operate as a bar to the enforcement of arbitral awards, in the same section we will distinguish the clear cases of corruption from the intermediary agreements of sale of influence. Afterwards will be discussed the issue of arbitrability and several other significant aspects related to corruption which can arise during arbitral process. Following this we will review standards of proof applied by arbitral tribunals for establishing the fact of corruption. The paper then proceeds with the analysis of the grounds for challenging corruption tainted arbitral awards and provides an overview on the conflict of laws considerations which are relevant for determining the validity of the parties’ underlying contract. Finally, we will discuss the different approaches adopted by national courts in regards with the extent of judicial scrutiny of arbitral tribunals’ findings and try to identify the most appropriate approach for balancing the two competing considerations: principle of finality of arbitral awards and discouraging corruption in international trade.

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1. **The Concept of the Public Policy**

The concept of the public policy is well established in almost all jurisdictions. There is no unique definition of public policy. New York Convention, other multilateral treaties and most national legislations simply refer to “public policy” without giving any further formulation. Nevertheless, reference can be made to a number of broad definitions which have obtained international practice. Public policy has been defined as the “most basic notions of morality and justice.”

Public policy is a reflection of the fundamental social, economic and moral values of the society, which is subject of gradual change as long as the values of the society also change in the course of time. Thus, it can be concluded that public policy consists of core of principles which are inevitable for effective and successful operation of certain legal system.

Public Policy could be relevant at different stages of international arbitration. Arbitral tribunals refer to the public policy while establishing their jurisdiction by determining the validity of arbitration agreement. Furthermore, during arbitration proceedings public policy may affect parties’ agreement on substantive and procedural issues. Hence, public policy is the determinant of the conduct of the arbitration and content of arbitral award. Finally, public policy concerns may be relevant at post-award stage when the national judge has to decide whether the award should be set aside or refused for the enforcement.

While determining the applicable rules in arbitration, tribunals can consider national, international or transnational public policy. Hereby, it would be expedient to draw the distinction between national and international public policy, on the one hand, and international and transnational public policy on the other.

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9 see Sections 5 and 6.
10 Buchanan, Mark, Public Policy and International Commercial Arbitration in: American Business Law Journal 1988, Vol. 26, Issue 3, p. 513. However, some commentators also distinguish regional public policy, i.e. the public policy of economic or political area, see, for instance Lew, Julian, Mistelis, Loukas and Kröll, Stefan, Comparative International Commercial Arbitration, Kluwer Law International, Hague 2003, p.422; but for the purposes of this thesis it is not necessary to take this four leveled approach.
1.1. Distinguishing National and International Public Policy

From the above given definitions of public policy we can deduce that national public policy is a reflection of the fundamental principles of one particular society in its moral, economic, religious and political environment. National public policy concerns could be a convenient label for the reluctance to give up a national solution in favor of the Community Law and policy. It could also be an obstacle against harmonization of substantive law.\(^ {11}\)

As for the ‘‘International public policy’’, it is particularly confusing expression. It does not mean that it is ‘‘international’’ in the same sense as public international law is international.\(^ {12}\) Pieter Sanders explained that ‘‘international public policy, according to generally accepted doctrine, is confined to violation of really fundamental conceptions of legal order in the country concerned.’’\(^ {13}\)

Similarly, the Court of Final Appeal of Hong Kong in the Polytek case\(^ {14}\) clearly indicated that international public policy does not mean some standards that are common to all nations. In particular the court held that:

‘‘[…]it (international public policy) means those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected.’’\(^ {15}\)

Accordingly, national as well as international public policy relates to the legal order of one particular country and therefore the international public policy of one country may be different from international public policy of another country.\(^ {16}\) The difference between these two concepts is that the international public policy reflects the most fundamental concerns of the national legal order.


\(^{14}\) Court of Final Appeal of Hong Kong, 2 HKC 205, Hebei Import & Export Corporation v. Polytek Engineering, 1999.

\(^{15}\) Ibid., para. 28.

\(^{16}\) Hunter and Silva, supra note 11, p. 367.
1.2 Distinguishing International and Transnational Public Policy

It is more important to clarify that international public policy is not the same as transnational public policy. The concept of transnational public policy implies the principles which are commonly recognized around the world by political and legal system. Another way of explaining the concept might be the general principles of morality accepted by the civilized nations. In contrast, the international public policy “is not more than public policy as applied to foreign awards and its content and application remains subjective to each State.”

It thus can be concluded that transnational public policy has a narrower scope and is more uniform than international public policy. Transnational public policy plays the decisive role in international dispute resolution. An award contravening transnational public policy is less likely to be upheld by the national courts. Conversely, there is higher probability that the arbitral decision based on public policy concerns of the world community will be enforced in national courts.

The difference between national and transnational public policy is even more significant. The former has relative character and is confined with the territory of the forum state, while the latter can have recognizable effects beyond national borders. Transnational public policy can avoid the arbitrators’ subjectivism when they are unaware which national public policy should prevail and are interpreting the elements of public policy with their “own sense of justice.”

2. Whether Corruption Violates the Public Policy

Corruption is omnipresent. It has been the part of the human life for thousands of years. Corruption encompasses all situations when agents and state authorities break the confidence entrusted with them. More precisely corruption can be defined as:

[…] transaction between a natural or legal person and any person who performs a public service function in any branch of government which involves a direct or indirect

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19 Raeschke-Kessler and Gottwald, supra note 2, p. 603.
exchange or an offer to exchange any kind of benefit in return for an act or an omission to act by a person performing a public service function. This is not necessarily the.  

However, this is not necessarily the formulation employed by national laws or international treaties.

Almost all legal rules and authorities condemn corruption, claiming that it contravenes the concerns of international public policy, even the transnational public policy. Already in 1963, in well-known International Chamber of Commerce (‘‘ICC’’) case No. 1110 judge Lagergren declared that ‘‘corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations’’. 22 More recently, arbitral tribunal in World Duty Free v. Kenya held that ‘‘bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy.’’ 23

It is indisputable that awards procured by the corruption or awards enforcing corruption-tainted contracts contravene the public policy, whereas there is a controversy about the issue whether intermediary agreements requiring the intermediary (agent) to exercise personal influence on third party for the benefit of principal could be regarded as a particular type of corruption violating the public policy. Different jurisdictions took different positions in regards with this issue.

Many countries adopted anti-corruption laws that strictly forbid intermediary agreements on public procurement matters, while some of them completely ban intermediary services. 24 These laws are based on the idea that the intermediary services constitute the risk of corruption. Consequently, the countries, which consider these practices illegal, will be reluctant to enforce the agreements dealing with them. 25

However, other jurisdictions, for instance Switzerland, took the view that intermediary services violate the public policy only if parties in fact had the intention to bribe or in another way exercise improper influence over the officials of the certain state. Scherer made an interesting comment about this issue:

24 Countries like Algeria, Saudi Arabia, Libya completely prohibit intermediary agreements for the purchase of armament contracts; see Sayed, supra note 5, p.168-169; 192-193.
Many countries do not ban contracts with such lobbyists, influence peddlers, or ‘‘agents d’influence’’ as long as no money or other advantage flows directly or indirectly to a public official and no improper influence is exercised over the public official. In fact, it stands to reason that influence is the main stock in trade of any agent. Only a foolish principal would retain an agent without influence. Agents may have acquired influence as a result of longstanding professional experience, through the force of their personality, by their standing in society or through their respected expertise.  

However, the crucial issue is to measure this ‘‘impropriety’’, i.e. to determine whether influence exercised over the public official could be deemed improper and therefore illegal. Thus, drawing the line between legal and illegal influence trading is rather hard, especially under the circumstances when the obvious fact of bribery is not established.

Nevertheless, differences between jurisdictions exist and in the view of these divergences it is inevitable to determine in each particular case – where the arbitral award enforcing the intermediary agreement is challenged on the public policy ground – whether the law of the forum state or the law of place of performance bans the intermediary agreements per se, or otherwise deems that the elements of the impropriety have to be demonstrated.

3. Legal Consequences of a Finding of Corruption

3.1. The Jurisdiction of Arbitral Tribunal and Arbitrability of the Issues of Corruption

First question which arises while resolving the cases involving corruption is the jurisdiction or the competence of the arbitral tribunals. When a contract is potentially tainted by corruption, the crucial issue is to determine the validity of the arbitration clause contained that contract. The modern approach regarding this issue is based on the principles which are already well-established in international commercial arbitration. First, the parties’ agreement and their intentions must be respected. Second, the principle of competence-competence, according to which the arbitral tribunals have the power to judge on their own jurisdiction, must be taken into account. Finally, we have to consider the separability doctrine under

27 Hwang and Lin, supra note 25, p. 72.
which the arbitration agreement is deemed independent from the main contract and therefore it will survive and remain valid even if the underlying contract is illegal.\(^{28}\)

However, in judicial practice we can meet the judgments where courts came up to the conclusion that the corruption-tainted contract should invalidate the arbitration clause too. The one of the most famous examples is ICC case N110 where the Swedish sole arbitrator G. Lagergren concluded that he had no jurisdiction over the dispute and consequently disqualified himself on the ground that the contract was illegal and therefore the arbitration clause should also be deemed ineffective.\(^{29}\)

Nowadays, this is not generally accepted view anymore and separability doctrine has universal support. It is the cornerstone of institutional rules on arbitration and it is invoked consistently by the courts and arbitral tribunals.\(^{30}\) In Fiona Trust & Holding Corporation v Privalov House of Lords gave the following explanation about the operation of separability doctrine: “The arbitration agreement must be treated as a distinct agreement and can be void or voidable only on grounds which relate directly to the arbitration agreement.”\(^{31}\) Thus, the only exception to the separability principle is when the arbitration agreement itself is obtained by threat or corruption.\(^{32}\) There are several cases where English courts gave the opinion that the arbitral tribunal’s jurisdictions on the merits of the dispute shall be declined if the arbitration agreement is directly affected by corruption,\(^{33}\) but even if there is a doubt about the legality of the arbitration agreement the competence-competence doctrine grants the arbitral tribunal the power to judge about its jurisdiction and determine the validity of arbitration clause.

Accordingly, the disputes about the existence of corruption in the main contract as well as in arbitration agreement are arbitrable. The arbitral tribunal is entitled to scrutinize the evidences and the arguments presented by the parties, investigate the corruption and then rule on the existence and consequences of the illegal activities under the applicable law.

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\(^{28}\) UNCITRAL Model Law 2006, Article 16(1); ICC Rules 2012, Article 6(4); UNCITRAL Arbitration Rules 2010, Article 27(1).


\(^{31}\) House of Lords, UKHL 40, Fiona Trust & Holding Corporation v Privalov, 2007, para. 19.

\(^{32}\) New York Convention 1958, Article V(1)(a).

3.2. The Admissibility and the Merits of the Claim

In the following section will be analyzed how finding of a corruption can affect the admissibility and merits of the claim of the party involved in corruption. The issues related to admissibility and the merits of the claim shall be determined according to the applicable law governing the entire contract and arbitration agreement.

Mostly the national laws distinguish the contracts procured by the corruption, i.e. the contract where only one party has the intent to commit and illegal act, and the contracts that provide for corruption, such as which is entered into with the primary purpose to commit corrupt act (that is to say when both parties have joint intentions to commit illegality). Such joint intentions mostly remain unwritten, but in some cases they are expressly stipulated in the contract. \(^{34}\) The main difference between this two is that the contract procured by the bribery is “intrinsically valid”, it survives and continues existence until the innocent party challenges it. As for the contracts that provide for corruption, they are shall be deemed null and void and therefore “entirely ineffectual” without any need to be set aside. \(^{35}\)

In earlier court decisions the judges came up to the same conclusions. For instance, in *Archbolds v Spangletti*\(^{36}\) the court made the distinction between the contract made by mutual contest and contract made unilaterally by stating that:

> If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all.\(^{37}\)

Thus, according to English common law practice the innocent party is not obliged to challenge the voidable contract (contract procured by corruption) and may choose to enforce it. Accordingly, the contract remains alive, but the innocent party may lose the right to set it aside if it had the knowledge about the corruption and did not take any steps to rescind the contract. However, the mere fact of breaching the contractual duties by the innocent party does not mean that it will be precluded to challenge the contract in the future.\(^{38}\)

*World Duty Free v. Kenya* provides the example of how the contract procured by the corruption could be set aside by the innocent party. The investor in World Duty Free was the

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\(^{34}\) See Lord Mustill’s Expert Legal Opinion in *World Duty Free*, supra note 23, para. 164; you can also consider analysis provided in Hwang and Lin, supra note 25, p. 44.

\(^{35}\) *World Duty Free*, supra note 23, para. 164.

\(^{36}\) High Court of Justice, Queen’s Bench Division, 1 QB 374, In Archbolds Ltd v S Spanglett Ltd., 1961.

\(^{37}\) Ibid., para. 388; you can also consider the following judgment: High Court of Justice, Queen’s Bench Division, QB 267, St John Shipping Corp v Joseph Rank Ltd, 1956.

\(^{38}\) *World Duty Free*, supra note 23, para. 164
corporation known as World Duty Free Company Ltd which entered the contract into with Kenya. According to contract World Duty Free had to run the duty-free operations in international airports of Kenya. Claiming that Kenya breached its obligations World Duty Free initiated arbitration pursuant to arbitration agreement. During the arbitral proceedings investor admitted that it gave “personal donation” in amount of $2 million in order to be able to run business operations with Kenyan government. The arbitral tribunal adhered to the applicable law and determined that the contract had been procured and therefore it could be voidable at the instance of Kenya. Moreover, after getting the knowledge about the bribery from the investor’s memorial, Kenya immediately challenged it in the counter-memorial. Thus, Kenya had not waived its right to rescind the contract. Consequently, investor’s claim was dismissed and the contract was properly set aside on the public policy ground.

World Duty Free v. Kenya case is also a perfect illustration of how transnational public policy could be operated as a ground for challenging the enforcement of the contract. In the present case claimant argued that the contract was valid under local Kenyan custom on the basis that “personal donation” was given to the president under “Harambee” system of “mobilizing resources through private donations for public purposes” and correspondingly was legally justified. However, arbitral tribunal held that the outright bribery committed by the claimant contravened transnational public policy and it cannot be justified whatever the local rules or customs applied. In particular the court noted that “it is…unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what would otherwise violate transnational public policy or the foreign applicable law chosen by the contractual parties for their transaction […]”

As for the contracts which provide for corruption, they are deemed to be null and void and thereby are unenforceable, i.e. the parties may not ground their claims on that kind of contract. The underlying rationale of this rule is that immoral and illegal act cannot serve as the basis of the lawful action. Furthermore, in the circumstances when the parties are both blameworthy defendants have the stronger position. Thus, the claims based on contracts that provide corruption are not admissible.

39 Ibid., para. 66.
40 Ibid., para. 164 and 182.
41 Ibid., para. 182-183.
42 Ibid., para. 110.
43 Ibid., para. 170.
44 Ibid., para. 113.
Accordingly, if the intermediary enters into the agreement with its principal for the object to procure the contract illegally from the third party for the benefit of the principal, the agreement between the principal and the intermediary is intrinsically invalid and thereby unenforceable. Consequently, the intermediary, who fulfills the obligations under the tainted intermediary agreement, cannot claim for the commission. Neither can the principal recover his money paid for the intermediary even if the latter fails to procure the contract or other necessary governmental approvals.\textsuperscript{45}

However, the above mentioned example must be distinguished from the scenario when only the intermediary intends to perform the contract in unlawful way and the principal is not aware of such intention. As the principal was not intending to commit an illegal act and entered into the valid agreement, it must not be precluded from the opportunity to recover the payments made to intermediary acting in illegal way.

4. Proof of Corruption and Substantive Standards

The proof of corruption is one of the horniest issues for the arbitral tribunal. In most of the cases it is difficult to prove the allegation of corruption. The person committing corruption will generally try to avoid all documentary and other unambiguous evidences proving an illegal act. Furthermore, most of the international arbitration rules as well as the national arbitration laws do not contain the rules about the burden and standards of proof. The arbitral tribunal adjudicating the dispute involving corruption, in the first place, has to determine the laws and rules applicable for the burden and standard of proof.\textsuperscript{46}

4.1. Laws and Rules Applicable to the Burden and Standard of Proof

The rare example from international rules which contain the principles about the burden and standard of proof are UNCITRAL Arbitration Rules, which provide that “each party shall have burden of proving the facts relied on to support his claim or defense.”\textsuperscript{47} However, the above cited provision is general rule which does not exclude other specific regulations and/or legal presumptions included in the substantive law applicable to the contract.\textsuperscript{48} For

\textsuperscript{45} ICC Rulings: ICC case No. 6248, 1990 (addressing the first scenario); ICC Rulings: ICC case No. 5943, 1990 (addressing the second scenario).
\textsuperscript{46} Haugeneder, supra note 21, p. 545.
\textsuperscript{47} UNCITRAL Arbitration Rules 2010, Article 27 (1).
instance, in Rome II Regulation\(^49\) is defined that if the substantive law governing the contract constitutes the provisions regarding the presumptions of law and burden of proof, then these provisions shall be applicable.\(^50\) Notwithstanding the foregoing, this provision will not have a great significance with regard to corruption, since there are, in general, no rules containing presumptions on corruption. Thus, when the party makes the allegation of corruption, the general rule that on the alleging party rests the burden of proving, usually applies.\(^51\)

As for the national jurisdictions, the standard of proof is either part of procedural law\(^52\) or substantive law.\(^53\) Some commentators argue that the substantive law chosen by the parties or applied by the tribunal shall always govern the standard of proof, whereas others believe that it should be determined by applicable procedural rules. Be that as it may, arbitral tribunals, despite some limitations, have factual freedom to determine the standard necessary for proving the allegation of corruption.\(^54\)

### 4.2. Required Standard to Prove Corruption

There is, in general, a little controversy about the standards of proof applied by the arbitrators. In the arbitral awards arbitrators try to avoid grounding their decisions solely on the applicable standard of proof and establish the relevant facts by evaluating the presented evidences with reasonable certainty without referring to the specific standards. Consequently, arbitrators in their decisions usually do not discuss the issue of applicable standard of proof.\(^55\)

However, in the cases involving corruption the standard of proof applied by the tribunal is often critical, since in practice, the direct evidences for proving corruption are rarely available\(^56\) and arbitrators base their assumptions on circumstantial evidences.\(^57\)

\(^{50}\) Rome II Regulation, Article 22(1).
\(^{52}\) Germany, Austria, see Haugeneder and Liebscher, supra note 17, p. 546.
\(^{53}\) Switzerland, England, see Ibid., p. 546.
\(^{55}\) Haugeneder and Liebscher, supra note 21, p. 546.
\(^{56}\) Cases with obvious corruption like World Duty Free, supra note 23.
\(^{57}\) Scherer, supra note 26, p. 31.
There are two main approaches in regards to the standard of proof required to establish the corruption. The approach based on common-law tradition makes a distinction between two types of standards: the civil standards of “preponderance of evidence” which requires demonstrating that the existence of a fact is more probable than its non-existence and the higher standard of proof with “clear and convincing” evidence. These first above mentioned standard is evolved from the legal doctrine of “balance of probabilities”, usually applied by the courts in civil cases. As for the second, its origin is “proof beyond reasonable doubt” standard widely used by the juries in criminal proceedings.

The standard of proof in the civil law jurisdictions refers to the “inner conviction” of the decision maker. Thus, the required standards of proof are satisfied if the available evidence is sufficient to convince the judge or arbitrator in the existence of the fact.

The difference between these two approaches adopted by common and civil law legal systems is obvious: the “preponderance of evidence” and “beyond reasonable doubt” standards provide the description of external, objective threshold necessary to determine the existence of certain facts (common law approach). Whereas the standard applied in continental Europe is expressed from the decision maker’s point of view, without any objective explanation of what is sufficient or necessary for the judge or arbitrator to come to the “inner conviction”. Furthermore, the “inner conviction” standard applies equally to the all kinds of allegations, including corruption. This approach is justified by the equality of parties and due process requirements. However, it is also recognized that the “inner conviction” should be based on the objective factors.

4.3. Standard of Proof in Arbitral Practice

An overview of the arbitral practice shows that there is no uniform standard regularly applied by arbitral tribunals. Analysis of the arbitral awards show that the arbitrators usually rely on available evidence and do not try to base the findings of fact solely on the specific

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58 Raeschke-Kessler and Gottwald, supra note 2, p. 603.
61 Haugeneder and Liebscher, supra note 21, p. 548.
62 Ibid., p. 547.
standard. Thus, the standards evolved from the legal doctrine have been flexibly applied by the arbitral tribunals.⁶⁴

4.3.1. Weighing of Evidence without Reference to the Specific Standard

In many disputes arbitral tribunals determined the existence or non-existence of corruption without indicating the standards applicable to the particular case.⁶⁵ For instance, in World Duty Free v. Kenya after plaintiff admitted that he had handed over $2 million to the president of Kenya,⁶⁶ tribunal just noted that this fact cannot be considered as ’’personal donation for public purposes’’ and therefore concluded that ’’those payment must be regarded as bribe” purposely made to obtain the contract.⁶⁷

The similar approach was taken in many commercial arbitration cases where tribunals resolved the issue of corruption without discussing the burden or standard of proof. For example, in ICC case No. 6248 arbitral tribunal simply concluded that the existence of corruption is apparent from the ’’evidence presented in this arbitration’’.⁶⁸ The same happened in ICC cases No. 3913 and No. 3916 where arbitral tribunals without referring to any particular standards noted that the intermediary agreements were tainted by corruption. The only difference is that in the first case arbitral tribunal mostly relied on testimony evidences,⁶⁹ whereas in the other, arbitrators based their findings on circumstantial factors.⁷⁰

In other commercial disputes arbitrators rejected the claims about corruption, but as in above mentioned cases, the required standards of proof were not discussed.⁷¹ In ad hoc arbitration the sole arbitration gave the following reasoning:

The Arbitrator gives particular weight to the contemporary documents which evidence the advice required from and given by Claimant during the negotiation period. They are in marked contrast with the scanty evidence offered in certain arbitrations on commissions claimed by intermediaries […]⁷²

The sole arbitrator also noted that the defendant is not discharged from its burden of proving and shall therefore provide ‘’further and direct evidence’’ in order to support its contentions.

⁶⁴ Haugeneder, supra note 21, p. 548.
⁶⁵ Ibid., p. 549.
⁶⁶ World Duty Free, supra note 23, para. 37.
⁶⁷ World Duty Free, supra note 23, para 136.
⁶⁸ ICC Rulings: ICC case No. 6248, 1990;
⁷¹ Haugeneder, supra note 21, p. 550.
Thus, the arbitrator wanted to emphasize that the defendant’s obligations of presenting the supportive evidences against claimant’s allegations shall not be excluded.

The ICC case No. 9333 is another example when arbitral tribunal rejected the allegations about the corruption without giving any detailed descriptions of the burden or standard of proof, which should have been applied by the arbitrators while deciding the issue of corruption. The tribunal just noted that the claimants could not provide the circumstantial evidence which suffices to convince the arbitrators that the illegal act really occurred.

4.3.2. Standards Applied by Arbitral Tribunals

On the contrary from the above noted cases, some arbitral tribunals discussed in detail the required standards necessary for establishing the fact of corruption. However, the discussions of the applied standards are not uniform in international commercial arbitration. The analysis of the arbitral awards show that arbitral tribunals mostly rely on higher standards, requiring only ‘‘clear and convincing evidence’’ or situations which are ‘‘beyond reasonable doubt’’.

In *Himpurna v PLN* the arbitral tribunal applied higher standards of proof by stating that:

\[\text{[\ldots] there is a presumption in favour of the validity of contracts; that this presumption is healthy; that it is strengthened when contracts have provided the basis upon which many persons have acted over time, and that a finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof.}\]

Higher standard of proof was also required in two other well-known cases, such as *Hilmarton* and *Westacre*. In *Hilmarton* case arbitrators considered some documents referring to the payment which was probably made by the defendant in order bribe local authorities. However, arbitral tribunal concluded that there was no direct evidence to establish the fact of bribery and as for the indirect evidences, they were not sufficient to

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73 Haugeneder. supra note 21, p. 551.
75 Haugeneder, supra note 21, p. 547.
76 *Himpurna California Energy Ltd. (Bermuda) v. PT. (Persero) Perrusahaan Listruik Negara (Indonesia), Final Award, 1999.*
77 Ibid., para 116.
78 *Hilmarton, Broker v. Omnium, Contractor, Final Award, 1988.*
prove corruption “beyond doubt”. In Westacre case the arbitral tribunal applied the
doctrine of “inner conviction”, which, as already noted above, was evolved from civil law
jurisdiction. In particular, the tribunal stated:

[…] the arbitral tribunal, as any state court, must be convinced that there is indeed a
case of bribery. A mere “suspicion” by any member of the arbitral tribunal,
communicated neither to the parties nor to the witnesses during the phase to establish
the facts of the case, is entirely insufficient to form such a conviction of the Arbitral
Tribunal. From this reasoning and final decision we can conclude that higher standard of proof was
applied in this case too. However, some commentators interestingly opine that when the
arbitral tribunals do not have sufficient investigative measures, they usually take the
easier route and heighten the standards of proof.

The Westinghouse case is an example of the greatest elaboration on required standard of
proof. The arbitral tribunal, at first, adhered to the standards of proof defined by
applicable laws after which arbitrators came up with a conclusion that in corruption cases
all applicable jurisdictions provided for higher standard of proof, particularly a “clear and
convincing” evidence. Although arbitrators stated that the heightened standards were
more appropriate in the given circumstances, they still considered the civil standards of
“preponderance of evidence”. However, arbitrators founded that the evidences provided
by the defendants could not even satisfy the standard of “preponderance of evidence”.

Some arbitral tribunals consider the complexity of proving corruption and lighten the
standards of proof for alleging party. For instance, in ICC case No. 8891, related to the
validity of intermediary agreement, the tribunal held that according to the well established
principle regarding burden of proof it is up to the party alleging the corruption to prove the
illegal fact. Arbitrators further noted that in the given scenario corruption could be
established by “serious indices”, but after examination of the evidences tribunal concluded
that the fact of illegal activity cannot be proved “with certitude.” However, the analysis of
circumstantial evidences, such as party’s ability to submit the proof of his activity, duration

80 Martin, surpa note 30, p.9.
82 Martin, supra note 30, p.8; Raeschke-Kessler and Gottwald, supra note 2, p. 604.
83 ICC Rulings: No. 6401, Westinghouse and Burns & Roe (USA) v. National Power Company and the
Republic of the Philippines, Arbitral Award, 1991.
84 Martin, supra note 30, p. 32.
86 Haugeneder, supra note 21, p. 553.
of a performance, method and amount of remuneration, lead to the conclusion that the object of the both parties was to bribe officials, and consequently, the tribunal declared the contract void. Thus, in the present case arbitral tribunal established the fact of corruption according to circumstantial evidences by applying lower evidentiary standards.

After the foregoing discussion it would be expedient to determine the most appropriate standard of proof. Some commentators opine that applying higher standard of proof will lead to unjust advantage of claimant. On the other hand, the lower standard of proof will put respondent in superior position. Accordingly, for the principle of parties’ equality it would be reasonable if tribunals apply usual standard of proof, i.e. ‘’preponderance of evidence’’, also known as ‘’balance of probabilities’’. This was done in ICC case No. 4145 where the arbitral tribunal underlined that the fact of corruption could be established by circumstantial evidence, if it will be resulted in ‘’the very high probability’’.  

Similar approach was chosen by the arbitral tribunal in ICC case N6497, where parties entered into several intermediary agreements under which intermediary had to provide the services in order to obtain the construction contracts for the principle. The dispute arose about the amount of commission fee with respect to the certain contracts. The principle was claiming that these contracts partly served for channeling the bribes and on that ground refused to pay the certain amount of commission. The court, after considering the allegations of corruption, held that intermediary agreement demonstrated “high degree probability that the real object of Product Agreement Q [the addendum] was to channel bribes to officials in country X”. As a result, the tribunal came up to the conclusion that this degree of probability was sufficient to establish the fact of bribery and to void the contract.

This case is also interesting due to the fact that the arbitral tribunal considered the possibility of shifting the burden of proof from claimant to respondent, but at the end did not do it, because the during the testimony respondent’s witness refused to name the persons who received the bribes. Thus, the exception to the general rule, that normally the alleging party bears the burden of proof, exists. In particular, the burden of proof could be reversed under

87 Raeschke-Kessler and Gottwald, supra note 2, p. 606.  
88 Consider, for instance, ICC case No. 8891, supra note 83.  
89 Raeschke-Kessler and Gottwald, supra note 2, p. 604  
92 Ibid., para. 79.  
93 The main reason of not invoking higher evidentiary standards was that the accused party refused to disclose the information about the bank records in relation to 1/3 of the commission fee; see Radjai, Noradèle, Switzerland – Where there is Smoke, there is Fire? Proving Illegality in International Arbitration, in: Arbitration Committee Newsletter 2010, Vol.15, Issue 1, p. 141.  
circumstances, when alleging party brings relevant, but non-conclusive arguments before the tribunal. 95

5. Grounds for Challenging the Corruption-tainted Arbitral Awards

Leading jurisdictions on arbitration interpret the grounds for setting aside arbitral awards in conformity with the corresponding New York Convention grounds related to the refusal for recognition/enforcement96 and therefore it is not necessary to distinguish the concept of public policy defense between enforcement and setting aside regimes.

The corruption as a particular issue of public policy may arise in two possible ways at the post award stage. First, award could be challenged if the award was a product of corruption, i.e. if the award making process was affected by corruption. The second possible scenario is when the tribunal does not properly consider the raised allegations of corruption during arbitral process.97 The both possible scenarios related to the challenging of the corruption-tainted awards will be discussed below.

5.1. Challenging the Award Procured with Corruption

There is no doubt that in cases, where arbitrators get monetary or non-monetary benefits in order to render an award in favor of one of the parties, the award is considered to be induced by the corruption and therefore it is contrary to the public policy of all civilized nations, i.e. contrary to transnational public policy.98

There is international consensus that if arbitral tribunal is involved in the corruption the award must not be enforced notwithstanding the fact whether corruption impacted the outcome or not.99 But in practice we meet the cases when the award was still enforced despite the evidence that the tribunal was bribed. In dispute between Techno v IDTS 100 the former was seeking to enforce the award in US courts. Before rendering an award IDTS inquired themselves whether the tribunal could be bribed and had ascertained that it was relatively easy to buy the arbitrators. Being aware of this fact IDTS still remained silent and

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97 Sheppard and Delaney, supra note 33, p. 4.
98 Ibid., p. 3-4.
99 Ibid., p. 4.
waited for the tribunal’s decision. After rendering the adverse award IDTS decided to challenge it on the public policy ground on the enforcement stage, but US Court of Appeal rejected the claim and held that despite the allegations, IDTS waived its right to assert public policy exception by having knowledge, but not making any objections. Although in this case the court did not express the view about the validity of the allegations, it held that even if they were valid, not raising an objection means waiver of the right and thereby public policy defense cannot be used. “Heads I win, tail you lose”\textsuperscript{101} – that is how the judge characterized IDTS’s action.

Similarly, already in 1946 the court in \textit{San Carlo Opera Co. v. Conley} held that:

\begin{quote}
Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.\textsuperscript{102}
\end{quote}

Other court judgments also prove that attacks on the arbitrators’ qualification and objectivity are unsuccessful in the circumstances when the party has the information about partiality or bias, but does not make an objection until the award is rendered.\textsuperscript{103}

5.2. Challenge to the Substance of an Award

The main reason why parties claim that arbitral tribunals did not give the due consideration to the allegations of corruption is that they disagree to the identification and/or interpretation of the laws made by the arbitrators for determining the validity of underlying contract.\textsuperscript{104} There is a consensus about the issue that if the contract is illegal under its governing law, it must be deemed void and therefore could not be enforced.\textsuperscript{105} However, while dealing with corruption cases, issue may arise where the underlying contract is valid under its governing law, but it may be subject of public policy or mandatory provisions of the law of place or performance or arbitral seat, under which the contract might be deemed void and therefore unenforceable. Accordingly, arbitrators and judges often face the problematic situations where they have to decide whether parties’ chosen law could be overridden by the law of arbitral seat or place of performance. This problem will never arise where, for instance, the

\textsuperscript{101} Ibid., para.10.
\textsuperscript{102} United States District Court, SD New York., 72 F.Supp. 825, San Carlo Opera Co., Ltd. v. Conley, 1946, para. 35.
\textsuperscript{104} Hwang and Lin, supra note 25, p. 34-37.
\textsuperscript{105} Ibid., p. 34.
bribery of state authorities is in issue. Such a clear case of corruption is not tolerated by the civilized countries and therefore it is unlikely that applicable laws will conflict each other while determining the validity of the underlying contract. Moreover, bribery of public officials and such clear cases of corruption is deemed contrary to transnational public policy and regardless of the law applied by arbitral tribunal or national court, commitment of an illegal act would be established and therefore claims brought under this contract by the corrupt party would be dismissed.

Accordingly, in the disputes where the clear case of corruption is at hand, the tribunal is not required to conduct conflict of laws analysis, since the contract must nevertheless be declared void as being contrary to the transnational public policy. However, when the disputes arise under intermediary agreements – which are not considered as contrary to the transnational public policy, then the conflict of laws considerations are of great significance, since potentially applicable laws may have different approaches to this issue and, besides that, arbitrators and judges do not have the power to annul them on transnational public policy grounds disregarding the applicable laws.

As already noted above some legal systems prohibit intermediary agreements in light of concerns that they are made for the purpose to bribe or otherwise exercise personal influence over the state officials, no matter the intention or fact of illegal act is proved or not. In contrast, some jurisdictions upheld intermediary agreements unless parties’ illegal intention, the fact of bribery or execution of improper influence is demonstrated.

For the respect of parties’ autonomy and their intentions it is required that the choice of law clauses of the contract to be upheld in the majority of the cases. However, as already mentioned, under certain circumstances the principle of parties’ autonomy and their chosen law is often overridden by mandatory rules or other public policy concerns of the law of place of performance or arbitral seat. Hence, choice of laws considerations play the decisive role while determining the legality of intermediary agreements.

Throughout the following sections the conflict of laws analysis will be based on the disputes arising from the intermediary agreement, but all the assumptions will be applicable to any

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106 Born, supra note 96, p. 2139-2140.
107 Hwang and Lin, supra note 25, p. 70.
108 See, for instance, World Duty Free, supra note 23, discussed in Sub-section 3.2.
110 Ibid., p.71.
111 See Section 2.
113 Ibid., p. 190-230 and 348-353;
other types of contracts which could be deemed legal under its governing law, but might be contrary to the law of arbitral seat or place of performance. However, as already discussed above, this kind of scenario is less likely to arise in the cases other than dealing with intermediary agreements.

5.2.1. Relevance of the Law of Place of Performance

In many cases parties and their intermediary agreements have no or insignificant connection with the jurisdiction supplying the chosen law and instead they have closer link to the place where main contractual obligations are undertaken.\textsuperscript{114} Jurisdictions of some countries provide that public policy concerns reflected in mandatory rules of place of performance may prevail to the chosen law if they have close relationship to the dispute.\textsuperscript{115} It is the imperative nature of mandatory rules that \textit{can} (but not necessarily) make them applicable irrespective of the law governing the relationship between parties.\textsuperscript{116} Whether the rule should be deemed as mandatory or not depends on its scope, nature and purpose.\textsuperscript{117}

The principle that under certain circumstances mandatory provisions of the law of place of performance might have overriding power over chosen law is established in Rome I\textsuperscript{118} Regulation which allows discretionary application of the mandatory rules of the country ‘"where the obligations arising out of the contract have to be or have been performed''.\textsuperscript{119}

Similarly, Article 19 of Swiss Private International Law Act of 1987 (‘‘PILA’’) provide that the law of the country ‘‘closely connected’’ to the case may be applicable if ‘‘the legitimate and manifestly preponderant interests of a party so require’’.\textsuperscript{120} While applying this provision over the disputes regarding intermediary services, Swiss arbitral Tribunals were usually reluctant to conclude that they supersede the chosen law and therefore they upheld intermediary agreements. Parties in most cases are unable to demonstrate that their ‘‘legitimate and manifestly preponderant interests’’ are in issue or the circumstances related to the dispute are sufficiently ‘‘closely connected’’ to the law other than chosen by the

\textsuperscript{114} Hwang and Lin, supra note 25, p. 30.
\textsuperscript{115} Born, supra note 96, p. 2172-2173.
\textsuperscript{117} Born, supra note 96, p. 2186-2193.
\textsuperscript{119} Ibid., Article 9(3).
\textsuperscript{120} Hwang and Lin, supra note 25, p. 33.
parties. However, there is a controversy whether this rule should be applied in international arbitration or not. Swiss courts held that PILA governs only international arbitral disputes having its seat in Switzerland and, correspondingly, Article 187, which states that parties’ chosen law must considered at first, should be respected. On the other hand, Swiss Federal Tribunal noted several times that for determining validity of the contract tribunals have to consider the rules of European Competition law, even if parties made an explicit indication in the contract about the governing law. Thus, arbitral tribunals under Article 187 of PILA must still consider mandatory provisions of the law of place of performance.

English conflict of laws rules, which generally apply in most of Commonwealth countries, do not favor the principle that under certain circumstances mandatory provisions of the law of place of performance can prevail to the parties’ chosen law. However, the principle exception relevant to the issue of illegality of intermediary agreements was established in Foster v. Driscoll case, where the contract about the import of whiskey into the United States was legal under its governing law (English law), but contravened the mandatory rules of the law of the place of performance, i.e. the law of the United States. The court established that the intention of the parties were to perform an act which was deemed illegal under the law of the United States and consequently declared the contract unenforceable. Accordingly, while applying common law conflict of laws rules arbitral tribunal will not uphold intermediary agreements in which parties entered with the common intention to violate anti-corruption laws of the place of performance. Moreover, commentators argue that this principle should be extended to the scenarios when only one party has the intention to commit an act contravening mandatory rules of the law of the place of performance. In this case the party having that intention (but not innocent party) will be unable to enforce the contract.

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121 Sayed, supra note 5, p. 271-272.
122 Hwang and Lin, supra note 25, p. 35
123 Ibid., p. 35.
124 United States Court of Appeals, KB 287, Foster v Driscoll and Others, Lindsay v Attfield and Another, Lindsay v Driscoll and Others, 1929;
125 Although in this case the validity of the contract about the import of whiskey was disputed, commentators and judges several times held that this rule could also be relevant with respect to the intermediary agreements, since the latter one in some countries is considered as one particular type illegality. See, for instance, Hwang and Lin, supra note 25, p. 35; Consider also the judgement of Swiss Federal Tribunal, Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A, 1990 (discussed later in this Section), where the judge adjudicating the validity of intermediary agreement noted that English arbitral tribunal might have reached the different decision by operating Foster v Driscoll rule.
126 Hwang and Lin, supra note 25, p. 36; However, this common law rule should be distinguished from the contrary approach of Rome I 2008, according to which parties’ intentions are irrelevant.
*Hilmarton* case 127 is a good illustration of how the approaches taken by different courts and tribunals vary in regards with this issue. In this case parties entered into the intermediary agreement according to which Hilmarton had to obtain the construction contract for Omnium de Traitement (OTV) from the Algerian government. Swiss law was the substantive law of the contract and the place of arbitration was Geneva. In this case the sole arbitrator reviewed the contract under the Swiss law chosen by the parties and Algerian law as the law of the place of performance. The dispute arose after OTV, for whose benefit Hilmarton procured the contract, resisted paying the certain amount of the commission determined under intermediary agreement. OTV was arguing that the contract was illegal, contravened the public policy of Algeria and therefore it must be deemed void. However, under the Swiss law - which does not prohibit the contracts about the trade of influence unless the fact of bribery is established, - the contract was valid. The arbitral tribunal accepted OTV’s allegations about illegality on the ground that the contract, which was illegal under the law of the place of performance, would violate the concept of good morals of Switzerland and as a consequence declared it unenforceable. However, Swiss Federal Tribunal then set this award aside on the basis that the Algerian law was too broad and protectionist, violating the principle of parties’ autonomy, whereas under Swiss law the contract was valid, since parties did not have any intentions to commit illegal act. 128

The second arbitral tribunal, which was formed after the award was set aside, found that the contract is enforceable and ordered OTV to pay commission to Hilmarton. Consequently, Hilmarton sought the enforcement of the award in English High Court, where OTV made a counter move and challenged the award on the same ground - that the underlying contract was illegal under the law of the place of performance and therefore contravened the public policy of Algeria. English high court enforced the award, however, the judge acknowledged that English arbitral tribunal adjudicating the same dispute would have probably reached the different decision by dismissing Hilmarton’s claim on the basis of *Foster v. Driscoll* rule, under which the parties’ intentions about performing the contract in the country which prohibits intermediary agreements might have plaid the decisive role. 129

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127 *Hilmarton* case is one of the most controversial arbitration ever reported, there is two arbitral awards which then were challenged in the national courts of three different countries; ICC Rulings: ICC case No. 5622, 1988 and 1992; French Supreme Court, Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A, 1994; Swiss Federal Tribunal, Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A, 1990; High Court of Justice, Queen’s Bench Division, Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A, 1999.


129 High Court of Justice, Queen’s Bench Division, Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A, 1999; consider the discussion provided above in this Section about *Foster v. Driscoll* rule.
For the reasons mentioned above, we can conclude that conflict of laws rules applied by arbitral tribunals or national courts play decisive role in determining whether chosen law could be overridden by the mandatory provisions of the law of place of performance or not. It is indisputable that if the application of mandatory rules is rejected then parties’ chosen law must govern the contract. Otherwise, it is less presumable that mandatory provisions banning intermediary agreements will activate Article 19 of PILA, whereas in common law countries it is higher probability that mandatory provisions will be applied under Foster v. Driscoll rule. However, while operating Foster v. Driscoll rule parties’ intentions must be necessarily considered, particularly, if they choose the law with the sole intention to evade some public policy restrictions of the country most closely connected to the dispute, then parties’ chosen law can be overridden by the law of the place of performance. This principle was ascertained in Peh Teck Quee v Bayerische Landesbank Girozentrale where appellants claimed that the contract must be deemed illegal under the law of the place of performance (Malaysian Law) notwithstanding with the fact that Singapore law had to govern the contract according to the choice of law clause. In that case court concluded that parties had good reasons to choose Singapore law and therefore they did not have common intentions to evade Malaysian regulatory statutes. Consequently, parties’ chosen law was upheld, but court was clear in its reasoning that parties’ intentions plaid the decisive role while determining the validity of the agreement.

Thus, parties’ bad faith may justify invalidating the intermediary agreements under the law of the country having closest connection to the dispute. In contrast, it is worth to notice that according to Rome I Regulation subjective element of the contract is immaterial. Commentators opine that legislators wanted to limit parties’ bad intentions for evading the law of the place of performance. It therefore means that parties’ intermediary agreements can be invalidated by courts and arbitral tribunals if main contractual obligations are performed in the country which prohibits the services rendered in that country.

5.2.2. Relevance of the Law of Arbitral Seat

In order to determine the validity of intermediary agreement tribunals also have to consider the law of the forum state and determine whether this agreement violates fundamental public

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policy of that state or not. The law of the arbitral seat can be applied if contravention is of fundamental moral nature or if contract has close connections to the forum state.132

In Soleimany (the ‘‘father’’) v. Soleimany (the ‘‘son’’), the dispute arose between the father and the son based on the contract for smuggling the carpets out of Iran. The arbitration was held in London by Beth Din - a Jewish Court of Chief Rabbi applying Jewish law134 - which recognized that the activities were performed by illicit enterprise, were illegal and contravened the Iranian laws of expert control and revenue. However, the agreement was still enforced on the ground that these facts had no relevance for the Jewish law governing the contract, under which any purported illegality would have no impact on the parties’ rights. After the award was rendered, the son applied to register it as a judgment. The judge made the order granting leave to enter judgment and giving leave to enforce the award, but at the same time granting the father the power to apply for setting aside the order within the fourteen days period. Subsequently father applied to set aside the leave for enforcement of the award in the English Court of Appeal. The father’s motion was successful and the English court refused to enforce the award, because it violated the fundamental public policy of England. In this case, the contract was illegal under the Iranian law (law of the place of performance) too, but the fundamental public policy of England was so manifestly infringed that it was sufficient to ‘‘lead to non-enforcement by the English court whatever their proper law and wherever their place of performance.’’135 Thus, the contract would have also been set aside if the contract was legal under the Iranian law.

The law of arbitral seat may also supersede parties’ chosen law even when the underlying contract violates the public policy of the forum, but this violation must not necessarily be of fundamental moral nature. Thus, the contravention may be purely domestic and not necessarily international. However, in that case public policy of both - forum state and place of performance – must be infringed. Lemenda case136 is a good illustration of this issue.137

Under the intermediary agreement plaintiff had to procure renewal of the contract by using

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134 Beth Din is a Jewish authority which offers Jewish communities two services: civil arbitration and religious rulings.
135 The High Court of Appeal of England, Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd., APP.L.R. 05/12, 1999, para. 34; In this case court referred to the distinction between national and international public policy, drawn in Lemenda.
136 High Court of Justice, Queen’s Bench Division, QB 448, Lemenda Trading Co. v African Middle East petroleum co. Ltd., 1988.
137 Here has to be noted, that this case was not disputed in arbitration. However, Lemenda principle regarding the application of the law of the forum is widely used in arbitral and judicial practice. Consider for instance Westacre, supra note 135.
influence on Qatari officials. After examining the intermediary agreement English Court concluded that it contravened the law of both counties, i.e. the law of forum state (English law) and place of performance (Qatari law). Court further noted that even though agreement did not contravene the main concerns of England’s international public policy, it still must not be enforced, since national public policies of both – forum and place of performance - are violated. Consequently, court found intermediary agreement unenforceable. Although in the present case English law was governing the intermediary agreement, in Westacre court concluded that Lemenda principle would still apply even if the agreement was not governed by the English law.\textsuperscript{138}

Accordingly under Lemenda rule courts may set aside or refuse to enforce an award which upholds an agreement contrary to purely domestic public policies of place of performance and arbitral seat.

6. The Permissible Extent of Court Review of Arbitral Tribunal’s Findings at the Setting Aside and Enforcement Stages

Arbitral tribunal is allowed and not obliged to set aside or refuse to enforce an award if one of the grounds stipulated in international arbitration rules is established. Article V(2)(b) of New York Convention and Article 36(1) of UNCITRAL Model Law provide that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:...The recognition or enforcement of the award would be contrary to the public policy of that country.\textsuperscript{139}

In similar terms, Article 34(2)(b)(ii) of UNCITRAL Model Law provides that the award may be set aside on public policy ground. Accordingly, arbitral tribunal may still enforce an award even if the contravention of public policy will be at hand. The court has the discretion to determine the nature and significance of the illegality and decide whether it would be reasonable or not to enforce an award.\textsuperscript{140} Two competing considerations take the field while exercising this power: protecting forum state’s public policy and respecting the finality of

\textsuperscript{138} Westacre, supra note 135, para. 34-35.

\textsuperscript{139} New York Convention 1958, Article V(2)(b;) UNCITRAL Model Law 2006, Article 36(1).

\textsuperscript{140} Takahashi, Koji, Jurisdiction to Set Aside a Foreign Arbitral Award, in Particular an Award Based on an Illegal Contract: a Reflection on the Indian Supreme Court’s Decision in Venture Global Engineering, in: American Review of International Arbitration 2008, Vol. 19, Issue 1, p. 183
the arbitral award. There are several trade-offs between these two considerations which must be taken into account.

The principle of finality of arbitral awards is reflected in most national and international arbitration rules.\textsuperscript{141} This principle clearly reflects the spirit of international arbitration, i.e. to solve the dispute in one shot, without possibility of appealing it. Respecting the finality principle leads to several advantages: avoiding relitigation of the merits already adjudicated in arbitration, increases the predictability of dispute resolution through international arbitration, preserves the principle of international comity and respects the capacities of foreign and transnational tribunals.\textsuperscript{142} On the other hand, public policy covers broad area of state’s main interest and goes beyond policy objectives underlying the preservation of the finality of the award. For the present purposes, the most relevant and significant manifestation of public policy in tension with finality of the award is prohibition against the contracts violating good morals and/or public order, such as agreements involving bribery and other clear forms of corruption. It is, thereby, understandable that national courts are usually reluctant to enforce agreements which are deemed to be contrary to the forum state’s main interests and fundamental moral values, and which will therefore undermine a fair competition and integrity of the public administration.\textsuperscript{143}

The crucial issue which arises while considering these two competing considerations is whether the courts are entitled to re-examine arbitral tribunal’s findings or they have to base their judgments purely on the findings obtained during arbitration proceedings. In practice, after rendering the award having no finding of corruption dissatisfied party usually challenges it on the ground that relevant evidence of corruption was discovered only after closing of arbitral proceedings; that the arbitral tribunal did not consider properly the evidence proving corruption or tribunal did not apply correctly the law governing the issues of corruption or illegality. Even the courts belonging to the same jurisdiction take different approaches in regards with the extent of the judicial review of arbitral tribunal’s findings. Attitudes towards the judicial scrutiny of the awards are following: i) minimal judicial review, ii) maximal judicial review, iii) contextual judicial review.\textsuperscript{144}

\textsuperscript{141} German Arbitration Law 1998, Section 1055; Swiss Federal Code on Private International Law 1987, Article 190; English Arbitration Act 1996, Section 98.
\textsuperscript{142} United States Supreme Court, 83-1569, Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc, 1985.
\textsuperscript{143} Hwang and Lin, supra note 25, p. 51.
\textsuperscript{144} Sayed, supra note 5, p. 391-421.
6.1. Minimal Judicial Review

Courts conducting minimal judicial review are usually reluctant to scrutinize and reexamine the findings of corruption made by arbitrators in the award. However, under certain circumstances courts taking minimal judicial review approach may reinvestigate the issue of corruption and therefore re-examine award’s findings of law and fact. First possible scenario when court is entitled to do it is when party alleging corruption presents fresh evidence to the arbitral tribunal; second is the error of law made by the arbitral tribunal and third - existence of fraud, duress or some vitiating factors. All these different scenarios will be exemplified and discussed below.

First, will be analyzed the situation where courts show high degree of deference to the tribunal’s findings and consequently upheld the award. Northop v. Triad is a good illustration of this particular aspect of minimal judicial review approach.

An American defense company, Northrop Corporation, was willing to sell military equipment and related backup services to the Saudi Arabian Government. For that purposes, company entered into an intermediary agreement with two Liechtenstein companies entirely owned by well-known Saudi Arabian businessmen, Mr. Adnan Khashogi. The dispute arose due to the commission for intermediary services, which Northrop resisted to pay. Northrop argued that Saudi Arabian decree prohibited sales of military equipment to the Saudi Arabian government and therefore claimed that the intermediary agreement should be unenforceable. However, the arbitral tribunal came up to the conclusion that despite the promulgation of the Saudi Arabian decree, under the Californian Law (governing law) Northrop was obliged to perform the agreement and as a consequence rendered the award enforcing the payment of commission to the intermediary. Although Northrop successfully challenged the award in the US court, the Ninth Circuit Court of Appeal then reversed lower court’s judgment setting aside the award. The Court of Appeal held, that:

…the mere error of interpretation of California law would not be enough to justify refusal to enforce the arbitrators’ decision….The arbitrators’ conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to

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146 Hwang and Lin, supra note 25, p. 58.  
the Arbitrators; the Arbitrators carefully considered and decided them in a lengthy written opinion.\textsuperscript{148}

It is evident that the court fully relied on the findings made by the tribunal and did not reconsider the illegality issue of intermediary agreement. Thus, this judgment demonstrates the high degree of deterrence to the finality principle of arbitral awards.

The court took the similar approach in \textit{Thomson-CSF v Frontier AG} case.\textsuperscript{149} The main issue of the dispute was the nature of the intermediary agreement governed by the French law and under which Frontier AG had to obtain the contract of selling six frigates to Taiwan for Thomson-CSF. The parties entered into the agreement in 1990, when the government of France, owing to China’s objections to the selling of frigates, opposed the deal. However, in 1991 the government of France re-authorized the deal by dropping its opposition, after which Thomson-CSF gained the right to sign the sales contract with Taiwan. Frontier AG brought the arbitration proceedings in Switzerland after Thomson-CSF refused to pay the commission fee. Frontier AG was arguing that the purpose of the intermediary agreement was to overcome the objections of Chinese officials by legitimate lobbying activities performed by Mr. Kwan. In contrast, Thomson-CSF claimed that Mr. Kwan was involved in corruption and was acting for neutralizing the French veto by illegitimate ways. However, arbitral tribunal rejected allegations of corruption and rendered the award in favor of Frontier AG. Thomson-CSF challenged the award on different grounds in the Swiss Federal Tribunal. Similarly to \textit{Northop v. Triad} case, one of the grounds of the challenge was the incorrect application of the law, namely the French Penal Code which prohibited the agreements of the sale of influence. Court in its reasoning noted that even if the law was ‘’badly applied’’ and the challenge was founded, it would not have been sufficient for setting aside the arbitral award.\textsuperscript{150}

Accordingly, in both above noted cases courts were reluctant to conduct judicial review of tribunals’ application and interpretation of the corresponding law. In addition, in \textit{Thomson-CSF v Frontier AG} court also resisted to re-open findings of fact made by the arbitral tribunal. In particular, court rejected Thomson-CSF’s argument that the tribunal relied on ‘’non-existent evident’’ while concluding that Mr. Kwan’s action did not constitute corruption.\textsuperscript{151}

\textsuperscript{148} Ibid., para. 1269.
\textsuperscript{149} ICC Rulings: ICC case No. 7664, Frontier AG v. Brunner Sociede vs Thomson CSF, Final Award, 1996; This case, similarly to \textit{Hilmarton}, was judged several times in national courts of different countries.
\textsuperscript{150} Sayed, supra note 5, p. 400.
\textsuperscript{151} Hwang and Lin, supra 25, p. 54.
The limitations to the general minimal judicial review approach, however, exist. These three limited instances, which were already noted in the beginning of this chapter, will be discussed and exemplified below.

First, we will refer to the scenario when court re-opens arbitral tribunal’s findings of fact due to the fresh evidence provided by challenging party. However, distinction should be made between fresh evidence and new evidence. The former can be defined as unavailable evidence which could not have been obtained and therefore submitted during arbitration proceedings. In contract, new evidence is obtainable at the time of arbitration hearing process, but challenging party fails to present it to the arbitral tribunal.\footnote{Westacre case} will be a good illustration of this issue.

Westacre entered into a contractual relationship with the Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia (the “Directorate”) and a Yugoslavian bank (the “Bank”)\footnote{All following references to the Directorate should be read as to the “Directorate and the Bank.”} according to which Westacre had to act as an intermediary with respect to the sale of military equipment to the Government of Kuwait. The written contract was performed in Kuwait, but was governed by the Swiss law and place of arbitration was also Switzerland. After the Directorate breached its contractual obligations Westacre filed the suit in arbitration. Directorate alleged that Westacre bribed various Kuwaitis with the aim that those persons would exercise their influence in favor of entering into a sales contract. On that ground Directorate had contended that agreement was against to the “ordre public international” and thereby it must have been deemed void. The arbitral tribunal held that defendants could not submit the relevant evidences for proving the bribery and correspondingly all allegations regarding the corruption were rejected.\footnote{Westacre Investments Inc. v. Jugoimport – SDPR. Holding Co. Ltd, Arbitral Award, 1994.} Moreover, arbitrators concluded that lobbying by private enterprises with the aim of obtaining public contracts is not an illegal activity and contrary to the public policy under Swiss law.

The Directorate challenged the award in The Swiss Federal Court and tried to vacate it under Swiss law. The appellants brought the allegations on corruption again. The Swiss Federal Tribunal noted that they can base their arguments only on the facts found by the arbitral tribunal and since the allegations of the corruption were already considered and rejected by the tribunal, appellants’ claims should be rejected in the present case too (despite the fact that if the allegations were proved, the agreement would have become void under Swiss

law). Court found that there was no ground of appeal and as a consequence upheld the award.\textsuperscript{155}

Subsequently the award on its enforcement stage was challenged again by Directorate in English High Court and later in The Court of Appeal. Directorate provided the new evidence not submitted before the tribunal, by way of a sworn affidavit alleging that intermediary agreement was just the fake contract to pay the bribe to Mr. Al-Otaibi (intermediary) through Westacre which was acting as a vehicle for the sole object to maintain the anonymity of Mr. Al-Otaibi and other public officials of Kuwaiti. In addition, Directorate was alleging that witnesses of Westacre gave false evidence during arbitration proceedings in order to conceal the fact of bribery. Lord Justice Mantell made the following comment on the new allegation of corruption:

The allegation was made, entertained and rejected [by the Tribunal]. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.\textsuperscript{156}

So, the judge underlined that the new allegation was based on the facts and materials which were known for the appellant during the arbitration proceedings and therefore could have been brought before the tribunal. Moreover, both courts noted that the award was valid under to the law chosen by the parties, i.e. Swiss law and the award was made by Swiss arbitrators whose competence and jurisdiction was not a question. The courts wanted to emphasize that the public policy of sustaining international arbitral awards outweighed the public policy in discouraging international commercial corruption in the circumstances where corruption was already considered and rejected by the arbitral tribunal. This principle of ‘‘strongest and conceivable public policy’’ against re-opening the tribunal’s findings may be disturbed only upon submission of fresh evidence. As a consequence, the award was enforced.\textsuperscript{157}

Second limitation of minimal judicial review approach is error of law made by the arbitral tribunal.\textsuperscript{158} The Singapore Court of Appeal case of \textit{AJU v. AJT} is properly illustrates that particular aspect of minimal judicial review approach. AJU and AJT entered into the contract under which AJU was allowed to stage an annual tennis tournament in Bangkok for five

\textsuperscript{155} Swiss Federal Tribunal, Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd, 1996.
\textsuperscript{156} Westacre, supra note, 135, para. 70.
\textsuperscript{157} Swiss Federal Tribunal, Thomson-CSF v Frontier AG, 1997; this judgment can be interpreted as standing for the same proposition.
\textsuperscript{158} Doraisamy Raghunat, \textit{AJU v AJT: Drawing the Line for Judicial Intervention in Arbitral Awards}, official legal opinion on \textit{AJU v AJT} case of DueanneMoriss & Selvam LLP (law firm), 2012, p. 3.
years period. Disputes arose and AJT commenced arbitral proceedings against AJU. In the meanwhile AJU lodged complaint of fraud with the Thailand Special Prosecutor’s Office, alleging that AJT by providing forged document fraudulently misrepresented that they were entitled to organize the tournament. Under Thai law, fraud is deemed as compoundable offense, while forgery and use of forged documents are non-compoundable. It means that withdrawing the complaint would only have terminated the criminal proceedings regarding fraud, but not for the forgery.

As the investigations were ongoing, parties entered into the settlement agreement under which AJT had to terminate arbitral proceedings if AJU had provided the evidence of withdrawal, discontinuation or termination of all criminal proceedings going in Thailand. AJU was also required to pay a settlement fee in amount of US$470,000. Subsequently AJU fulfilled all of its duties under the settlement agreement. As a result, the Thai authorities ceased the criminal proceeding on the charge of fraud and on the ground of insufficient evidence issued non-prosecution order on the forgery charges. Nevertheless, AJT refused to terminate arbitration, arguing that AJU did not fully comply with the obligations of settlement agreement, since the proceedings on the forgery charges could still have been renewed in case of production of additional evidence.

AJU made an application to the tribunal for terminating arbitral proceedings on the basis that the parties reached final settlement. AJT, on the other hand, claimed that the agreement was invalid on the grounds of duress, undue influence and illegality. In reaching its decision, arbitrators took into account that both parties were advised by consultants. Consequently, AJT should have been aware of the fact that the discontinuance of criminal proceedings for forgery charges would still have been laid in the hand of Public Prosecutor and withdrawal of the proceedings could not have guaranteed the ending of the investigations. The tribunal also found that settlement agreement was valid and, consequently, dismissed both claims and rendered interim award terminating arbitral proceedings.

AJT applied to the High Court to set aside the interim award on the public policy ground, arguing that the settlement agreement was illegal, since it was concluded for the sole purpose to stifle the prosecution of forgery charges and that corruption was involved in the procurement of the non-prosecution order. The court rejected the latter ground, however, accepted the former one and therefore re-opened tribunal’s findings on the validity of settlement agreement. After re-evaluating the evidences the court found that the settlement agreement was illegal under its governing law (Singapore law) and the law of the place of performance (Thai law) and, consequently, set the interim award aside.
On the appeal, the key issues were whether the lower court was correct in re-opening the findings of the arbitral award and whether the judge correctly found that the settlement agreement was illegal.

The court considered two divergent approaches adopted under English case law: “less interventionist” approach taken by Wesracre majority on the one hand, and “more interventionist” two-stage test of Soleimany v. Soleimany, on the other. Considering the finality principle of arbitral awards the court took the Wesracre approach and held the lower court did not have the right to re-open the arbitral tribunal’s findings in the case at hand. The Chief Justice further noted that the arbitral tribunal considered all relevant facts and, hence, the court could not re-open or substitute the findings made by arbitral tribunal. The court is only entitled to do it if it errs in finding of law.

Hereby, it becomes crucial to draw the distinction between a finding of fact and a finding of law. In this regards, the Court of Appeal provided a description of the finding of law, that is to say the explanation of what constitutes the error of law. If the arbitral tribunal had found that settlement agreement was illegal under its governing law and nevertheless held that it could be enforced in Singapore on the basis that enforcing a contract, which was illegal under its governing law, is not contrary to the public policy of Singapore, would be finding of law. Thus, in that scenario court is entitled to intervene and re-open tribunal’s findings in order to correct an error of law. From the foregoing discussion we can conclude that the second limitation to the minimal review approach is error of law, which from this particular example can be also defined as an incorrect identification or interpretation of the forum state’s public policy.

In contrast, finding that the contract is illegal under its governing law is just a finding of fact which is not sufficient ground for the intervention, unless there is “‘fraud, breach of natural justice or some other recognized vitiating factors.’”

Third limitation of minimal judicial review approach is those above noted vitiating factors which will be exemplified in Thomson-CSF v Frontier AG when this case, after dismissing Thomson-CFS’s application for setting aside the award, second time went before the Swiss Federal Tribunal. The challenge was based on the findings of French investigations which revealed that the real object of intermediary agreement was to influence French Foreign

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160 Hwang and Lin, supra note 25, p. 55
161 The Singapore Court of Appeal, SGCA 41, AJU v AJT, 2011, para. 65
Minister to reconsider his objections on the sale. Mr. Kwan (intermediary) was just used to conceal the fraudulent scheme orchestrated by associates of Frontier AG. However, as already mentioned, Frontier AG was claiming that Mr. Kwan was just acting to overcome the objections of Chinese officials in legitimate way. Hence, it became obvious that Frontier AG committed a fraud in presentation of the evidence before the arbitral tribunal. The court found that the arbitral tribunal was misled by the procedural fraud which therefore had the direct influence on the award. As a result, Swiss Federal Tribunal set aside the award and remanded the matter to the original tribunal or a new tribunal to be constituted under ICC rules.

6.2. Maximal Judicial Review

Maximal judicial review could be defined as the total scrutiny of arbitral tribunal’s findings of fact and law. Main justification of the courts taking this approach is to preserve main national values and interests reflected in the public policy.

The first main characteristic of maximal judicial review approach is that the findings can be re-examined de novo. Court has the freedom to re-evaluate the findings of facts and re-examine not only non-application, but bad interpretation of the law. Second, the court may consider the evidence which was available and obtainable at the time of arbitral proceedings, but was not presented before the tribunal by challenging party. Third, court has the ‘’total control’’ for de novo review of the allegations about the facts even if they were rejected by arbitral tribunal. Several cases will be discussed below for the better clarification of these particular aspects of maximal judicial review approach.

First, we will adhere to already well-known Thomson-CSF v Frontier AG case which on the enforcement stage was also adjudicated in France by the Paris Court of Appeal. In particular, Frontier AG presented the award for enforcement in France after Swiss Federal Tribunal had already rejected Thomson-CSF’s motion to set the award aside. Paris

These investigations were finished when the arbitral award was already challenged once in Swiss Federal Tribunal.

Sayed, supra note 5. p. 406.

Ibid., p. 407-408.

Enonchong, supra note 152, p. 514.

Sayed, supra note 5, p. 408-409.


However, as we already discussed above, this award was then successfully set aside when it was challenged second times in the Swiss Federal Tribunal (see Sub-Section 6.1.).
Tribunal of First Instance rendered an award enforcement order which was appealed by Thomson-CSF in Paris Court of Appeal.

Thomson-CSF was alleging that the evidence presented by Frontier AG before the arbitral tribunal was defrauded and fictitious, contravening public policy, and on that ground also filed a criminal complaint requesting the investigation of fraudulent scheme in which associates of Frontier AG were involved. The alleging party also requested to stay proceedings until the results of the criminal investigations would be uncovered. The Paris Court of Appeal granted the request and ordered to stay proceedings directly in the beginning of criminal investigations (before the revelation of fraudulent scheme), which therefore means that it did not apply the fraud limitation for the intervention with arbitral tribunal’s findings of fact under minimal judicial review approach. Furthermore, court noted that challenging an award on international public policy ground grants the court with the power to perform comprehensive judicial review of arbitral tribunal’s findings, disregarding whether appellant provided the evidence of fraud or not. The court in its reasoning several times underlined the importance of public policy values and held that the arbitrators are required to have the ‘ability to appreciate all elements of facts and law allowing notably to justify the application of the rule of international public policy, and, in the affirmative, to measure the legality of the contract.’

The court gave the similar reasoning in Alsthom v Westman case, where the parties entered into the intermediary agreement under which Westman had to promote Althom’s gas turbines in order to help it in the bidding process and get the prequalification status for certain petrochemical project in Arak, Iran. After getting through the prequalification process Westman requested the commission fee, but Alsthom rejected to pay it. Consequently, Westman initiated ICC arbitration. During arbitral hearings Alsthom was arguing that intermediary agreement was illicit in its motives and objectives as the primary purpose of this agreement was to pay the bribes to the public officials. However, arbitral tribunal held that there was no sufficient evidence to prove illegality of intermediary agreement and rendered the award ordering Alsthom to pay the commission.

Alsthom, which had by then changed its name to European Gast Turbines (to avoid confusion we will still refer to it as Alsthom), sought the setting aside of the award before

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170 Hwang and Lin, supra note 25, p. 60.
171 Paris Court of Appeal, Thomson-CSF v Frontier AG, 1999, see Hwang and Lin, supra note 25, p. 60.
173 Martin, supra note 30, p. 38.
the Paris Court of Appeal alleging that the enforcement will contravene the public policy on two grounds: first, the award enforced the contract which was null and void since its main objective was traffic in influence and bribery; second, because the award was based on fictitious report of expenses which Westman submitted in arbitration. In order to prove its allegations Alsthom provided new evidences which could have been obtained during the hearings, but was not presented before the tribunal. The court held that the presented evidence was not sufficient to prove the corrupt nature of the contract, however, concluded that the second ground for setting aside the award was founded. Consequently, The Paris Court of Appeal set aside the award on public policy grounds.\(^\text{174}\)

Thus, in this case the court conducted de novo review of the tribunal’s findings. The judges considered the issue of illegality of underlying contract which was already adjudicated by the tribunal. They also accepted the new, but not fresh evidence, which could have been presented during the arbitral proceedings.

The foregoing analysis demonstrate that the courts applying maximal judicial review approach show less deterrence to the finality principle of arbitral awards and are more ‘‘jealous in preserving certain national values and policies.’’\(^\text{175}\)

Maximal judicial review approach was adopted by many European courts, such as, for instance, the Court of Appeals of Brussels, the Court of Appeal of Hague, the Higher Court of Düsseldorf\(^\text{176}\) and Federal Court of Germany.\(^\text{177}\) All of these courts have taken the view that they are entitled to judicially scrutinize the awards without any limitation.

However, recent practice show that the judicial attitude of European courts towards maximal review approach is slightly shifted. Below will be analyzed several cases where the courts, belonging to the jurisdictions supporting maximal judicial review approach, rejected to undertake the ‘‘total control’’ on the arbitral award and therefore did not conduct de novo review of the tribunal’s findings of fact and law. For the illustration of that issue we will get back again to Thomson-CSF v Frontier AG case (which had been stayed in 1999), on which the final decision was rendered in 2010. Despite revelation of the corrupt object of the intermediary agreement and misleading the tribunal by fraudulent evidence, Frontier AG recommenced the proceedings and was yet seeking the enforcement of the award on the ground that the finality of the arbitral award had to outweigh the public policy values. The


\(^{175}\) Sayed, supra note 5, p. 393.

\(^{176}\) Hwang and Lin, supra note 25, p. 61.

\(^{177}\) Harbst, supra note 145, p. 26.
court rejected the argument and refused to enforce the award. However, the court in its reasoning justified the re-examination of the tribunal’s findings on the ground that the award was the product of procedural fraud.\textsuperscript{178} Thus, in this case, despite the acceptance of new evidence, the court applied minimal review approach, since the existence of fraudulent evidence is deemed to be one of the limitations of minimal judicial review standard.

Moreover, the Paris Court of Appeal’s reluctance to conduct \textit{de novo} review of the awards dates back to its decision of \textit{SA Thales Air Défense v. Euromissile case},\textsuperscript{179} where the court held that the award on the public policy ground may be reviewed \textit{de novo} if the recognition or enforcement of that award would “breach French legal order “in an unacceptable manner,” such breach constituting a “manifest” violation of an essential rule or a fundamental principles.”\textsuperscript{180} Accordingly, in France there is no longer unanimous support for maximal judicial review approach.

Similarly, German courts in several cases resisted to conduct maximal judicial review of the arbitral awards. In High Regional Court of Hamburg alleging party was challenging the enforcement of arbitral award, rendered in Swiss arbitration, on the ground that the money paid under the contract was just bribe and not the payment for performing the services. However, the High Regional Court of Hamburg held that the court’s power to re-examine the findings of the tribunal was limited to procedural errors and therefore it was impermissible to re-examine the findings of the tribunal.\textsuperscript{181}

The same approach was adopted by High Regional Court of Bavaria which held that it is generally forbidden for the court to replace arbitral tribunal’s evidence with its own evidence and underlined the independence of the arbitration and finality principle of arbitral awards.\textsuperscript{182}

Hence, the approach of judicial review adopted by the courts can vary even within the courts belonging to the same jurisdiction.

\textbf{6.3. Contextual Judicial Review}

In order to keep the balance between two important public policies - sustaining international arbitration awards, on the one hand, and discouraging corruption in international trade, on

\textsuperscript{178} Hwang and Lin, supra note 25, p. 62.
\textsuperscript{181} High Regional Court of Hamburg, 6 U 110/97, 1998.
\textsuperscript{182} High Regional Court of Bavaria, 4Z Sch 23/02, 2003.
the other, courts have to conduct contextual judicial review of arbitral awards. Contextual review is a two-stage test which provides a structure manner for the two types of competing public policies to be balanced.183

The leading form of two-stage test was suggested in Soleimany v. Soleimany case where the English court at the enforcement stage looked behind the award, rendered by Beth Din and considered the issues regarding corruption and the illegality of the underlying contract. Interestingly, Waller L.J.184 delivering the court’s judgment in this case, explained how the court has to scrutinize the award which did not find the illegality underlying the contract of the parties. The court took the view in obiter dictum, that in order to respect both concerns of public policy, two-stage test should be adopted. At the first stage, the court has to determine whether the alleging party provided prima facie evidence about the illegality of the contract and then conduct preliminary enquiry (short of full-scale investigation) in order to see if ‘full faith and credit’ should be given to the arbitral award.185 Waller L.J. suggested that it was unnecessary to conduct full-scale investigation in the first stage since it ‘would create the mischief which the arbitration was designed to avoid’.186 Once the court concludes that ‘full faith and credit’ could not be given to the arbitral award, then full-scale enquiry into the issue of illegality should be conducted as a second stage.187

Westacre case better illustrates which factors have to be considered on the first stage in order to determine the necessity of full-scale enquiry on the second stage. Sayed restated these factors as follows:

1) Available evidence of legality and illegality;

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

3) The degree of competency of the Arbitrator;

4) The way arbitration was conducted. Care must be taken to verify whether the award was procured by fraud, collusion or bad faith.188

However, Waller L.J in Westacre judgment developed his two-stage test (first applied in Soleimany v. Soleimany) and argued that the ‘nature of the illegality’ should also be considered by the court as a first stage factor. Although the other judges did not favor two-

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183 Leong, Chong Yee, Commentary on AJT v AJU, Singapore International Arbitration Centre, p. 4
184 He was also the dissenting judge in the decision of High Court of Appeal of England in Westacre.
185 Enonchong, supra note 152, p. 506.
186 Soleimany v Soleimany, supra note 112, para. 824
187 Leong, Chong Yee, Commentary on AJT v AJU, Singapore International Arbitration Centre, p. 3.
188 Sayed, supra note 5, p. 415.
stage test, they nonetheless conducted first stage enquiry (obiter) and established that the ‘‘nature of the illegality’’ should be regarded as the factor which had to be considered only on the second stage ‘‘as part of the balancing exercise between the competing public policy considerations of finality and illegality.’’ Thus, majority of the Westacre operated the two-stage test applied by Waller L.J. in Soleimany v. Soleimany and therefore did not consider ‘‘the nature of the illegality’’ on the first stage. Consequently, they came up to the following conclusion:

First, there was evidence before the Tribunal that this was a straightforward, commercial contract. Secondly, the arbitrators specifically found that the underlying contract was not illegal. Thirdly, there is nothing to suggest incompetence on the part of the arbitrators. Finally, there is no reason to suspect collusion or bad faith in the obtaining of the award.

Accordingly, the majority of Westacre held that there was no need to conduct full-scale investigation under second stage, even if the two-stage test should have been applied in this case.

Waller L.J made it clear that while evaluating the illegality issue of the underlying contract (on both stages) the court had the freedom to consider not only fresh, but new evidence as well; it may even consider the evidences already submitted before the arbitral tribunal. Such broad discretion to consider all kinds of evidences echoes the standard of maximal judicial review, whereas preliminary enquiry, instead of full-scale investigation at the first stage, is the illustration of the deference to the arbitral tribunal’s findings, in line with minimal judicial review standard. Thus, contextual judicial review approach holds the intermediary position between minimal and maximal review standards.

6.4. The Appropriate Standard of Judicial Review

Crucial issue is to determine which of the above analyzed approaches serves better for the balance of two competing public policy considerations – finality of the awards and discouraging corruption in international trade.

First, we will start the discussion with minimal judicial review approach which shows the great deference to the international arbitration and finality of the arbitral awards. Although

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189 Westacre, supra note 135, para. 71.
190 Ibid., para. 71.
191 Hwang and Lin, supra note 25, p. 66
respecting the principle of the finality of arbitral awards serves number of functions and therefore has number of advantages, it is also undisputable that, on the other hand, minimal judicial review approach ignores other fundamental public policy concerns, such as the public policy discouraging morally repugnant agreements for corruption. For the demonstration of the weakness of minimal judicial review approach we will recall to already discussed Thomson-CSF v Frontier AG case. For instance, if the French or Swiss court had enforced the award against Thomson-CSF and before the end of the criminal investigations (as we already know the investigations revealed findings of corruption) Frontier AG would have become insolvent, then the enforcement of the award would have been unjust and therefore contrary to the French and Swiss public policy. Furthermore, the related consequences would have been irreversible, since it might have been impossible to alleviate the damages done to fundamental public policy concerns of both countries. 192

Accordingly, under minimal judicial review approach party, which procured the contract with bribery, in almost all circumstances (subject to certain limitations of minimal review standard) will have the opportunity to enforce corruption-tainted award.

In contrast, maximal judicial review standard goes too far and ignores the public policy goals underlying the principle of finality of arbitral awards. It is correctly argued that arbitration may not be a ‘means to circumvent public policy rules’. 193 Therefore the contextual judicial review which holds the intermediary position minimal and maximal review standards might be the appropriate way to balance the two competing considerations. Below will be briefly discussed whether this statement is viable or not.

If the court had adopted the contextual judicial review standard to the Thomson-CSF v Frontier AG case then the corruption involved in intermediary agreement could have been detected. Although the enquiry on the first stage is conducted on summary basis, it nevertheless uncovers some significant signs of corruption. Moreover, the probability of discovering the corruption increases if the later version of two-stage test, proposed by Waller L.J. in Westacre, would be operated, since assessing the ‘nature of the illegality’ on the first stage will certainly trigger the second stage where more elaborate examination ought to be conducted by the court. Thus, it is clear that under contextual judicial review there is greater chance to discover corruption or other illegality rather than under minimal judicial review standard.

192 Ibid., 74.
On the other hand, the first stage of the contextual judicial review is supposed to preserve the public policy goals underlying the finality of the award, since it does not permit the investigation of the findings in favour of the alleging party. It means that if the arbitral award’s lack of credibility could not easily be perceived by provided evidences and argumentations, then the court should give full faith and credit to the tribunal’s findings and therefore uphold the award.\(^{194}\)

Finally, we want to adhere to the issue whether the two-stage test, adopted by Waller L.J. in *Soleimany v. Soleimany*, or proposed in his dissenting Westacre judgment, is more effective. Commentators opine that the latter one has the superiority.\(^{195}\) Excluding the ‘‘nature of the illegality’’ from the first stage means that if the arbitration is conducted in due manner with ‘‘high caliber ICC arbitrators’’\(^{196}\) and there is no doubt about the impartiality of the arbitrators, then the court will not proceed to the second stage enquiry and therefore will upheld the award no matter how serious the alleged illegality is. For instance, in *Thomson-CSF v Frontier AG* case alleging party was arguing that French Foreign Minister was involved in corrupt scheme, but other factors of the first stage were evenly balanced. If *Soleimany v. Soleimany* approach would be applied to this scenario, then the court would not have had the mandate for full-scale enquiry on the second stage and as a consequence, corruption-tainted contract would have been enforced.\(^{197}\) In contrast, for the respect of finality of the arbitral awards court has to uphold the award under the circumstances where the factors of the first stage are evenly balanced and there is no serious allegation of illegality.

However, commentators argue that Waller L.J. went too far when he noted that even the evidence submitted before the tribunal could be considered by the court. Waller L.J.’s view in this case is too extreme and infringes the principle of finality.\(^{198}\) Conversely, majority in *Westacre* held that only the submission of fresh evidence can be the justification for the interference with the arbitral award’s findings.\(^{199}\) Thereby we conclude that the intermediate approach, allowing the courts to interfere with the award in the cases where there is new, but not necessarily fresh evidence, could be deemed as a most appropriate means for balancing two competing public policy considerations.

\(^{194}\) Hwang and Lin, supra note 25, p. 76.

\(^{195}\) Ibid., p. 76-77.

\(^{196}\) Westacre, supra note 135, para. 70.

\(^{197}\) Enonchong, supra note 152, p. 800.

\(^{198}\) Hwang and Lin, supra note 25, p. 77; Enonchong, supra note 152, p. 509-510.

\(^{199}\) Enonchong, supra note 135, p. 510.
Conclusion

The underlying theme of this paper has been to illustrate the discrepancy between mounting denunciation of corruption in international commercial relationships and persistent resistance to such denunciation. Corruption contravenes the main concerns of public policy of all civilized nations; it is internationally condemned and vigorously denounced. At first glance this condemnation is indeed implemented in arbitral and judicial practice. However, this study found out that arbitral tribunals as well as national courts take different approaches while dealing with the cases involving corruption. This paper sought to provide an explanation why there was no uniformity in international dispute resolution practice with regard to the usage of public policy defense based on the allegations of corruption. The main reasons of this discrepancy are summarized below.

Firstly, different jurisdictions define corruption in various ways. Particularly, they have different points of view whether intermediary agreements could be regarded as a particular type of corruption or not. Secondly, arbitral tribunals differ from each other by the standards of proof which they require from the alleging party for proving the fact of corruption. Thirdly, arbitral tribunals and national courts, applying different conflict of laws rules of different jurisdictions, come up to the diverse conclusions whether parties’ chosen law may be overridden by the law of arbitral seat or place of performance. This matter, on the other hand, has a decisive impact on their decisions about the enforcement of corruption tainted contracts or/and awards. The last main cause of this discrepancy, analyzed in this paper, is that the approaches, adopted by the national courts in regards with the extent of the judicial review of arbitral tribunal’s findings of law and fact, are so divergent, that they may lead to the diverse decisions of the courts even in the cases having similar circumstances.

In this paper we sought to provide possible solutions in respect with some above noted controversies existing in the arbitral and judicial practice. However, the question remains open whether the intermediary agreements should be deemed illegal as being one particular type of corruption or the parties’ intentions must decide the issue of their legality. It is indisputable that harmonization of the different jurisdictions in with regards to this issue will reduce the discrepancies existing today in international dispute resolution practice of corruption cases.
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