PRIVATE REMEDIES FOR CORRUPTION
TOWARDS AN INTERNATIONAL FRAMEWORK

ABIOLA O. MAKINWA

eleven international publishing
# Table of Contents

Acknowledgements ........................................ v

List of Selected Acronyms and Abbreviations ...................... xv

Table of Cases ........................................ xvii

Part I The Foundation for Private Remedies ...................... 1

1 Introduction ................................................................ 3
1.1 The Corruption Conundrum ........................................ 4
1.2 The Research Question ........................................ 11
1.3 Choice of Research Method .................................... 14
1.4 Functional Comparison ....................................... 16
1.4.1 Choice of Countries for Comparison .................. 18
1.4.2 The Parameters for Comparison ......................... 20
1.5 Empirical Case Study ......................................... 22
1.5.1 Choice of Country for Analysis ..................... 23
1.5.2 Methodology of the Case Study ..................... 24
1.5.3 Analysis of Data ......................................... 25
1.6 Relevance of Research ...................................... 26
1.7 Outline of this Book ....................................... 28

2 The Challenges of Fighting Corruption ....................... 31
2.1 Introduction .................................................. 31
2.2 The Problem of Definition ..................................... 33
2.2.1 Corruption as an 'Umbrella Term' ..................... 34
2.2.2 Corruption as a Culturally Complex Phenomenon .... 35
2.2.3 Definition as a Starting Point to Private Remedies .. 36
2.2.4 Illustrations from Case Study: Cultural Perspectives .. 38
2.3 Compromised Processes of Governance .................. 40
2.3.1 The Inefficacy of the 'Compromised' State .......... 40
2.3.2 Corruption as a Self-Fulfilling Prophecy ............ 42
2.3.3 Illustrations from Case Study: The Cycle of Poverty .. 43
2.4 Challenge Faced by Business Operators .................. 45
2.4.1 The Lure of Functional Corruption .................. 45
2.4.2 Illustrations from Case Study: Corruption as an Entry Process .. 46
2.5 Challenge Faced by Judicial Processes .................... 48
### Table of Contents

2.5.1 Illustrations from Case Study: Access to Justice and Information 50
2.6 New Ordering of International Society 51
2.6.1 Corruption in an Increasingly Integrated World 52
2.6.2 The Shifting Public/Private Divide 52
2.6.3 Illustrations from Case Study: The 'Trickle Down' Effect 53
2.7 The Path Ahead 54
2.7.1 Illustrations from Case Study: Moving Forward 55
2.8 Conclusion 57

3 From the FCPA to an International Standard 59
3.1 Introduction 59
3.2 The Foreign Corrupt Practices Act – The Genesis 62
3.2.1 Protecting the Public Interest 64
3.3 The FCPA: The Prohibitions 67
3.3.1 The Anti-Bribery Provisions 68
3.3.1.1 Purpose of the Bribe or Other Inducement 69
3.3.1.2 Persons to Whom the Act Applies 71
3.3.1.3 Alternative Jurisdiction 77
3.3.1.4 Payment to a Foreign Official 79
3.3.1.5 Basis FCPA Liability 81
3.3.2 Exceptions to the Application the FCPA 84
3.3.2.1 Facilitating Payments for Routine Governmental Actions 84
3.3.2.2 Affirmative Defenses 86
3.3.3 Books and Records Provisions 87
3.3.3.1 Prohibition Against False Accounting 88
3.3.3.2 Adequate System of Internal Controls 90
3.4 FCPA Penalties 91
3.4.1 Criminal Penalties for Anti-Bribery Provisions 91
3.4.2 Civil Penalties for Anti-Bribery Provisions 92
3.4.3 Criminal Penalties for Books and Records Provisions 93
3.4.4 Civil Penalties for Books and Records Provisions 93
3.4.5 SEC Powers of Subpoena and Injunction 94
3.5 FCPA Guidance and Opinions by the Attorney General 94
3.6 Enforcement of the FCPA 95
3.7 Effect of Other US Laws and Provisions 97
3.8 Loopholes in the FCPA 99
3.9 Encouraging a Public-Private Partnership 100
3.10 Internationalization of the FCPA Standard 101
3.10.1 World-Wide Criminalization: The Consensus against Corruption 102
3.10.2 Categories of Instruments 105
### Table of Contents

3.11 Key Elements of International Corruption 107  
3.11.1 Active Bribery Directed at a Foreign Official 107  
3.11.2 A Commercial Context 110  
3.11.3 Exclusion of Facilitation Payments and Permitted Bribery 110  
3.11.4 Effect, Nature and Intent of the Bribe 111  
3.11.5 Territorial and Nationality-Based Jurisdiction 112  
3.11.6 Mandatory and Permissive Aspects of Normative Order 114  
3.12 Self-Regulation and Best Practices 115  
3.12.1 The OECD Guidelines for Multinational Enterprises 116  
3.12.2 The OECD Good Practice Guidance 117  
3.12.3 The United Nations Global Compact 118  
3.12.4 The International Chamber of Commerce Rules 118  
3.12.5 The Partnering Against Corruption Initiative 119  
3.13 Observations 119  
3.14 Conclusion 122  

### Part II Models of Private Remedies 123  

<table>
<thead>
<tr>
<th>4</th>
<th>Private Remedies in the United States</th>
<th>125</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1</td>
<td>Introduction</td>
<td>125</td>
</tr>
<tr>
<td>4.2</td>
<td>The Normative Framework</td>
<td>126</td>
</tr>
<tr>
<td>4.2.1</td>
<td>International Instruments</td>
<td>126</td>
</tr>
<tr>
<td>4.2.2</td>
<td>Federal Law</td>
<td>127</td>
</tr>
<tr>
<td>4.2.2.1</td>
<td>18 USC Chapter 11 Bribery Graft and Conflicts of Interest</td>
<td>128</td>
</tr>
<tr>
<td>4.2.2.2</td>
<td>Antitrust Law</td>
<td>129</td>
</tr>
<tr>
<td>4.2.2.3</td>
<td>Securities Acts 1933 and 1934</td>
<td>132</td>
</tr>
<tr>
<td>4.2.2.4</td>
<td>The RICO Act 1970</td>
<td>134</td>
</tr>
<tr>
<td>4.2.2.5</td>
<td>The False Claims Act 1863</td>
<td>135</td>
</tr>
<tr>
<td>4.2.3</td>
<td>State Commercial Bribery Laws</td>
<td>136</td>
</tr>
<tr>
<td>4.3</td>
<td>The Private Right of Action</td>
<td>139</td>
</tr>
<tr>
<td>4.3.1</td>
<td>Position Under Treaty Law</td>
<td>139</td>
</tr>
<tr>
<td>4.3.2</td>
<td>Position Under the FCPA</td>
<td>141</td>
</tr>
<tr>
<td>4.3.3</td>
<td>Position Under State Law</td>
<td>145</td>
</tr>
<tr>
<td>4.4</td>
<td>Transaction Validity</td>
<td>147</td>
</tr>
<tr>
<td>4.4.1</td>
<td>The Fiduciary Duty</td>
<td>147</td>
</tr>
<tr>
<td>4.4.2</td>
<td>The Primary Contract</td>
<td>149</td>
</tr>
<tr>
<td>4.4.2.1</td>
<td>Unenforceability on Grounds of Statutory Illegality</td>
<td>150</td>
</tr>
<tr>
<td>4.4.2.2</td>
<td>Unenforceability on Grounds of Public Policy</td>
<td>151</td>
</tr>
<tr>
<td>4.4.2.3</td>
<td>Effect of Unenforceability of Primary Contract</td>
<td>156</td>
</tr>
<tr>
<td>4.4.3</td>
<td>The Secondary Contract</td>
<td>159</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>4.5</td>
<td>The Private Claim for Corruption</td>
<td>165</td>
</tr>
<tr>
<td>4.5.1</td>
<td>Actions by Principal of Disloyal Agent</td>
<td>166</td>
</tr>
<tr>
<td>4.5.1.1</td>
<td>Recovery against the Disloyal Agent</td>
<td>167</td>
</tr>
<tr>
<td>4.5.1.2</td>
<td>Recovery against the Bribe-Giver</td>
<td>170</td>
</tr>
<tr>
<td>4.5.2</td>
<td>Shareholder Actions Under the Federal Securities Laws</td>
<td>172</td>
</tr>
<tr>
<td>4.5.3</td>
<td>Shareholder Actions for Breach of Fiduciary Duty</td>
<td>175</td>
</tr>
<tr>
<td>4.5.4</td>
<td>Private Actions by Nationals</td>
<td>176</td>
</tr>
<tr>
<td>4.5.5</td>
<td>Private Actions by Foreign Governments</td>
<td>177</td>
</tr>
<tr>
<td>4.5.6</td>
<td>Private Actions by Losing Competitors</td>
<td>178</td>
</tr>
<tr>
<td>4.5.7</td>
<td>Private Actions by Consumers</td>
<td>182</td>
</tr>
<tr>
<td>4.6</td>
<td>Observations</td>
<td>183</td>
</tr>
<tr>
<td>4.7</td>
<td>Conclusion</td>
<td>185</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5</th>
<th>Private Remedies in England</th>
<th>187</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>187</td>
</tr>
<tr>
<td>5.2</td>
<td>The Normative Framework</td>
<td>189</td>
</tr>
<tr>
<td>5.2.1</td>
<td>The Common Law Offense of Bribery</td>
<td>191</td>
</tr>
<tr>
<td>5.2.2</td>
<td>Statutory Law</td>
<td>193</td>
</tr>
<tr>
<td>5.2.2.1</td>
<td>The Public Bodies Corrupt Practices Act 1889</td>
<td>193</td>
</tr>
<tr>
<td>5.2.2.2</td>
<td>The Prevention of Corruption Act 1906</td>
<td>194</td>
</tr>
<tr>
<td>5.2.2.3</td>
<td>The Prevention of Corruption Act 1916</td>
<td>195</td>
</tr>
<tr>
<td>5.2.2.4</td>
<td>The Anti-Terrorism, Crime and Security Act 2001</td>
<td>196</td>
</tr>
<tr>
<td>5.2.3</td>
<td>The New Bribery Act 2010</td>
<td>196</td>
</tr>
<tr>
<td>5.2.3.1</td>
<td>General Bribery Offenses</td>
<td>198</td>
</tr>
<tr>
<td>5.2.3.2</td>
<td>Bribery of Foreign Officials</td>
<td>200</td>
</tr>
<tr>
<td>5.2.3.3</td>
<td>Failure of Commercial Organization to Prevent Bribery</td>
<td>200</td>
</tr>
<tr>
<td>5.2.3.4</td>
<td>Facilitation Payments</td>
<td>201</td>
</tr>
<tr>
<td>5.2.3.5</td>
<td>Scope of Application</td>
<td>202</td>
</tr>
<tr>
<td>5.2.3.6</td>
<td>Self-Reporting/Plea Bargain Agreements</td>
<td>203</td>
</tr>
<tr>
<td>5.3</td>
<td>The Civil Law Definition of Corruption</td>
<td>207</td>
</tr>
<tr>
<td>5.3.1</td>
<td>First Essential Element: Secrecy</td>
<td>208</td>
</tr>
<tr>
<td>5.3.2</td>
<td>Second Essential Element: Conflict of Interest</td>
<td>212</td>
</tr>
<tr>
<td>5.4</td>
<td>Transaction Validity</td>
<td>217</td>
</tr>
<tr>
<td>5.4.1</td>
<td>The Primary Contract</td>
<td>219</td>
</tr>
<tr>
<td>5.4.2</td>
<td>The Secondary Contract</td>
<td>223</td>
</tr>
<tr>
<td>5.5</td>
<td>The Private Claim for Corruption</td>
<td>228</td>
</tr>
<tr>
<td>5.5.1</td>
<td>Claim by Principal for the Bribe and Resulting Profits</td>
<td>229</td>
</tr>
<tr>
<td>5.5.1.1</td>
<td>Claim Against the Agent</td>
<td>229</td>
</tr>
<tr>
<td>5.5.1.2</td>
<td>Claim Against the Bribe-Giver</td>
<td>235</td>
</tr>
<tr>
<td>5.5.2</td>
<td>Claim in Tort for Damages</td>
<td>238</td>
</tr>
</tbody>
</table>
### Table of Contents

5.5.3 Claim for Breach of Employment Contract 240
5.5.4 Rule Against Double Recovery 241
5.5.5 Misfeasance in Public Office 241
5.5.6 Tortious Interference 243
5.5.7 The Public Interest Litigant 244
5.5.8 Shareholder Litigation 245
5.6 Observations 246
5.7 Conclusion 250

6 Private Remedies in the Netherlands 251
6.1 Introduction 251
6.2 The Normative Framework 255
6.2.1 International Instruments 255
6.2.1.1 Explanatory Reports on the CLC and UNCC 257
6.2.2 National Law 259
6.2.2.1 The Dutch Penal Code 259
6.2.2.1.1 Active Bribery as an Offense by Public Officials 260
6.2.2.1.2 Passive Bribery as an Offense by Public Servants 261
6.2.2.1.3 Private Bribery as an Offense 262
6.2.2.2 Dutch Civil Law 264
6.2.2.2.1 Distinguishing Element of Bribery 265
6.3 Consequences of Bribery on Contracts 267
6.3.1 Contractual Validity of Primary and Secondary Contracts 267
6.3.2 The Primary Contract 269
6.3.2.1 Invalid as Contrary to Public Order and Public Morality 270
6.3.2.2 Invalid as Contrary to Mandatory Law 271
6.3.3 The Secondary Contract 273
6.3.3.1 Invalidity for Duress, Fraud, Undue Influence 274
6.3.3.2 Invalidity for Reasons of Error 276
6.4 Right to Return of the Bribe or Other Performance 281
6.4.1 Position of the Bribe-Giver 281
6.4.2 Position of the Bribe-Recipient 282
6.4.3 Position of the Principal of the Disloyal Agent 284
6.5 Tort Claims 285
6.5.1 The Claim Against the Agent 286
6.5.2 The Claim Against the Bribe-Giver 286
6.6 Compensation for Damages 288
6.6.1 Damages for Non-Performance of an Obligation 288
6.6.2 Joint and Several Liability 291
6.7 Dismissal of the Agent 291
# Table of Contents

6.8 The Collective Claim 292
6.9 Observations 294
6.10 Conclusion 297

7 The Role of International Arbitration 299
7.1 Introduction 299
7.2 The Arbitration Panel and the Victim of Corruption 301
7.3 Implications of Criminalization 302
7.4 The Public/Private Divide 304
7.5 Effect of Mandatory Nature of Anti-Corruption Rules 306
7.6 Convergence of International Public Policy on Corruption 311
7.7 A Medley of Roles 313
7.7.1 The Negative Passive Role 314
7.7.2 The Positive Active Role 316
7.8 Questioning the Role of the Arbitration Tribunal 322
7.9 The Socially Responsible Arbitration Tribunal 324
7.10 Conclusion 326

Part III Towards an International Framework 329

8 Transaction Validity 331
8.1 Introduction 331
8.2 Consequences of Corruption under the UN Convention 333
8.2.1 No New Legal Regime 334
8.2.2 Measures Under Art. 34 UNCC 335
8.2.3 Corruption as a Vitiating Factor 337
8.3 The Primary Contract 337
8.3.1 US Law 337
8.3.2 English Law 341
8.3.3 Dutch Law 344
8.3.4 International Arbitration 346
8.4 The Secondary Contract 348
8.4.1 US Law 348
8.4.2 English Law 350
8.4.3 Dutch Law 351
8.4.4 International Arbitration 353
8.5 The Contract as an International Regulatory Tool 354
8.6 Observations 357
8.6.1 Effect of the UNCC 357
8.6.1.1 Art. 34 Reaches Across the Public/Private Divide 357
8.6.1.2 No New Legal Regime 358
8.6.1.3 Reporting on Measures Under Art. 34 UNCC 358
8.6.1.4 Corruption as an Independent Vitiating Factor 358
8.6.2 The Primary Contract 359
8.6.3 The Secondary Contract 360
8.7 Conclusion 361

9 Instituting Private Legal Proceedings 365

9.1 Introduction 365
9.2 Civil Liability as Enforcement Mechanism 366
9.3 Art. 35: The Cornerstone of a Victim-Centered Approach? 369
9.4 Private Right of Action Under Art. 35 UNCC 371
9.4.1 Narrow Scope of Art. 35 UNCC 371
9.4.1.1 Subjection to Principle of Sovereignty 371
9.4.1.2 Subjection to National Law and Principles 372
9.4.1.3 Art 35: Pre-Conditions for Private Right of Action 373
9.4.2 Art. 35 UNCC: Effect of Pre-Conditions 375
9.4.3 Art. 35 UNCC: Effect in US, England and the Netherlands 377
9.4.3.1 Position in the US 378
9.4.3.2 Position in England/the Netherlands 379
9.4.4 No Change in Existing Civil Liability Regimes 381
9.5 Scope of Private Remedies 383
9.5.1 Corruption as an International Legal Wrong 383
9.5.2 Acts of Corruption 384
9.6 Interests Protected Against Acts of Corruption 385
9.7 Damage Primarily to Private Interests 389
9.7.1 Private Redress by Principal of Disloyal Agent 390
9.7.2 Remedies for Tortious Interference 396
9.7.3 Securities Litigation 401
9.7.4 FCPA Antitrust Cases 404
9.8 Damage Primarily to the Public Interest 405
9.8.1 Claim for Social Damages 407
9.8.2 Claim for Mandatory Restitution by a State Company 408
9.8.3 Private Citizens Challenging Acts of Corruption by State Officials 410
9.8.4 The NGO Acting in the Public Interest 411
9.8.5 The Succeeding Government 414
9.8.6 Summary 414
9.9 Encouraging the Private Litigant 415
9.9.1 Standing to Sue: Rights *ius quaesitum tertio* 415
9.9.2 Public Interest Litigation 419
**Table of Contents**

9.9.2.1 Protective Cost Orders 421  
9.9.2.2 Alternative Fee Arrangements 423  
9.9.2.3 Encouraging the Whistle-Blower 425  
9.10 Observations 427  
9.10.1 Effect of Art. 35 UNCC 428  
9.10.1.1 Civil Liability as Sanction and as Right of Redress 428  
9.10.1.2 Limited Scope of Private Right of Action Under Art. 35 UNCC 428  
9.10.1.3 Art 35 UNCC: No Change to Civil Liability Regimes 429  
9.10.1.4 Articulation of *Acts of Corruption* as Legal Wrongs 429  
9.10.2 Claims for Damage to Private Interests 429  
9.10.3 Claims for Damage to Public Interest 432  
9.10.4 Schemes to Encourage the Private Litigant 433  
9.11 Conclusion 434

10 Towards a Transaction Approach 437  
10.1 Introduction 437  
10.2 The Paradox of 'Consensus' and the 'Successful Violation' 440  
10.3 Pitfalls of Current Approach 444  
10.3.1 The Trade Off 444  
10.3.2 Resorting to Private Justice 446  
10.3.3 Effect of Pitfalls 447  
10.4 Anti-Corruption in a Quandary? 449  
10.5 Changing the Conceptual Framework 450  
10.6 Levels of Interaction 452  
10.6.1 The Mandate Level 453  
10.6.2 The Violation Level 455  
10.6.3 The Consequence Level 456  
10.7 Advantages of a Transaction Approach 459  
10.8 Conclusion 461

11 Final Conclusions 463  
11.1 The Foundation for Private Remedies 464  
11.2 Models of Private Remedies 467  
11.3 Towards an International Framework 476  
11.4 Areas for Future Research 477  
11.5 Final Words 478

Selected References 481

Index 503