Effect of Bribery in International Commercial Arbitration

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Available at: https://works.bepress.com/harshadpathak/4/
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Abstract: The issue of bribery in international commercial arbitration throws up complex issues throughout the proceedings. The given paper addresses the three procedural concerns associated with claims tainted by bribery – arbitrability, admissibility, and investigative powers of arbitral tribunal. Regarding arbitrability, it is amply clear that claims tainted by bribery are no longer non-arbitrable in nature. However, an arbitral tribunal ought to proceed to the merits of the dispute only in the circumstance that such claims are found to be admissible before the tribunal. With respect to admissibility of such claims, the authors suggest that if bribery is shown to exist, then such tainted claims shall be procedurally barred due to the application of the Doctrine of Clean Hands and the public policy implications. Lastly, the paper also discusses the three-fold duty of an arbitrator as to determination of corruption in a commercial dispute.

Keywords: commercial arbitration; bribery; doctrine of clean hands; corruption; arbitrability; admissibility; public policy.


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This paper is a revised and expanded version of the paper titled 'Effect of bribery in international commercial arbitration’ presented at 3rd International Private Law Conference, Athens, Greece, 4 October 2012.
1 Introduction

Corruption levels around the world are perceived to have increased over the past few years. Consequently, international commercial arbitrators today are faced with more allegations of corruption, including bribery, than ever before.

The claims tainted by bribery throw up difficult factual and legal issues at practically every stage of the arbitral process. These issues raise complex concerns, varying from arbitrability of the subject matter to the capacity of a quasi-judicial authority to investigate such claims. Thus, the question arises as to how such issues can be resolved within the confines of international commercial arbitration?

The objective of the given paper is to address the procedural concerns associated with claims involving allegations of bribery in international commercial arbitration. In particular, three concerns are individually addressed – arbitrability, admissibility, and investigative powers of an arbitral tribunal.

First, the authors discuss the questions of arbitrability of claims involving allegations of bribery, analysing the judicial development since Judge Lagergren’s famous words in the 1963 ICC award, as well as considering the public policy implications. It is proposed that claims tainted by bribery are no longer non-arbitrable in nature; however, an arbitral tribunal ought to proceed to the merits of the dispute only in the circumstance that such claims are found to be admissible before the tribunal.

This brings us to our second concern – admissibility of claims involving allegations of bribery. The authors propose that in the event bribery is shown to exist, such tainted claims shall be procedurally barred. Reliance is placed on the Doctrine of Clean Hands and the highly contentious considerations of international, as well as transnational, public policy.

In the third and last section, the authors address the question as to how an arbitral tribunal should decide the question of existence of bribery. The discussion focuses on the investigative powers of an arbitral tribunal and the evidentiary considerations that ought to be taken into account while making such decision.

2 Arbitrability of claims involving allegations of bribery

“Arbitration is no longer an unwelcome stepchild in the courts”.

The widespread acceptance and approval of arbitration has posed questions on the relevance of the notion of inarbitrability, that is, the awareness that arbitration is unsatisfactory for resolving certain classes of disputes. Courts across the globe have backed away from this doctrine, rejecting some of its former applications entirely.

The moot point that this section seeks to address is whether the courts/tribunals, when faced with a claim involving allegations of bribery would take recourse to this doctrine and hold such a claim to be inarbitrable?

Arbitrability refers to whether the specific claims raised are of a subject matter capable of settlement by arbitration, and are not subject to the exclusive jurisdiction of the courts. It may be ‘subjective’, that is, the incompetence of either of the parties to submit the specific dispute to arbitration, or ‘objective’, involving the simple question of
what type of issues can and cannot be submitted to arbitration. The latter basically pertains to the implications of the public policy exception to arbitrability, relevant to the present discussion.

2.1 Notions of public policy in international commercial arbitration

Public policy as applied in the field of international arbitration is indeed an eclectic notion. It operates not only as a defence against enforcement once the arbitral award is rendered, but is also relevant as a limit to the procedure followed during an arbitration proceeding. Occasional exceptions to arbitrability are also based on notions of public policy whether derived from statute or decisional law, or neither.

Public policy is believed by many to be the ultimate and necessary limit to the autonomy of international commercial arbitration, and the relationship between the two is exemplified, on occasions, as evidently confrontational, while others characterise it in terms of an alliance. The public policy of a particular place can be defined as comprising the principles and rules ‘pertaining to justice or morality’ or serving ‘the essential political, social or economic interests’ of that place. It can be either national, or transnational.

While transnational public policy is about the internationally accepted standards to be applied, the national public policy can be further categorised as either international public policy or domestic public policy.

International public policy, narrower in scope than the domestic public policy, refers to those principles of the country’s domestic public policy that it will insist on applying in an international relationship or relationship involving different nationalities. Domestic public policy, on the other hand, applies territorially in the sense that it applies only to transactions or relationships which do not involve any foreign element.

Recently, the International Law Association in its Resolution 2/2002 on International Commercial Arbitration had attempted to define the scope of such international public policy to include,

1 fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned
2 rules designed to serve the essential political, social or economic interests of the State, these being known as lois de police or public policy rules
3 the duty of the State to respect its obligations towards other States or international organisations.

Thus, “[a]ccording to this distinction, what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations”.

2.2 The public policy exception to arbitrability

The notion of public policy in international commercial arbitration brings us to another associated question regarding the law (or the public policy) applicable to arbitrability. The following solutions have, inter alia, been advocated in answer to the incommodious question regarding the applicable law:
locus regit actum, meaning the law of the place where the arbitration agreement has been concluded

the law of the seat of the arbitral tribunal, i.e., the lex arbitri

the proper law of the substantive contract in which the arbitration clause is embedded (lex causae)

the law of one/both the parties

the law of the country where the arbitral award is (most likely) to be enforced (which of course leaves us with the uncertainty and indeed speculation where enforcement proceedings might take place)

a combination of laws which may be contemplated under any one of the foregoing seven solutions.

In certain cases, tribunals have chosen to not apply the specific law of a country, but have taken recourse to a transnational approach to determine arbitrability. Whenever there exists a principle that is so intrinsically a part of transnational public policy, tribunals may choose to pay little heed to arguments from the countries relevant in the arbitration. Therefore, when transnational obligations override the international public policies, the tribunal is obliged to apply transnational principles in determining arbitrability. Depending on the facts and circumstances, tribunals have on different occasions picked different solutions from the aforementioned lot. However, the public policy governing arbitrability has most often been determined on the basis of the lex loci arbitri, because the same is most easily identifiable.

In international commercial disputes, certain legal claims, such as civil rights, and employment discrimination claims, do not only implicate the interests of the parties involved in the dispute, but also have significant repercussions for the public at large. However, commercial arbitration is believed to be essentially private in its structure and its aims, and is completely consensual in nature; party autonomy being its backbone. Since commercial arbitrators are men drawn for their specific business expertise, they might, therefore, be incapable of delving into matters which involve public interest.

Thus, the public policy exception to arbitrability is founded on the premise that in cases where an important interest of the public at large is likely to be affected by the resolution of a dispute, decision by arbitration is inappropriate.

The question to be addressed here is whether claims involving allegations of bribery come within the epithet of the aforementioned doctrine.

2.3 Bribery and the public policy exception to arbitrability

Traditionally, arbitration was not considered an appropriate venue for adjudicating claims involving allegations of bribery. The reluctance in recognising the arbitrability of bribery claims can be attributed to concerns about the tribunal’s restricted power to compel the production of evidence and to impose penalties. Earlier judicial decisions frequently concluded that challenges to the legality of the parties’ underlying contract also implicated the associated arbitration clause.

The much debated ‘Lagergren case’, which was a 1963 International Chamber of Commerce (ICC) arbitral award, relied on “general principles denying arbitrators the power to entertain disputes of this nature” to hold the contract (including the arbitral
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clause) to be null and void because it had been drawn up to facilitate the bribing of Argentine officials.22

Contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable... Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations... Parties who ally themselves in an enterprise of the present nature must realize that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes... Thus, jurisdiction must be declined in this case.23

More recent awards and national court decisions have not accepted the aforementioned view.24 Since 1968, a number of arbitral tribunals have had to consider other cases of alleged bribery. Rather than dismissing such disputes on jurisdictional or non-arbitrability grounds, tribunals have found that they had jurisdiction, chosen to enter into the merits of the case, and then admitted or rejected the claims for the illicit commission.25 Therefore, arbitral tribunals have either decided that corruption was not established and applied the contract,26 or that corruption was proven and refused to apply the contract, referring themselves to either international or transnational public policy.27

This post-Lagergren approach is based on certain basic principles underlying international commercial arbitration.

Firstly the preservation of the sanctity of the arbitration agreement which is the root of the arbitrator’s jurisdiction and secondly, the principle of severability (or separability) of the arbitration clause, meaning that the illegality only goes to the substance of the main contract and would not ipso facto render the arbitration clause void. Therefore, tribunals today prefer to “consider separately the impact of bribery on the arbitration clause and on the contract itself”.28

In the ICC Award No. 5622, while opting in favour of their jurisdiction, the tribunal held that “the protection of the superior interest of the international community seems much more to urge the arbitrator not to renounce jurisdiction over the merits of the case”. A number of ICC awards,29 including the high-profile Hilmarton arbitration and the Westacre arbitration, (and the post-award litigation that followed) endorsed the view that an illegality such as bribery would render the agreement null and void. However, the question of the arbitrator’s jurisdiction to hear the dispute involving illegal commissions was not in issue at all,30 pursuant to aforementioned principles.

Furthermore, even ICSID tribunals have upheld their jurisdiction without any demur having analysed the public policy implications of the alleged bribery as a question of merits.31 The English Court of Appeals has also approved the aforementioned view in stating that “if arbitrators can decide that a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery”.32

Till date, there has been only one exception to this approach, the much criticised Pakistan Supreme Court judgment in HUBCO v. WAPDA33, which went back to Langergren’s award, and held bribery claims to be inarbitrable.

Although, historically, arbitration has been sporadically used in criminal matters,34 it is clear today that an arbitrator has the power to look into matters falling outside its primary, civil jurisdiction so as to draw the civil consequences of a rule of criminal law in a business dispute.35 Therefore, the march of case law suggests that disputes which involve allegations of bribery are not considered to be non-arbitrable.

This recent trend of taking jurisdiction in matters concerning the allegations of bribery consists of allowing the arbitrators to hear disputes relating to matters of public
policy, irrespective of a possible contravention of the same. The arbitrators are, therefore, to hear disputes involving such allegations “in so far as [they] confine themselves to examining the public policy implications on their mission” before admitting claims based on contracts tainted with bribery.

It is the admissibility of the claim and not the arbitrability which is to be decided by the arbitrator on the basis of the relevant public policy applicable to the dispute.

3 The question of admissibility

While the recent trend suggests that claims involving allegations of bribery are arbitrable, there is yet to appear any significant international consensus as to the admissibility of such claims. This section addresses the very same concern.

The question sought to be addressed is whether, in international commercial arbitration, claims involving acts of bribery are admissible before the tribunal.

It is proposed that if any claim before an international arbitral tribunal is found to have been tainted by an act of bribery, then such claims ought to be dismissed as being inadmissible; the reasons being two-fold. First, claims tainted by an act of bribery are barred by the Doctrine of Clean Hands; and second, allowing such claims may also contravene the relevant public policy applicable to the dispute.

3.1 Doctrine of Clean Hands

The Doctrine of Clean Hands, commonly associated with the maxims of ex turpi causa non oritur action, acts as a procedural bar to the admissibility of the claim. Therefore, “claims tainted by wrongdoing will not succeed, and the loss lies where it falls”.

The doctrine bars the claimant’s claims due to its illegal or improper conduct in relation to those claims. “It applies to a party whose own conduct in connection with the transaction has been unconscientious, unjust, marked by a want of good faith or violates the principles of equity and righteous dealing.”

The question of application of this doctrine in international commercial arbitration raises a preliminary concern as to whether a common law doctrine is applicable to an international dispute.

Admittedly, the clean hands doctrine is based on the general common law principle of equity requiring that one, who seeks equity, does equity. However, “it seems to be taken for granted that various equitable rules, such as [the clean hands principle] are part of international law and require no further explanation than their relevance to the case at hand.” Thus, there do not appear to be any hurdles in applying the doctrine to an international dispute.

Moreover, arbitrators have always had their reservations in allowing claims involving corrupt activities. Although Judge Lagergren in 1963 had gone on to conclude that an arbitral tribunal would lack jurisdiction where there is a prima facie case of corruption – an opinion that is no longer accepted – it is hard to argue with the reasoning behind such conclusion.

The observations of the Judge bear resemblance with the objective of the clean hands doctrine that – no polluted hand shall touch the pure fountains of justice. Therefore, the authors tend to align with Judge Lagergren’s line of reasoning, adopting a similar approach towards bribery, although to draw a different conclusion.
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Recently, in the ICSID case of WDF v. The Republic of Kenya, the tribunal dismissed the investor’s claim concluding that the claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio*. However, the tribunal’s decision was also influenced by the public policy considerations, subsequently discussed by the authors. Therefore, it cannot be disputed that a claim tainted by bribery does not pass the test of the Doctrine of Clean Hands; thereby, being inadmissible before an arbitral tribunal.

3.2 Public policy concerns

The type of public policy, relevant under the New York Convention, is the international public policy of the state where the award is sought to be enforced. Though the Convention does not apply directly to proceedings before an arbitral tribunal, it is still necessary for the tribunal to ensure that the potential award is consistent with the international public policy of the state of enforcement. Additionally, an arbitral tribunal may also have to take into consideration the transnational public policy since failure to do so may threaten the enforceability of the award at the place where it is sought to be enforced.

3.2.1 International public policy and bribery

Most developed systems consider corruption to be contrary to their international public policy, and prescribe that agreements tainted by corruption are unenforceable. In particular, “[b]ribery is considered to act as a threat to the international public order as it enables individuals to exert influence over other areas of business and governance”. Consequently, it can be conclusively suggested that such principles are arguably part of international public policy of various states. For instance, in 1993 the Paris Court of Appeal recognised that,

> A contract having as its aim and object to traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.

Evidently, the body of legal rules and authorities that have emerged over the past two decades make it almost inconceivable for any court to now deny that corruption contravenes international public policy of most nation states.

In such a scenario, if an arbitral tribunal allows a claim tainted by bribery, then in nine cases out of ten, it shall conflict with the international public policy of the enforcing state. Therefore, it becomes the duty of the arbitral tribunal to take into consideration the public policy concern and dismiss such claim as being inadmissible due to violation of the international public policy of the enforcing State.

3.2.2 Transnational public policy

Despite the condemnation of corruption by most nation States, there still exists a lack of uniformity between the international public policies of different States, particularly with respect to activities like purchase of private influence and influence peddling, defeating the purpose behind enacting the UNCITRAL Model Law and the New York Convention.
This lack of uniformity has led many jurists to emphasise on the need for a supra-national or truly international public policy, which is not subject to State autonomy. The demand for a supra-national public policy [hereinafter ‘transnational public policy’] is not recent and was first recognised by Judge Lagergren when he had relied on general principles of law recognised by civilised nations to declare that contracts which seriously violate *bonos mores* are invalid.

Presently, it is thought to refer to the “fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by civilized nations”.49 The need to recognise a transnational public policy stems from the professional duty of International arbitrators,50 as well as a duty to their own notions of what is correct,51 to use best endeavours to protect the public policy considered inviolable by the majority of states.52 Moreover, recognising a transnational public policy has a significant practical effect of making awards more transportable, in that this practice increases the likelihood that enforcement courts will not have a problem with the ultimate award that they did not have a hand in creating, thus making enforcement more likely.53

Hence, though the New York Convention is thought not to refer to transnational public policy, it is now widely recognised that there should be transnational public policy;54 furthered by the fact that different courts have already admitted transnational public policy.55

### 3.2.3 Bribery as a transnational principle

In determining matters of bribery, a transnational public policy approach is considered to be of great help.56 In this regard, it is the duty of an arbitral tribunal to establish whether the threshold of transnational public policy should be applied and under what conditions.57 However, prior to deciding if a claim violates a transnational principle, an arbitral tribunal ought to satisfy itself if a particular issue constitutes a part of the transnational public policy. This is based on a subjective satisfaction of whether there exists a ‘broad consensus’ amongst the nation States to elevate a particular concern to a transnational level.58

Thus, the essential question to be answered is whether bribery possesses the requisite ‘broad consensus’ so as to constitute a part of the transnational public policy? The answer to the aforementioned question is not straightforward. While bribery in the public sector has often been acknowledged to be a part of the transnational public policy, no such conclusive assertions can be made with regard to bribery in the private sector.

In case of bribery in the public sector, “[o]utright bribery aimed at subverting state officials’ proper discharge of their duties is clearly a violation of transnational public policy”.59 The requisite broad consensus is evidenced by the existence of a plethora of Conventions to combat bribery.60 One need not look beyond the enactment of the United Nations Convention Against Corruption (2003), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997). “International financial institutions such as the World Bank and the IMF have [also] adopted guidelines that deny funding to governments whose officials have solicited or accepted bribes”.

Hence, it is sufficiently established that corruption and bribery in the public sector contravene transnational public policy,61 rendering claims tainted by bribery to be inadmissible.
With respect to bribery in the private sector, the opinion is still divided. On one hand, it may be argued that there exists no such ‘broad consensus’ as there is in case of the public sector. The reasons are multiple.

First, various tribunals that have elevated the act of bribery to a transnational status have confined their views to situations where the alleged act of bribery pertained to a public official, and not the private sector.63

Second, there exist numerous legal systems wherein the practice of purchase of personal influence in the private sector is not considered to be criminal. “Many countries do not ban contracts with… influence peddlers as long as… 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”.64

For instance, practices such as purchase of private influence are expressly permitted in certain major jurisdictions, most notably in the USA by virtue of the Foreign Corrupt Practices Act 1977, as well as in Australia, Canada, New Zealand, and South Korea. Under the fiscal law of many countries, ‘bribes’ paid can also be deducted as business expenses.65

Third, the existence of transnational conventions or resolutions alone condemning a particular practice does not necessarily translate into a ‘broad consensus’ which might be used by the arbitrator as a justification for ascertaining the existence and violation of a principle of international public policy. 66 For instance, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is limited to prohibiting bribery in the public sector, while remaining silent with respect to such activities in the private sector.

Lastly, doubts have also been expressed on multiple occasions that the threshold of ‘transnational public policy’ is extremely high to be met in cases of purchase of private influence.

Colman J. in the case of Westacre Investment Inc.67 had observed that “although commercial corruption is deserving of strong judicial and governmental disapproval, few would consider that it stood in the scale of opprobrium quite at the level of drug-trafficking”.

While equating the transnational public policy principles with the jus cogens norms, it has also been suggested that no norms from international arbitration rise to the level of jus cogens norms.68 Thus, there appears to be sufficient evidence to suggest that bribery in the private sector does not violate transnational public policy. However, on the other hand, one may still insist that a broad consensus exists even with regard to private bribery. After all, most modern states regard the definition of corruption as extending to include all persons who are induced to act corruptly in the discharge of their duties, whether in the public or private sectors.69

This is demonstrated by the fact that there is swathe of new legislation in all regions aimed at tackling private sector corruption.70 In fact, many believe that private bribery is as deleterious as its public sector counterpart, if not worse, since the private sectors in most countries are actually larger than the public sector.71

International consensus on a broad definition of both public and private sector corruption may also be found in the UN Convention Against Corruption (UNCAC), considering that there are 158 state parties to the UNCAC.

Therefore, considering the divided opinion, the authors choose best to not adopt a definite stance in this regard. However, the basic premise of the proposition remains unaffected – if an arbitral tribunal finds bribery in the private sector to also conflict with
the transnational public policy, then any claims consequently tainted shall be inadmissible before the tribunal. This leaves us with only one question to be considered – how does an arbitral tribunal determine the existence of bribery in a commercial dispute?

4 Investigation and evidence of corruption in international commercial arbitration

An arbitrator is not an investigator or a criminal judge and thus lacks power to draw civil consequences. However, an arbitral tribunal still has significant discovery tools available to it, which it can use to unearth the truth relating to bribery allegations.

4.1 Investigative powers

Like most crimes and intentional misconduct, and perhaps more so acts of corruption and collusion, are specifically designed not to be able to be identified or detected. Even without the police powers of the State, arbitrators are able to order the disclosure of documents under many international arbitration institutions’ rules, which also authorise tribunals to issue subpoenas for witnesses or documents. Moreover, the parties are permitted to obtain the assistance of the tribunal for taking the testimony of both voluntary and involuntary witnesses.

In addition, arbitral tribunals may also be assisted by the courts in compelling the testimony of witnesses or production of documents pursuant to the national laws of the arbitral seats.

4.2 Evidentiary considerations

4.2.1 Burden of proof

To effectively exercise its investigative powers in order to identify a corrupt transaction, an arbitral tribunal needs stout knowledge about the placement of burden of proof between the parties, the standard of proof to be applied once the burden is established and what universal indicators point towards a corrupt transaction.

The practice of nearly all international arbitral tribunals is to require each party to prove the facts upon which it relies in support of its case. This practice is recognised explicitly in the UNCITRAL Rules.

However, requiring a party which was not party to the questionable transaction and who has no access to data or documentation maintained by the other party to present evidence or prove the corruption of such activities may be tantamount to aiding and abetting such corruption.

Thus, where there is a reasonable indication of corruption, we may shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met. However, such a reversal of burden of proof may not be compatible with the right to fair trial.

Thus, in ICC Award No. 6497, the arbitral tribunal seems to have accepted to the shift of the burden of proof which is only to be made in special circumstances and for very good reasons.
Since most of such evidence has to be procured from officials or politicians who have been bribed by the intermediaries or the parties in question, the burden of proof becomes insurmountable.\textsuperscript{79} On the other hand, the party accused of corruption can easily produce countervailing evidence to prove his innocence.\textsuperscript{80} Therefore, shifting the burden of proof when there is a reasonable basis to believe corruption is involved may solve many problems.

4.2.2 Standard of proof

Even if it is decided that the party alleging corruption has the burden of proving the existence of the same, there are differing opinions as to the standard of proof required to prove the existence of corruption.

There have been many cases where allegations of corruption or bribery have been dismissed by the tribunals citing lack of proof,\textsuperscript{81} and tribunals have stated ‘clear and convincing proof’ is required.\textsuperscript{82} In contrast, in many cases, circumstantial evidence has been considered sufficient to prove the existence of bribery or corruption as proving allegations of bribery is usually a very difficult task as the illicit object of the contract is generally hidden\textsuperscript{83}. Thus, arbitrators are left with no other choice than to analyse the clues and indicators available in order to determine whether corruption had taken place.

4.2.3 Indicators of bribery in a commercial transaction

If the tribunal decides to admit circumstantial evidence to show proof of bribery, it needs to decide what evidence would be considered as indicators of corruption.

The activities of the agent or the intermediary forms one of the most functional indicators of bribery. In ICC Case No. 8891/1998, the arbitral tribunal termed excessively high fees/commission of the agents as a ‘red flag’ for corruption. Similarly, “unusual patterns or financial arrangement” including unusually high commissions were considered as red flags indicating corruption by the FCPA in the USA. However, the entirety of facts needs to be considered before any inference may be drawn. There might be instances where the amount of commission promised to the agent (even though higher than international standards) was warranted by the facts of the case.\textsuperscript{84}

Further, if the high amount of commission is not backed by a proportionate benefit flowing to the agent; it is considered a suspicious practice as the excess amount may be paid as a part of a bribe.\textsuperscript{85}

The duration of the service provided by the agent also plays an important role. Sometimes, a relatively short duration of service period can indicator of corrupt intent.\textsuperscript{86} Moreover, the actions of the agent in the completion of his agency agreement also become relevant. Since most disputes between the principal and the agents are centred on the non-action of the agents towards the fulfilment of the agreement, a majority of most principals insist on the inclusion of a clause demanding the proof of the agent’s causal connection with the completion of the agreement. Thus the absence of the same is a strong indicator of corruption.\textsuperscript{87} Another indicator of corruption can be the widespread existence of corruption in the country where the agreement took place.\textsuperscript{88}

As can be seen, there exist a variety of indicators to corruption in international commercial transactions. It is thus the duty of the tribunal to look into the facts of the particular dispute and decide the matter accordingly. The tribunal is not bound by any of the indicators mentioned herein and may itself observe new criterion indicating
corruption. Moreover, a balance between the strength of the complainant’s case and the presence of the indicators needs to be maintained. In *WDF v. Kenya* where even though the respondent failed to defend the case to a satisfactory level, the tribunal noted that due to ‘the gaps in the [claimant’s] story [of solicitation of bribes by the respondent] [were] very significant’ and thus as the claimant was unable to establish its burden of proof, none of the indicators could have been used to crystallise the inference of bribery.

4.3 Role of the arbitrator

An arbitrator, unlike a judge in a national court, is appointed at the request of the parties having the contractual dispute and may assume that he only needs to address the particular interests of the parties in the arbitration and need not be concerned with international policy issues.

Thus, in issues of corruption and bribery, the question arises as to whether the tribunal is obligated to investigate even when neither party raises the issue before the tribunal, but the facts and circumstances of the case suggest the contract is likely to have been tainted by bribery. Arbitrators must consider a number of factors when deciding how to proceed, especially fact that the primary duty of the arbitrator is to render an enforceable award. To investigate claims of bribery, particularly where none have been raised by the parties, may invite challenges to the arbitrator’s jurisdiction and the validity of the award on the basis of *ultra vires* and/or *ultra petita*. Conversely, to disregard the possibility of bribery in a dispute may also undermine the enforceability of the award. Enforcing a claim based on a contract that is void due to bribery would violate international public policy, and result in any award being likely to set aside.

The tribunal in the *Westacre* case took the position that “If the defendant does not use it in his presentation of facts, an arbitral tribunal does not have to investigate”. It has been argued that given the clear confirmation that bribery is *bonos mores* and illegal in international law and that the duty of arbitrators is to uphold such law, arbitrators need to be proactive in dealing with bribery issues. Otherwise, it is possible that an arbitral tribunal may be used to validate the legality of a contract that a state prosecutor would view as illegal and the participants as criminal. For example, in the recent *Megafon* case involving a Russian cell phone operator, an arbitral tribunal based in Zurich, on its own suspicion, conducted a private investigation into the crime of money laundering and ruled that a party could not reap the benefit of the disputed agreement because it is a criminal organisation and its money was tainted.

However, most arbitral tribunals tend to restrict themselves to the allegations of the parties, and require clear proof of bribery or corruption, irrespective of what suspicions they may have. Only in very rare cases is search for indicia of bribery made on commercial arbitrators’ own initiative.

5 Conclusions

The plethora of issues arising due to claims involving allegations of bribery are marred by complexity, compelling arbitral tribunals to adopt a cautious approach.

Yet, the issue of arbitrability of such claims provides the most straightforward approach. In the post Lagergren era, an arbitral tribunal is expected to assume limited
jurisdiction to determine the existence of bribery. The exercise of jurisdiction to consider the merits of the dispute, however, is contingent upon the admissibility of such claims before the tribunal.

The issue of admissibility raises more complicated concerns. The authors proposed that such claims, shown to be tainted by bribery, are inadmissible owing to the application of the Doctrine of Clean Hands. In addition, such claims are bound to violate either the international public policy of the enforcing State, or the often cited transnational public policy; reinforcing the argument for inadmissibility.

Lastly, the vast investigative powers of the arbitral tribunal used to identify tainted commercial transactions impose a threefold duty upon the tribunal – to possess the knowledge of the placement of burden of proof, to weigh the evidence produced against a standard of proof, and to take cognizance of the tainted contract even if the parties have not brought forth the allegations.

The actual extent of such powers, however, varies on a case by case basis, influenced by the attitude of the tribunal towards condemning corruption in international commercial disputes.

Notes
12 International Law Association, supra note 9.
23 ICC Award No. 1110/1963.
25 Born, supra note 21, at 805.
26 ICC Award No. 6401 (Westinghouse – 1992); ICC Award No. 7664 (Frontier – 1996).
29 ICC Award No. 3916/1982; ICC Award No. 7664 (Frontier – 1996); ICC Award No. 8891/1998.
30 Barrington, supra note 22.
36 Gaillard, supra note 15.
38 “From an immoral consideration, an action does not arise”.
41 Crown Construction Co. v. Huddlestone, 961 S.W.2d, 559; Thomas v. McNair, 882 S.W.2d 870, 880.
43 International Law Association, supra note 9.
Effect of bribery in international commercial arbitration

48 Hwang, M.S.C. and Lim, K., Corruption in Arbitration – Law and Reality.
51 Gaillard, supra note 15.
53 Mayer, supra note 50.
57 Hunter, supra note 17.
58 International Law Association, supra note 9.
59 Hwang, supra note 48.
60 International Law Association, supra note 9.
61 Wilske, supra note 46.
62 ICSID Case No. ARB/00/7; ICC Award No. 1110/1963.
63 ICC Award No. 6248/1992; ICSID Case No. ARB/00/7.
66 Kreidler, supra note 16.
70 Transparency International (2009), Global Corruption Report, 165.
71 Hwang, supra note 48.
73 International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, Art. 4(10).
75 UNCITRAL Rules, Art. 24.
76 Mills, supra note 72.
77 Id.
78 Mourre, supra note 35.
79 Nicholls, supra note 69.
80 Lamm, supra note 40, at 701.
83 ICC Award No. 8891/1998.
84 ICC Award No. 9333/1998.
85 ICC Award No. 1110/1963.
86 ICC Award No. 8891/1998.
88 ICC Award No. 1110/1963; ICC Award No. 3916/1982.
89 ICSID Case No. ARB/00/7.
91 ICSID Case No. ARB/00/7.
93 Abdel Raouf, M. (2010) ‘How should international arbitrators tackle corruption issues?’, in 
Fernández-Ballesteros, M.A. and Arias, D. (Eds.): Liber Amicorum Bernardo Cremades 1,16.