Corruption in International Commercial Arbitration:

The Right of the Arbitrator to Conduct Self-initiated Investigation of Corruption

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Abstract

International commercial arbitration is a private dispute resolution, founded upon an agreement to arbitrate, in a trans-boarder context. It is a time-efficient form of dispute resolution, which offers the parties extensive discretion, in the conduct of the proceedings. This party autonomy is not un-limited. The question is, however, how far the autonomy stretches, and how it stands, in relation to the duties, and obligations of the arbitrator.

Corruption, which is contrary to fundamental, universal principles, known as public policy, does not only disrupt trade, but also negatively affects the arbitral procedure. A main contract, which is tainted by corruption, is invalid, thus, leaving the parties without legal ground, for arbitration. In order to arrive at the conclusion of invalidation, of the main contract, due to corruption, evidence of such behaviour has to be established. It is not the arbitrator’s role to engage into investigations of criminal offences, however, an exception might come in question, in cases where corruption is involved. The arbitrator is further restricted by legal arbitral rules to address matters, which have not been raised by the parties, themselves.

Due to the disruptive nature, and strong condemnation, of corruption, there is reason to address these issues by the arbitral tribunal. Though the arbitrator is restricted, by legal provisions, to initiate and conduct investigations without the parties consent, the narrow application of many relevant rules have developed in such a way, through arbitral practice, that these restrictions appear to have little effect.
Preface

There is more to law than learning the laws. The vast subject of arbitration is a perfect example of that. It is my wish to make a personal contribution to this field, by addressing something different. That is why I chose to write about the delicate issue of corruption in arbitration. During my internship at the Embassy of Sweden in Zagreb, Croatia, I had the opportunity to look closer into the work on anti-corruption. The combination of these two separate, yet intertwined, subjects resulted in this thesis, which I hope the reader will find interesting.

I have several people to thank, for their support, during the fantastic years as a law student at Uppsala University, and these last months of hard work. Firstly, I would like to thank my supervisor, Professor, LL.D Kaj Hobér, for all the help during the finalisation of this essay. I would like to express my greatest gratitude to H.E. Ambassador Fredrik Vahlquist, and my supervisor Counsellor Karin Anderman, for the wonderful and insightful time at the embassy. It was a great learning experience, which gave me invaluable knowledge for the writing of this essay, but more importantly for my future. I would also like to thank my friend Nadja Bejtovic, for proofreading my work, and giving me helpful feedback.

Lastly, a special thanks to my family, for the encouragement and support during the completion of this essay. I would like to express a particular thanks to my father, who has taught me the most valuable lessons of life, and always guided me in my decisions. If it had not been for you, I would not stand where I am today. Hvala!

Uppsala, September 2013
Table of Contents

ABSTRACT ........................................................................................................... I
PREFACE .............................................................................................................. II

1 INTRODUCTION ............................................................................................. 1
1.1 BACKGROUND ............................................................................................ 1
1.2 AIM .............................................................................................................. 2
1.3 DELIMITATIONS ......................................................................................... 3
1.4 METHOD ..................................................................................................... 3
1.5 DISPOSITION .............................................................................................. 5

2 ARBITRATION .................................................................................................. 7
2.1 THE NATURE OF ARBITRATION ............................................................... 7
2.2 INTERNATIONAL COMMERCIAL ARBITRATION ...................................... 8
2.3 THE CONTRACTUAL RELATIONSHIP BETWEEN ARBITRATION AND PARTY ....................................................................................................... 10

3 CORRUPTION IN ARBITRATION .................................................................. 12
3.1 THE EFFECTS OF CORRUPTION IN ARBITRATION ................................. 12
3.2 INVESTIGATION OF CORRUPTION .................................................. 15

3.2.1 ICC Case No. 1110 ............................................................................. 15
3.2.2 Separability .................................................................................. 17

3.3 SUA SPONTE INVESTIGATION IN RELATION TO PARTY AUTONOMY ................................................................. 18

3.3.1 RESOLVE THE DISPUTE IN AN ADJUDICATORY MANNER ................................................................. 19
3.3.1.1 Arbitrability ............................................................................. 20
3.3.1.2 Annulment on Public Policy Grounds ................................................................. 22
3.3.1.3 Decisions in Accordance With Applicable Law ................................................................. 27

3.3.2 Conduct the Arbitration in Accordance with the Arbitration Agreement .......30
3.3.2.1 Excess of Authority - ultra petita ............................................................................. 30
3.3.2.2 Validity of the Main Agreement ............................................................................. 36

4 CONCLUSION .................................................................................. 39

4.1 CAN AN ARBITRATOR CONDUCT SUA SPONTE INVESTIGATION? 39

4.2 SHOULD AN ARBITRATOR CONDUCT A SUA SPONTE INVESTIGATION? ................................................................................................. 40

4.3 SUMMARY .................................................................................. 44

5 BIBLIOGRAPHY ............................................................................ 46

5.1 BOOKS .................................................................................. 46
5.2 ARTICLES AND JOURNALS ............................................................. 47
5.3 CASES .................................................................................. 49
5.4 OTHER SOURCES ...................................................................... 50
1 Introduction

1.1 Background

Commercial Arbitration can be traced back to the beginning of the first recorded societies.\(^1\) Archaeological findings have been made from early Middle East, Ancient Egypt, Ancient Greece, Ancient Rome, and European Middle Ages etc.\(^2\) According to Lord Mustill, “commercial arbitration must have existed since the dawn of commerce”.\(^3\) International commercial arbitration is attractive due to its flexibility, neutrality, and confidentiality. For this reason, it is crucial that arbitration functions properly, as a safe and secure judicial institution.

Unfortunately, a wide-spread problem, which disrupts international trade and the private sector, is corruption.\(^4\) The Global Corruption Barometer is an annual report made by Transparency International, which reveals corruption that citizens experience, in their everyday lives.\(^5\) In 2013, it was reported that more than 1 in 4 people (27%) had paid a bribe, in the last 12 months.\(^6\) Transparency International’s latest Bribe Payers Index, from 2011\(^7\), measures perceived likelihood that companies from certain countries will pay bribes, abroad. The countries surveyed are 28 of the world’s largest economies, which make up 80% of the total world outflow, of goods, services, and investment. The index scores countries from 0-10. A score of 0 indicates that a country always pays bribes, while a score

\(^3\) Lord Mustill, “Arbitration: History and Background” (1989) 6 Journal of International Arbitration, p.43
\(^4\) For more on corruption in the private sector see: (ed.) Zimbauer, Dieter; Dobson, Rebecca; Despota, Krina, *Global Corruption Report 2009: Corruption and the Private Sector*, Transparency International: Cambridge University Press, September 2009
\(^5\) Transparency international is a global civil society organisation that leads the fight against corruption. The organizations has over 90 offices worldwide with an international secretariat in Berlin.
\(^7\) Hardoon, Deborah and Heinrich, Finn, *2011 Bribe Payer’s Index*, Transparency International 2012
of 10 indicates that bribes are never paid. The top score of 8.8 is held by the Netherlands and Switzerland. The lowest scores were given to Russia, with a total of 6.1, and China which scored 6.5.

Even though corruption is internationally condemned, both through national laws and international treaties, as a breach of public policy and moral standard, its appearance is not simple for tribunals and courts to resolve. With corruption in arbitration, several issues emerge, which negatively affect the legality of the process, and also counteract the purpose of law and legal certainty. Despite the measures taken against corruption, it continues to disrupt international trade. National legislations have taken different approaches to this problem, which, in turn has given rise to grey areas and further uncertainty. In order to tackle corruption in arbitration, it is important to work efficiently with common tools and force.

Corruption in arbitration is a problem because it can affect the arbitral process, and consequently pose a great difficulty for the arbitrator, who has a duty to resolve the dispute presented before the tribunal. The party autonomy can restrict the arbitrator from addressing these issues. How corruption can, and should be tackled in arbitration, is a complex matter. Thus, there is reason to further examine the impact of corruption within arbitration, and look into an arbitrator’s obligations, duties, and authority regarding this problem.

### 1.2 Aim

The aim of this essay is to establish whether or not an arbitrator can, or should, address corruption in arbitration. More specifically, the uncertainty concerning an arbitrator’s authority to investigate corruption *sua sponte* (of own accord) will be examined. Further, the aim is to investigate the scope of the arbitrator’s investigative obligation.

Corruption has a negative impact on the arbitral process, and causes difficulties and uncertainties for an arbitrator, who often, lacks consistent and clear
guidance on how to address these issues. This problem will be addressed in this essay.

1.3 Delimitations

Corruption occurs all over the world, and in different facets of the society. The spread of corruption has been documented from country to country, with great variation. The reasons for the existence or emergence of corruption will not be discussed in this essay. The existence of corruption, for any reason, will be assumed. Further, corruption occurs within several areas of law, but the focus of this essay will be on international commercial arbitration, and all discussions are based on arbitrable matters.

Corruption can occur in different stages of the arbitral process. A distinction is made between corrupt conduct in the course of the arbitral proceedings, and contracts evolving from corruption, or facilitating corrupt behaviour. The focus of this essay will only be on contracts tainted by corruption. Corruption evolving from circumstances such as bribery of arbitrators, and of witnesses or appointed experts, will not be considered.

For simplicity reasons, the arbitrator, in masculine form, will be used when referring to subjects of the arbitral tribunal. It will be alternated with the general term, tribunal.

1.4 Method

The chosen method for this essay is based on the general aim, which is to investigate, describe, and evaluate whether or not sua sponte investigation of corruption falls within the arbitrator’s authority. This method is the general teleological approach, where circumstances of corruption within arbitration will be described,
with the use of cases and literature. Among the profound quantity of literature treating corruption in arbitration, a selection of literature dealing specifically with international commercial arbitration has been used. Further, a large number of legal articles, with particular and concentrated substance on various aspects of corruption in arbitration, have been used. Corruption, as such, will be described through doctrine, but also with the use of information from various organizations dealing with these issues. The legal status of corruption will be explained with the help of national law, international treaties, and commentaries.

When discussing different aspects of the arbitral procedure, references will be made to the Model Law (United Nations Commission on International Trade Law Model Law on International Commercial Arbitration), in general. The Model Law was designed as a guideline for national lawmakers to follow, as part of their national legislation. Its nature and function as an arbitral framework, in international commercial arbitration, makes it a convenient law to discuss, in this essay. Likewise, the New York Convention (The Convention on the Recognition and Enforcement of Foreign Arbitral Awards), which serves as a key instrument in international arbitration, will be used. The international context of the New York Convention, and the Model Law alike, is also important. The adoption of these two laws is widespread. References to other laws will also be made, for the purpose of exemplification.

Due to the fact that this essay deals with international arbitration, most sources come from foreign literature. The aim of this essay is not to make a legal comparison. However, some foreign sources, such as laws on corruption and arbitration, will be used, in order to shed light on different approaches in this area of law. In this assessment of the international arbitrator’s role, the examination of the international doctrine, and international commentators’ views, is of specific importance.

In order to highlight some points of discussion, references will be made to provisions in the Swedish Arbitration Act. For this purpose, some Swedish cases have been used as examples. Sweden is a popular place of international arbitra-
tion, and the Swedish Chamber of Commerce is a well-established arbitral institution.

Further, as arbitral awards, in general, are not made public, it has been necessary to rely on secondary sources, for information about specific cases. Many secondary sources have re-printed the cases in entirety, or in part. The sources, which are referred to in this essay, are important, frequently-cited, international awards, regarding corruption. The award with greatest importance is the so-called Judge Lagergren case, ICC Case No. 1110. This was the first international arbitral case to address corruption. For this reason, the decision and mechanisms behind the award will be elaborated in this essay. References to other cases have been made, with exemplification as the purpose.

In order to explain the problematic situation of the arbitrator, when encountered with corruption in an arbitral procedure, an overview of arbitration, as a private dispute resolution, has been included. To better understand the scope of the problem, the concept of corruption has been described.

1.5 Disposition

The second chapter serves as an introduction to arbitration, as an alternative dispute resolution. It gives a general overview of the different elements of arbitration. The advantages, and disadvantages with corruption, are discussed in this chapter. Also, a section about the relationship between the arbitrator and the parties is included.

The third chapter is an important introduction to the issue of corruption, within arbitration. This is the core of the essay, and deals with the contradictions between party autonomy, and the arbitrator’s possibility to conduct *sua sponte* investigation of corruption, in order to resolve the dispute. The prohibition of corruption, on public policy grounds, is elaborated in this chapter. Moreover, this part of the essay describes the legal provisions in relation to the arbitrator’s mis-
sion, as well as the different aspects of arbitration which have developed from the legal practice.

The fourth, and concluding chapter, is a summary and analysis of various arguments described in the third chapter. The chapter serves as the last fraction in the process of finding an answer to the question of the limits to the arbitrator’s mandate, in relation to issues of corruption.
2 Arbitration

2.1 The Nature of Arbitration

Due to its private, adjudicative nature, arbitration is a much-preferred form of dispute resolution. In arbitration, parties are free to choose the arbitrators, as well as the rules, place, and language of the proceedings. In international commercial arbitration, companies often prefer a neutral process, to avoid being subject to another country’s judicial system, which could potentially give the other party a home-court advantage. The most-preferred and widely-used tribunal, for settlement of commercial disputes, is the ICC (International Chamber of Commerce in Paris). The LCIA (London Court of International Arbitration) and the AAA/ICDR (International Chamber for Dispute Resolution of the American Arbitration Association) are the other two, most popular, dispute tribunals, in international arbitration.

Further, the decision made in an arbitral process is usually a final decision, and it is binding. A higher court of appeal does not exist, which, in theory, results in a shorter legal process, as well as a quicker and facilitated, international enforceability of the award. On the other hand, engaging in a process, where the parties do not have the right to appeal the decision, can be seen as a risk taken by the parties, since they agree on settling with any decision that is made. Another

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disadvantage is the cost of arbitration. The cost-efficiency of arbitration used to
be one of the main advantages, but today, it is regarded as less true. As arbitra-
tion has become bigger and more common, parties have developed more and
more tactics, which delay the procedures, and increase the costs.12

Another advantage of arbitration is the confidentiality, which ensures that the
parties’ sensitive company records are not made public. This is an attractive fac-
tor for companies wishing to protect their reputation.13 Though positive for the
parties, the principle of confidentiality can have a negative impact, and prevent
the development of the arbitral process, and arbitration, as a legal institution. Ar-
bitral awards are generally not made public, which means that there is a very nar-
row, common practice, within arbitration. Confidentiality, naturally, does not
allow for transparency within the arbitral institution. Consequently, an area with
little transparency is more prone to corruption taking place.14

2.2 International Commercial Arbitration

Under the provision of Article 1(3) of the Model Law, the international element
of commercial arbitration is constituted by parties having their places in different
states, or when the place of arbitration, performance under the contract, or the
subject matter relates to more than one country. The Model Law provides a wide
interpretation of “commercial”, covering all forms of relationships of commercial
nature. Different examples of “commercial” relationships are stated in an ex-
planatory note, in the Model Law, but the list is not exhaustive. An internation-
ally-recognised definition for the term “commercial” has not been established,
due to the difficulty of creating an exclusive range of relationships, which fall
under the term.

12 Moses, p. 4
13 Moses, p. 49, Heuman, Lars, Arbitration law of Sweden: Practice and Procedure, Huntington,
14 See: Transparency International
The legal framework of international commercial arbitration is wide. The applicable laws for each specific arbitration settlement will depend on the choices of the parties. The framework of the arbitral process, with the agreement and laws, can be pictured as a pyramid.\textsuperscript{15} The point facing downward is the arbitral agreement, exclusively between the parties. The entire framework relies on the legality of this level. If the agreement is invalid, the rest of the framework is invalid.

On the second level, above the agreement, are the rules chosen by the parties, or the institutional rules, which are provided by the arbitral institution. National arbitration law lies above these institutional laws. These provide for substantive issues, such as the interpretation of the contract, and determining the merits of the dispute. Many countries have adopted the UNCITRAL Model Law on International Commercial Arbitration. It is the equivalent of the Arbitral Rules of the Stockholm Chamber of Commerce, as a comparison.

The third level in this construction is the developed international arbitral practice. This practice can serve as rules, which develop from the practice, or as guidelines. The International Bar Association on the Rules of Ethics is one example of the international practice.

The international treaties cover the top layer of the pyramid. The New York Convention is one of these treaties. Another important treaty is the Convention on International Commercial Arbitration (The European Convention). The entire arbitral framework provides parties with protection, and secures a fair process.

The New York Convention, along with the Model Law, is in large part, the reason for commercial arbitration’s great popularity. The conventions are adopted by many countries in the world, and have created a common ground for dispute resolution, in international trade and business.

\textsuperscript{15} Moses, p. 5
2.3 The Contractual Relationship between Arbitration and Party

The relationship between the arbitrator and the parties is not stated in most national laws. Even the Model Law remains silent, thus, leaving the interpretation to national courts and commentators. Two main, separate stands on the relationship between an arbitrator and a party exist. One views it as contractual, in which the two subjects enter into a separate agreement, under which the arbitrator is to perform certain functions.\textsuperscript{16} The other position holds that the rights and duties of an arbitrator are derived from law, and not from a contract.\textsuperscript{17} Born, who disagrees with the later interpretation, argues that it cannot be solely derived from law, as the agreement provides the arbitrator with a scope of authority, and the status of an arbitrator is an area, which national laws, and other arbitral framework hardly cover.\textsuperscript{18} The arbitrator serves as a private adjudicator, in the dispute between parties. The scope of the arbitrator’s role, and the obligations under which he is to perform, are governed by the arbitration agreement, and applicable law. He is obliged to perform his role in an independent and impartial manner, in order to resolve the dispute, based on the submissions made by the parties. The basis of the adjudicative function cannot be altered by contract, in order to i.e. permit unequal treatment of the parties. Thus, this function is a matter of mandatory law.\textsuperscript{19}

The relationship between the parties and the arbitrator arise in an area governed by mandatory rules, and public policy. These rules provide important limitations, and regulate essential aspects of the arbitrator’s mission, as an adjudicator.\textsuperscript{20} Although the primary source of the arbitrator’s mission is derived from the arbitration agreement, these mandatory provisions are necessary to define the terms of

\textsuperscript{17} Constantin, Calavros, “Grundsätzlisches zum Rechtsverhältnis zwischen Schiedsrichtern und Parteien nach griechischem Recht“ in: Lindacher, Walter F, Festschrift für Habscheid, Bielefeld 1989, p. 75
\textsuperscript{19} Born, International Arbitration, p. 1604
\textsuperscript{20} Born, International Arbitration, p. 1605
the agreement. The arbitrator’s rights and duties are derived from a contract, governed by national and international legal framework.

Heuman, on the other hand, does not take a stand on the question. The relationship will depend on each specific case, with the potential use of both theories.\textsuperscript{21} This is the so-called hybrid, or mixed theory (a third stand).\textsuperscript{22} He does say that the Contract theory, which was once taken for granted, has partly been abandoned, in the past years.\textsuperscript{23} According to Swedish law, an arbitration agreement can be declared invalid, under the Contract law. The agreement is terminated under the same provision as a regular contract, under the law. This indicates that the relationship between party and arbitrator can be regarded as contractual.

\textsuperscript{23} Heuman, \textit{Arbitration Law of Sweden: Practice and Procedure}, p. 199
3 Corruption in Arbitration

3.1 The Effects of Corruption in Arbitration

Corruption is a composition of many different acts, in different forms. It can be divided into the following categories: petty corruption (a smaller amount of money paid for frequent transactions), administrative corruption (bribes to escape taxes, regulations, or in order to win a procurement contract), corporate corruption (within private corporations), and political corruption (within the public sector and the political arena). Systematic corruption occurs on all levels of society, while grand corruption involves senior officials, ministers, heads of states, or politicians. Bribery enables individuals to improperly influence areas of business and governance, such as the media, judiciary, and criminal justice.

It has not been possible to find one unified definition of corruption, because of the variety of forms in which it is carried out. The many different national approaches to corruption further complicate the situation. Because of this, corruption is treated differently in different countries. The outcome of awards, which, for instance, are raised before the national court for enforcement, will be different, depending on each country’s approach to what constitutes corruption. Major anti-corruption acts, such as the OECD, the Council of Europe, and the UN conventions, do not define corruption. Instead, corrupt offences are established in these legal frameworks. Transparency International defines corruption as “the abuse of entrusted power for personal gain”.

According to Transparency International’s Bribe Payer’s Index, corruption, in the form of bribes, is most likely to occur in construction, oil, gas, and mining

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industries. The majority of corruption allegations are made in cases regarding infrastructure projects, like energy plants or telecommunication landfills. Cases regarding the purchase of armaments, and construction of military training facilities, are the second-most affected by corruption. Finally, the third-largest area associated with corruption is the exploitation of natural resources.

Corruption is the biggest obstacle to economic and social growth, around the world. More than 5% of the global GDP (around US $2.6 trillion) is estimated to be the cost of corruption. More than US $1 trillion is paid, per year, in bribes alone. Due to this, the cost of doing business, globally, increases by approximately 10%, on average. The cost of corruption to society is too large, which is one of the reasons why this problem needs to be resolved. Corruption causes reduction of growth, and reduces development. Investment is negatively affected, where corruption exists. When funds intended for public investments end up in private pockets, growth is reduced. This negatively affects infrastructure, and public services.

Another cost of corruption is the outcome that it has on key institutions in society. The rule of law is undermined and thus the occurring political instability creates a society where the public trust in governments, corporations, and global institutions are hurt. However, the past decades have seen large international commitment against corruption. Harder laws, regulations, and penalties have been implemented. The role of the legal framework, and the work of the organisations against corruption, is not solely to prohibit corruption, but also to increase the public awareness. In 1977, the American Foreign Corrupt Practices Act (FCPA) was adopted as the first cross-boarder regulation, prohibiting corrupt

25 Hardoon, Deborah and Heinrich, Finn, 2011 Bribe Payer’s Index, Transparency International 2012, p. 14
26 Muchlinski, Peter; Ortino, Federico & Schreuer, Christoph, The Oxford Handbook of International Investment Law, Oxford University Press, Oxford 2008, p. 592
29 Bhargava, p. 5
30 Bhargava, p. 5
31 (ed.) Zinnbauer, Dieter; Dobson, Rebecca; Despota, Krina, Global Corruption Report 2009: Corruption and the Private Sector, p. xix
practice abroad, by American businessmen. Thereafter, several major treaties on anti-corruption were ratified by several countries. Some of the major ones include the OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions from 1999, the United Nations Convention against Corruption (UNCAC), and the United Kingdom Bribery Act, which is applicable to bribery, globally.

The consequences of corruption on the arbitral process are significant. A contract, which has been based on corrupt activities, is invalid. For instance, a bribe paid to enter the market of a country. In ICC Case 8891, the tribunal stated that “a contract instigating or favouring the corruption of public officials is contrary to transnational public policy, and if this appears to be the object of the consultancy contract, there would be no other option than to find it null and void.” The dispute resolution relies on a valid contract, from which the dispute arises. If the main contract between the parties is not valid, there is no ground for the settlement of the dispute.

Given the strong condemnation of corruption, due to its disruptive effects, in combination with the negative effects that it has on the arbitral process, it is of significant value that such behaviour is dealt with appropriately. Another reason why corruption should be treated at the tribunal is to protect the integrity of arbitration as a judicial institution. An arbitral award does not have precedential value. However, given the significance of combating, corruption there is reason for arbitrators to engage against illegality, within this institution. An active involvement within the tribunal can provide valuable input to this area of law, where there is little consensus on the exact definition of what constitutes a breach of international public policy.

34 ICC Award 8891, Re-printed in part by Martín, p. 49
3.2 Investigation of Corruption

Should the main agreement be tainted by corruption, it needs to be declared invalid. How the arbitrator concludes that a main agreement is invalid is questionable. It demands certain actions from the arbitrator’s side; however, there are limitations to the duties, obligations, and authority that they hold. Any initiative, to address matters in the procedure, without the parties consent, can constitute a breach of the party autonomy. Arbitrators are private adjudicators that act in the interest of the parties, by which they are chosen, as opposed to litigation judges, who have to take the public interest into consideration. It is not the role of the arbitrator to conduct investigations and prosecute criminals. Furthermore, arbitrators lack adequate investigation tools. The arbitrator’s main role is to solve the dispute between the parties, by which he is authorised, on the basis of the arbitration agreement. Kreindler, for example, argues that an arbitrator does not have to engage in social engineering when encountering corruption. He does however, hold that the role of the arbitrator, and the legal platform from which he operates, gives the arbitrator legitimate tools to investigate and combat illegality.

In order to discuss the question of the arbitrator’s authority to investigate corruption *sua sponte*, it is important to determine the status of the arbitrator, in the arbitral proceeding. The potential obligation, or authorization, of the arbitrator to conduct a *sua sponte* investigation must be weighed against the party autonomy.

3.2.1 ICC Case No. 1110

The pioneer case on corruption, in arbitration, was ICC Case No 1110. The sole arbitrator, Judge Lagergren, denied himself of jurisdiction, after concluding that a case involving corruption “can have no countenance in any court, either in the

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37 Kreindler, “Public Policy and Corruption in International Arbitration: A Perspective for Russian-Related Disputes”, s. 248
Argentine, or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal.” 38 The dispute at the tribunal regarded a claim for commission, by an Argentinean agent. The parties agreed that the Claimant would receive a commission fee from a company, which competed for the contracts. The Claimant would exert his influence on members of the Argentinean government, by bribes, which were part of the commission.

Judge Lagergren investigated and gathered evidence of the suspected commission payment *sua sponte*, after the parties had asked for these specific circumstances to be disregarded, by the tribunal. Judge Lagergren stated that “in the presence of a contract in dispute of the nature set out hereafter, condemned by public policy, decency and morality, I cannot in the interest of the administration of justice avoid examining the question of jurisdiction on my own motion.” 39

This award shows that corruption should be addressed in arbitration, and thus, it can be said to have set a minimum standard. Investigation should be conducted partly in order to determine the provision of the case, and partly to decide the jurisdiction. Though, the way in which Judge Lagergren conducted the arbitration, and arrived at the decision, is not followed in current arbitral cases. 40 Judge Lagergren has been criticised for not recognising the separability doctrine. Subsequent awards, dealing with corruption, have applied this principle. In ICC Case No. 6248, from 1990, both the competence-competence and separability doctrines were tried, and confirmed. 41 The Defendant had made allegations that violation of good morals and public policies had occurred, under the Consulting Agreement. Based on the provisions of Article 8(3) of the ICC Rules of Conciliation and Arbitration, and Article 178(3) of the Swiss Private International Law Act, the tribunal concluded that:

39 ICC Case No. 1110 (1963), para 2, reprinted in: Wetter
40 Lew, Mistelis, Kröll, para 9-80; Compare the view of Wetter: Judge Lagergren did not fail to implement the separability doctrine. The applicability of the doctrine as such was never at hand. Judge Lagergren applied the competence-competence. He saw the compromise and the Terms of Reference as separate agreements. Thus the dispute was refuted on non-arbitrability grounds.
The validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid. This principal of [separability] has long been recognized not only generally, but also specifically with respect to main contracts which were found void on the ground of a violation of good morals and public policy.

The separability doctrine was also addressed in the Westinghouse case, from 1991. The tribunal stated, in their Preliminary Award on Issues of Jurisdiction and Content Validity, that the effects on the arbitration clause are separate from the effects on the main agreement. However, while the Claimant argued that the doctrine of separability applies, the Defendant argued that the doctrine does not apply, if the main contract has been obtained by bribery. The Tribunal, thus, considered the applicability of the separability doctrine, in bribery cases. The Tribunal held that it is true that, in some instances, the circumstances concerning the validity of the main contract also can affect the arbitration clause. However, the Tribunal did not comment further on that question.

The jurisdiction of the arbitrator, on the grounds of a corrupt main contract, will not be disputed. The separability doctrine enables the arbitrator to retain jurisdiction, in order to fulfil the mandate given, and conclude the dispute. In this way, the main contract tainted by corruption, can be disqualified, and the corrupt behaviour condemned.

### 3.2.2 Separability

Separability is a universally-accepted principle in international arbitration, and it is recognized by most jurisdictions in the world. Article 16(1) of the Model Law states that an arbitration clause is an independent agreement, and should be treated independently, from the rest of the contract. The separability doctrine is derived from the competence-competence. As stated in the Model Law and Arti-

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article 21(2) UNCITRAL Arbitration Rules, it is for the purpose of the tribunal’s plausibility to rule on its own jurisdiction that:

An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

The arbitrator’s decision, that the underlying main contract is null and void, does not make the arbitration clause invalid. It is important to note that the separation of the arbitral agreement is only a separation from the main contract. It does not mean that the arbitration agreement is independent from any national law.\(^{45}\)

Separability has been created for practical reasons. Should the arbitration clause be invalid, the arbitrator would have no authority, to make any decisions. Decisions regarding the validity of the parties’ contract fall within the arbitrator’s mandate to resolve the dispute [see below at 3.3.2.2 *Validity of the Main Agreement*].

### 3.3 *Sua sponte* Investigation in Relation to Party Autonomy

An arbitrator is obliged, to fulfil the mandate under the arbitration agreement. The obligations can vary, depending on the formation of the agreement. The basic duties have been summarised by Born, in the following: (a) resolve the dispute in an adjudicatory manner; (b) conduct the arbitration in accordance with the arbitration agreement; (c) maintain the confidentiality of the arbitration; (d) propose a settlement; (e) complete the mandate.\(^{46}\) Within the scope of this essay, the discussion will focus on the obligations under (a) and (b), since these are the relevant obligations, which can stand in contradiction to party autonomy, when considering corruption in arbitration.


The difficulties which the arbitrator confronts, when encountering corruption in arbitration, requires a balancing of the obligations, under the private mission of the arbitrator, and the protection of ethics and good morals in international trade.

3.3.1 Resolve the Dispute in an Adjudicatory Manner

The adjudicatory nature of the arbitrator’s obligations requires the arbitrator to conduct the proceedings impartially and independently, in order to secure a fair process. It is a general rule, which is stated in most laws and treaties.\(^{47}\) Should an arbitrator over-step these expectations, he could be challenged before an arbitral institution, or a court.\(^{48}\) The arbitrator should not be biased towards either one party, or have any financial, or other interest, in the outcome of the case.\(^{49}\)

This duty also includes the obligation to render an enforceable award. Provisions of this duty are found in most institutional rules.\(^{50}\) The arbitrator is not held liable if the award is not enforceable, but he is expected to be competent enough to achieve enforcement.\(^{51}\) It would be undesirable, for the parties to engage in an expensive arbitral procedure, which turns out to be futile. An enforceable award is one that complies with public policy, and the formal requirements, according to applicable law. An award, which does not comply with the requirements, can be annulled or found non-recognisable. Annulment under Article 34 of the Model Law is the equivalent to non-recognition, under Article V of the New York Convention.\(^{52}\)

\(^{47}\) See i.e.: Article 12 Model Law, Article 10(I) UNCITRAL Arbitration Rules, Article 11 ICC Rules

\(^{48}\) Moses, p. 2


\(^{50}\) Article 35 ICC Arbitral Rules, Article 32(2) LCIA Rules, Article 47 SCC Rules , Article 1 IBA Rules of Ethics

\(^{51}\) Moses, p. 80

\(^{52}\) References will only be made to the Model Law, for reasons of simplicity, since Article 34 Model Law and Article V New York Convention are more or less identical.
3.3.1.1 Arbitrability

The arbitrator has the duty, independent of the parties’ motions, to decide the arbitrability of a dispute, i.e. due to public policy.\(^{53}\) An arbitrator’s judicial mandate is to resolve the dispute submitted. However, it does need to be resolved in accordance with applicable law, with consideration of mandatory rules and public policy, in order to render a binding and enforceable award.\(^{54}\)

Parties are free to make arbitration agreements on issues, which according to civil process law, are amenable. According to Tweeddale and Tweeddale, there is no such internationally-accepted opinion, on which matters can be arbitrated, and which cannot.\(^{55}\) Each country’s national law may prescribe arbitrability to different matters. Many different jurisdictions and perspectives on legality, and illegality make it difficult to create a consensus on arbitrability.

Article II(1) of the New York Convention prescribes that arbitration can be denied if the dispute is not “capable of settlement by arbitration”. Further, article V(2)(a) contains an exception, to recognition of an award, if the subject matter of the dispute cannot be settled, according to the law of the country where it is sought to be recognized. The Model Law has a similar provision of non-arbitrability, as stated in Article 1(5), where it provides for the non-arbitrability of specific types of disputes. An award decided on a matter which is non-arbitrable, can be annulled under Article 34(2)(b)(i) Model Law.

Non-arbitrability can either refer to certain issues or agreements, or relationships, which cannot be arbitrated because their legal form does not allow for the issue to be submitted to arbitration. It can also depend on a certain element within an agreement, which i.e. is against public policy, and cannot be arbitrated.\(^{56}\) Issues, which constitute a breach of public policy, are non-arbitrable,

\(^{54}\) Born, *International Commercial Arbitration*, p. 835
\(^{55}\) Tweeddale and Tweeddale, para 4.23
\(^{56}\) For a detailed description see Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p. 139-148
because they are not amenable, due to their illegal nature. Corruption is such an issue.57

Third parties are, generally, not affected by arbitration, and they do not have the right to express interest in arbitration. An arbitral award cannot bind third parties, or the public. The public interest can therefore not be impaired. However, non-arbitrability can still be based on the interest of the public because it can refer to such acts, like corruption, which can have a significant effect on society and the public. For an issue to be non-arbitrable due to public policy in Sweden, for example, it has to be of significant interest to the public.58

The purpose of the non-arbitrability doctrine is judicial protection. Many circumstances, such as criminal matters, should not qualify for arbitration, since it is a private form of adjudication.59 It seems evident, that the doctrine also protects arbitration, as an institution, and its nature, as a neutral place for dispute resolution. It does not allow contracting parties to escape legal responsibility, by construction of contracts based on illegality.

Just as the Model Law, the Swedish Arbitration Act includes provisions of the arbitrator’s competence (section 2(1)). This doctrine enables the arbitrator to decide on disputes, which either are not, or, only partially are, covered by the arbitration agreement. Further it enables the arbitrator to independently make decisions regarding arbitrability, or a party’s raised motion.60 The aim of the competence-competence is to give arbitrators authority, to decide upon their own jurisdiction, in a case, and to render the award, but also to declare lack of jurisdiction, when that is the case.61 The doctrine is stated in both Article 16(1) of the Model Law, and Article 21(2) of the UNCITRAL Arbitration Rules, where it is explicitly stated that “[t]he Tribunal may rule on its own jurisdiction, including any objections, with respect to the existence or validity of the arbitration agreement.”

57 For a more elaborate description of non-arbitrable matters see Born, International Arbitration: Law and Practice, p. 83ff; see also: Heuman, Arbitration Law of Sweden: Practice and Procedure, p. 140
58 Heuman, Skiljemannarätt, Stockholm: Norstedt juridik, 1999, p. 156
59 Born, International Arbitration: Law and Practice, p. 82
60 Heuman, Arbitration law of Sweden: Practice and Procedure, p. 348
61 Heuman, Arbitration law of Sweden: Practice and Procedure, p. 347
The general opinion has been that Judge Lagergren committed a mistake for not recognising either the separability doctrine, or the doctrine of competence-competence.\textsuperscript{62} The arbitration clause is a separate agreement from the contract between the parties. This is an important factor, which will affect the process and the contract. Separability enables arbitrators to address the issue of corruption, to investigate allegations, and to judge the validity of the contract. This ensures that parties do not get away with such behaviour. The importance of separability relates to practical and analytical aspects of the arbitration process. However, separability can also have an impact on questions related to the choice of law, validity of the contract, and competence-competence.\textsuperscript{63} Hence, justification of \textit{sua sponte} investigation can be sought not only on grounds of upholding public policy, but also for the possibility to carry out an arbitral procedure. The tribunal should be able to determine whether it can uphold the claims presented by the parties, and render an enforceable award.

3.3.1.2 Annulment on Public Policy Grounds

If the subject matter of the dispute is contrary to public policy, as regulated in Article 34(2)(b)(ii) Model Law, the award may be annulled. The explicit wording, “only if”, implicates that the list in Model Law Art 34(2) is exhaustive.\textsuperscript{64} The article is not mandatory; rather “an award may be set aside”.

The ILA Committee on International Arbitration concluded, after its review of the development of public policy, in the later part of the 20\textsuperscript{th} century, that there exists “an international consensus that corruption and bribery are contrary to international public policy”.\textsuperscript{65} The common international, legal framework, treaties

\textsuperscript{62} Wetter, p. 278
\textsuperscript{63} Born, \textit{International Commercial Arbitration: Practice and Procedure}, p. 313
\textsuperscript{65} International Law Association Committee (ILA) on International Arbitration, "Interim Report on Public Policy as a bar to enforcement of international arbitral awards", London Conference 2000, p. 22; see also: ICC Case No. 1110
and regulations are further evidence of a global consensus on the issue of corruption. International public policies are fundamental principles of law, common in developed legal systems. They are considered to have mandatory application, regardless of the parties’ agreement.\textsuperscript{66} International public policy is not to be confused with national public policy, which covers a broader range of prohibitions based on the national legislation. Rather it is a narrow scope of severe, illegal acts, such as agreements to perform criminal acts, slavery, arms-trafficking, expropriation, and corruption.\textsuperscript{67} During the drafting of the Model Law, it was considered whether to include the term, “international public policy”, in Article 34(2)(b)(ii). The idea was rejected due to the lack of precision in the concept, and the broader term, “national policy”, was chosen instead. The article covers international public policy, as well.\textsuperscript{68}

Each state has its own national legislation and public policy. For this reason, it has not been possible to create one universal definition. Although it was considered, by the drafters of the Model Law\textsuperscript{69}, neither the drafters of this model law, nor drafters of other international treaties, made any attempt to create a universal standard for this ambiguous concept.\textsuperscript{70} In ICC Case No. 1110 Judge Lagergren described the corrupt act, which was subject to arbitration, as “gross violation of good morals and international public policy”.\textsuperscript{71}

Both the annulment article of the Model Law and the non-recognition article under the New York Convention are narrowly construed.\textsuperscript{72} Further, the Model Law holds a strong presumption, in favour of the validity and enforceability of an award.\textsuperscript{73} Annulment, or non-recognition of international arbitral awards, due to

\begin{itemize}
\item \textsuperscript{66} Born, \textit{International Commercial Arbitration}, p. 2194f
\item \textsuperscript{67} Born, \textit{International Commercial Arbitration}, p. 2194-2196; Holtzmann and Neuhaus, p. 914
\item \textsuperscript{68} Holtmann and Neuhaus, p. 918-919
\item \textsuperscript{69} Holtmann and Neuhaus, p. 919
\item \textsuperscript{70} Holtzmann and Neuhaus, p. 919; ILA Committee on International Commercial Arbitration, New Delhi Conference 2002, para 21
\item \textsuperscript{71} ICC Case No. 1110, para 23
\item \textsuperscript{72} Born, \textit{International Commercial Arbitration}, p. 2800
\end{itemize}
public policy, has generally been made only in limited, exceptional cases, as it is very difficult to successfully claim non-enforceability, or annulment on this ground.\footnote{Lew, Mistelis, Kröll, para 26-114} US case law has shown much restriction in this context. The US Federal Arbitration Act requires “explicit”, “well-defined and dominant policies”, and the breach has to be “clearly shown”.\footnote{Born, \textit{International Commercial Arbitration}, p. 2627} The same trend is present in both German and French practice.\footnote{Born, \textit{International Commercial Arbitration}, p. 2627} French courts have, however, annulled arbitral awards involving bribery.\footnote{Judgement of 30 September 1993, \textit{Euro’\textsuperscript{e}n Gas Turbines SA v. Westman Int’l Ltd}, XX Y.B., Comm. Arb. 198 (Paris Cour d’appel), 1995} In one German case, it was held that annulment can be upheld only in extreme cases. The enforcement must lead to evident abuse, and grave harm to public order.\footnote{Judgement of 25 August 2004, 2004 SchiedsVZ 319 (Bayern Oberlandesgericht)}

It has been invoked, however, where there has been clear violation of fundamental, mandatory legal rules.\footnote{Born, \textit{International Commercial Arbitration}, p. 2625} In the case \textit{Soleimany v. Soleimany}\footnote{Lew, Mistelis, Kröll para 26-119}, a father and a son entered into an agreement, concerning the export of valuable Persian carpets. The export was in breach of Iranian law. While the son exported the carpets, the father sold them in England. When a dispute, concerning the division of the proceeds of sale arose, the two parties agreed to settle the dispute by arbitration, at the Beth Din (Jewish Tribunal). The Court found that though the smuggling of carpets was illegal, it did not undermine the contractual obligations of the parties. The Court decided in favour of the son. After the father refused to comply with the award, the son sought enforcement before English court. The father claimed the illegality of the contract, on public policy grounds. The English court acknowledged this, and refuted enforcement of the award.\footnote{Lew, Mistelis, Kröll, para 26-119} This case, unlike most of the other cases discussed in this essay, contained an obvious breach of public policy, since the whole agreement was contrary to Iranian law. The court could set aside the award, without further inquiry into the matters of the case.
Kreindler writes that “[p]ossible review by a court, at the seat or elsewhere, should not be seen as a Sword of Damocles.”\textsuperscript{82} Review of an award will not be sought simply, for any reason. If the arbitrator conducts the arbitration, and renders an award accordingly, the risk should be small. Even though there is a possibility that the award will be reviewed by a national court, where the illegality can be assessed, it is not a strong enough reason for the tribunal to abstain from addressing issues of corruption. Moreover, it is not likely that, if a national court would review certain elements of illegality, the court would have the same access to evidence as the tribunal. Thus, the tribunal, which has the primary access to relevant facts, should take the opportunity to conduct proper examination. With this in consideration, it is safe to say that the tribunal is a proper forum for investigating a contract tainted by corruption. Further, it is of importance to note that the purpose of the award is to be binding, and final.\textsuperscript{83} Given the possibilities of the national court, it seems more likely that a final and binding award will be correctly obtained, if corruption issues are addressed at the tribunal.

The finality of awards in international commercial arbitration should be challenged only in exceptional cases. An award, which is contrary to public policy, is such an exception.\textsuperscript{84} The pro-enforcement presumption can impact the way in which the court makes decisions, where enforcement of awards are raised. This presumption is based on the fact that arbitration is supposed to be an efficient and final resolution. Should national courts review the decision in its entirety, these traits of arbitration would be lost, and arbitration could risk becoming just a first stage in a protracted litigation process. As long as the correct procedures are followed, the award should be enforced.\textsuperscript{85}

If the arbitrator concludes the arbitration, and resolves the dispute without taking consideration of any suspicion of corruption, the award can be challenged

\textsuperscript{82} Kreindler, “Public Policy and Corruption in International Arbitration: A Perspective for Russian-Related Disputes”, p. 247
\textsuperscript{83} Kreindler, “Public Policy and Corruption in International Arbitration: A Perspective for Russian-Related Disputes”, p. 247
\textsuperscript{84} International Law Association Committee on International Arbitration, New Delhi Conference, 2002
on public policy grounds, and non-recognised, by the national court. However, there is a risk that the national court decides to uphold the award, without making any further inquires of the evidence of corruption. A court is more likely to uphold the award at the enforcement stage, than to reverse it.\textsuperscript{86} This has been confirmed in cases like Westacre and Hilmarton\textsuperscript{87}. The Court of Appeals, in the Westacre case, noted that the allegations of corruption had been made, entertained, and rejected, at the Tribunal. Thus, the court concluded that it was not necessary to re-address the circumstances of corruption. The respondent alleged that the claimant had bribed public officials, and that the contract therefore was void. The Court of Appeals considered which policy to give priority; either the policy of non-enforcement of awards on public policy grounds, or the policy supporting the finality of arbitral awards. The court held that it is important to uphold laws and policies against bribing foreign officials. Despite this, the conclusion was that these policies did not measure up to public policies against such illegality as prostitution, or drug-trafficking. Thus, the court upheld the arbitration award. However, the dissenting judge was concerned by the issue of corruption. He noted that an award, based on a corrupt contract, should not be possible to enforce, in an English court.

In the Hilmarton case, the High Court considered whether or not the award would be enforced under English law, given that there could have been illegalities involved. The court finally concluded that as irrelevant, and held that the award must be upheld. The conclusion regarding the findings, under the applicable law, which was Swiss law, had to be respected.\textsuperscript{88}

A national court cannot re-examine the case, and make decisions on the substantive matters. When enforcement of an award is challenged before national court, it is limited to evaluation of whether the award contains matters which can give ground for refusal.\textsuperscript{89} Whether the arbitrator has exceeded his authority, or

\textsuperscript{87} ICC Case No. 5622, Reprinted in part in: Martin, p. 20
\textsuperscript{88} Martin, p. 25
\textsuperscript{89} Berg, Albert Jan van den., diss. The New York Arbitration Convention of 1958: Towards a Uniform
not, has to be determined from the arbitration agreement, and the claims made by the parties. The court cannot search for new substantive matters, as this would constitute a re-examination of the case.\textsuperscript{90}

The existing international public policy, prohibiting corruption, brings responsibility to administrators of justice, including arbitrators, to ensure that the laws and instruments provided against corruption are applied.\textsuperscript{91} The issue of uncertainty remains, however, if the arbitrator, when there is suspicion of corruptive acts, can conduct an investigation on his own motion. The arbitrator’s judicial mandate is to resolve the dispute, in accordance with applicable law. The primary role carried by the arbitrator is not to defend public policy, but to enforce the contract.\textsuperscript{92} Therefore, a duty to investigate breaches of criminal law, when there is no evidence, nor allegations made by either party, cannot be imposed on the arbitrator. Unless allegations are made, the arbitrator should not search for evidence of criminal offences.\textsuperscript{93} On the other hand, it neither can be assumed, that an arbitrator should be bound by a contract, which in nature is illegal and invalid due to corruption. Furthermore, corruption constitutes a breach of public policy, not only criminal law [see below at 3.3.1.2 \textit{Annulment on Public Policy Grounds}].

\textbf{3.3.1.3 Decision in Accordance With Applicable Law}

In order to resolve a dispute in an adjudicative manner, the arbitrator is further obliged to decide the issues of the dispute, according to the applicable law.\textsuperscript{94} The

\begin{itemize}
\item \textit{Judicial Interpretation}, The Hague: Asser, 1981, p. 312
\item Mourre, p. 111
\item Hunter, and Paulsson, p. 153
\item Kreindler, “Public Policy and Corruption in International Arbitration: A Perspective for Russian-Related Disputes”, p. 246
\end{itemize}
choice of law in arbitration is the fundamental part of party autonomy. Party autonomy is, today, “considered to be one of the cornerstones of international commercial arbitration.”\textsuperscript{95} It is stipulated in most arbitration acts, and the rules of most arbitration institutions.\textsuperscript{96} Limitation of party autonomy can theoretically be made in four instances, of which international public policy is one.\textsuperscript{97}

Applicable law can be another than the one chosen by the parties. The arbitrator has the freedom to consider the applicability, when conflict of law arises.\textsuperscript{98} If the law chosen by the parties is contrary to international public policies, that law should not be applied. If for instance, evidence of bribery is established and proven in a case, but the applicable law does not prohibit such acts, that law can be contrary to public policy. It is then the responsibility of the arbitrator to solve this issue, and apply an appropriate law.\textsuperscript{99} As Brown writes, “public policies apply as limits or constraints on national mandatory laws and public policies, precluding application of national laws and policies that contravene international public policies.”\textsuperscript{100}

However, the nature of international public policy is such that, it can be said to make up “the lowest common denominator of all legal systems of the world.”\textsuperscript{101} As will be discussed further below, the application of international public policy is restricted, due to its exceptional function. On this basis, it is difficult to see that an arbitrator would find an applicable law contrary to international public policy.

Even if a law on anti-corruption is applicable in a specific case, it is not a guarantee that the arbitrator will rule on the merits of corruption. The arbitrator is

\textsuperscript{96} See i.e. UNCITRAL Model Law Article 28(1), 1961 European Convention on International Commercial Arbitration Article VII, SCC Rules Article 22(1)
\textsuperscript{97} Hobér, para 2.53
\textsuperscript{100} Brown, \textit{International Commercial Arbitration}, p. 2197
\textsuperscript{101} Hobér, para 2.89
determining the facts of the case, and applying the applicable legal rules.\textsuperscript{102} In the Hilmarton case, the arbitrator reviewed the contract under the chosen substantive law, and under the law of the place. The dispute concerned a commission payment, for obtaining a contract in Algeria. Bribery could not be proven beyond doubt under the substantive law, but there was proof of trafficking in influence taking place. Under Swiss law, which was the substantive law, the contract was not null and void, as trafficking under influence is not prohibited, in that sense. Instead, the arbitrator argued that influencing was illegal under Algerian law, which was the law of the place. He stated that the law of the place should be applied, as the prohibition of influencing is a general principle that should be in the interest of all legal systems wishing to take part in the fight against corruption.\textsuperscript{103}

In ICC Award 9333 the tribunal chose to disregard the FCPA because Swiss law was applicable.\textsuperscript{104} The tribunal stated that, even if one would suppose that the FCPA is a mandatory law, and can override another substantive law, an evaluation of the interests, in the application of this law will impact its applicability. Further, the tribunal concluded that the ultimate aim of the FCPA is not to protect public policy, but to restore confidence and uphold the reputation of American corporations, involved in high profile corporate scandals.

The choice of law considerations will be primarily relevant for the establishment of corruption in a case. If the arbitrator makes relevant findings of corrupt behaviour, it has to be established whether these facts qualify as corruption, under the applicable law. Given that corruption is contrary to international public policy, facilitation of such practices in any way, will normally be considered invalid, regardless of the applicable law.

\textsuperscript{103} Re-printed in part by Martin, p. 20
\textsuperscript{104} ICC Award 9333 (1998), Re-printed in part by Martin, p. 51
3.3.2 Conduct the Arbitration in Accordance with the Arbitration Agreement

The arbitrator must perform the obligations, in accordance with the provisions set forth in the arbitration agreement, unless the agreement is contrary to mandatory rules, or public policy. This obligation is connected to the principle of party autonomy, which grants the parties freedom to agree upon the substantive laws and procedure, to be applied in the arbitral procedure. The Swedish Arbitration Act allows the parties to decide on both the jurisdiction of the arbitrators, and the procedural issues to a considerable extent. The parties can agree on the scope of the arbitrator’s authority. In particular, party autonomy restrains the arbitrator from conducting the procedure, by making decisions without the parties’ consent.

3.3.2.1 Excess of Authority – ultra petita

The arbitrator is obliged to decide all issues which are presented to him, based on the matters raised by the parties, but no other issues. In order to fulfil his obligation, to conclude the dispute and render an enforceable award, the arbitrator needs to address claims made by either party. Subsequently, an arbitrator must address allegations of corruption, made by one or both parties. When one party’s claims directly refer to the corrupt behaviour of the other party, “it is a vital precondition to the fulfilment of this mandate that [arbitrators] consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to public policy.”\textsuperscript{105} It cannot be expected that a party should be legally obliged to perform a contractual obligation, towards the counter-part, when the tribunal has not considered public policy objects, against such an obligation.

All issues falling within the scope of the arbitration agreement must be considered by the arbitrator. An award may be annulled, or non-recognised if the

\textsuperscript{105} Born, \textit{International Commercial Arbitration}, p. 2183
arbitrator fails to decide on issues, submitted for arbitration. Similarly, if an arbitrator exceeds his mandate, by deciding on issues, which have not been submitted by the parties, the award also risks being unenforceable, or annulled under Article 34(2)(a)(iii) Model Law. Excess of mandate can be constituted when “the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.” According to this main rule, an arbitrator is only allowed to decide on issues, which fall under the parties’ claims. The parties lay down the scope of the arbitration through the arbitration agreement. They can narrow down the scope to only include issues under the express terms of the agreement, or grant jurisdiction on all cases which arise in the arbitration.

Generally, it could be expected that the parties would draft the arbitration clause, broadly in order to avoid the additional expenses of parallel proceedings, should another dispute issue arise. The contrary must be true in corruption cases, in which parties most likely want to avoid the corrupt acts, to fall under arbitral scrutiny. When interpreting arbitration clauses, it will depend on the court which interpretation the certain wording of the clause is given. In Fiona Trust Holding Corp. the court stated that “any jurisdiction or arbitration clause in an international commercial contract should be liberally construed.” The broad interpretation of arbitration agreements, consequently results in a narrow interpretation of the non-enforcement and annulment grounds.

The pro-arbitration presumption has replaced the previous restrictive interpretation. That archaic view was based on the fact that arbitration was viewed as an exception to the norm, which was court litigation. As an exception, arbitration was imposed with a restrictive interpretation. The current interpretation holds a presumption that parties wish to have all their disputes arbitrated. Unless

106 Born, International Commercial Arbitration, p. 2610. 2798-2799
107 Born, International Arbitration: Law and Practice, p. 36
109 Fiona Trust Holding Corp. V. Privalov [2007] 1 All E.R. (Comm.) 891 (English Court of Appeal)
110 Redfern, Alan and Hunter, Martin, Law and Practice of International Commercial Arbitration, p. 445
111 Born, International Commercial Arbitration, p. 1076-1078
112 Gaillard and Savage, para 480
a disclaimer, regarding the jurisdiction of certain issues, is included in the arbitration clause, it is assumed that the arbitration agreement covers also those issues.\textsuperscript{113} This presumption has been confirmed in several cases. In US arbitration a strong pro-arbitration presumption has developed. The US Supreme court stated in \textit{Mitsubishi Motors corp.} that “any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration.”\textsuperscript{114} Similarly, the Swiss Federal Tribunal has held that “if it is established that an arbitration clause exists, there is no reason to interpret that cause restrictively”. It should be “assumed that the parties wished for an embracing jurisdiction of the arbitral tribunal.”\textsuperscript{115}

Matters, which are outside the scope of the parties’ submissions, refers to circumstances where an arbitrator relies on arguments, or authorities, which are not presented by the parties. The arbitrator does not take any new dispute-issues into consideration. Decisions are made on matters which support the claims submitted by either party, without these matters having been presented by either party. The arbitrator basically takes matters into consideration, which support the claims of the parties. Annulment on this ground is the most common. However, courts have, generally, been reluctant towards accepting claims on these grounds.\textsuperscript{116} Some courts have adopted a presumption that tribunals do act within their authority. Gaillard and Savage claim that, simply basing decisions on allegations, or arguments, not presented by the parties, does not constitute excess of authority. Annulment of an award on these grounds requires that one party is granted more, than asked for.\textsuperscript{117} When in doubt about the scope of the submissions, generally, it will be decided in favour of the arbitrator’s interpretation.\textsuperscript{118} This can be derived from the presumption of validity of arbitral awards, discussed earlier in this essay.

In the case that the arbitrator makes a “surprise decision”, where no opportunity is given to the parties, to comment, or take notice of the grounds for deci-

\textsuperscript{113} Born, \textit{International Commercial Arbitration}, p. 2178f
\textsuperscript{114} \textit{Mitsubishi Motors corp. v. Soler Chrysler-Plymouth, Inc.}, 473 US 614, (1985), at 626
\textsuperscript{116} Born, \textit{International Commercial Arbitration}, p. 2607; Lew, Mistelis, Kröll, para 26-92, 26-93
\textsuperscript{117} Gaillard and Savage, p. 1631
\textsuperscript{118} Born, \textit{International Commercial Arbitration}, p. 2609
sion, the award can be subject to annulment or non-recognition. It would violate the procedural rights of the parties. Parties have a general right to be given an opportunity to be heard, as regulated in Article 34(2)(a)(ii) of the Model Law.

It is difficult to draw any generalised conclusions regarding corruption. This form of illegal acts is broad, and can be performed in various ways, and degree. The circumstances can vary in each specific case. However, from the discussion above it can be said that, due to the narrow interpretation of this specific regulation, an arbitrator who decides on matters which are outside the scope of the parties’ submissions, in general does not exceed his authority. If a party claims that the contract is invalid, and an arbitrator supports this claim, by findings of corrupt behaviour, he would probably not exceed his authority. However, in order to establish that corruption has been involved, an investigation is likely to be required.

Matters, which are outside the scope of the arbitration agreement, refers to new issues in the arbitration; issues which the parties have excluded from arbitration. It is a circumstance which the parties do not wish to have resolved. Despite the fact that Judge Lagergren, who set the standard for addressing corruption in arbitration, investigated matters on his own mission, subsequent case law has shown a different spectrum of approaches. In the Westacre case, the tribunal stated that, “[i]f the defendant does not use it in his presentation of facts, an Arbitral Tribunal does not have to investigate. It is exclusively the parties’ presentations of facts that decide in what direction the arbitral tribunal has to investigate.”

In the Westinghouse case, the tribunal chose not to go further with investigations of corrupt behaviour. It was stated that “the Tribunal does not have to solve this delicate issue since it has found on the facts presented to it that the Defendants have failed to prove their allegations of bribery.”

In order to fulfil the obligations as an arbitrator, the parties can be addressed with questions for clarity, when there is suspicion of corrupt behaviour. This right should, however, not be exercised, other than when there are strong indica-

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119 ICC Case No. 7047, Westacre, re-printed in part by Martin, p. 5
120 ICC Case No. 6401, re-printed in part in Martin, p. 4
tions of corruption.\textsuperscript{121} One commentator’s suggestion, on how to handle corruption in arbitration, is to set indicators of i.e. bribery, which can invalidate a contract. Thereafter, the arbitrator should be proactive in determining the existence of such indicators.\textsuperscript{122} Mere belief, or whistle-blowing are not a strong enough bases for a self-initiated investigation, by the arbitrator.\textsuperscript{123} In ICC Case No. 8891, the tribunal independently addressed the suspicion of bribery, by looking for certain indicators.\textsuperscript{124} The case confirms the difficulty in proving corruption, as the illegal objects of the contract are usually hidden behind other clauses of less significance. Thus, in order to validate suspicion, or allegations of corruption, there is no other choice than to conduct an investigation, by addressing the indicators, and analysing them. The tribunal, in this case, found that the consulting contract was concluded with the intention to engage in bribery. In order to reach this conclusion, the arbitrators took a more proactive role, by investigating the circumstances of the case. A number of criteria, for detecting corrupt behaviour, were set up. Based on these criteria, which include a high rate of commission, and a short duration of the agent’s involvement, among others, the tribunal found, after analysing the available evidence, that the circumstances of the case confirmed these criteria. For instance the commission amounted to 18.5\%, which is regarded as particularly high. The involvement of the plaintiff was 2.5 months, which is very short, in relation to the task assigned.

Decisions made on new matters, in arbitration, constitute a larger infringement, in the party autonomy. If a new matter refers to an issue, which is not part of the dispute subject for arbitration, clearly, the issue is not included under the arbitration agreement. Nevertheless, the matter may have relevance for the arbitral process. For instance, the dispute might regard an omission of performance, which is derived from the main contract. If the main contract is tainted by corruption, addressing the evidence or the suspicion will have relevance for the arbitra-

\textsuperscript{122} See: Martin, p. 6
\textsuperscript{123} Mourre, p. 111
\textsuperscript{124} Martin, p. 5
tablished whether or not the main contract is valid. This may require an investigation, or gathering of evidence, in order to conclude the circumstances surrounding the dispute. It is held, by a number of commentators that raising issues, which are relevant for the resolution of the dispute, does not constitute *ultra petita*. In the balance between the obligations of upholding public policy, and the prohibition of *ultra petita*, the former would probably overweigh the later. However, according to Kreindler, this question does not need to be answered. An arbitrator’s *sua sponte* investigation should normally not constitute a violation of *ultra petita*. Corruption affects the validity of the main contract, upon which the dispute resolution depends. Thus, determining issues, that can affect the validity of the main agreement, are in every sense, relevant for the dispute resolution [discussed below at 3.2.2.2 *Validity of the main contract*]. It is the duty of the arbitrator to ascertain all relevant facts of the case. An arbitrator has the right to do so, with all appropriate means.

The uncertainty of whether an arbitrator can inquire into *sua sponte* investigation of corruption, arises from different principles, obligations, and policies within arbitration. Where corruption is involved, the possibility to investigate such public policy stands in contradiction to party autonomy. Even though party autonomy is a fundamental principle of arbitration, contributing to the popularity of this dispute resolution, it may have to pay the way for other fundamental principles. It is true that an arbitrator is a private adjudicator, with a duty to resolve the dispute, in accordance with the parties’ wishes. However, an arbitrator is also a servant of justice. The legal aspects of arbitration play a principal role in this discussion, as well. A tribunal cannot be seen solely as an instrument of party autonomy, in which international public policies against illegality, such as cor-

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126 Kreindler, “Public Policy and Corruption in International Arbitration: A perspective for Russian Related Disputes”, p. 244
127 Kreindler, “Public Policy and Corruption in International Arbitration: A Perspective for Russian-Related Disputes”, p. 240; Lew, Mitelis, Kröll, para 12-13
ruption, can be ignored. A number of commentators have concluded that the arbitrator has a stricter duty to apply the law correctly, and conduct an enforceable award, than solely assist the implementations of the parties’ interests. Should the arbitrator not address issues of corruption, he may risk being an accomplice, to a breach of public policy, by rendering an award on an illegal contract.

3.3.2.2 Validity of the Main Agreement

When accepting appointment, the arbitrator consequently accepts the provisions in the arbitration agreement, decided on by the parties. This obligation is, however, not binding, when the provisions under the arbitration agreement are contrary to mandatory laws, or otherwise illegal. According to AAA/ABA Code of Ethics Canon I (E), for example, “[a]n arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator’s judgement would be inconsistent with this Code.”

As has been previously discussed, a contract tainted by corruption is invalid. This leads to the question of whether it falls within the scope of the arbitration agreement, to resolve disputes concerning existents, validity, or legality of the main contract. It will follow, without uncertainties, when such provisions are explicitly formulated in the arbitration clause. However, even when not included in the agreement, there exists a presumption that the arbitration agreement also extends to this question. The presumption has been confirmed in many cases, both in common and civil law. The German Bundesgerichtshof stated in a

128 Kreindler, “Approaches to the Application of Transnational Public Policy by Arbitrators”, 6th IBA International Arbitration Day, Sydney, 13 February 2003, at p. 15; see also: Martin, p. 6; Mourre, p. 97
129 Mourre, p. 116; Mayer, p. 239; Sayed, p. 276, Born; p. 2197; Mayer, p. 239; Cremades and Cairns, p. 84
130 Born, International Commercial Arbitration, p. 1108
131 Born, International Commercial Arbitration, p. 1108
judgement of 27 February 1970, that, when in doubt, it should be decided that the arbitral agreement includes also the mandate to decide on the validity of the main agreement. Decisions suggesting the opposite, have also been confirmed, however, according to Born they are few.

Subsequently, this suggests that when an arbitrator suspects that the main contract might be tainted by corruption, he should conduct an investigation, in order to conclude the validity of the main contract, upon which the arbitral decision depends. A reasonable conclusion, to draw from this, is that an examination of underlying matters, which can have contributed to the invalidity of the main contract, must be necessary. If the main contract has been tainted by corruption, the arbitrator will have to investigate the circumstances, in order to establish if the dispute can be resolved by arbitration.

Although, in the strict wording of the provisions under Article 34(2)(b)(iii) Model Law, inquiring into these kinds of investigations could constitute *ultra petita*. However, a deviation from this rule is present both in case law and international doctrine. For instance, Kreindler holds that,

> illegality contentions going to the nullity of the main contract […] even if initiated by the tribunal itself, should normally be deemed to “fall within the terms of the submission to arbitration”… [as] it has a core relevance to… public policy… [and] should be seen as necessarily falling within the terms of virtually any submission to arbitration.

Investigation of illegality allows the tribunal to reach a legal conclusion concerning the validity of the main contract, and as such, must fit into the claims already made by the parties. Subsequently, Kreindler holds that an arbitrator acts outside his authority only when the suspected illegal action is irrelevant to the claims presented.

A down-side of voiding a contract is that one party will escape its obligations under the contract, as was concluded in ICC Case 8891. The tribunal noted that

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134 Born, *International Commercial Arbitration*, p. 1109
voiding the contract results in one party benefiting, by escaping from its obligations. The party was relieved from paying the consultant the price agreed upon. Although, this is a down-side of voiding an illegal contract, it is not sufficient ground to legitimize a contract with illicit purpose.\textsuperscript{137} The arbitrator, even though he has obligations towards the parties which hired him, has a bigger obligation not to breach public policy. Thus, a party who entered a corrupt agreement in the first place, will have to accept the consequences.

Arbitrators may, however, be reluctant towards declaring contracts null, and void. This is especially so because a contract between the parties is a result of the party autonomy.\textsuperscript{138} Further, the arbitrator’s own authority is derived from the parties’ contract, and he depends upon it. The arbitrator can find himself standing in between two contrasting interests - should he take the role as servant of justice, or the role as servant of the parties?\textsuperscript{139} This reluctance should be regarded, as unjustifiable, since the nullification of the parties’ contract does not invalidate the arbitration agreement. Therefore, the arbitrator does not lose his jurisdiction. The reluctance of the arbitrator can be traced to the loyalty towards the parties, that have entrusted him, with the mission of resolving the dispute. In the end, whether corruption will be addressed in arbitration, or not, will depend on the arbitrator’s own interpretation, and choice of addressing the matters presented to him. The discussion on whether or not an arbitrator can conduct a \textit{sua sponte} investigation, culminates into a battle, between the party autonomy, and the arbitrator’s mandate, in relation to public policy grounds.

\textsuperscript{137} Martin, p. 51
\textsuperscript{138} Mayer, p. 244
\textsuperscript{139} Raouf, p. 2
4 Conclusion

4.1 Can an Arbitrator Conduct sua sponte Investigation?

The question regarding the possibility and right of an arbitrator, to conduct a *sua sponte* investigation of corruption matters in arbitration, is not easily answered. There is an indispensable difference in the theoretical answer derived from laws and rules, versus the answer based on legal practice. These two perspectives generate two possible answers. Important to mention in this discussion, is also, the existence of a significant difference between what the arbitrator can do, and what the arbitrator should do. The fact that an arbitrator could conduct an investigation of corruption matters in arbitration, does not mean, that he should do so.

1. According to the strict meaning of international arbitral law, an arbitrator does not have mandate to inquire into *sua sponte* investigation of corruption. Such an investigation requires the arbitrator to search for facts, and raise matters which the parties have not presented before the tribunal. This is against the rule stated in Article 34 (2)(a)(iii) of the Model Law. Should an arbitrator conduct such an investigation, the award may be challenged before national court.

2. An arbitrator, as a private adjudicator, has several obligations and duties to consider in the course of the arbitration. The purpose of arbitration is to render a binding and enforceable award, in order to resolve the dispute. If an arbitrator does not address evidence of corruption in a case, even when there are indicators of such behaviour, the award which is rendered risks being annulled, or non-enforceable, on public policy grounds. A contract tainted by corruption is invalid. If the arbitrator renders an award based on an illegal contract, the award should be declared non-enforceable on public policy grounds. In order to comply with
the obligations condoned on him, the arbitrator should examine whether or not the main agreement is valid. Thus, some sort of investigation of relevant facts is necessary. Further, if the arbitrator raises issues which are relevant for the conclusion of the dispute, it is not believed to constitute an excess of authority. Due to the strong condemnation of corruption, it seems legitimate to say that, the present policies and stands hold a position in favour of *sua sponte* investigation.

Moreover practice has shown that national courts do not readily annul awards or find them non-enforceable. Due to the pro-enforcement bias, an award will only be challenged in exceptional cases. The broad interpretation of arbitration agreements, leads to a narrow interpretation of the annulment article of the Model Law, and non-enforceability article of the New York Convention. Combined, this contributes to an interpretation, and application, of current regulations, on *ultra petita*, being made in such a way that, the regulations pose limited restriction on the arbitrator. The practice of applying the rules, suggests that there is little restriction on the arbitrator. The means to attack an award are narrowly interpreted and applied. Consequently, an award based on a *sua sponte* investigation, by the arbitrator, is less likely to be overturned by the court. Thus, an arbitrator could in practice conduct a *sua sponte* investigation, without the award being annulled or non-enforced. There is a risk that the award is challenged before national court, but, the risk that it will be overturned, seems small.

### 4.2 Should an Arbitrator Conduct a *sua sponte* Investigation?

There seems to be two legitimate arguments, of any significant importance, against a *sua sponte* investigation of corruption in arbitration. Firstly it is not the role of the arbitrator to engage in investigations of criminal behaviour. That is primarily the duty of the prosecutor. Secondly, and probably the most significant argument, at least in theory, is the *ultra petita* argument.

The first award concerning corruption in arbitration was rendered after a *sua sponte* investigation. Several principles give legitimate grounds for this kind of
investigation. The arbitrator has two choices; either to ignore evidence of corruption, and leave it for the national courts to handle, or to be proactive in upholding public policy, as well as to protect the arbitral institution. However, many essential factors of the arbitral procedure rely on a valid main contract. Corruption will have negative effects on the main agreement. Subsequently, the arbitrator will not be able to uphold his duties and obligations and conclude the arbitration in an adjudicatory manner. If corruption is investigated *sua sponte*, and the illicitness of the main contract is established, the arbitrator can find the matter non-arbitrable, due to public policy. Likewise, if the arbitrator ignores the potential existence of illicitness in the main contract, the arbitral award may be non-recognised on public policy grounds. Either way, corruption in arbitration cannot be upheld and ignored. Therefore, it seems more efficient that corruption is dealt with by the arbitrators, before investing time and effort in an arbitral process that will show futile in the end.

The restriction of the arbitrator, to decide on matters not presented by the parties, stands in contrast with the obligation to render an enforceable award. An award should not be contrary to public policy, nor can it be rendered on an invalid underlying contract. On the other hand an arbitrator, who carries a judiciary role, cannot ignore illegalities in order to fully engage in his role, as the private adjudicator of the parties. Should corruption and other illegal matters completely be ignored in favour of the parties’ interests, there is a risk that the arbitral institution might become a safe place for corruption. Arbitration would cease to fulfil its function as an instrument of the judiciary. Although party autonomy is an essential part of this dispute resolution, it cannot be granted exclusively. If it was, it could intertwine with illegality. This could be regarded as a fundamental argument in favour of *sua sponte* investigation. It seems trivial that an arbitrator, within his mandate, should strive towards upholding the integrity of the arbitral institution.

The rendering of an enforceable award has been identified as a primary trait of corruption. It is the whole purpose of arbitration, and logically, holds a strong position. As has been discussed previously, national courts have developed a
strong presumption in favour of the validity of a rendered award, at the enforcement stage. In both the Westacre and Hilmarton case, the awards were upheld by tribunals, without consideration of whether the contracts were tainted by corruption, or not. Clearly, an award can be enforceable, even if contrary to public policy. If evidence of corruption is not dealt with at the tribunal, there is a risk that it will not be considered by national courts, either. Therefore, the argument that corruption will lead to the rendered award being unenforceable, or annulled, is correct in theory, but practice has shown otherwise. Annulment, or non-recognition, of an award, on public policy grounds, is only granted in exceptional cases, where there is clear evidence of such a breach. The risk that an award is overturned on grounds of corruption is rather small, due to the difficulty of proving corruption. Therefore, should an arbitrator render an award, despite suspicion of corruption, it may be enforced after all.

Likewise, annulment, or non-recognition, on grounds that the arbitrator has exceeded his authority, is narrowly construed. Here, as well, national courts have constructed a presumption that the arbitrator does act within mission. In theory, it is relevant to discuss the issue of corruption, in relation to annulment and non-enforcement. Practice has, however, shown that the situation is quite different when these issues are present before the tribunal. Even the risk that the arbitrator faces, for excess of authority, can be regarded as theoretical. It will depend on the national court, before which the enforcement of the award is raised. Based on the presented facts, it seems that the legal limitations on an arbitrator’s *sua sponte* investigation are not strict.

In the Westacre case, the tribunal actually considered which policy overweighs the other; the policy of enforcing an award, or upholding public policy. However, since the court did not recognise corruption as contrary to public policy, the court concluded that enforcement of the award overweighs. It can be suggested that the outcome would have been different, had the court recognised corruption as a public policy, which it in fact is. Thus, the court suggests that public policy overweighs enforcement of awards. Principally this means that an award contrary to public policy, in practice, should be non-recognisable as well.
However, just as the court in the Westacre case, national courts are reluctant towards overturning the work of a very competent arbitral tribunal.

Furthermore, it has been argued that, if the issue has relevance for the resolution of the dispute, it does not constitute excess of authority. Corruption is, to a high degree, relevant to the arbitrator’s ability to render an award appropriately. The tribunal does have a better position than a national court to properly evaluate the evidence. The arbitrator has more extensive access to evidence, documents, information, and witnesses compared to the national court. Further, it is the arbitrator who has the concerned case at his hands, and has possibility to evaluate the information. Thus, the arbitrator is in a better position to properly examine the circumstances of the case, and reach a conclusion concerning illegality. The competence-competence doctrine supports this position. The doctrine allows the arbitrator to examine his own jurisdiction, under the circumstances of the case. Thus, the arbitrator needs to establish the circumstances, and facts, in order to reach a conclusion regarding the provisions of the case. The separability doctrine further supports the arbitrator’s ability to conduct arbitration, even when the main agreement is invalid. The arbitrator has legal tools at his hands, in support of an investigation *sua sponte* of corruption.

The strong condemnation of corruption, and its negative effects, is a reason for why corruption should be addressed and fought, where possible. The international engagement on anti-corruption shows not only the importance of combating corruption, but also a large common interest. Arbitration, as part of the judicial system, is certainly a forum which should be distanced from any illegality. In that sense arbitrators should take more responsibility concerning corruption in arbitration, and investigate such matters notwithstanding the parties’ wishes.

On the other hand, the arbitral regulation, in the stricter meaning of the rules, does not open up for such investigations to be made. Arbitrators are clearly restricted by law. However, the evolved practice has opened up for possibilities to conduct investigations, without this constituting misconduct. It is my opinion, that, corruption should be addressed, but proper tools for doing so need to be created. The current arbitral regulations are not constructed for the purpose of com-
bating corruption. Perhaps what is necessary, is for the arbitral community, to adapt the regulations in accordance with the evolving practice.

4.3 Summary

Justification of the principle of *sua sponte* investigation, in arbitration, is primarily derived from the negative role that corruption holds, and the destructive consequences of corruption in society, including arbitration. The international consensus on the status of corruption, as contrary to public policy, makes it even more desirable that it be actively condemned. Addressing corruption at the tribunal is a means to counteract this illegality. The problem is, however, that arbitration has not been constructed for resolution of these kinds of issues. Illegal and criminal matters are restricted to the prosecuting authorities. The purpose of arbitration is not to investigate and handle criminal offences. Despite this, there is a point in considering these issues, in relation to the scope of the arbitral institution.

The fight against corruption is of vital importance for a fair worldwide marketplace. Therefore good governance, ethics and transparency are indispensable. If arbitration would become a safe place for corruption, it would no longer be useful for the business community. Corruption does need to be counteracted with efficient means. It cannot be accepted within arbitration. In the aspiration to join in the anti-corruption battle, as well as protecting arbitration as a forum for dispute resolution, *sua sponte* investigation of corruption has been justified, with arguments based on public policy grounds, and principles of enforceability, and proper adjudication.

The conclusion of this examination is that an arbitrator can successfully conduct a *sua sponte* investigation. However, it remains evident that clarifications in this area are necessary. A trend towards a practice, in favour of *sua sponte* investigation, is manifest. If the arbitration community shares the prevailing opinion of
the various commentators, that corruption should be investigated by the arbitrator, it needs to be properly expressed, i.e. in the form of regulations or guidelines. For the future, it seems legitimate to hold, that this problem needs to be deliberated, in order to create clarity, at least to some degree.
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