

The emergence of transnational responses to corruption in international arbitration

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ABSTRACT

As the global fight against corruption continues to intensify, arbitrators play an increasingly important role in developing responses to cases raising corruption issues. The present article investigates the steady emergence of general principles, or transnational rules, which are available to and increasingly applied by arbitrators who adjudicate corruption issues. First, in light of the difficulty of deducing direct evidence of corruption, arbitrators have consistently accepted that corruption can be proven through a sufficient number of indicia, or ‘red flags’ of corruption. Second, in certain circumstances, arbitrators and courts may depart from the traditional rule that refuses to restore benefits performed under contracts tainted by corruption. Third, a number of cases have affirmed that issues of corruption are to be resolved by reference to rules of transnational public policy, rather than local mandatory rules, or *lois de police*, where local rules do not form part of the *lex contractus*. While such responses to corruption have not and need not achieve unanimous recognition in all legal systems, they have been adopted in a significant number of cases to function as general principles that can guide arbitrators dealing with corruption issues.

1. INTRODUCTION

Corruption is today one of the greatest challenges facing international commerce and has serious detrimental effects on markets, efficiency, and public welfare. While corruption is certainly not a novel issue for arbitration (over half a century ago, in International Chamber of Commerce (ICC) Case No 1110, Judge Lagergren was called on to decide a dispute concerning bribery and fraudulent inducement of government officials), arbitrators in both commercial and investment treaty arbitration proceedings are today adjudicating corruption issues with increasing frequency. A number of simultaneous factors have contributed to the current prevalence of corruption issues in international arbitration. Following widespread political upheaval in

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recent years, such as the Arab Spring, newly formed governments have regularly condemned the practices of previous regimes that held the reins of power for decades. In a number of arbitrations, states and state entities have sought to distance themselves from these practices by alleging that a dispute inherited from a previous government arises out of a contract or investment tainted by corruption.¹ The development of the international legal framework against corruption is another important factor. The entry into force in 1999 of the Organization for Economic Cooperation and Development (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention')² marked a radical turning point by requiring its signatories, which today total 43 states, to put in place legislation and related measures that criminalize corruption. National investigations and criminal proceedings have unearthed new evidence of corruption that has in turn been deployed by parties to international arbitrations.³ A third important factor to the proliferation of corruption issues in international arbitration is the steady growth of arbitration claims based on international investment treaties. Given that the jurisdiction of arbitral tribunals over such claims is premised on the requirement that an investment be made in conditions of legality, it is unsurprising that state respondents are increasingly raising corruption allegations as a preliminary objection or at the merits phase in an effort to deprive claimants of investment treaty protection.

The focus of the present article is not to revisit the many facets of this important topic,⁴ but instead to examine the body of rules available to arbitrators who are called to adjudicate corruption issues, whether they concern corruption *strictu sensu* (ie the bribery of foreign officials), deliberate abuses of authority such as trading in influence⁵ or other forms of illicit conduct such as fraud and money laundering. The

1 See eg the allegations of corruption advanced by the Arab Republic of Egypt against Mubarak-era government officials in *Ampal et al v The Arab Republic of Egypt*, ICSID Case No ARB/12/11 [Y Fortier, C McLachlan and F Orrego Vicuña] Decision on Jurisdiction dated 1 February 2016, para 276. See also C Foty, 'The Evolution of Arbitration in Arab World' (*Kluwer Arbitration Blog*, 1 July 2015) <<http://arbitrationblog.kluwerarbitration.com/2015/07/01/the-evolution-of-arbitration-in-the-arab-world/>> accessed on 25 February 2019.

2 The OECD Convention (adopted 21 November 1997 and entered into force 15 February 1999).

3 One notable example is the recent scandal surrounding the alleged bribery by Italian companies ENI and Saipem to obtain rights over oil fields in Algeria. Another is the *Lava Jato* corruption probe in Brazil, which implicated a number of parties including Petrobras and the construction company Odebrecht. The effects of these scandals have extended to a number of oil and gas and public works contracts containing arbitration clauses. In recent award, an arbitral tribunal in Houston rejected Petrobras' attempt to avoid a contract with Vantage Drilling International on grounds that Petrobras' former executives had paid bribes to Vantage's Brazilian agent to obtain the contract. The tribunal held that there was no 'convincing evidence' that Vantage was aware of the bribery scheme (while noting that the situation concerning the involvement of Vantage's former CEO was 'less clear') and that in any event, Petrobras had ratified novations and amendments to the contract and was thus estopped from claiming it was void or voidable. See *Vantage Deepwater Company & Vantage Deepwater Drilling Inc v Petrobras America Inc, Petrobras Venezuela Investments & Services BV and Petróleo Brasileiro SA*, ICDR Case No 01-15-0004-8503, Final Award dated 29 June 2018 (WW Park (President), CN Brower and J Gaitis).

4 For recent studies on the topic of corruption, see E Gaillard, 'La corruption saisie par les arbitres du commerce international' (2017) 3 *Rev Arb* 805; E Gaillard, 'Note sous l'arrêt de la Cour de cassation du 13 septembre 2017' (2017) 4 *JDI* 1361; M Hwang and K Lim, 'Corruption in Arbitration: Law and Reality' (2012) 8 *IAJ* 1, 1.

5 See eg the prohibitions of trading influence at art 18 of the UN Convention Against Corruption (adopted 31 October 2003 and entered into force 14 December 2005) and art 12 of the Council of Europe Criminal Law Convention on Corruption (adopted 27 January 1999 and entered into force 1 July 2002).

growing body of arbitral case law addressing these issues highlights a number of important trends. First, there is no question today that arbitrators are empowered, and indeed have the duty, to investigate and adjudicate corruption issues and thereby contribute to the global fight against corruption. Second, given that arbitration is a product of party autonomy, the rules that arbitrators should apply when adjudicating corruption allegations are in some cases determined by the *lex contractus*. Finally, notwithstanding the relevance of the *lex contractus* in some cases, there has been a steady emergence of general principles, or transnational rules, which are increasingly applied by arbitrators who adjudicate corruption issues, as well as national courts called on to review arbitral awards. While such rules have not and need not achieve unanimous recognition in all legal systems, they have been adopted by a significant number of national laws and have emerged as general principles that can guide arbitrators dealing with corruption issues.⁶

In order to examine these rules, this article will focus on three issues that arbitrators face when deciding corruption allegations: whether corruption can be proven through circumstantial evidence or the so-called ‘red flags’ (Section 2); whether benefits rendered in the performance of a contract tainted by corruption or illegality are recoverable in restitution (Section 3); and whether local mandatory rules (*lois de police*) should displace the parties’ choice of law when issues of corruption and illegality are at stake (Section 4).

2. CIRCUMSTANTIAL EVIDENCE OR ‘RED FLAGS’ OF CORRUPTION

2.1 Red flags as a means of evidence

Illicit arrangements such as bribery and money laundering are typically carried out in private by tacit agreement or behind seemingly legal transactions. Furthermore, parties involved in such arrangements consistently endeavour not to leave any incriminating evidence of their activities. Where a party to arbitration bases a claim or defence on the existence of corruption, the question of how it can prove its allegations is therefore decisive. The difficulty of deducing direct evidence of corruption and other forms of illegality is compounded by the fact that such practices can only rarely be proven through witness testimony. The circumstances in *World Duty Free v Kenya*, where the investor’s chairman volunteered that he paid US\$2 million as a ‘personal donation’ to the President of Kenya ‘as part of the consideration for the agreement’ approving the investment⁷ remain exceptional: in most arbitrations, parties categorically deny having participated in any aspect of an illicit scheme. In this context, allegations of corruption remain, in the words of the tribunal in *EDF v Romania* ‘notoriously difficult to prove’.⁸

6 On the formation of transnational rules in international arbitration, see E Gaillard, ‘Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules’ (1995) 10(2) ICSID Rev-FILJ 208; E Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 52–66.

7 *World Duty Free v Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) [G Guillaume (President), A Rogers and VV Veeder] para 135.

8 *EDF (Services) Ltd v Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) [P Bernardini (President), A Rovine and Y Derains] para 221.

Much of the debate surrounding the evidentiary issues relevant to corruption has centred on the issue of standard of proof, with some proponents arguing that a heightened standard requiring ‘clear and convincing’ evidence should give way to a standard based on the ‘balance of probabilities’.⁹ This discussion, however, is to a large extent academic given arbitrators’ wide discretion in matters of fact-finding and power to freely evaluate evidence without rigid adherence to any particular standard of proof.¹⁰ Instead, a more pertinent issue concerns the means of evidence through which parties can prove corruption allegations, and in particular, whether a party can meet its evidentiary burden by deducing a sufficient number of indicators of corruption, or the so-called ‘red flags’.

There are a number of sources outside the context of international arbitration that employ the red flags methodology. For instance, the use of anti-corruption checklists is widely recommended in matters of commercial due diligence, particularly where commercial parties participate in a procurement process or work with a third party.¹¹ The US Department of Justice and Securities Exchange Commission has published detailed guidelines for recognizing corruption under the Foreign Corrupt Practices Act (FCPA).¹² In England, an independent committee chaired by Lord Woolf prepared a report in 2008 that similarly compiled a list of red flags that may arise in the appointment, management, or payment of third-party advisers.¹³

2.2 Red flags methodology in commercial arbitration

The rich case law deciding disputes under intermediary agreements provides a perfect illustration of the already widespread use of the red flags methodology by arbitrators to determine the existence of corruption. While intermediary agreements take on a myriad of forms, ranging from simple letters of comfort to more elaborate agency or commission contracts, their common feature is to remunerate the intermediary for the procurement of a specific concession or other public contract, rather than for the provision of particular services. The terms of intermediary agreements

- 9 For authors who consider that a heightened standard of proof is preferable for matters of corruption, see eg G Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2315. For authors in favour of a standard based on the ‘balance of probabilities’, see eg M Hwang and K Lim (n 4) 28–29; C Partasides, ‘Proving Corruption in International Arbitration: A Balanced Standard for the Real World’ (2010) 25(1) ICSID Rev—FILJ 47.
- 10 See eg art 25(1) of the ICC Rules of Arbitration (empowering the tribunal to ‘establish the facts of the case by all appropriate means’); art 27 of the UNCITRAL Arbitration Rules (‘the arbitral tribunal shall determine the admissibility, relevance, material, and weight of the evidence offered’); art 34(1) of the ICSID Arbitration Rules (‘the Tribunal shall be the judge of the admissibility of any evidence adduced and its probative value.’).
- 11 See eg the 2016 OECD *Guidelines on Preventing Corruption in Public Procurement*, which detail a number of ‘integrity risks’ and ‘red flags’ to be considered in the procurement process, as well as the 2010 ICC *Guidelines on Agents, Intermediaries, and Other Third Parties*, which advise companies to be sensitive to circumstances that suggest bribery risks or ‘red flags’ and set out a series of illustrative examples of red flags warranting further review when selecting or working with a third party.
- 12 Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *FCPA: A Resource Guide to the US Foreign Corrupt Practices Act* (14 November 2012) 22.
- 13 Woolf Committee, *Business Ethics, Global Companies and the Defence Industry: Ethical Business Conduct in Bae Systems Plc* (2008) 25–26.

were relatively sparse in the years preceding the adoption of the OECD Convention.¹⁴ Today, such agreements are often laden with virtuous clauses, including boilerplate covenants that the intermediary shall comply with all relevant anti-bribery and anti-corruption laws and regulations, as well as long lists of services (various studies, advice of all kinds) intended to give the intermediary's remuneration a cloak of legitimacy.¹⁵

It is therefore unsurprising that arbitrators have not limited themselves to reviewing the terms of intermediary agreements to determine whether their true object is legitimate, and have instead readily applied the red flags methodology—often without regards to any specific source of law—to weigh a variety of relevant circumstantial evidence of corruption. In an early award rendered in 1982 (ICC Case No 3916), an Iranian party brought a claim against a Greek company for partial payment of commissions owed under an agreement for assistance with obtaining contracts from various administrative entities of the Iranian state. The sole arbitrator took note of the short timeframe in which the Iranian party had obtained the government contract and, following the Iranian party's refusal to explain the nature of his activities or the composition of his group of companies, concluded that 'the action undertaken by [the Iranian party] could be nothing else but the exercise of [his] influence over those deciding who the Iranian State was going to contract with'.¹⁶ The arbitrator accordingly declared the agreement null and void and in violation of international public policy. In an award rendered in 1994 (ICC Case No 6497), the tribunal examined an agreement governed by Swiss law pursuant to which the claimant was to earn an 'extraordinary' commission of 33.33 per cent for securing a construction contract with a Middle Eastern country and whose terms 'did not describe the services to be rendered . . . but affirm[ed] that the services had been received in full'. The claimant's principal gave 'confusing and contradictory' explanations of the nature of the agreement at the evidentiary hearing. The tribunal held that there was a 'high degree of probability the real object of [the agreement] was to channel bribes to officials in country X', and that '[s]uch probability [wa]s high enough' to hold that the agreement was null and void.¹⁷

Arbitrators have consistently applied the same red flags methodology in more recently reported cases deciding claims under intermediary agreements. In an award

14 See, for example, one of the engagements having led to ICC Case No 1110: 'We confirm that on the placing of an order with us and after the confirmation that the corresponding irrevocable credit has been opened in our favour and when the payment of the first instalment has been made in accordance with the terms and conditions of payment for the said order and subject to and when the necessary consent from the British Foreign Exchange Control has been obtained, we will place at your entire disposal five per cent of the total F.O.B. sterling value of the said order, in pounds sterling, without charge or obligation on your part.' Citation published in JG Wetter, 'Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110' (1994) 10(3) *Arb Intl* 277, 282.

15 The comments of the tribunal in ICC Case No 8891, an award rendered in 1998, that 'the illicit object' of such agreements 'is generally hidden behind contractual provisions which may seem anodyne' (*l'objet illicite est généralement dissimulé derrière des dispositions contractuelles d'apparence anodine*) ((2000) 4 *JDI* 1076, 1079) has never been as true as it is today.

16 *French purchaser v Dutch Seller*, ICC Case No 3916, Final Award (1982) in (1984) 111 *JDI* 926, 929–30.

17 *Consultant v Contractor*, ICC Case No 6497, Final Award (1994), para 30 in (1999) 24 *YB Comm Arb* 71.

rendered in 1998 (ICC Case No 8891), the tribunal held that the true object of the parties' contract was, in fact, to bribe foreign officials, based on four red flags, namely the short duration of the contract, the agent's inability to provide evidence of its activities, the manner in which the agent was remunerated, and the 18.5 per cent success fee.¹⁸ In a 2006 award (ICC Case No 13515), an ICC tribunal affirmed that, in the absence of direct evidence, it would deduce the reality of illicit payments from 'serious and convergence indicators'. It held that while the fact that corruption was endemic in North African country in question was not sufficient proof for bribery, other indicators, namely the intermediary's commission of 40 per cent and the short duration of the contract were together sufficient for it to prove that its object was unlawful.¹⁹ Finally, in a 2008 award (ICC Case No 13914) concerning a dispute under an agreement governed by Texas law for the procurement of seismic surveys off the coast of an African country, the tribunal held that a number of red flags set out in the guidance note on the US FCPA were present, including a high success fee, the agent's lack of expertise in the seismic business, and during the arbitration, the agent's refusal to produce requested documents (in particular, bank records) and unilateral redaction of other documents without credible explanation. The tribunal concluded that the indicators together proved that the object of the arrangement was the payment of bribes to key officials of a state-owned company to influence their decision-making in the procurement process.²⁰ In a number of further cases concerning disputes under intermediary agreements, arbitrators have applied the red flags methodology but found on the facts of the case that there were insufficient indicators to reach a finding of corruption.²¹

While there are fewer examples in the case law, arbitral tribunals have equally applied the red flag methodology in disputes concerning contracts procured through corruption. The 2005 award in ICC Case No 12990, published only in extracts, concerned claims arising under a complex scheme of agreements governed by French law signed between three oil companies and an African government. The declared aim of the agreements was the acquisition of crude oil by the claimants in return for assisting the government to carry out a structural adjustment programme. The

18 ICC Case No 8891 (n 15) 1083.

19 ICC Case No 13515, Final Award (April 2006) in 'Special Supplement—Tackling Corruption in Arbitration' (2013) 24 ICC Int'l Ct Arb Bull 66 ('*Que faute de preuve directe de paiements illicites, c'est à partir d'indices sérieux et convergents que l'arbitre international peut déduire, avec un fort degré de certitude, la réalité de l'illicéité*').

20 ICC Case No 13914, Final Award (March 2008) paras 194 and 228 in 'Special Supplement—Tackling Corruption in Arbitration' (2013) 24 Int'l Ct Arb Bull 77.

21 In a recent unreported award concerning a price adjustment claim by a Spanish company against a Egyptian state-owned gas supplier, a tribunal in Cairo disregarded clear and cogent evidence of corruption through the use of intermediaries that one rarely sees so readily available. See S Perry, 'Corruption Defense Fails in Cairo Gas Pricing Case' (13 March 2018) <<https://globalarbitrationreview.com/article/1166535/corruption-defence-fails-in-cairo-gas-pricing-case>> accessed on 25 February 2019. For other examples, see *Consultant v State Agency and Others*, ICC Case No 7047, Final Award (1994) in (1995) 21 YB Comm Arb 79; *Monsieur X v société L*, ICC Case No 9333, Final Award (1998) in (2001) 19(4) ASA 757; ICC Case No 12472, Final Award (August 2004) in 'Special Supplement—Tackling Corruption in Arbitration' (2013) 24 Int'l Ct Arb Bull 46; ICC Case No 13384, Final Award (December 2005) in 'Special Supplement—Tackling Corruption in Arbitration' (2013) 24 Int'l Ct Arb Bull 62; ICC Case No 16090, Final Award in (2016) 1 ICC Dis Res Bull 147.

government that signed the agreements was overthrown in a civil war and in the arbitration that followed, the subsequent government alleged that the contracts were void as their object was to bribe leaders of the former regime. The tribunal accepted what it called a ‘weakened standard of proof . . . based on a presumption created by indicators’,²² and held that the evidence before it did not enable it ‘to identify any trace of the claimants’ alleged activities’ and that this, together with the excessive percentage-based commission paid to them, strongly indicated the presence of corruption. The tribunal further held that the fact that corruption was endemic to the African state in question corroborated its other findings,²³ and accordingly declared the agreements null and void and in violation of international public policy.

2.3 Red flags methodology in investment treaty arbitration

The practice of arbitrators in commercial cases of assessing evidence of corruption using the red flags methodology has been followed in two notable investment treaty arbitrations. In *Metal-Tech v Uzbekistan*, an ICSID tribunal held that it lacked jurisdiction over the claimant’s investment because it was procured in violation of the Uzbek criminal law on bribery.²⁴ In that case, the claimant’s representative testified at the hearing that the claimant had, over the course of six years, remunerated three consultants with close ties to local government officials over US\$4 million for ‘lobbying’ services—rather than the assistance with the operation, production, and delivery of products as specified in the relevant agreements. The tribunal subsequently ordered the claimant to produce copies of the agreements and documents evidencing the services rendered by and payments to the consultants. Applying the ‘established lists of indicators, sometimes called “red flags” . . . which, although worded differently, have essentially the same content’, the tribunal considered the claimant’s inability to produce evidence of any legitimate services performed by the consultants, together with other indicators including the ‘striking’ amounts paid under the agreements, the consultants’ lack of relevant qualifications, and the complex payment structure channelled through Switzerland and the British Virgin Islands, together proved the claimant had paid two of the consultants to bribe Uzbek officials to secure a government decision approving the claimant’s investment.²⁵

22 ICC Case No 12990, Final Award (December 2005) in ‘Special Supplement—Tackling Corruption in Arbitration’ (2013) Int’l Ct Arb Bull 52, paras 251–52 (*‘Cependant, ce caractère illicite est souvent difficile à prouver, les parties masquant l’objet réel du contrat derrière des stipulations contractuelles anodines. Les Tribunaux - ou les arbitres - peuvent, en principe, utiliser tous moyens de preuve autorisés par la loi, étant entendu qu’ils ne sont pas liés par la formulation du contrat . . . L’exigence en matière de preuve est dès lors réduite et peut se limiter à une présomption reposant sur des indices’*).

23 *ibid* paras 257 and 315 (*‘Il n’a pas été possible d’identifier une trace des activités prétendues de la Demanderesse, que ce soit dans les ministères [de l’État X], au sein du FMI ou des principaux opérateurs économiques [les sociétés B et C] . . . En l’espèce, on ne peut ignorer le fait bien connue que [l’État X] faisait face à une situation de corruption endémique’*).

24 *Metal-Tech Ltd v The Republic of Uzbekistan*, ICSID Case No ARB/10/3 [G Kaufmann-Kohler (President), J Townsend and C von Wobeser] Award (4 October 2013). Having found the investment to be in violation of Uzbek law, the tribunal did not reach a decision on Uzbekistan’s related defences that the investment violated international public policy and transnational principles prohibiting bribery and corruption.

25 *ibid*, paras 372, 327, and 351.

In *Spentex v Uzbekistan*, an ICSID tribunal similarly held that the Dutch claimant had procured its investment by paying bribes to local officials through various consulting companies.²⁶ In assessing the evidence before it, the tribunal considered that there is an ‘inherent danger to dispose of the problem [of corruption] by resorting to strict evidentiary rules that may make proving or disproving corruption practically impossible’. The tribunal instead took into account indirect and circumstantial evidence of corruption and determined that the ‘red flags’ [it identified] were sufficient to warrant the conclusion that corruption had occurred’. Specifically, the tribunal took into consideration the disproportionate amounts paid to the consultants (\$6 million), the consultants’ lack of relevant qualifications, the short time period between the conclusion of the consultancy contracts, and the submission of the claimant’s bid for the investment, the opaque nature of the services that were supposedly provided, and the claimant’s failure to disclose the consulting contracts or any payment invoices or bank records. The tribunal concluded that:

‘Connecting the dots’ of the individual pieces of evidence described above leads the Tribunal to conclude that the most compelling explanation of the events surrounding the tender process . . . and the making of the investment is clearly that it involved corrupt activities on the part of the investor and of officials of the Respondent.²⁷

2.4 Red flags methodology in national courts

Arbitral tribunals are not alone in applying the red flags methodology to allegations of corruption and illegality. In a series of recent cases, French courts have also applied the red flags methodology in proceedings to set aside arbitral awards. In the 2017 *Belokon* case, the Paris Court of Appeal set aside an award decided under the UNCITRAL Arbitration Rules on grounds that it would allow the award creditor, Mr Belokon, to profit from money laundering.²⁸ During the arbitration, Kyrgyzstan had requested the tribunal to dismiss Belokon’s claims on grounds that the tender process for this acquisition of his investment in a bank was ‘rigged, as the only other individual to bid for the bank . . . was a banking lawyer who had previously advised [Mr Belokon]’. Kyrgyzstan further argued that Belokon’s investment was ‘improper’ in light of his acquaintance with the son of the deposed Kyrgyz president. The tribunal took a conservative approach and held that ‘[t]he mere relationship between the Mr Belokon and [his former lawyer was] insufficient to prove fraud in connection with the investment’, and that it was ‘in no position to make a positive determination that there was anything improper in [Mr Belokon’s] acquaintance with [the former

26 *Spentex Netherlands, BV v Republic of Uzbekistan*, ICSID Case No ARB/13/26 [A Reinisch (President), S Alexandrov and B Stern] Award (27 December 2016). At the time of this article, the award is not yet published. For a detailed summary of the award, see K Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration* (CUP 2017) 128–36.

27 Quoted in Betz, *ibid* 134.

28 Paris Court of Appeal Decision dated 21 February 2017, 16; *Valeri Belokon v The Kyrgyz Republic*, UNCITRAL, Award, 24 October 2014.

president's] son, Maxim Bakiev, which was not shown to have been more than superficial'.²⁹

The Paris Court of Appeal subsequently granted Kyrgyzstan's application to set aside the award and held that Belokon's acquisition of the bank was indeed improper. The Court conducted a *de novo* review of facts that before the tribunal and a consideration of new evidence that another bank in Latvia held by Belokon, which was connected to the bank at issue in the arbitration, had been found in violation of anti-money laundering laws after the arbitral award was rendered. In reaching its conclusion, the Court relied, *inter alia*, on the fact that 'the call for tender was conducted in an irregular manner'³⁰ and that 'the relationships between Mr [Belokon] and [the former president's son] who controlled 'the country's economy'³¹ were 'not superficial and could certainly be described as "inappropriate" [...]'.³² The Court considered that these constituted 'serious, precise and converging' indicators of money laundering and accordingly set aside the award due to 'a manifest, effective and material violation of international public order'.³³ In a second decision rendered in 2017, *Democratic Republic of Congo v Customs and Tax Consultancy LLC*,³⁴ the Paris Court of Appeal applied a similar methodology when assessing the state's argument that the contract underlying the award had been procured through corruption, but ultimately rejected the state's application to set aside the award. The Court of Appeal found that a violation of public procurement proceedings could constitute a 'particularly significant indicia' of a violation of the public policy against corruption, this could not by itself constitute grounds for setting aside the award absent other 'serious, precise and converging' evidence of corruption.³⁵

The arbitral case law plainly demonstrates the emergence of a general principle, or transnational rule, that arbitrators may apply when assessing evidence of corruption and other illicit activities. Arbitrators adjudicating claims under contracts governed by a variety of laws, as well as claims arising under international investment treaties, have consistently applied the red flags methodology as a principled response to inherent difficulties of proving corruption and other illicit practices. This practice

29 *Valeri Belokon*, *ibid*, paras 58, 62, and 64–65.

30 *République du Kirghizistan v M Belokon*, CA Paris, 21 February 2017, (2017) 3 Rev Arb 915 ('[L]a cour estime, pour sa part, que les faits rapportés ci-dessus établissent suffisamment que l'appel d'offres s'est déroulé dans des conditions irrégulières . . .'); (2017) 4 JDI 1361, with a note by E Gaillard; see also (2017) 3 Rev Arb 929, with a note by S Bollée and M Audit; (2017) 35 ASA Bull 551, with a note by LC Delanoy.

31 *ibid* ('[Le président] a officialisé l'influence de son fils Maxim sur le gouvernement et sur l'économie du pays').

32 *ibid* ('[i]l apparaît donc que les relations entre M. [Belokon] et [le fils de l'ancien président] n'étaient pas superficielles et qu'elles peuvent certainement être qualifiées d' "inappropriées" dans la mesure où les prestations immobilières fournies par Manas Bank à [le fils de l'ancien président] s'analysent comme des abus de biens sociaux').

33 *ibid* ('[L]a reconnaissance ou l'exécution de la sentence entreprise, qui aurait pour effet de faire bénéficier M. [Belokon] du produit d'activités délictueuses, viole de manière manifeste, effective et concrète l'ordre public international; qu'il convient donc de prononcer l'annulation sollicitée.').

34 *République démocratique du Congo v Société Customs and Tax Consultancy LLC*, CA Paris, 16 May 2017, (2017) 3 Rev Arb 1066; Gaillard, *ibid*.

35 *ibid* ('Considérant que si l'inobservation des règles de transparence dans la passation des marchés publics est un indice particulièrement significatif de telles infractions, elle ne saurait être sanctionnée pour elle-même, indépendamment d'une atteinte actuelle à l'objectif de lutte contre la corruption.').

should be applauded as an appropriate contribution of arbitrators' inherent fact-finding powers to the global fight against corruption.

3. RESTITUTION OF BENEFITS UNDER CONTRACTS TAINTED BY CORRUPTION

A second recurrent issue in the arbitral case law concerns the fate of benefits performed under a contract tainted by corruption. While it is well established under both civil law and common law systems that contracts providing for corruption are invalid,³⁶ a more difficult question is whether, even where the parties to an illicit contract are denied any judicial remedy under the contract, they may claim restitution of what they have rendered in performing the agreement.

3.1 The traditional approach: denying restitutionary remedies

The traditional approach to this issue, which continues to be upheld in the domestic law of most countries,³⁷ is to deny restitutionary remedies in these circumstances. This principle, enshrined in the maxim *in pari causa turpitudinis cessat repetitio* (where both parties are guilty, no one can recover), entails that the parties to a contract should not receive the return of their performance if the invalidity of the contract results *contra legem* or *contra bonos mores*. The policy behind the rule is to create uncertainty concerning the execution of illicit contracts in order to dissuade parties from entering into them.³⁸ For instance, a number of legal systems recognize that the payment of bribes is a *causa turpis* and preclude a claim for restitution by the party paying the bribe.³⁹

36 Under English law and other common law systems, contracts to carry out a corrupt act are void *ab initio*, whereas contracts procured by corruption are voidable at the instance of the innocent party. See H Beale, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) vol I, paras 16-008 and 16-194. The effects of this doctrine are similar to those under civil law systems such as French law, which recognize that a contract providing for corruption is null and void. See art 6 of the French Civil Code (*'On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs'*) ('One cannot derogate, by special agreement, from the laws which concern public policy and morality'); art 1162 of the French Civil Code (*'Le contrat ne peut déroger à l'ordre public ni par ses stipulations, ni par son but, que ce dernier ait été connu ou non par toutes les parties'*) ('The contract cannot derogate from public policy by its provisions or its aim, whether the latter were known or not by all of the parties.').

37 For a comparative law analysis of this issue, see MJ Bonell and O Meyer, *The Impact of Corruption on International Commercial Contracts* (Springer 2015).

38 See E Peel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) para 11-124 ('[T]he denial of a remedy may induce the innocent party to take greater care not to enter into an illegal transaction.'). Beale (n 36) para 16-009; quoting *K/S Lincoln v CB Richard Ellis Hotels Ltd* [2009] EWHC 2344, [22] ('The courts have also considered that "the underlying principle or policy is one of deterrence; that the courts will not encourage illegal acts by allowing claims based upon them".'); P Malaurie and L Aynès, *Droit des Obligations* (LGDJ 2017) s 727.

39 In Germany, for instance, this rule is codified at s 817 of the *Bürgerliches Gesetzbuch* ('If the purpose of performance was determined in such a way that that the receiver, in accepting it, was violating a statutory prohibition or public policy, then the receiver is obliged to make restitution. A claim for return is excluded if the person who rendered performance was likewise guilty of such a breach, unless the performance consisted in entering into an obligation; restitution may not be demanded of any performance rendered in fulfilment of such an obligation.') Emphasis added. Under US law, a bribe payer is entitled to restitution if it can show that it paid under duress or was mistaken about the legality of its conduct. In the context of public contracts, however, US courts adopt a 'zero tolerance' approach and refuse to award restitution of bribes on grounds of public policy. See Z Teachout, 'The Unenforceable Corrupt Contract: Corruption in Nineteenth Century Contract Law' (2011) 35 NYY Rev L & Soc Change 681, 681-86.

Arbitrators in commercial arbitrations have applied the traditional rule in a number of cases and have refused to award restitution under contracts held to be tainted by corruption. For instance, in ICC Case No 3913, the tribunal held that an intermediary agreement governed by French law was null and void as its true object was to bribe officials of an African government, and for this reason, the parties could not 'demand the performance of the contract, and the damages from losses that could result from its non-performance', nor could they demand the restitution 'of sums paid or advances made for its performance'.⁴⁰ In ICC Case No 12290, the tribunal similarly held that contracts governed by French law were null and void as their object was to bribe leaders of a former government of an African state, but rejected the claim by the new government for the reciprocal restitution of amounts paid. The tribunal considered that 'a State where corruption is endemic cannot arbitrate behind its own conduct which would have led it to participate in an arrangement tainted with corruption, and then formulate a request for undue restitution'.⁴¹

Even while upholding this traditional rule, arbitrators are not blind to the consequences of excluding recovery under a partially performed contract where both parties are blameworthy, namely that the defendant to the claim will be put in a stronger position than the claimant (*in pari delicto potior est condition possidentis*).⁴² In ICC Case No 8891, for instance, the tribunal noted that its decision that the parties' contract was null and void because it provided for bribery had 'without any doubt, a consequence that is at least unpleasant' given that 'the party that benefitted from the services rendered by its counterparty will be exempted from paying the agreed consideration'.⁴³ The tribunal in *World Duty Free v Kenya* analysed this issue at length. The claimant, who argued that the 'draconian' dismissal of its claims would allow Kenya to profit from its participation in corruption, asked to be 'relieved from the one-sided burden of public policy'. The tribunal agreed that '[i]t remains a highly disturbing feature in this case that the corrupt recipient of the Claimant's bribe was more than an officer of state but its most senior officer' and that 'no attempt ha[d] been made by Kenya to prosecute him for corruption or to recover the bribe in civil proceedings'. It nonetheless rejected the claimants' argument, holding that 'there is

40 ICC Case No 3913 (1981) in (1984) 4 JDI 921 ('Des constatations qui viennent d'être relatées, il résulte que la convention liant (l'entreprise britannique) à (l'entreprise française) a une cause illicite, que – pour cette raison – elle est nulle et de nul effet et qu'en conséquence elle rend les parties mal fondées à se prévaloir pour exiger tant son exécution que la réparation du préjudice pouvant résulter de son inexécution, de même que la prise en compte, ou le cas échéant, la restitution, des sommes payées ou des avances faites pour son exécution.').

41 ICC Case No 12290 (2005) in (2010) 4 JDI 1417 ('En effet, le tribunal considère qu'un Etat ne peut en lui-même être corrompu; seuls ses dirigeants peuvent être corrompus . . . Cependant, un Etat où la corruption est endémique ne peut s'abriter derrière sa propre conduite qui l'aurait amené à participer à un montage entaché de corruption pour ensuite formuler une demande en remboursement de l'indu. Il en résulte que dans la mesure où [l'Etat] aurait dû se rendre compte du fait que la cause du Protocole était illicite, sa demande de restitution n'est pas fondée.').

42 See Beale (n 36) paras 16–194.

43 ICC Case No 8891 (1998) in (2000) 4 Clunet 1076, 1083 ('Par ailleurs, le tribunal arbitral est conscient que la nullité d'un contrat de pots-de-vin a pour effet que la partie ayant bénéficié des services de son cocontractant est dispensée d'en payer le prix convenu. C'est là, sans nul doute, une conséquence pour le moins déplaisante. Elle apparaît toutefois insuffisante à légitimer le contrat, soit à légitimer le contrat, soit à en imposer la validité malgré son objet ou sa cause illicite.').

no legal basis at English law . . . to operate a discretionary balancing exercise'.⁴⁴ In the tribunal's view, the outcome of the case should favour the people of Kenya over the claimant, as 'the law protects not the litigating parties but the public; or in the case, the mass of tax payers and other citizens making up one of the poorest countries in the world'.⁴⁵

3.2 Departing from the traditional approach: *Patel v Mirza* and the 2010 UNIDROIT Principles

Since the *World Duty Free* case was decided, English courts have changed their approach to the question of whether a claim for unjust enrichment is debarred by the parties' illegal conduct. The 20 July 2016 judgment of the UK Supreme Court in *Patel v Mirza*⁴⁶ case concerned a £620,000 payment by Mr Patel to Mr Mirza to place bets on a bank's share price with the mutual intent that Mirza would use insider information to decide the timing of those bets. The funds were not used and Mirza refused to return the payment. Patel brought a claim for unjust enrichment against Mirza for the return of £620,000. The High Court had rejected Patel's claim for restitution of the funds on the basis of the illegality of the arrangements. That decision was reversed by the Court of Appeal, and the reversal was unanimously upheld by the Supreme Court, in which all nine judges agreed that the Mirza's appeal should be dismissed.⁴⁷ Lord Toulson, who gave the lead judgment, held that the illegality defence to restitution should only be applied in cases where it serves the public interest. In Lord Toulson's view, the relevant factors to be considered included whether the seriousness of the conduct and its relevance to the contract justified denying the claim, and whether there was any disparity in the parties' relative culpability. While Lord Toulson's ruling in *Patel v Mirza* was heavily criticized by other Supreme Court justices deciding the case who argued that it relied too heavily on an exercise of discretion, and has not yet been tested in claims arising under contracts tainted by corruption, it could offer a rule to be applied by arbitrators in disputes arising under illicit contracts governed by English law.

The 2010 UNIDROIT Principles of International Commercial Contracts (the 'UNIDROIT Principles') also set forth an exception to the *in pari causa turpitudinis cessat repetitio* rule. Article 3.3.2 of the UNIDROIT Principles provides that the parties to a partially performed contract that infringes a 'mandatory rule' may recover what they have rendered in performing the contract 'where this would be reasonable in the circumstances'. Paragraph 2 of the same article refers to a list of criteria to be taken into account when awarding restitution, including 'the purpose of the rule that has been infringed, the category of persons for whose protection the rule exists', and 'any sanction that may be imposed under the rule infringed'.⁴⁸ The drafters of

44 As the *World Duty Free* tribunal noted, the rule was first expressed by Lord Mansfield in 1775: 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'. *Holman v Johnson* (1775) 1 Cowp 341, 343.

45 *World Duty Free* (n 7) paras 175 and 180–81.

46 *Patel v Mirza* [2016] UKSC 42, para 120, per Lord Toulson.

47 *ibid.*

48 See UNIDROIT Principles of International Commercial Contracts (2010), arts 3.3.2(1) and 3.3.1(2). For a commentary, see MJ Bonell, 'The New Provisions on Illegality in the UNIDROIT Principles 2010' (2011) 16 ULR 3, 517–36.

UNIDROIT Principles clearly contemplated instances of corruption when elaborating this rule. The Official Commentary cites an example of a construction contract signed between a foreign contractor and a local government. The contractor 'having been awarded the Contract . . . has almost completed the construction' when a new government claims that 'the Contract is invalid because of corruption' and refuses 'to pay the outstanding 50% of the price'. The Official Commentary continues:

. . . under the circumstances it would not be fair to let the [new government] have the almost completed power plant for half the agreed price. [The contractor] may be granted an allowance in money for the work done corresponding to the value that the almost completed power plant has for [the government] and [the government] may be granted restitution of any payment it has made exceeding this amount.⁴⁹

There are only specific circumstances in which arbitrators could apply the solution offered by the UNIDROIT Principles to the question of restitution of amounts paid under illicit contracts. Where the parties have expressly chosen the UNIDROIT Principles to govern their agreement, arbitrators are of course bound to apply this rule.⁵⁰ By contrast, where the *lex contractus* is a law that provides its own solution to the question of granting restitution in the presence of corruption, such as the case of German law or US law,⁵¹ arbitrators are required to respect the parties' choice of law.

On the other hand, where the parties agree that their contract should be governed by general principles,⁵² or where the parties' agreement is silent as to applicable law, arbitrators may face a rare situation of a conflict between the requirements of an important source of transnational law, namely the UNIDROIT Principles, and the *in pari causa turpitudinis cessat repetitio* rule that is still followed in most legal systems. In these circumstances, arbitrators may choose the most suitable comparative law source, of which the UNIDROIT Principles is one among others.

4. TRANSNATIONAL PUBLIC POLICY AND *LOIS DE POLICE*

The third relevant area in the case law on corruption concerns the intersection of two delicate issues of private international law: rules of truly international, or transnational, public policy and local mandatory rules (*lois de police*).

4.1 Transnational public policy

Today, there is little doubt that transactions providing for the corruption meet the general disapproval of the international community. The bribery of government officials is explicitly sanctioned as illegal conduct in most countries.⁵³ Furthermore, over the past decades, the international community has developed an increasingly detailed

49 UNIDROIT Principles of International Commercial Contracts (2010), art 3.3.2, Comment 2(1).

50 *ibid*, Preamble, Comment 4.

51 See n 39.

52 The Preamble to the UNIDROIT Principles specifies that they 'may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like'.

53 See eg US the 1977 US FCPA 1977, 15 USC ss 78dd-1ff; Canadian Corruption of Foreign Public Officials Act 1998, SC 1998, c 34; UK Bribery Act 2010.

corpus of rules that condemn corruption in largely consistent manner. The 1997 OECD Convention is not the only international instrument against corruption. The United Nations (UN) Convention Against Corruption, which entered into force in 2005, condemns a wide range of corruption offences, including bribery, embezzlement, trading in influence, and money laundering, and requires its 182 State Parties to implement a number of public and private anti-corruption measures in the fight against corruption.⁵⁴ The Organization of American States adopted the Inter-American Convention Against Corruption in 1996⁵⁵ and in 1999, the Council of Europe also adopted two anti-corruption conventions.⁵⁶ Corruption has also increasingly become the focal point of private organizations. The Rules on Combatting Corruption, first adopted by the ICC in 1977 and last updated in 2011, constitute a method of self-regulation aimed at encouraging businesses to respect high standards of integrity in business transactions and to resist attempts at extortion or solicitation of bribes.⁵⁷

In this context, there is little doubt that a transnational rule has been established according to which a contract or an investment that has been reached by means of corruption should not be given effect. Arbitrators have frequently recognized this transnational rule. In his landmark decision in ICC Case No 1110, Judge Lagergren characterized bribery and corruption as ‘contrary to good morals and to international public policy common to a community of nations’.⁵⁸ In *Wena Hotels v Egypt*, the tribunal similarly held that bribery and corruption are contrary to ‘international *bonos mores*’.⁵⁹ In *World Duty Free v Kenya*, the tribunal was ‘convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy’.⁶⁰ In ICC Case No 8891, the tribunal explained that ‘arbitrators do not generally restrict themselves to founding their decision on a given national law but also refer to a general principle of law or to international or transnational public policy’.⁶¹ In ICC Case No 3913, the tribunal held that the unlawfulness of the contract at issue resulted not only from French law but ‘also from the conception of international public policy as recognised by most nations’.⁶² And in *Spentex v Uzbekistan*, the tribunal concluded that corruption in the making of an investment violates the principle of ‘*international ordre public*’.⁶³

54 UN Convention Against Corruption (adopted 31 October 2003 and entered into force 14 December 2005).

55 Inter-American Convention Against Corruption (adopted 29 March 1996 and entered into force 6 March 1997).

56 Council of Europe Criminal Law Convention on Corruption (adopted 27 January 1999 and entered into force 1 July 2002); Council of Europe Civil Law Convention on Corruption (adopted 4 November 1999 and entered into force 1 November 2003).

57 ICC, *ICC Rules on Combatting Corruption* (2011 edn, first published 1977).

58 Award rendered in 1963 in ICC Case No 1110, published in Wetter (n 14).

59 *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Final Award, 8 December 2000 [M Leigh (President), I Fadlallah and D Wallace] para 111.

60 *World Duty Free* (n 7) para 157.

61 ICC Case No 8891 (n 43) (*‘Bien que la corruption soit illicite dans la plupart des ordres juridiques, les arbitres ne se limitent généralement pas à fonder leur décision sur un droit étatique, mais font encore appel à un principe général du droit ou à l’ordre public international ou transnational’*).

62 ICC Case No 3913 (1981) in (1984) 111 *Clunet* 920, 921 (*‘Cette solution n’est pas seulement conforme à l’ordre public international tel que la plupart des nations le reconnaît’*).

63 Quoted in Betz (n 26) 130.

4.2 Local mandatory rules (*lois de police*)

A more controversial issue concerns the application of local mandatory rules (*lois de police*) enacted by certain states in the fight against corruption. For instance, between 1978 and 1991, the Algerian legislature enacted a law prohibiting the use of intermediaries for securing certain types of government contracts.⁶⁴ Other similar rules were promulgated in Syria, Lybia, and Saudi Arabia in relation to arms contracts.⁶⁵ During the 1980s, the Indian legislature similarly prohibited the use of agents in arms contracts.⁶⁶ While arbitrators must respect the parties' choice of law and apply *lois de police* that belong to the *lex contractus*, the relevance of *lois de police* other than those belonging to the *lex contractus* has been hotly debated. This question is not purely theoretical, given that parties, such as those to intermediary agreements, rarely choose a *lex contractus* that would automatically invalidate them.

Thus, some authors argue that arbitrators should not only give effect to the prohibition against corruption under transnational public policy, but should also apply the *lois de police* of any state having a close connection to the dispute, such as the law of the place of arbitration and the law of place of the award's likely enforcement.⁶⁷ This theory suggests that arbitrators should follow the rule enshrined in Article 9(3) of the Rome I Regulation that applies to judges in EU Member States,⁶⁸ or Article 19(1) of the Swiss Federal Act on Private International Law that applies to Swiss judges,⁶⁹ both of which permit the application of *lois de police* other than those of the

64 See *Loi No 78-02 du 11 février 1978 relative au monopole de l'Etat sur le commerce extérieur*, *Journal officiel de la République algérienne*, 14 février 1978, 114–15, especially art 9. For a commentary, see A Mebroukine, 'Le choix de la Suisse comme siège de l'arbitrage dans les clauses d'arbitrage conclues entre entreprises algériennes et entreprises étrangères' (1994) 12 *ASA Bull* 4, pp. 4–34.

65 See eg in Syria, art 2 of Legislative Decree No 51 of 30 September 1979 prohibiting intermediation in public markets; for Libya, see Law No 6 of 1985; for Saudi Arabia, see the resolution of the Council of Ministers No 1275 of 12.09.1395 Hijj. On the question as a whole, see A Sayed, *Corruption in International Trade and Commercial Arbitration* (Kluwer 2004) 191–97; 'Business Ethics and Anti-Bribery Policies in Selected Middle East and North African Countries', MENA-OECD Investment Programme (2006) 11–12 <<http://www.oecd.org/mena/competitiveness//36086689.pdf>> accessed on 25 February 2019; Typologies on the Role of Intermediaries in International Business Transactions, OECD Final Report (4 November 2009) 26 <<https://www.oecd.org/daf/anti-bribery/43879503.pdf>> accessed on 25 February 2019.

66 OECD Final Report (4 November 2009), *ibid*.

67 See eg C Seraglini, *Lois de police et justice arbitrale internationale* (Dalloz 2001); A Crivellaro, 'Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence' in *Arbitration, Money Laundering, Corruption and Fraud* (Dossiers ICC Institute of World Business Law 2003) 109 and especially 118.

68 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (17 June 2008) (Rome I), art 9(3) OJ L 177, 4 July 2008, pp. 6–16. ('Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.').

69 *Loi fédérale sur le droit international privé 1987* (LDIP), art 19(1) ('Lorsque des intérêts légitimes et manifestement prépondérants au regard de la conception suisse du droit l'exigent, une disposition impérative d'un droit autre que celui désigné par la présente loi peut être prise en considération, si la situation visée présente un lien étroit avec ce droit') ('When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this act may be taken into consideration, provided that the situation dealt with has a close connection with such

lex contractus in certain circumstances. This reasoning is misguided, however, as it ignores the fact that countries, which grant judges such powers, have enacted particular rules that apply where the parties have made an express choice of law, and which prevail over the rules governing the judge's powers in this regard. In France, for instance, arbitrators are mandated by Article 1511 of the Code of Civil Procedure to apply 'the rules of law chosen by the parties', without reference to the rules contained in the Rome I Regulation. Similarly, an arbitrator in Switzerland must apply the law chosen by the parties pursuant Article 187 of the Swiss Federal Act on Private International Law; Article 19(1) of the same Act, which applies to judges, is inapplicable.⁷⁰

The case law of French courts concerning requests to set aside arbitral awards for violation of international public policy provides a perfect illustration of the correct approach to *lois de police* that do not form part of the *lex contractus*. In *République démocratique du Congo v Société Customs and Tax Consultancy LLC*,⁷¹ the state (likely because there was insufficient evidence to establish an allegation of corruption) requested the Paris Court of Appeal to set aside an arbitral award on grounds that the parties' investment contract, which was governed by French law, was awarded to the claimants without any tender process in breach of a mandatory rule of Congolese law on public procurement. Rejecting this argument, the Court of Appeal was careful to distinguish the Congolese *loi de police* from the *lex contractus* and reasoned that 'a State cannot invoke the violation of its own legislation in annulment proceedings in order to opt out of its contractual engagements'.⁷² The Court further reasoned that, notwithstanding the importance of the mandatory Congolese rule on public procurement, the *loi de police* did not reflect a sufficiently important rule to amount to a rule of French international public policy applicable to a request to set aside an arbitral award. In this regard, the Court rejected the state's argument that the violation of its local public procurement procedure was in breach of international public policy as reflected in the UN Convention Against Corruption, which promotes transparency and accountability in the management of public finances.

The Paris Court of Appeal reaffirmed the same approach in its 16 January 2018 decision setting aside an ICC award in *MK Group v Onix*, which it held violated international public policy in a 'manifest, effective, and material' manner. In that case, Onix had obtained a declaratory award from the arbitral tribunal that it had been validly transferred shares in a Laotian gold mining company. MK Group requested that

other law.'). For those in favour of the application of art 19(1) to arbitrators seated in Switzerland, see eg F Knoepfler, 'L'article 19 LDIP est-il applicable à l'arbitrage international?' in C Dominicé, R Patry and C Reymond (eds), *Etudes de droit international en l'honneur de Pierre Lalive* (Helbing & Lichtenhahn 1993) 531; G Kaufmann-Kohler and A Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP* (2nd edn, Weblaw 2010) ss 661–66. See *contra* A Bucher (ed), *Loi sur le droit international privé. Convention de Lugano, Commentaire Romand* (Helbing Lichtenhahn 2011) 1643.

70 See *Judgment of the Swiss Federal Tribunal of 30 December 1994* (1995) 13 ASA Bull 217. See also D Girsberger and N Voser, *International Arbitration: Comparative and Swiss Perspectives* (Kluwer 2016) s 1382.

71 See n 34.

72 *ibid* ('[L]e moyen est articulé au regard, d'une part, d'une loi de police fixant des règles de passation des marchés publics, d'autre part, d'un objectif de lutte contre la corruption exprimé par une convention internationale . . . U)n Etat ne peut invoquer devant le juge de l'annulation, afin de se délier de ses engagements contractuels, la violation de sa propre législation').

the Paris Court of Appeal set aside the award on grounds that Onix had obtained the award on the basis of a fraudulent approval of its investment, in violation of a Laotian *loi de police*. As part of its *de novo* review of the award, the Paris Court of Appeal determined that MK Group had prepared a Laotian language version of the parties' investment agreement that, in contrast to the English language version of the same agreement, stated that it would provide \$12.5 million in financing to the local company as a condition precedent to the share transfer. The Court found that the Laotian language version containing the condition precedent had been fraudulently presented to the Laotian authorities in order to obtain administrative authorization for the share transfer.⁷³ The Court further reasoned that a foreign *loi de police* could only be relevant to a request to set aside an award to the extent that it reflected the French conception of international public policy, and that it was irrelevant in that case that the Laotian courts had refused enforcement of the award for violation of local mandatory rules.⁷⁴ However, the Court of Appeal held that the acquisition of legal title by fraudulently obtaining an investment authorization required by domestic law would violate international public policy. In this connection, the Court referred to a 1962 resolution of the UN General Assembly regarding the sovereignty of nations over their natural resources, from which it inferred that there was an 'international consensus' regarding the right of states to subject the exploitation of natural resources located within their territory to a preliminary authorization and to exert control over foreign investments made in that area.

The approach of the Paris Court of Appeal in these cases echoes the fate of the first award rendered in 1988 in the *Hilmarton* saga, in which a sole arbitration in Geneva annulled the parties' 'legal and fiscal' intermediary agreement, which was governed by Swiss law, for violation of the Algerian law in force at the time which prohibited the use of intermediaries for securing certain procurement contracts.⁷⁵ With the benefit of hindsight, there were a sufficient number of indicia in that case for the sole arbitrator to declare the agreement invalid based on the red flags methodology: the sole arbitrator himself noted the high commission paid under the agreement, the clandestine nature of the intermediary's services, the exchanges between the parties evidencing payments to local officials, and a witness testified at the hearing that he 'took care' of Algerian officials when they travelled to France. The prohibition of the use of intermediaries at the place of performance itself could also have been elevated to a red flag of corruption. The sole arbitrator instead based his decision that the agreement violated international public policy on the violation of the Algerian *loi de police* against the use of intermediaries. On 17 November 1989, the Geneva Court of Justice annulled the award on grounds that it had not respected the *lex contractus* nor was it justified by the Swiss understanding of international

73 *MK Group v SARL Onix*, CA Paris, 16 January 2018, No 15/21703.

74 *ibid* ('*Considérant que l'ordre public international au regard duquel s'effectue le contrôle du juge de l'annulation s'entend de la conception qu'en a l'ordre juridique français, c'est-à-dire des valeurs et des principes dont celui-ci ne saurait souffrir la méconnaissance même dans un contexte international; que ce n'est que dans cette mesure que des lois de police étrangères peuvent être regardées comme relevant de l'ordre public international, de sorte qu'il est en principe indifférent que la sentence soumise au juge français ait fait l'objet d'un refus d'exécution pour violation de l'ordre public dans l'Etat dont les dispositions de police s'appliquent au contrat litigieux.*').

75 ICC Case No 5622, Award (19 August 1988) in (1993) 1993 Rev Arb 327, pp. 327–342.

public policy, which pointed to a different solution.⁷⁶ In other words, the violation of a local mandatory rule that did not form part of the *lex contractus* could not be conflated with the conception of international public policy of the state where the arbitration took place.

Arbitrators deciding disputes governed by English law may follow a different approach. Under English law, a contract that is considered unlawful at the place of a contract's performance is also unlawful as a matter of English law.⁷⁷ This principle is a rule of English common law, which is viewed differently from the *lois de police* methodology.⁷⁸ As a result, an arbitrator who resolves a dispute under a contract governed by English law may well give effect to a foreign *loi de police* without being criticized for disregarding the *lex contractus*.

On the other hand, where the *lex contractus* is not English law or another common law that follows the same rule,⁷⁹ arbitrators should apply transnational or truly international public policy without regard to *lois de police* that represent the isolated view of a particular jurisdiction. This approach empowers arbitrators to disregard the agreement of the parties only in those situations where it contravenes the fundamental rule of transnational public policy, such as the condemnation of corruption. In this connection, a number of authors have expressed strong support in favour of the existence of rules that arbitrators must apply in carrying out their duty because they administer justice on behalf of the international community.⁸⁰ As early as 1989, the Institute of International Law adopted a resolution that similarly states that '[i]n no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.'⁸¹ Far from being confined to the sphere of grand principles, the rules of transnational public policy provide arbitrators with concrete solutions to the complex and sensitive problem of corruption in international arbitration.

76 Geneva Court of Justice (17 November 1989) in (1993) 1993 Rev Arb 316, pp. 316–321. For an English translation, see (1994) YB Commercial Arb 124. It is worthy of note that, after the adoption of the 1987 Private International Law Statute (LIDP), the Swiss Federal Tribunal acquired exclusive jurisdiction in setting aside procedures.

77 *Regazzoni v KC Sethia* (1944) Ltd [1958] AC 301; *Toprak Mahsulerrri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98; *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 729.

78 See especially Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins: The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) ss 32-097–32-103.

79 For the application of a similar rule by Canadian courts, see *Gillespie Management Corporation v Terrace Properties* (1989) 62 DLR (4th).

80 See eg F Eisemann, 'La lex fori de l'arbitrage commercial international' in *Travaux du Comité français de droit international privé Année* (1977) 34–36 pp. 189–213; L Matray, 'Arbitrage et ordre public transnational', in Jan Schultz and Albert van den Berg (eds), *The Art of Arbitration. Essays on International Arbitration. Liber Amicorum Pieter Sanders* (Kluwer Law and Taxation Publishers 1982) 241; P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in P Sanders (ed), *ICCA Congress Series No 3. Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law and Taxation 1987) 257.

81 Institute of International Law, Session of Santiago de Compostela, 1989, 'Resolution on Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises', art 6 (1989) 63(I) YB 330.

5. CONCLUSION

The arbitral case reveals a range of rules available to arbitrators who are called to adjudicate corruption issues, many of which have already reached the status of general principles or transnational rules. As the global fight against corruption will continue to intensify, arbitrators, whose role is to adjudicate disputes in the international sphere, are perfectly placed to uphold the values of the international community and to contribute to this fight by continuing to develop responses to the difficult issues that arise in cases raising corruption issues.