Corruption, money laundering and international arbitration

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Abstract. A fact of common life that a lot of international businesses have some element of illegal activity. Historically, the most common is bribery. The dramatic increase worldwide - and especially in Latin America - of the drugs traffic has come to invade through money laundering, the corporate and business world. In some cases, the disputes related to such businesses are resolved through arbitration. This article deals with the burden of proof, the role of arbitrators and the validity of an arbitration award in which the parties to the dispute were involved in unlawful activities. The article concludes that these acts are contrary to international public policy and that arbitrators have a duty to examine the facts and to rigorously address the issue in the award in order to safeguard the integrity of the arbitration process.

Keywords. International Arbitration – Corruption - Money Laundering - Public Policy- Evidence in Arbitration.

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I. Introduction

*C*orruption and money laundering are two phenomena that seriously affect democratic structures and the development of countries. They both are current issues even though they are longstanding problems. In the case of corruption, one would only have to remember, for instance when Cicero prosecuted Verres Gaius in 70 BC for bribery and abuse of authority committed in the province of Sicily[1]. In the case of money laundering, closest precedents are found in the activities of criminal

[1] Trial of Gaius Verres. See http://es.wikipedia.org/wiki/Cayo_Verres

organizations in the United States at 1920's. Given the severity of the adverse effects of those offenses in the society as well as in international business, in recent years almost all countries in the world have been adopting international treaties to combat and prevent such activities.

So far there is nothing surprise worthy. What is indeed a new phenomenon which is also gaining importance is the presence of corruption and money laundering not only in the political and business structures but also in international arbitration. How should an arbitral tribunal proceed against an allegation or finding of facts related to corruption or money laundering? How can corruption or money laundering be proved in arbitration? Once proved, what is the impact on international arbitration? The aim of this paper is to address these three questions. First, I shall analyze separately the concepts of corruption and money laundering to later address them jointly in the answer to the three previously stated questions.

II. Corruption

A. Concept

Corruption is considered by the United Nations as "an insidious plague"[2] and despite being internationally condemned a universally accepted definition is yet to be found[3]. The international community uses the term corruption as shorthand to refer to a number of illegal activities. In certain jurisdictions every illegal activity linked to corruption has a legal term. For example, nepotism, fraud, extortion, bribery and collusion are forms of corruption. In turn, each term can encompass a number of prohibited activities. This makes clear that the list of illegal activities is non-exhaustive. In order to clarify the term 'corruption', we can say that any act of offering, giving something of value to influence the actions of others, receiving or demanding a benefit in exchange for actions or omissions concerning the performance of public functions, the misuse of confidential information for personal gain, giving wrong

[2] See Preface to the United Nations Convention against Corruption.

[3] The Toolkit against corruption developed by the Global Program of the United Nations concluded that there is no universally accepted definition of corruption. However, some international organizations have defined the concept as in the case of the World Bank which defines it as "the abuse of public office for private gain." See http://www.opic.gov/sites/default/files/docs/anti_corruption_spanish.pdf

information to benefit or harm a third party, embezzlement or theft, and obstruction of justice, are actions forming part of the catalog of corrupt acts[4].

B. International instruments

Corruption is universally condemned. There are a significant number of international legal instruments aimed at fighting and preventing corruption[5]. Among the most significant is the Inter-American Convention of the Organization of American States (OAS) against Corruption adopted on March 26, 1996, which purpose is to promote and strengthen the development of mechanisms to prevent, detect, punish and abolish corruption in contracting countries[6]. This was the first international treaty on corruption[7].

Globally, efforts to fight corruption have been assembled mainly within the United Nations. The most important is the United Nations Convention against Corruption adopted on October 31st, 2003 which establishes a set of standards, measures and regulations that may apply to States to strengthen their domestic legal regimes regarding combat against corruption. The Convention against Corruption is to promote the adoption of preventive measures and contains a mandate to States to classify as criminal offenses in their national laws the most common forms, in both the public and private sectors, of corruption.

The Global Compact was established as a mechanism to implement the guidelines of the Convention against Corruption. It is an initiative aimed to businesses as to assistance in the implementation of the ten principles of the United Nations Convention against Corruption. Among the main principles is the number 10 which states: "Businesses should work against corruption in all its forms, including extortion and bribery." This principle constrains companies Global Compact

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4 See United Nations Convention against Corruption, 1996.

5 For instance, the Convention against Corruption of the United Nations, 1996, the Ministerial Conference of the World Trade Organization in Singapore, the International Monetary Fund publication "International Monetary Fund, Good Governance: The Role of the IMF 1997". World Bank, World Development Report: 2004. Chamber of Commerce (ICC) Extortion and Bribery in International Business Transactions, Conduct Rules, 1999. Council of Europe Convention on Criminal Law on Corruption of January 27,1999.

6 Article 2 of the Convention.

7 Until 2012, 33 OAS Member States are party to the Convention.

participants to avoid any form of corruption and adopt policies within the organization addressing the corruption issue and to establish mechanisms to avoid corrupt practices in their business operations. [8] Guidelines contain an entire section entitled "Combating Bribery" providing:

> Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantages to obtain or retain business or any other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. [9]

An instrument that has currently gained importance as well, and that had a significant impact on the protection of foreign investment machinery is the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" of 1997 by the Organization for Economic Cooperation and Development (OECD). [10] The aim of the Convention is to prevent and fight off the bribery of foreign public officials in connection with international business transactions as per the common elements stated in the OECD recommendation and the legal and jurisdictional principles of each country. The OECD Convention has been signed and ratified by all OECD member countries as well as by Argentina, Brazil, Bulgaria and South Africa.

The European Union has also taken steps to combat corruption in the Member States and their institutions through the implementation of various instruments in the context of cooperation between law enforcement agencies and the judiciary. [11]

Following the Convention against Corruption, the OECD, many countries have adopted legislation implementing the convention. The latest country to anti-corruption legislation adopted pursuant to the guidelines of the OECD Convention is the UK which in April, 2011 adopted the Bribery Act 2010 which classifies the bribery of a public official of a country abroad as criminal offense. Mexico, Brazil,

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[8] See Guidance Document "Implementing the tenth principle against corruption", 2004.

[9] OECD Guidelines for Multinational Enterprises, 6.

[10] The so called "Anti-bribery Convention" is rooted in U.S. law (Foreign Corrupt Practices Act) of 1977 which criminalized bribery of public officials.

[11] EU Convention on the fight against corruption in involving officials of the European Communities and of the Member States of the European Union [Official Journal C 195, 25.6.1997).

Guatemala, Colombia, India and Russia, among others, are also in the process of adopting similar legislation. [12]

C. Corruption scenarios in international arbitration

A typical case of corruption in international arbitration is that in which a contractor Y enters into an agreement with a State agency under which the public entity decides to terminate the concession agreement, thus, contractor Y commences an international arbitration against the State for an alleged violation to the concession agreement. At jurisdictional stage, the State argues that the arbitration claim is inadmissible since Y enterprise made illicit payments to officials in the bidding process in order to be favored with the concession.

Another situation is when such company Y enters into an agreement with enterprise Z under which company Z is constrained to work as a subcontractor of Y. The State agency cancels the concession agreement on the grounds that there was evidence that company Y bribed government officials to secure the concession. The agreement between Y and Z contains an arbitration clause. Company Z sues Y claiming that if not for the bribery of Y, Z would have received substantial economic gains in enactment of the agreement. Company Z claims damages in arbitration from Y.

A third example regarding the agreement may be the fact that during the arbitration is alleged that a party forged the signature of the other party to the trade agreement.

A fourth example is judicial corruption. In this situation, the local court has colluded with one party in a local dispute to the detriment of the other party as to support the first one at a trial. Judicial corruption can be argued, for instance, as a denial of justice before an international tribunal under a bilateral investment treaty. Likewise, there is corruption in arbitration. Among the classic examples is where one of the parties to the arbitration presents false evidence or testimony, or a member of the arbitral tribunal has received a payment or obtained benefit from a disputing party.

[12] See report in http://www.freshfields.com/en/insights/Bribery_Act_1_Year_On_Research/

III. Money laundering

A. Concept

As in the case of 'corruption', there is no single definition for money laundering. From a survey of existing international instruments on the subject we can posit that money laundering is the act by which a person transfers, uses or possesses property, knowing that such property is derived from a felony to conceal or disguise its illicit origin in order to avoid the criminal investigation, conviction and confiscation of such property.[13] The problem of money laundering is a serious one. According to the International Monetary Fund, the total sum of laundered money in the world is between 2 and 5 percent of global gross domestic product. International concern about money laundering lies for the most part in its connection with drug trafficking, and recently with terrorism.[14]

Money laundering operates as follows: (i) cash is derived from an illegal activity, (ii) the money is deposited in financial institutions. At this stage currency exchange may occur and foreign currencies can in turn be converted into various financial instruments, (iii) the funds are transferred to other institutions to conceal its origin. The aim is to disassociate the assets from its illicit source, and (iv) the funds are used to acquire legitimate assets. At this stage illicit funds are integrated into the national economy through the purchase of luxury goods, real estate, securities or even financing to other criminal organizations or through fictitious disputes.[15]

B. International instruments

Over the last 12 years, the fight against money laundering has focused on that coming from drug trafficking. The United Nations is one of the most active organizations in the international fight against money laundering. It conducts the United Nations International Drug

[13] United Nations Convention Against Transnational Organized Crime (Palermo Convention) Article 6.1

[14] Reference Guide to anti-money laundering prepared by the World Bank and the International Monetary Fund (IMF), 2006, second edition.

[15] Reference Guide to anti-money laundering p. 9. World Bank and IMF (2006)

Control Program. Among the achievements of the United Nations is the adoption in 1988 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention).

The Vienna Convention criminalizes money laundering.[16] However, it is an instrument aiming drug control, so that crimes regarding to money laundering are related to drug trafficking only. This led the international community countries to further efforts to widely combat money laundering. As so the Financial Action Task Force (FATF) [17] was created in order to find ways in which they could expand the application of the Vienna Convention to a broader universe of crimes. As a result of these efforts, in 1990 forty recommendations to combat money laundering were issued. The first revision of the Forty Recommendations was conducted in 1996 and later in 2006. Following these recent revisions, the recommendations apply to terrorism financing as well.

The following international effort was to strengthen international cooperation. In 2000 it adopted the United Nations Convention against Transnational Organized Crime (known as the "Palermo Convention"). Article 6 of the Palermo Convention criminalizes money laundering similarly and requires contracting States to consider "widest range of predicate offenses" [Article 2(a)] understanding by "predicate offenses" those based on "serious crimes"[18]. However, the Convention does not define what is meant by the "widest range" of crimes. It was left to the discretion of each country to determine the scope of the predicate offense with the only requirement of the Vienna Convention which states that the drug trafficking is to be considered as a predicate offense. In recent versions of the Forty Recommendations, the scope of such offenses is broader. Within the predicate offenses categories are: terrorism, human trafficking, sexual exploitation, illegal drug trafficking, illicit arms trafficking, murder, kidnapping, hostage taking, smuggling, theft, fraud, piracy, among others.

Great efforts to combat money laundering have been made in Europe. In 1990 the Council of Europe adopted the Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990 Convention). The 1990 Convention requires Member States to classify in their laws money laundering as a crime. Meanwhile

[16] Article 3 of the Convention states that money laundering is a crime.

[17] International Financial Action Task Force (FATF) http:www.oecd.org/fatf_

[18] Clause 6, see also the 40 FATF Recommendations in http:www.oecd.org/fatf

and in parallel, the European Commission has adopted three directives related to combat money laundering. The first directive was adopted in 1991 and forced the Member States to carry out actions to prevent the legalization of received drug money. This will require all financial institutions to identify all clients, maintain information and introduce internal control mechanisms as well as to report suspected money laundering. Given that combatting money laundering from drug trafficking was not sufficient, the EU Council and the European Parliament adopted a second directive in which Member States were constrained to combat money laundering derived from "serious crimes" such as organized crime, fraud, kidnapping, corruption and crimes that generate significant assets and are punishable under the criminal laws of the Member States. A special feature of the second directive was the inclusion of the legal profession in the list of those required to report suspicious transactions, that is, lawyers in private practice. The second directive applies to lawyers who are involved either in the planning or execution of transactions with customers in: (i) purchase or sale of property, (ii) managing funds, assets and bonds of their customers: (iii) opening or operation of bank accounts, or clients legal representation in any financial or real estate transaction. The third directive was adopted as to to embrace the updated version of the 40 recommendations of the FATF particularly those relating terrorist financing.

America have also made efforts to combat money laundering. In 1986 the Organization of American States adopted the Program of Action of Rio de Janeiro that creates the Inter-American Drug Abuse Control Commission (CICAD) and in 1992 the Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses. In the process of implementation of the Model Regulations, Central American countries signed the Central American Convention for the Prevention and Suppression of the Offenses of Money Laundering and Laundering of Assets Connected to Illicit Drug Trafficking and Related Offenses.

C. Money laundering situations in international arbitration

Money laundering may be present in different ways tin an international arbitration. One of them is through the simulation of a commercial dispute between two enterprises related but that do not appear to be

at first glance. Company A claims damages to Company B. To support the claim fictitious documents are submitted, and because both parties are involved in money laundering, there is no objection from any of them regarding the authenticity of documents. The proceedings carry on and although the tribunal is suspicious about the origin of the resources decides not to do its own investigation and renders an award in favor of one of the companies. The losing company makes the supposed payment of damages and money laundering is perfected. The example above is not commonplace in practice. A more frequent situation is one in which the arbitration does not result in an award in favor of a party but the parties during the proceedings settle the simulated. In this settlement the parties deem terminated the dispute in which one party agrees to pay the other a sum of money as they jointly request the tribunal to adopt the settlement between the parties as a consent award. The award will be used later by the parties to justify the legitimate use of resources, for example, to the tax authorities, thus accomplishing the laundry of money.[19]

Another situation is that in which money is laundered by means of a sales agreement, for example, of luxury goods or real estate, where the price paid for the good is exorbitantly higher than the market price and the seller whether ignores or just decides to overlook the origin of the money given the great business opportunity that is presented. A legitimate dispute may arise following the breach to the terms and conditions of the transaction which could lead to an international commercial arbitration.

Third, a member of a criminal organization may conduct "legitimate" business in which part of their illicit funds is transferred to a company that in turn invest in another foreign company. The assets of the foreign company are funded in part by money from criminal activities. During the course of those operations, the State decides to expropriate the property of the foreign company of which the member of the criminal organization is an investor. Pursuant to an investment treaty, the foreign company –controlled by the member of the criminal organization– submits an arbitration claim alleging unlawful expropriation under the bilateral investment treaty. An arbitral tribunal finds that the State has violated its international obligations and directs payment to the investor of a specified sum of money by way of compensation.

[19] For related examples see McDougall, A. *International Arbitration and Money Laundering*, American University International Law Review, vol. 20, no 5, 2005.

IV. The role of the arbitral tribunal

Allegations of corruption by one party or suspicion that one of the parties to the arbitration is laundering money may have valid support based on the evidence or it may be simply a defense strategy to delay the proceedings as to either improve its bargaining position on a possible settlement or avoid an adverse award on the merits of the dispute. How should a tribunal act when there is evidence of corruption or money laundering regarding the subject-matter of the dispute? This is a question on which the arbitrators must first be very careful not to be deemed accomplices in corrupt transactions, or at the other end, to determine whether or not a party committed a criminal offense and impose penalties.

An arbitral tribunal has several courses of action when faced with a case in which the subject-matter of the dispute implicates corrupt practices. On the one hand, the tribunal may decide not to make a determination on the allegations of corruption or money laundering. Second, a tribunal may decide that the arbitration claim is inadmissible on the grounds that the transaction violates international public policy. Finally, the tribunal may conclude that the disputed agreement is void or that the transaction is characterized as an illegal activity under the mandatory rules and the law most closely connected to the transaction, or investment. This may be the domestic law where the agreement was entered into, where it was implemented, or where the investment takes place.

Does an arbitrator have a positive duty to report allegedly illegal activities to the competent authorities of the country where such activities took place? In principle, there is no legal obligation to notify or report suspicions of wrongdoing. But this begs the question of whether there is a moral obligation. Even in the case of an act that is classified as a crime, for instance, money laundering and bribery, there appears to be no rules from which to infer a moral obligation for the arbitrator notify or denounce such illegal activities to the criminal authorities. It would be optimal and recommended but there is no obligation as such derived from its mandate as arbitrator.[20]

The question then arises as to whether a special treatment exists depending on the illegal act or not. In other words, do counsel for the

[20] Kreindler, R. *Aspects of Illegality in the formation and performance of contracts* (2003) Int. A.L.R.

parties, or the tribunal members, have special obligations depending on the seriousness of the illegal act? In case of money laundering, European attorneys would be subject to the directives of the European Union and accordingly they might be–even if there are serious doubts about it–required to notify the European country in which they are licensed, to report to the competent authorities the alleged criminal activity when the lawyer suspects that the arbitration proceeding is a sham or when a money laundering transaction is involved.[21]

V. Evidence in arbitration

Demonstrating the existence of an unlawful act, including corruption or money laundering, is one of the hardest things to prove in international arbitration. Currently, the illegal act has reached a degree of sophistication that is almost impossible to categorize it at first glance as illegal. The performance of the so-called "representatives" for instance, or the delivery of goods to public officials is disguised so that it even seems to be a mean to the achievement of the business operation and therefore legitimate. However, there are some exceptional cases in which the task of proving the illegal act will not be as difficult for the tribunal. During the course of the arbitration proceedings in *World Duty Free v Kenya*, the witness who also happened to be the CEO of the company that filed the arbitration claim testified, "the protocols in Kenya, required me to make a personal donation to President Moi [President of Kenya] ... X informed me that the appropriate amount of the donation was to be for two million dollars. I was informed later that the donation should be in cash. .. For the meeting with President Moi I brought with me some of the cash in a portfolio. Upon entering the hall we were greeted by the President, I left the portfolio in the wall. After the meeting I picked up my briefcase where I had left it off. On my way back from the meeting, I looked inside the portfolio and realized that the money had been replaced by fresh corn... I felt uncomfortable ... but I had no choice

[21] There are no clear rules in the UK yet the role of counsel in the arbitration regarding the application of section 328 of the Proceeds of Crime Act 2002. The Bowman v Fels case provides useful guidance on how it should be treated the subject of litigation and therefore the arbitration. See article by the London Court of International Arbitration *"Money Laundering. Bowman v Fels Implications for Arbitrators and Other Dispute Resolvers"*

if I wanted to get the investment contract."[22] In this case there was no difficulty in demonstrating what a bribe actually was. What is perhaps more awkward was not the bribery itself, or the amount of cash held in a portfolio or the corn kernels, or than the defendant itself, the Kenyan government, headed by the President, argued the existence of corruption in which he, the President himself, was who solicited and accepted the bribe, but actually, and this is the most surprising thing, that it was the claimant itself who presented evidence of the existence of bribery.

Leaving aside the embarrassing aspect of both (the respondent for claiming a bribe whose president himself requested and received, and the claimant for actually proving it), the reality is that in most cases of illegal or corrupt acts no direct evidence is found that allows arbitrators to conclusively determine if there is sufficient evidence to prove the existence of the criminal act.

What happens in situations where the evidence for the existence of the illegal act are based on criminal investigations carried out in the country origin of the claimant or the respondent (who alleges the existence of a corrupt act) but in which there is no final resolution by the local authorities? Or, what happens if the resolution is limited, confirming the existence of a corrupt act but only on one aspect and not on the facts presented in the arbitration? Undoubtedly, any investigation by criminal authorities will be important in the analysis and weight of the evidence examined by the tribunal. This, however, does not limit a tribunal to examine, on its own initiative or upon request, additional evidence and come to their own findings. It may even be said that a tribunal has the obligation to investigate his own suspicions about the existence of an unlawful act which affects the dispute on arbitration. The next step is to determine who has the burden of proving the wrongful act.

In international arbitration, the burden of proof rests over the person alleging a fact or making a proposition.[23] In the case of corruption and money laundering to prove the tort usually corresponds to the respondent as it is normally used as means of defense. There are different approaches to evidence standards. Some argue that it should be based on the preponderance of evidence

[22] *World Duty Free v Republic of Kenya*, ICSID Case ARB/00/07. Award of October 4, 2006, paragraph 130

[23] See for example Article 24 (1) of the Arbitration Rules of UNCITRAL

standard,[24] others to the beyond reasonable doubt standard by the Anglo-Saxon criminal law system, which implies a high standard of proof.[25] Arbitral practice denotes a trend towards a standard of clear and convincing evidence of the existence of the act when making serious allegations of unlawful acts. Thus, some argue, the more serious the allegation the higher the burden of proof.[26] There is a problem with the application of this standard. Risks of treating parts unevenly are taken by requiring a higher standard for allegations of corruption and money laundering. Having a party facing a high standard to prove corruption and money laundering and having the other party a lower standard for other fact matters that have a direct bearing on the merits of the dispute, the principles of due process and procedural fairness can be violated. There is a school of thought positing that there should be only one standard of proof, regardless of what the parties want to prove.

In addition to the burden of proving the existence of a corrupt act by whoever alleges it, it is also necessary to establish a connection between the unlawful act and the subject-matter of the dispute, for example, the award or cancellation of the agreement or investment. Not any unlawful act committed by one party during the existence and operation of the agreement or the investment means that the first one is null or invalid or that the investment is illegal. For instance, the fact that the complainant has evaded taxes does not mean that, however immoral and contrary to the tax laws of the country such act may be, it is a breach of contract, and therefore its claim may be dismissed by the tribunal. Nor does it mean that the behavior of the party committing the crime will be completely irrelevant to the outcome of the dispute.[27] What is required is a special connection between the act and the subject-matter of the dispute.

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[24] Fox, W. "*Adjudicating Bribery and Corruption Issues in International Commercial Arbitration*". *Journal of Energy and Natural Resources Law*. Vol 27 No 3 (2009) p.498

[25] 22nd Conference of the International Chamber of Commerce, Institute of World Business World, held on November 25, 2002http://www.iccwbo.org/about-icc/organisation/institute-of-world-business-law/resources/

[26] *Himpurna California Energy Ltd.* (Bermuda) *v. PT. Listruik Perrusahaan Negara* (Indonesia), Award of May 4, 1999

[27] Distort facts or violations of the principle of good faith, the doctrine of "clean hands" or "negligence" may be relevant in the court's analysis on the merits of the dispute to which its relevance will depend on the particular circumstances of each case including the law applicable to the dispute.

In practice, to prove the existence of an illegal act, tribunals tend to focus more on the quality of the evidence adduced rather than to the standard of proof. What evidence is admissible in arbitration to prove wrongdoing? The arbitration rules do not define which evidence is admissible. In international arbitration all appropriate evidence to prove a fact or set the right is permissible. The determination of the weight that corresponds to each proof will be at the discretion of the arbitral tribunal.[28] Documents proving the existence of a criminal investigation, the admission of an improper payment or act (whether or not listed as illegal in a particular jurisdiction) by any official from the holding, subsidiary or public official will be evidence of sufficient weight that the court will have to analyze and might as well require additional information in order to reach its own conclusion on the existence of the illegal act. If there is a determination by any authority of a country, including third countries, such as the investigation conducted by the Department of Justice against Siemens for operations in Argentina, will be evidence of an important weight in the arbitration.[29]

In the case of investment arbitration, one can only emphasize the importance of corresponding investigations commenced by the State alleging corruption or money laundering. A plea by the State alleging corruption or money laundering in the arbitration that is not supported by an investigation by the competent authorities of such country, will most likely detract from the credibility of such plea.

As mentioned above, in the case *Duty Free v. Kenya*, the arbitral tribunal found the existence of corruption since the investor itself admitted bribing the President of Kenya. In *Siemens v. Argentina*, the parties reached a settlement by which Siemens desisted from enforcing the favorable award of over $200 million obtained prior to the discovery (or showing) of the act of corruption.[30] This settlement was made after Argentina filed its recourse for review of the award supporting the existence of bribery on the part of Siemens to obtain the concession in Argentina, with the findings of the German and US

[28] See Rules on Evidence in International Commercial Arbitration of the IBA, Article 9.1

[29] Press Release, Department of Justice of the United States, "*Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $ 450 Million in Combined Criminal Fines*" in March. http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html See also *"The champion of a new culture of control"*, Financial Times, October 1, 2008

[30] *Siemens A.G. v Argentina*, ICSID Case ARB/02/8, Award January 17, 2007, paragraph 403.

governments in addition to the admissions made by high ranking executives of the Munich-based company. However, in the majority of cases there is no such hard evidence as in the Siemens or Duty Free cases. As stated before, in most cases tribunals have found it difficult to make a determination regarding the existence of corruption because of the lack of direct evidence. In practice, tribunals tend to determine the corrupt act on circumstantial evidence.[31] Among the pieces of circumstantial evidence are, for instance, in addition to the agreement, the conduct of the parties, journalistic investigations, practice and custom of taking bribes in certain jurisdictions or tolerate unlawful acts, disproportionate amounts of fees to the "agent " acting on behalf of the party who committed the crime alleged, the rarity of payments, disproportionate amounts of bank transfers, and the services performed, including congratulatory letters for payment or services performed that are unrelated to the nature of the transaction.[32]

Even when proven the commission of a corrupt act the question arises of whether it is necessary to prove two additional elements: (i) In case of corruption, that there was an intention to make an improper payment in order to induce certain behavior of the other person and such desired effect was achieved; (ii) In case of money laundering, if assets of criminal origin were used willingly to launder money and if such desired effect was achieved. First, there must be intention to influence the conduct of the party to gain a benefit.[33] Second, there is no need to prove, for example, that the overpayment actually caused the desired effect of the illegal act. The cause could be important if, for example in the case of bribery, what is desired is a declaration of nullity or invalidity of the respective contract, otherwise, proving the existence of such effect is not required. It is not even necessary that the act is consummated. That is, the act of bribery will be valid regardless of whether it was received or not by the other party. All that needs to be proven is that the corrupt act has been offered with the intent of bribing someone. As argued below, when the corrupt act is closely linked to the agreement or investment, such act would violate public policy.

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[31] Thus, commercial arbitration ICC No. 9333, the court rejected the allegation of corruption in the absence of "circumstantial evidence".

[32] Scherer M. "*Circumstantial evidence in corruption cases before international arbitral tribunals"*. (2002) Int. A.L.R.

[33] Montgomery & Ormerod, *Fraud: Criminal Law and Practice*, Oxford University Press, 2008.

VI. Effect on international arbitration: public policy

In 1963, in an ICC commercial arbitration, Judge Lagergren declined jurisdiction on the merits of a dispute submitted to arbitration in which bribery of public officials in Argentina to benefit a British company was argued. In ICC commercial arbitration No. 1110, Judge Lagergren considered that the contract in dispute was "reprehensible in terms of public decency and morality" since it "provided for the bribing of Argentine officials in order to obtain the expected business." The judge concluded that the court lacked jurisdiction because the parties to the agreement "have forfeited any right to ask for assistance of the machinery of justice"[34]. It bears noting that the tribunal was prepared to make inferences regarding the purpose and effects of the payments made:

> "[a]lthough these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."[35]

Although the decision has been criticized for declining jurisdiction to hear the merits of the dispute, what is not debatable is the importance of the principle of international public policy to an allegation of corruption or money laundering.

Public Policy is one of the exceptions to deny recognition and enforcement to an arbitral award. This principle is enshrined in Article V.2 of the New York Convention of 1958 and Article 36 of the Model Law of Arbitration of the United Nations Commission for International Trade Law (UNCITRAL). The aim is to enable the State to refuse recognition or enforcement if it contravenes the laws and morals of the country. The term used for a country is the national public policy.

[34] Quoted in *Redfern and Hunter on International Arbitration* Oxford University Press, 5th edition, p.132

[35] Paragraph 20, the case quoted in *World Duty Free v Kenya*, paragraph 148 of the award.

Internationally the term commonly used is "international public policy" or "transnational". There is a philosophical discussion about the distinction between one and the other. In practice such distinction is of little importance. It is called public because the content and application will depend on each State.[36] In case of international public policy, it is called as such if the arbitration is international and, for some, it is important to make the distinction because it depends on whether the act is contrary to public policy in a particular country or in several countries. In my opinion, it is irrelevant to distinguish between national and international public policy in cases of corruption and money laundering since both are acts universally condemned and I doubt there is a country in the world in which such action is not contrary to public policy.

As a starting point, it is important to pose the following question: What do we mean by international public policy? In international law the concept denotes mandatory rules or standards of conduct from which the disputing parties cannot derogate. It is described as that principle which "includes ... fundamental notions of law, decency and morality."[37]

The question arises as to whether in cases of corruption and money laundering, arbitration claims must be rejected on the grounds of international public policy. With respect to corruption, universal consensus is reached in the way that an agreement obtained by corruption violates the principle of international public policy.

The tribunal in the Duty Free case said:

> "In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is 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. Thus,

[36] International Law Association, Report of the Committee on International Commercial Arbitration (2000) p. 341

[37] Case Concerning the Application of the Convention of 1902, *Netherlands v Sweden*, Separate opinion of Sir Hersch Lauterpacht, (1958) ICJ Reports 90. See also the discussion on international public order in *World Duty Free v Republic of Kenya* paragraphs 138-141, 147. The case *Inceysa v El Salvador* (ICSID Case No. ARB/03/26), the court stated that "*international public order consists of the set of fundamental principles that are the very essence of the state and its function is essential to preserve values of the international legal proceedings against him contrary to*" paragraph 245.

> claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal"[38]

National courts have also affirmed the importance of international public policy. The Paris Court of Appeals held:

> A contract having as its aim and object a traffic in influence through the payment of bribes is, consequently, contrary to French international public policy as well as to the ethics of international commerce as understood by the large majority of States in the international community.[39]

In England, in 1775 Lord Mansfield in *Holman v. Johnson* case concluded:

> '...The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est condition defendentis.[40]

The is no doubt, then, that corruption is contrary to public policy of the countries that often are chosen as arbitral situses.[41]

Does this same principle apply to the case of money laundering? No arbitral practice –which I know of, exists to give a definitive answer. However, we believe that the same criteria should apply to money laundering. Both are illegal practices condemned by the international community, in both cases, countries have taken steps to prevent and

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38 *Duty Free* case supra note 32, paragraph 157

39 Ruling on September 30, 1993, Cour d'Appel de Paris, *European Gas Turbines International Ltd v Eastman*, Yearbook of Commercial Arbitration, p. 192. 201. Quoted in Barratt & Ichilcik, *Bribery and International Arbitration*, The European and Middle Eastern Arbitration Review GAR 201.

40 [1775] 1 Cowp 341, paragraph 343.

41 Id in supra 36 in Barrat & Ichilcik.

fight them vigorously, both are regarded illegal practices in virtually every country in the world, and in both cases the private sector has condemned such acts. Therefore I consider reasonable to conclude that the existence of money laundering violates the principle of international public policy. Consequently, the wrongful act, whether corruption or money laundering, if proved, would have a fatal outcome to the arbitral claim.

VII. Conclusion

An international tribunal has the obligation to safeguard the integrity of the arbitral process. First, the tribunal must establish the facts of the case on the basis of the pleadings and the evidence adduced by them during the procedure. In case of suspected commission of a proper unlawful act that was not argued by the parties, a court must require to examine thoroughly those facts that led the tribunal to suspicion. In particular, if the tribunal has before it evidence on which his opinion reasonable suspicion of committing a criminal offense such as corruption or money laundering exist, shall: (i) give due importance to any allegation concerning corruption or money laundering; (ii) recognize the important role played by the principle of public policy when the existence of a wrongful act is alleged, (iii) to investigate thoroughly the existence of wrongful act taking into account the mandatory standards of the dispute, and (iv) explicitly refer to these allegations in the award.[42]

If there is reasonable suspicion of the existence of corruption or money laundering and the parties do not cooperate with the tribunal in good faith, each arbitrator shall have the right to report its suspicion to the authorities and, as a last resort,resign from the tribunal as the last thing an international arbitrator would aspire is to become an accomplice of an illegal act.

[42] See Dossier published by the Institute of World Business Law ICC (2002) edited by B. Cremades and J. Lew