The Effects of Corruption in International Commercial Contracts

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I. Introduction

Corruption is generally considered one of the greatest enemies of international trade. Where corruption runs rampant, fair players are prevented from accessing the market and performance and quality are excluded from competition by those who use bribery as a means of acquiring contracts. It is a problem of vast magnitude: according to a frequently quoted World Bank study, an estimated USD 1 trillion in bribes are paid each year.¹ Corruption is said to increase the total cost of doing business globally by up to 10% and the cost of procurement contracts in developing countries by up to 25%. This means that for the EU alone approximately EUR 120 billion, or 1% of its GDP, is lost to corruption every year.²

The international community has therefore undertaken serious efforts to tackle the problem of corruption, and the topic has been of the highest priority since the mid-1990s. Countless sets of rules have mushroomed up from this movement, establishing anti-corruption as a new, independent branch of law. At the peak of this complex regime is a series of international conventions, which have since been ratified by many of the world’s leading industrial nations.³ These conventions are supplemented by domestic anti-bribery legislation, with well-known examples being the US Foreign Corrupt Practices Act (FCPA)⁴ and the UK Bribery Act.⁵ Moreover, the legislative landscape is further complemented by a number of non-

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⁵ Bribery Act 2010 (c.23).
governmental initiatives – such as from NGOs, professional organisations or multinational corporations – which use their own rules, recommendations and codes of conduct to strengthen the fortifications against corruption. Anti-corruption is therefore nothing less than a prime example of a transnational legal development in which the rules set at international, national and non-governmental level are constantly intertwining with one another.

So far, criminal law has been the weapon of choice for combating corruption. The majority of the international sets of rules contain the central obligation that Member States punish the payment of bribes and related crimes. In particular, the territorial scope of domestic criminal law has been expanded by shifting the focus of attention from the country where the corrupt incident occurred to the home country of the bribe-giver. The OECD, aiming to create a level playing field in the international business environment, has declared this tenet (whose origins are in the American FCPA) to be the general principle of its anti-bribery convention.

However, practical experience has shown that criminal law alone cannot cope with this difficult task; other branches of law must also contribute to achieving this joint objective. Combating corruption is therefore becoming an en vogue topic in other areas of law such as tax law and employment law, as well as in optimizing public procurement rules, in corporate governance, and in arbitration.

One branch of the law whose role in tackling corruption has thus far been underestimated is general contract law. Agreements of a contractual nature are present in many different forms

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7 The majority of the national reports are from OECD member states and have since transposed the anti-bribery convention into their national law; the legislative measures for CANADIAN law are currently in preparation. CHINA and SINGAPORE (both of which are not members of the convention) prohibit the bribery of foreign public officials. In contrast, a corresponding rule is apparently missing in VENEZUELA, where prosecution only takes place with respect to acts against domestic public officials.
8 See, e.g., the OECD Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 2009.
9 Here, special mention should be made of the protection of whistle blowers; see the general report by G. Thüsing.
10 See for instance the OECD Principles for Enhancing Integrity in Public Procurement of 2009.
11 The introduction of the “adequate procedures” defence in sec. 7(2) UK Bribery Act 2010 has caused the discussion to reach new heights.
of corruption. In light of the immense economic value embodied in such contracts it is surprising that such little attention has been paid to the legal analysis in this area. Many national reports bemoan the rarity of reported court cases – or even the complete lack thereof – on the civil law aspects of corruption in their respective countries.\textsuperscript{14} And yet there are two questions that immediately spring to mind: firstly, the question of using efficient civil law remedies to provide optimal protection to the victims of corruption; and secondly, the broader question of the role of contract law in the prevention of corruption, i.e. whether and to what extent the contract law regime can deter potential offenders from corruptive behaviour.

The consequences of bribery for the contracts concerned are primarily decided in accordance with the applicable national law. There have been few efforts to harmonise this area of law at international level; the Civil Law Convention on Corruption\textsuperscript{15} of the Council of Europe represents the only set of rules so far that has focussed entirely on the contractual aspects of corruption. However, for the most part these rules are limited to a general framework which grants the Member States considerable leeway in their respective transpositions and leaves many of the key questions unanswered.

Only rarely can special private law provisions on corruption be found in national legal systems. For instance, the American Racketeer Influenced and Corrupt Organizations Act (RICO) grants treble damages in particular instances of corruption.\textsuperscript{16} In KENYA, Art. 51 of the Anti-Corruption and Economic Crimes Act of 2003 provides that: ‘A person who does anything that constitutes corruption or economic crime is liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered’. Also, in several jurisdictions private law rules on corruption can be found in the national legislation on unfair competition.\textsuperscript{17}

\textsuperscript{14} The CZECH report mentions one claim under competition law, though this failed at last instance. The ESTONIAN report can also refer to just one court decision. According to the ITALIAN report, decisions dealing with the civil law consequences of corruption are “very few” in Italy. The POLISH report, too, bemoans the “surprising scarcity” of published case law in this matter. The PORTUGUESE and VENEZUELAN reporters were not aware of a single court judgement on the civil law consequences of corruption in their respective countries.

\textsuperscript{15} The Convention has to date been ratified by 35 countries. See further W. Rau, “The Council of Europe’s Civil Law Convention on Corruption”, in: O. Meyer (ed.), The Civil Law Consequences of Corruption (Baden-Baden: Nomos, 2009) 21 et seq.

\textsuperscript{16} 18 U.S. Code § 1964(c). The FCPA, on the other hand, does not give a private right of action.

\textsuperscript{17} Cf. for POLAND, Art. 12 u.z.n.k.; for the CZECH REPUBLIC, sec. 2983 of the New Civil Code; for SWITZERLAND, Art. 4a UWG.
However, the analysis of contracts tainted by corruption takes place usually within the framework of general contract law. Illegality and immorality, fraud and mistake, collusion and restitution are among those rules that immediately spring to mind. This area of law is known to vary considerably from country to country, and moreover, it is generally perceived as very complicated and embedded with public policy considerations. How does one then get past these boundaries which impede a discussion on the most appropriate remedies in international corruption cases?

II. Corruption and International Commercial Contracts

1. On Defining Corruption

The worldwide unanimity when it comes to condemning corruption is deceiving, as there is no uniform understanding about what the term corruption means. There are indeed a near infinite number of actions that could in everyday language be branded as “corrupt”. Yet, at a legal level an entirely different analysis is needed in each instance. Defining its own subject matter is thus one of the greatest challenges facing the anti-corruption movement. Each definition has to overcome different obstacles: firstly the national borders – what may be unproblematic in one area of the world may in fact trigger severe punishment in others; secondly, inter-disciplinary boundaries – corruption is not just a legal topic but is also heavily researched in other subjects; finally, the intra-disciplinary boundaries – the questions vary between the different branches of the law, and a working definition that fits the discussion of the criminal law aspects of corruption may thus be unfit for the purposes of private law, tax law or public procurement.

Instead of attempting to provide an abstract definition of corruption for specific aspects of private law, we will instead examine which instances of bribery are typically encountered by courts and arbitral tribunals in relation to international commercial contracts. The starting point is the following (fictitious) scenario:

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18 The drafters of the CISG famously excluded matters of validity altogether from the Convention, since they deemed them too controversial to achieve uniform rules. See Uncitral Yb. VIII (1977), at p. 93. However, the UNIDROIT Principles and the PECL have since approached this topic.

Contractor A of country X enters into an agreement with intermediary B (“the Commission Agreement”) under which B, for a commission fee of USD 1,000,000 would pay, on behalf of A, USD 10,000,000 to C, a high-ranking procurement advisor of D, the Minister of Economics and Development of country Y, in order to induce D to award A the contract for the construction of a new power plant in country Y (“the Main Contract”). B pays C the USD 10,000,000 bribe and D awards the main contract to A.

2. A Basic Model of Corruption

In its simplest form, a typical corrupt exchange can be seen as a triangular relationship between a principal, his agent and a bribe-giver. The selection of a principal-agent model as a starting point is not by accident, but reflects the prominent standing this model has held in the research on corruption since the 1970s.20 This model is especially suitable for the analysis of private law, as it allows for the clearest depiction of the legal relationships between the different actors. This is because such a triangular structure between principal, agent and bribe-giver also corresponds to a triangular contractual relationship in private law.

The basis of the triangle is formed by the relationship between the principal and his agent. This particular relationship can take many shapes in the modern business world; an agent can be, for instance, an employee in the procurement department, but also the CEO of a large multi-national company. The terms used here are understood in a broad context. In the aforementioned example, C is the agent and the Ministry D (where he is employed and which becomes party to the contract with bribe-giver A) is his principal. The connecting factor in all situations is that the agent acts for his principal when negotiating with the third party and should therefore decide not to his own advantage, but rather in the interest of his principal. The principal-agent relationship is therefore characterised by a strong fiduciary element.21

The third party (A) infringes on this fiduciary relationship by secretly affording the agent with an undue advantage, which need not be in monetary form but can encompass everything that the recipient considers valuable and suitable to cause him to undermine his loyalty: jewellery, jewellery,


21 See the definition given by Lord Templeman in Attorney General for Hong Kong v Reid [1994] 1 AC 324: “A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust”.
invitations to expensive trips, even immaterial assets such as honorary titles or granting sexual favours. In return for such items, the agent breaches his fiduciary duty by ensuring that the bribe-giver receives preferential treatment with respect to the contract with the principal. This preferential treatment can consist of receipt of the tender, which under fair competition would have otherwise been given to a competitor; alternatively, it can also be used in instances in which the bribe-giver would have nonetheless gained the tender, yet the bribe has been used in order to obtain better conditions.

Under this model it is therefore possible to distinguish between contracts providing for corruption and contracts procured by corruption. For the purpose of this report we shall refer to the contract providing for corruption between bribe-giver and bribe-taker as the “bribe agreement”; the contract between the principal and the bribe-giver that has been procured by corruption is referred to as the “main contract”. Although one could say that both contractual relationships are tainted with corruption, they are not necessarily subject to the same legal consequences. The following shall focus particularly on the validity of both of these contracts. In contrast, questions of compensation for corruption – though likewise immensely important in practice – must unfortunately be left aside.

3. Advanced Concepts of Corruption in International Commercial Cases

Instances of corruption in practice are often much more complex than can be expressed with a simple three-person framework like the one just introduced. Corruption is a topic that features a multitude of variations and is often connected with additional problems that, although not necessarily present in all instances of bribery, must nevertheless be borne in mind in the abstract search for appropriate legal consequences in the relationship between the parties to a bribe.

a) The Use of Intermediaries

The first additional problem concerns the manner and form in which the bribe is paid. In international trade it is likely that the relevant parties will not know each other personally and

22 In Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134 (2003), the defendant allegedly bribed Korean public officials with sexual favours in a weapons deal. Another case is mentioned in the DUTCH report.
23 On damages see Identification and Quantification of the Proceeds of Bribery – A Joint OECD-StAR Analysis, 2012.
will not know whether they can trust one another. It is therefore clear that the bribe-giver cannot openly approach his business partner’s agent and offer him a bribe. Rather, the illegality of these activities requires that the bribe results from a careful and subtle approach. Accordingly, negotiations concerning bribery often feature intermediaries (like B in the example) in order to ease the transaction.24 Such intermediaries often appear as “consultant” or “broker” for their employer.25 Consulting services are common in international trade and can be a sensible approach, for instance with respect to the political or economic situation in the target country or with respect to regional practices. However, amongst the herd are black sheep whose main or sole activity consists of funnelling bribes to influential people. These people have at their disposal both the political contacts as well as the know-how for such covert transactions.

The legal structure of this approach often follows the same pattern: A hires B to initiate the conclusion of a contract with D. The precise activities expected of him are described only very superficially in the consultancy agreement.26 The intermediary usually receives a generous contingency fee for his services – it is an open secret between the parties that parts of the fee will be used in order to bribe influential persons on the opposite side.27 However, the contracting company will often not want to know the details in order to be able to claim plausible deniability and thereby protect itself from prosecution.

b) The Victims of Corruption

Furthermore, it is to be noted that, contrary to a widespread cynical view, corruption is by no means a victimless crime. In contrast, many bear the brunt of its consequences. The direct effect is felt first by the principal, who often pays too much for the contract with the bribe-giver. In the aforementioned example A would not resort to bribery if he could not gain an

26 Suspicious, superficial paraphrasing of the tasks expected of the consultant is correctly considered a “red flag” for a corrupt basis of the agreement.
27 Therefore, Art. 2(a) of the ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery (2005 edition) provides that any payment made to an intermediary should represent no more than an appropriate remuneration for legitimate services rendered by him.
advantage that would be at least equal the payment of the bribe to C. In practice the resulting loss is probably even much greater than the amount paid as a bribe.

However, this is typically not the end of the story: corruption also has indirect negative effects on further parties. If (as in the example) D is a state or a government contractor, it has to cover its additional costs resulting from the inflated price through tax increases or by deducting the amount from other important infrastructure projects. In contrast, in the private sector the additional costs will usually fall within the party’s price calculation and will thereby be passed on to its customers; the price of the products will increase. Therefore, the costs of corruption will ultimately be borne by everyone.

A second group of victims can be said to be the competitors of the bribe-giver who, due to the illicit payment made by their rival, have lost the chance to acquire the main contract with the principal for themselves. Market survival depends on at least occasional success in acquiring contracts, as otherwise one quickly loses a position on the market. If there is no chance for bidders to acquire contracts through honest competition, they are then left with the choice between just two undesirable alternatives: either to voluntary retreat from the market or to enter the competition for the highest bribe. This dilemma forms the basis for why particular sectors have such great problems in containing widespread corruption after it has initially occurred.

Because of this situation it is to be expected that the competitors observe with particular criticism the question of the enforceability of a contract that has been purchased via bribes. If the law does not punish the bribe-giver but instead allows him to retain the contract, it sends a devastating signal to all other market participants to equally resort in the future to such illegal methods. The situation is further complicated by the lack of sufficient protection in the form of damages claims for competitors; there are practically no court decisions in which a competitor has successfully claimed compensation from his corrupt rival.

c) Shareholder Lawsuits

28 Hovenden v Millhoff [1903] All ER 848, per Smith LJ: “If a vendor bribes a purchaser’s agent, of course the purchase money is loaded by the amount of the bribe. It cannot be denied.”
29 The Bribe Payers’ Index, most recently issued by Transparency International in 2011, provides an overview of the spread of corruption in different industry sectors.
Ultimately, corruption can also create considerable harm on the bribe-giver’s side. It is
namely easy to overlook that a bribe-giver is not necessarily an economic unity, but can
encompass a number of different interest groups. A possible example is that, despite explicit
company policy to the contrary, an overambitious manager pays a bribe; then the company
and its shareholders are also victims of this corruption if, after the crime has been discovered,
the affected contracts fall through and, moreover, the prosecution leads to a severe fine. This
internal conflict of interests forms the background for the current boom of anti-corruption
compliance, which aims at reducing the risk of liability through organisational measures.

A relatively new problem is posed by the question of how the liability for these types of
damages can be achieved vis-à-vis the company’s shareholders. In this respect the focus of the
international discussion has thus far been on US law. A 2010 report by Reuters refers to 37
such proceedings within a four-year period, 26 of which were settled out of court. Here the
claimants were seeking compensation for the (in some cases extensive) decline in share price,
which was linked to investigations resulting from the American Securities and Exchange
Commission’s allegations of bribery. An in-depth discussion of the legal circumstances
cannot take place here, but nonetheless is to be considered that a decision in contract law on
the effectiveness of the main contract creates additional and so far unresolved questions on
the liability for the resulting losses.

III. Contracts Providing for Corruption

1. Invalidity of Agreements to Pay a Bribe

The bribe agreement between an agent and a bribe-giver takes place in the shadows of the
corruption triangle. The light cast on the other contractual relationships within the triangle
means that they are concluded in an open environment, whereas the illegality of the bribe

31 The FCPA Blog reports on current enforcement actions under the American FCPA. See for instance
http://www.fcpablog.com/blog/2014/1/10/alcoa-lands-5th-on-our-top-ten-list.html with a top-ten list of
enforcement actions so far.
briefly discusses some recent civil actions that took place after a firm’s disclosure of an FCPA-related
investigation. The CANADIAN report mentions pending class actions in the courts of Ontario and Quebec.
33 See, for the correlation between corruption and share value, S. Eicher, “When Shareholders Lose (or Win)
through Corruption”, in: S. Eicher (ed.), Corruption in International Business (Burlington: Gower, 2009), 31, at
42 et seq.; Wrage (supra note 25), 71.
agreement requires darkness to cover the conspiracy and secrecy of the negotiations in which the bribe-giver and agent come together, as well as the subsequent exchange of the benefits.

It is clear that the law must not serve to protect crooks in the performance of their corrupt intentions. Contracts providing for corruption are therefore unenforceable in any court of law. This applies not only to the direct promises of bribes from A to C but also to the “Commission Agreement” between A and the intermediary (B), so far as the actual task is to arrange the payment of bribes. In terms of the extent of the level of abjection of these contracts, there is no difference. Despite some national variations in the dogmatic underpinnings of nullity there appears to be universal agreement with respect to the outcome. One can thus identify the nullity of contracts providing for corruption as a transnational principle of law.

This principle is clearly expressed in Art. 8(1) Civil Law Convention on Corruption: “Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void”. In a similar vein, Principle No. IV.7.2(a) of the Trans-Lex Principles states: “Contracts based on or involving the payment or transfer of bribes (“corruption money”, “secret commissions”, “pots-de-vin”, “kickbacks”) are void.”

It can be observed at national level that the justification for rendering bribe agreements null and void is mainly based on two approaches, namely the arguments of illegality and immorality. The concept of illegality is coupled with the notion that a transaction cannot be valid according to the civil law when it violates mandatory statutory prohibitions. There can be no doubt that the criminal law provisions that penalize corruption represent such statutory prohibitions, as the actions required to perform the bribe agreement are exactly those that trigger liability under the criminal law. On the other hand, the immorality argument is much broader and is also applicable in those exceptional situations in which the criminal law has not been violated. The overview of the different legal systems does however show that there is

37 Immorality can play an independent role to set aside a contract in cases of corruption if the contract at issue exceptionally slips through the criminal law net, for instance because the legal system does not prohibit the payment of bribes abroad or particular forms of influence peddling.
not always a sharp dogmatic distinction between illegality and immorality, but rather that both
grounds for nullity are given alongside one another and often at the same time. 38

It can be observed that the various legal systems offer different approaches towards rendering
the bribe agreement null and void. In the Romanic legal family the effectiveness of the bribe
agreement fails due its illegal and immoral cause. 39 Other legal systems expressly state that
contracts are void if they are illegal, or contrary to public order, or violate common moral
principles. 40 Under the Common Law there appears to be more leeway in deciding the
individual case on the grounds of violation of public policy. That being said, here, too, the
courts will generally deem the bribe agreement unenforceable. 41

There is no difference of outcome with respect to whether widespread corruption is present in
one part of the world or whether it is considered necessary in order to do business. Although it
indeed may sometimes be possible to consider regional customs when assessing the
immorality and illegality of a contract, for instance when it comes to the accepted boundaries
for gifts or hospitality, this does not at all mean that widespread corruption in a country could
legitimise the payment of bribes per se. All national reporters responded negatively to the
question of whether the contract between A and B could be effective under the exceptional
circumstance that B’s task to facilitate the bribery of public officials constitutes a generally
accepted business practice in that country.

Parties to these contracts are of course aware that they cannot rely on the court to enforce their
expectations. There have in fact been instances in which one of the parties took advantage of
this in order to defraud the other, for example by paying him with counterfeit money. 42
However, usually there are more or less stable extra-legal enforcement measures that give
sufficient motivation to the parties to adhere to their – legally invalid – promises. For

38 In DENMARK, there is no tradition to distinguish between a contract being contra legem and being contra
bonos mores. Both principles are set out side by side in s. 5-1-2 of the Danish Law. In the UNITED STATES,
“contracts unenforceable on grounds of public policy” is seen as the general concept, and “illegal contracts” are
just one specific example for this category.
39 As reported for QUEBEC, FRANCE, ITALY and VENEZUELA.
40 The invalidity of the bribe agreement can be obtained by this means in, for instance, CHINA, the CZECH
REPUBLIC, DENMARK, ESTONIA, GERMANY, the NETHERLANDS, POLAND, PORTUGAL and
SWITZERLAND.
41 As reported for CANADA, ENGLAND, SINGAPORE and the USA.
42 J. Lambsdorff/B. Frank, “Corrupt Reciprocity – Experimental Evidence on a Men’s Game”, Int’l Rev L Econ
instance, they may hope to repeat the lucrative exchange of favours if they prove trustworthy to their partners the first time, or they are simply afraid of their retaliation.\footnote{For an economic analysis of the self-enforcing nature of the bribe agreement see J. Lambsdorf/S. Teksoz, “Corrupt Relational Contracting”, in: J. Lambsdorf/M. Taube/M. Schramm (eds.), The New Institutional Economics of Corruption (London: Routledge, 2005), 138 et seq.}

Nonetheless, the parties often give their transactions a legal gloss by using mock agreements in order to justify the flow of cash. For example, the agent receives a highly lucrative “consultancy agreement” even though he is not to actually provide any consultancy services. Such a method is often used in engaging intermediaries because their written contracts foresee, in principle, the provision of legitimate services such as consultancy or lobbying. Arbitral tribunals have already had to decide on several cases in which an intermediary sought payment of his commission for facilitating the main contract and the bribe-payer then invoked the nullity of their agreement because it actually aimed at the payment of bribes.\footnote{See, for instance, ICC Case No. 9333 (final award), ASA Bull. 19 (2001), 757 ff.; ICC Case No. 6497 (final award), YbCA XXIVa (1999), 71 et seq.} The claims for payment have so far always been rejected in all instances in which the arbitral tribunal was convinced that the contract with the intermediary actually served to camouflage corrupt enterprises.\footnote{See the report by R. Kreindler/F. Gesualdi; M. Raouf, “How Should International Arbitrators Tackle Corruption Issues?”, ICSID Review – Foreign Investment Law Journal 24 (2009), 116, at 127.}

The invalidity of the bribe agreement is to be taken into account ex officio by the court. The parties cannot waive its application, as the invalidity is not ordered for their protection but rather for the protection of greater common values that cannot be disposed of by agreement. Such an approach is also applicable in arbitral proceedings where the tribunal must also acknowledge the invalidity of the contract even if neither of the parties had pleaded this aspect. This was the situation in the well-known Lagergren award, in which the sole arbitrator rejected the claim from a contract for the bribery of Argentine public officials.\footnote{ICC Case No. 1110, Arb. Int. 10 (1994), 282 et seq. On the question whether the claim should be dismissed on procedural or substantive grounds, see R. Kreindler, “Aspects of Illegality in the Formation and Performance of Contracts”, in: A.J. van den Berg (ed.), International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series No. 11 (The Hague: Kluwer, 2003), 209, 226 et seq.}

Anyone can invoke the invalidity of a contract providing for corruption, including the parties to the agreement themselves. This means that the bribe-giver can refuse to pay the intermediary the commission for the acquisition of the desired contract, referring to its corrupt nature. Some authors and arbitrators have expressed their discomfort with this result. They perceive the benefit to the bribe-giver as being doubly unfair, as he not only betrays the other
party to the main contract by bribing his agent, but he also obtains the main contract without having to pay the intermediary if the consultancy contract is voided.\textsuperscript{47} Thus, the law seems to work to the advantage of the most dishonest of all parties.\textsuperscript{48} However, economists have shown that undermining the trust between bribe-payer and intermediary is appealing because neither side can then have faith in receiving their counter-performance. This ability to deprive the other party of its expectations has the desirable effect of destabilising a potentially corrupt relationship.\textsuperscript{49} The Paris Cour d’appel rightly recognised this when it decided: “The parties’ awareness of the immoral or illicit aim of the contract, required by jurisprudence, is not meant (whatever its actual consequences may be) to lessen the rigor of the sanction of nullity; on the contrary, it aims at reinforcing it by protecting the contracting party who has nothing to reproach himself with as to the conclusion of the contract; the application of the above-mentioned adage aims at preventing performance of an immoral or illicit contract by depriving the party which first executes it of all protection”.\textsuperscript{50}

The invalidity of a commission agreement because of intended bribery is to be distinguished from the situation in which the enterprise refuses to pay the intermediary’s commission because the use of intermediaries is generally prohibited in the country in which the main contract is to be procured. Several countries have in fact provided for such a general prohibition as a means of preventing corruption. In \textit{OTV v Hilmarton}\textsuperscript{51} the claimant had procured a contract in Algeria for the defendant even though Algerian law prohibited the use of intermediaries. However, the procurement contract was subject to Swiss law and thus presented the arbitrator with the question of whether the Algerian prohibition was relevant to this contract. This is clearly a conflict of laws problem, namely with regard to the application of overriding mandatory provisions of a third country.\textsuperscript{52} The respective national conflict rules often grant the court some discretion whether to consider the foreign laws in the individual

\textsuperscript{47} ICC Case No. 6497, \textit{YbCA XXIVa} (1999), 71, 72; cf. furthermore Cour de Justice Geneva, 17 November 1989, \textit{YbCA XIV} (1994), 214 et seq. The court found it “utterly shocking” that the bidder stopped making payments to the intermediary as soon as he got his desired contract. Intentions to bribe were not found in this case, however.

\textsuperscript{48} Cf. ICC Case No. 6497 (\textit{supra} note 47), at 72: “By the way, the result of such nullity is not necessarily equitable. The enterprise having benefited from the bribes (i.e., having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organised the payment of the bribes. The nullity of the agreement is generally only beneficial to the former, and thus possibly inequitable. But this is legally irrelevant”.

\textsuperscript{49} Lambsdorff (\textit{supra} note 20), 144 et seq.


\textsuperscript{51} ICC Case No. 5622, \textit{Hilmarton Ltd v Omnium de Traitement et de Valorisation}, \textit{YbCA XIX} (1994), 105 et seq.

\textsuperscript{52} For the courts in the EU Member States, the applicable conflict rule can be found in Art. 9(3) Rome I Regulation.
case. In this respect there was a split in the opinions of the national reporters as to whether a general prohibition of intermediaries, without evidence of a corrupt purpose of the contract, deserves acknowledgment independent of the applicable law.\textsuperscript{53}

2. Restitution of the Bribe – The Illegality Defence

The invalidity of the bribe agreement does however give rise to the further question of the fate of those elements of the agreement that have already been performed. As a general principle, something that has been received on the basis of a legally void contract has to be returned.\textsuperscript{54} According to this notion it thus appears that the invalidity of the agreement could allow A to demand the return of the bribery payment from C or from the intermediary B.

However, the law contains an important exception to this principle of restitution, namely the venerable maxim \textit{ex turpi causa non oritur actio}. In other words, the parties to the contract should not receive the return of their performance if the invalidity of the contract results \textit{contra legem} or \textit{contra bonos mores}. The legal system’s disapproval of the illicit contract is thus not extinguished by the failure of claims for performance, but continues on the level of unjust enrichment. The roots of this illegality defence can be traced back to Roman law, though it has since grown to feature different extents of rigorousness and numerous exceptions in the various legal systems.\textsuperscript{55}

Without a doubt, the payment of bribes represents a very clear case of \textit{causa turpis}, and the majority of legal systems do in fact exclude the bribe-giver’s claim to reimbursement.\textsuperscript{56} For instance, the ENGLISH national report refers to a case in which the payment of a bribe to an Indian public official did not lead to the conclusion of the desired contract; the claim for

\textsuperscript{53} Although the GERMAN reporter would give effect to such a prohibition as a legitimate means of tackling corruption, the PORTUGUESE reporter considers the absolute prohibition of intermediaries as unreasonable and would not enforce it when it is not part of the applicable law.

\textsuperscript{54} The DUTCH report holds, in this respect, a unique position as it considers it possible for the restitution to fail when the bribe-taker has performed his part of the agreement and has procured the contract for the bribe-payer. In this instance reasonableness and fairness would demand to leave the performances where they have fallen, as otherwise the recipient would receive no remuneration for his performance.


\textsuperscript{56} The exclusion of restitution due the \textit{ex turpi causa} rule is generally supported by the national reporters for ENGLAND, ESTONIA, FRANCE, GERMANY, ITALY, SINGAPORE, SWITZERLAND and VENEZUELA. The national reports for QUEBEC, DENMARK, the USA and the UNIDROIT PRINCIPLES support this approach only on a case to case basis after considering the individual facts. In contrast, the reimbursement of the bribe can, in principle, be demanded in the CZECH REPUBLIC, POLAND, PORTUGAL and the NETHERLANDS.
reimbursement of the money paid as a bribe failed due to the illegality defence.\textsuperscript{57} In GERMAN law this rule has been codified in § 817 sent. 2 BGB; here, the courts have also rejected claims for reimbursement of bribes.\textsuperscript{58}

a) Reasons for Excluding Restitution

At first glance it would appear that the exclusion of repayment in instances of bribery leads to an absurd result: the corrupt agent does not have to return the bribe to the bribe-giver, and as such, it seems that the law rewards him for his corruptibility. The invalidity of the bribe agreement therefore appears to present him with no disadvantages if he has already received the bribe. In contrast, the bribe-giver is doubly punished, as the law denies him the enforcement of the corrupt agreement as well as the reimbursement of the bribe.

However, the approach does require further explanation, as the striking imbalance between the parties is certainly intentional: the party who performs first is faced with the risk of the entire loss of its performance. In turn, there is no incentive for his contractual partner to fulfil his part of the agreement, as he does not need to expect either claims for performance or reimbursement; he can thus breach the agreement without fear of consequence. Both parties have reason for doubting the honesty of their partners in crime, as both will have already demonstrated that they are willing to use illegal agreements to cheat their joint contractual partner, namely the principal. However, they nonetheless have to trust each other, because the law offers no protection to their agreement. The one-sided distribution of the economic risk of advance performance thus illustrates that the law intends to undermine the relationship of trust between two potentially corrupt parties.

A further reason for the failure of the claim for restitution can also be given: it would surely be unsatisfactory if the bribe-giver could rely on the assistance from the court in seeking to undo illegal payments. Excluding the claim for repayments thus protects the integrity of the courts, which dishonest parties should not be allowed to use as an instrument to facilitate their wrongdoings.\textsuperscript{59} In other words, the law does not help those who venture outside of the law, or

\textsuperscript{57} Nayyar v Denton Wilde Sapte [2009] EWHC 3218 (QB), at 118.
\textsuperscript{58} The GERMAN report quotes OLG Karlsruhe, Blutalkohol 2007, 49 f.
\textsuperscript{59} This aspect has been emphasized be the reports from DENMARK and VENEZUELA.
as the great English humourist A.P. Herbert translated the *ex turpi causa* rule: “A dirty dog will get no dinner from the Courts”. ⁶⁰

b) Room for Exceptions

The illegality defence in cases of corruption can be said to be basically sound law. It is based on the clean hands maxim as well as on specific preventative considerations. However, most jurisdictions will not enforce the rule with absolute rigor but give the judge room to take into consideration all the circumstances of an individual case. The question thus arises of whether in cases of corruption there could be exceptional circumstances that argue for the restitution of bribery payments.

(aa) Prevalent Culpability

The idea of prevention and the aspects on the protection of the court’s dignity both assume that each party has knowingly acted in a reprehensible manner. Where each party has to equally accept the accusation of unlawful behaviour, it is justifiable that the loss remains where it has occurred: *in pari delicto potior est conditio possidentis*. However, this maxim can be questioned in instances in which the performing party is not – or is only minimally – guilty, i.e. has not acted *in pari delicto*.

A conceivable example would be a mistake of a party regarding the legality of its behaviour, although from a semantic perspective we probably would not speak of bribery if the payer did not knowingly pursue a corrupt intent. In AUSTRIA, a claimant was reimbursed with the payment he made in the unsuccessful attempt to be appointed consul general of an African republic. ⁶¹ This was despite the fact that Austrian law contains in § 1174(1)(1) ABGB the principle that there can be no return of that which was given to facilitate a tort. It seems as if the court was not convinced that the claimant in this case had entirely understood that his money should have served to cause the responsible public officials to make a decision in his favour and was not merely a donation towards worthy causes in that country. ⁶²

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⁶² In contrast, in similar instances of unsuccessful attempts to purchase a title the courts have rejected the claim for reimbursement, see for ENGLAND *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1; for GERMANY, BGH, NJW 1994, 187.
A further example for a situation that allows for the exceptional restitution of a bribe is that the payer was incapable of understanding the reprehensibility of his actions. In a GERMAN decision from 1917 the court held, albeit obiter, that it is possible that the claim for reimbursement could be open to a mentally deranged woman (who had paid a public official in order to receive a place in a care home) as she could not have breached good morals on account of her condition.\textsuperscript{63} In another GERMAN case\textsuperscript{64} a foreigner was deceived by a dishonest compatriot, who convinced him that a residence permit in Germany could only be obtained via bribery. The fraudster offered to arrange the payment, but eventually kept the money for himself. In contrast to the first example, here the payer was at least aware that the payment was illegal. Nonetheless, the judge was very generous in his decision to permit the claim for restitution because the payer was clearly unfamiliar with the circumstances in Germany and, as a result, was exploited by the fraudster.

Furthermore, exceptional circumstances may result from the payer’s particular predicament and therefore make him appear to be worthy of protection. For instance, one could hardly speak of corruption where the money has been solicited by the agent by means of a serious threat. From a semantic perspective corruption requires the bribe-giver and bribe-taker to cooperate voluntarily with one another. The POLISH report gives a hypothetical example of parents who bribe a doctor so that he may be quicker in taking care of their seriously ill child. Nobody would judge the parents for their behaviour under such circumstances. However, the crucial case may be that an agent has solicited a bribe through the threat to not award the contract. Such behaviour could result in a financial predicament for a business if it depends on the contract or has already made considerable investments that it cannot afford to lose. However, does this mean that it has to succumb to the threat and may pay the bribe? At present there has been no court decision that acknowledges the right to corruption due to economic self-defence; in fact, such a suggestion seems preposterous, as there is always the option to report the blackmailing agent to his principal and thus restore fair conditions.

The UNIDROIT Principles suggest a third approach towards permitting the recovery of the bribe.\textsuperscript{65} If A has hired B to make the bribe payment, but B has not yet paid the bribe to the corrupt officials, then A may be granted the right to recover the bribe from B if he decides no

\textsuperscript{63} RGSt 51, 87, 91.
\textsuperscript{64} AG Offenbach, NJW-RR 1992, 1204 f.
\textsuperscript{65} Art. 3.3.1 PICC (2010), Illustration 21.
longer to pursue the illegal purpose and withdraws from the contract. Such a right of repentance is known in the Common Law as *locus poenitentiae*. The intention is clear: a golden bridge should be built for the remorseful businessman in order to allow him to return to just behaviour. This exception in the UNIDROIT Principles was included at the end of the drafting process after only brief discussions on the content. However, the rule is not unproblematic, as although the purpose is well-intended, it can result in the reverse in practice. This is because such a rule increases the motivation for the intermediary to expedite the payment of the bribe, as he can thereby secure his commission. Thus, even though the maxim *ex turpi causa* intends to impede the performance of the corrupt arrangements, this “golden bridge” exception would give the bribe-giver a means of putting pressure on the intermediary to perform his part of the agreement.

(bb) Recipient’s Enrichment

There is an additional argument against the use of the illegality defence in cases of corruption, namely that the recipient of the bribe would be unlawfully enriched. It seems as if several legal systems should have difficulties with the notion that the agent could profit from the illegal agreement. After all, is it not a fundamental principle of justice that crime must not pay?

Nevertheless, this argument falls somewhat short, as the exclusion of restitution affects only the bribe-giver’s claim to the bribe; it does not indicate whether the bribe actually remains the bribe-taker’s property. However, as the national reports confirm, it is often possible to draw on other branches of the law to ensure that in such cases the unlawfully gained profit can be disgorged.

Several jurisdictions pursue this particular objective by providing that the profits gained from criminal activity are to be forfeited to the treasury. Art. 3(3) OCED Convention stipulates that in cases of bribery of foreign public officials the bribe is subject to confiscation and seizure. A

67 M.J. Bonell (*supra* note 34), 530-531.
68 In the words of Lord Hatherly in *Jegon v Vivian* (1870-1871), Law Reports Chancery Appeal Cases VI 742 (761): “This Court never allows a man to make profit by a wrong”.
similar rule is contained in Art. 31 UNCAC. CHINA and POLAND adopt this approach towards withdrawing the bribe from the recipient.\footnote{However, the POLISH report notes that there have seemingly been no court decisions on forfeiture in corruption cases.}

However, there is a second potential candidate to make claims for the bribe, namely the betrayed principal. Many legal systems allow the principal to claim against his disloyal representative for that which has been gained from the disloyalty. Such claims in private law often have priority over the state’s right of confiscation.\footnote{See the official Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, para. 23; M. Pieth, in: M. Pieth/L. Low/P. Cullen (eds.), The OECD Convention on Bribery (Cambridge University Press, 2007), 262.} In GERMANY, for example, there have been many changes in legal situation surrounding this subject, and whereas the Reichsgericht used to favour the confiscation of bribes over private claims, nowadays the principal’s right to recovery has precedence, supplemented by forfeiture of the proceeds of bribery to the state treasury if the principal does not exercise his right.\footnote{§ 111 i (5) Criminal Procedure Code (StPO).}

The legal basis for a claim to recovery can be formed by a duty to account for profits arising from the contractual relationship between the principal and agent. Such a duty often exists in the Common Law jurisdictions, but it is in ENGLAND where the discussion surrounding the exact form of the duty has recently been reignited.\footnote{According to the ENGLISH report; see also P. Millett, “Bribes and Secret Commissions Again”, The Cambridge Law Journal 71 (2012), 583 et seq.} The essence of the discussion focuses in principle on whether the claim is merely of a contractual nature or whether the fiduciary holds the bribe as constructive trustee for his principal. The latter approach would have particular advantages should the agent become insolvent, but also in situations in which the agent has invested the bribe and gained a profit. In AG for Hong Kong v. Reid\footnote{Attorney-General for Hong Kong v Reid [1994] 1 AC 324.} the Privy Council, applying the law of New Zealand, had accepted a constructive trust to the principal’s benefit. Accordingly, the latter could thus have instant access to land that was purchased by the bribe-taker using the bribe. Although the decision received a positive reception in England, the Court of Appeal favoured the opposite interpretation in Sinclair Investments v Versailles Trade Finance, as the “fact that the breach of fiduciary duty owed to the beneficiary resulted in the profit should not necessarily mean that the profit is treated as the property of the beneficiary”\footnote{Sinclair Investments v Versailles Trade Finance [2011] EWCA Civ 347, para. 53.} However, aside from this point the recent decision certainly allows a claim in equity for recovery of possession to be made against the agent.
The principal’s claim for recovery under GERMAN law had a varied past, however its result is widely recognised today. The exact legal basis is still disputed: contractual fiduciary duty, *negotiorum gestio*, or, in the case of public officials, an obligation to hand over gifts as a reflex response to the general prohibition on accepting presents.  

A similar situation can be observed in SWITZERLAND, where there is uncertainty regarding the correct legal basis for the claim but support from the leading opinions for a claim to recovery.

Nevertheless, not all legal systems feature a claim against the fiduciary to account for profits. In a recent English decision a Russian shipping company sued its former senior officers for dishonestly entering into shipping transactions which were against the interests of the principal. Two of the former officers allegedly received bribes. The Court found that under RUSSIAN law a bribe is not recoverable unless the claimant can show that he suffered a loss.

IV. Contracts Procured by Corruption

1. Can the Main Contract Be Considered as Valid?

Whereas the invalidity of a bribe agreement between A and C or of a commission agreement between A and B amounts to a transnational legal principle, there is a much more colourful spectrum of opinions regarding the suitable consequences of the main contract between A and D. In principle, there are three different solutions to consider. Firstly, the contract could, just like the bribe agreement, always and under all circumstances be void. Secondly, it would however also be possible to allow the injured principal to choose between the invalidity of the contract or continuing with its performance despite the corruption. Finally, the third approach would consist of treating the contract as binding, thereby effectively limiting the rights of the principal to other remedies such as damages or price reduction.

Each of these three solutions can actually be observed in practice. All in all, however, there seem to be relatively few court decisions in this area. One may speculate that, in light of the

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75 See the references in the GERMAN report.
76 For details see the SWISS report.
78 When Lord Mustill included in his famous listing of principles of *lex mercatoria* that a “contract obtained by bribes or other dishonest means is void, or at least unenforceable”, he indeed avoided a decision in favour of one of the two models, see M. Mustill, “The New Lex Mercatoria: The First Twenty-five Years”, *Arbitration International* 4 (1988), 86, 111 f.
commercial value at stake, the parties to these contracts would rather avoid judicial clarification and instead seek an amicable solution. This would be all the more likely in international trade, as the invalidity of the contract often does not benefit either party. The lack of judicial tuning of this problem is reflected to some extent in the national reports, as several reporters avoided clearly determining one particular dogmatic solution for their respective national law.

International sets of rules contain just initial starting points for the question of how to correctly deal with contracts obtained via bribery. Art. 8(2) of the Civil Law Convention of the Council of Europe says on the matter: “Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.”79 However, there is a lack of clarity concerning the exact requirements for declaring a contract void.80 Further imprecision can be seen in the wording chosen in Art. 34(2) UNCAC: “In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.” In contrast, the UNIDROIT Principles are clearer with regard to the principal’s right to elect.81 Lastly, in the field of public international law, Art. 50 of the Vienna Convention82 provides: “If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.”

a) Treating the Main Contract as Void

Where the applicable law provides for the invalidity of a contract procured by corruption, it cannot be enforced at court even if the principal would like to retain the contract despite its tainted nature.

79 It is noticeable that this wording of the Convention follows the French model, according to which the termination of contracts has to be decided by a court and not, for instance, by a unilateral declaration.
80 According to the Explanatory Report to the Convention, para. 64, “[i]t remains for the court to decide on the status of the contract, having regard to all the circumstances of the case”.
81 See Art. 3.3.1 UNIDROIT Principles, Illustration 16: “D may choose whether or not to treat the Contract as effective. If D chooses to treat the Contract as effective, A will be obliged to perform and D will have to pay the price, subject to an appropriate adjustment taking into consideration the payment of the bribe. If, on the other hand, D chooses to treat the Contract as being of no effect, neither of the parties has a remedy under the Contract. This is without prejudice to any restitutionary remedy that may exist.”
Illegality as a legal category is probably not the right starting point for voiding the contract: in contrast to the bribe agreement, the content of the main contract is not illegal. The law prohibits the payment of bribes, though generally not the performance of the contract obtained by such means. It can be observed for CHINA that the contract would still not be declared void even if it breaches administrative provisions or a public tender does not take place, even though this was required by law.\textsuperscript{83} However, several reporters from the Romanic legal family considered it possible that the illegality of the bribe agreement would penetrate through to the cause of the main contract.\textsuperscript{84}

Several other legal systems adopt the approach that the main contract shall be void if the payment of the bribe has had an effect on its content.\textsuperscript{85} For instance, GERMAN jurisprudence maintained for a long time the view that the main contract is \textit{contra bonos mores} and is thus void if its content is “disadvantageous” to the principal.\textsuperscript{86} In CHINA the contract may possibly be void if the corrupt agent played a central role in its allocation.\textsuperscript{87} In PORTUGAL public sector contracts shall be void without the possibility of approval.\textsuperscript{88} The ITALIAN procurement law, too, requires that the public authority terminate the contract once a final court decision finds corruption in its negotiation.\textsuperscript{89}

\textbf{b) Voidability of the Main Contract}

Assuming that the protection of the injured principal forms one of the main aims in tackling corruption, it may be sensible to allow him to decide on the validity of the contract rather than insisting on its invalidity. The principal could of course have legitimate economic reasons for wanting to uphold the contract, such as commercial profitability or even the fear that the invalidity could lead to further losses that result from the inevitable delay in acquiring a new contract.

\textsuperscript{83} See the CHINESE report for further details.
\textsuperscript{84} See especially the reports for FRANCE and VENEZUELA. For a different view, cf. the Canadian report for QUEBEC.
\textsuperscript{85} As is indicated for ESTONIA, ITALY and possibly in DENMARK.
\textsuperscript{86} BGH NJW 1989, 26; BGHZ 141, 357, 361; however, the tendency is now towards the mere voidability of the contract, see BGH NJW 2000, 511 f.
\textsuperscript{87} See the CHINESE report.
\textsuperscript{88} According to the PORTUGUESE report.
\textsuperscript{89} The ITALIAN report cites Art. 135 Code of Procurement (Statute n. 163/2006).
There are thus numerous legal aspects that can be considered with regard to the voidability of the main contract. For reasons of simplicity there will be no distinction here between whether the contract is initially pending validity but can be approved by the principal, or whether the originally valid contract can later become invalid by a corresponding declaration by the principal.

It can be seen that many legal systems allow for the rules on mistake and fraud to be used to rescind the main contract. The fraudulent behaviour in the above example would be present when A does not inform D of the payment to C. Such a duty to disclose may be observed in that the bribe payment represents a fraudulent interference with D’s business organisation and thus seriously endangers its integrity. A somewhat more complex argument could be that the fiduciary relationship between C and D results in a duty for C to disclose the benefit he has received, and A becomes C’s accomplice and must therefore answer for C’s omission. In that case, however, difficult evidentiary questions can arise if A maintains his reliance that C would report the receipt of the bribe.90

In the NETHERLANDS and in SWITZERLAND the rescission of the contract may be based on the notion that D has made a mistake regarding the reliability of its business partner A.91 Had D known that A is prone to paying bribes, he would have never concluded the contract with him in the first place. In the USA the Conflict of Interests Statutes play an important role in cases of bribery in the public sector, because they allow the federal government to void contracts relating to a conviction under certain criminal conflicts of interest statutes.92

A similar result can also be observed if the case is solved via the law of agency, i.e. if C has concluded the contract in the capacity of D’s agent. A possible argument for this approach is that C’s power was impliedly limited and did not allow him to conclude contracts under the influence of a bribe.93 However, agency law often contains special rules for the situation in which the agent and the contractual partner secretly cooperate to the principal’s disadvantage. Art. 2.2.7(1) UNIDROIT Principles guarantees a right to avoidance in case of a conflict of

90 In Grant v Gold Exploration & Development Syndicate Ltd [1900] 1 QB 233 the court held that a bribe-giver cannot seek to defend himself by stating that he believed the agent would disclose the transaction to his principal.
91 This reasoning was applied in a decision of the Higher Court of the Canton of Zurich of 17.9.2002, discussed by E. Wyss/H.C. von der Crone, “Bestechung bei Vertragsschluss”, Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW) 2003, 35 et seq.
92 As these statutes prohibit the mere potential of a breach of fiduciary duty, they require no showing of actual corruption. See the US report for details.
interests between the agent and the principal, provided the third party knew or ought to have
known of this conflict. Also, under CANADIAN common law, A is estopped from enforcing
the contract.\textsuperscript{94}

In several jurisdictions the right to avoid a corrupt contract has even been extended to third
parties. This means that where there is a statutory basis, a third party can intervene in the
principal’s decision to remain bound by the contract and thus prevent its performance. In the
CZECH REPUBLIC, the State attorney may under certain circumstances initiate civil court
proceedings to claim the invalidity of a transfer of property where there is a public interest in
determining the contract invalid.\textsuperscript{95} The POLISH law gives each bidder in a public or private
tender the right to request that the contract be invalidated if the party to that contract or
another participant has influenced the result of the tender in a manner violating statutory
provisions or the rules of fair dealing.\textsuperscript{96} Also in SPAIN, an injunction against performance of
a contract induced by bribery can be obtained from the court by competitors of the bribe-giver
or any third parties holding a legitimate interest.\textsuperscript{97} There does not appear to be any case law
on such an avoidance of the contract by competitors, and it is probably not advisable for these
parties to act against the principal’s intention, as they may wish to contract with him in the
future.

c) Validity of the Main Contract Despite Corruption

The final question requiring clarification is whether there are certain circumstances
imaginable under which the main contract can remain valid, i.e. D remains, in spite of the pre-
contractual corruption between A and C, bound to perform. In comparison to the two
aforementioned models, this solution is featured more seldom in literature and practice, but
there do appear to be particular situations in which the tainted main contract can nonetheless
remain in force.

For example, Art. 3.3.1 UNIDROIT Principles provides a maximum of flexibility in
determining the reasonable remedies. For instance, the rest of the contract can remain (with

\textsuperscript{94} See the CANADIAN report.
\textsuperscript{95} See the CZECH report on the legal basis for such a petition.
\textsuperscript{96} Art. 70\textsuperscript{5} of the Polish Civil Code.
\textsuperscript{97} On the Spanish approach see T. Rodriguez de las Heras Ballell, “A Civil Law Model for Combating
Corruption in Spain”, in: O. Meyer (ed.), The Civil Law Consequences of Corruption (Baden-Baden: Nomos,
2009), at 253.
changes) if grounds for invalidity affect just a part of the contract. In cases of corruption this would mean that the main contract could possibly remain if just a definable part was influenced by the bribe. The interests of the injured party could then be protected via an appropriate reduction in price.

The SWISS Federal Supreme Court has already used a different reason for deciding in favour of the bribe-payer. In this case the subject-matter of the contract was the disposal of sewage, and performance had already taken place over some time before it was discovered that bribes were paid in order to secure the contract. Furthermore, the evidence indicated that the bribe had not influenced the content of the contract – the claimant would have paid the exact same price irrespective of the bribe. The Federal Supreme Court initially determined that the contract was not contra bonos mores – under Swiss law this would have required that the content of the contract itself would violate public policy; the circumstances of its conclusion are, by themselves, insufficient. However, the claimant could rescind the contract due to the fraud concerning the non-disclosure of the bribe. The court maintained, however, that in this case rescission could exceptionally have effect only in the future, i.e. the contract remained valid until it was rescinded. The court thus wanted to avoid the difficulties that arise when winding-up long term contracts, but in so doing expressly accepted that the bribe-giver may retain the advantages he had gained from the contract until that point.

2. Unwinding the main contract

A particular question arises if the main contract between the principal and the bribe-giver is void under statute law or if the principal rescinds the contract: what happens with respect to the performance already rendered? As a general rule, the principal receives everything back that he has already paid under the voided contract. However, the question can also apply to the bribe-giver: does he also receive what he has given under the contract? Or does the ex turpi causa rule apply to this contractual relationship, too? In the latter case, the outcome under the aforementioned example would be that D could, without charge, retain A’s performance.

98 See official comment h) to Art. 3.3.1 UPICC.
99 BGE 129 III (2003), 320 f., as discussed by the SWISS report.
100 Art. 20(1) of the Swiss Law of Obligations (OR) only provides for the nullity of contracts where the content itself is illegal or contra bonos mores. The circumstances of its conclusion, on the other hand, are subject to other rules such as those on fraud.
An overview of the jurisprudence from the different jurisdictions shows that there is no uniform answer to the question of unwinding the main contract in cases of bribery. For instance, American courts are willing to deny restitution to the bribe-giver. In the leading decision *Grand v. New York* a contract for cleaning services at a city reservoir was rescinded after the bribery payments came to light, which occurred after the cleaning had been performed. The court permitted the City of New York to demand the payment of the entire sum (approx. USD 840,000) and denied the claimant compensation for the services he had performed. The judge justified this strict approach as necessary to deter manipulation of public tenders.

The claimant also left empty handed in *World Duty Free v. Kenya*. The case gained particular notoriety due to its unusual facts: The claimant in this case disclosed, with no sense of wrongdoing, the payment of bribes used to obtain the approval to run duty free shops at two airports in Kenya. Local authorities withdrew the claimant’s control over his stores. Thereupon, he demanded restoration of possession and compensation. The arbitral tribunal came to the decision that, under the laws of England and Kenya that applied to the contract, the host country had effectively avoided the contract due to bribery; the claimant therefore had no contractual rights available to him. However, it is to be noted that the arbitral tribunal was not posed the further question of whether compensation for the lost investment (approx. USD 27,000,000) was available. The arbitral tribunal thus left open whether possible claims for unjust enrichment were also excluded alongside claims for performance.

Contrastingly, in other cases the courts have admitted claims for restitution of what has been performed. For example, in ENGLAND the bribe-giver can, in principle, demand reimbursement of the performance, though the amount of the bribe is to be deducted. In an ICC case the parties had concluded a contract for maintenance of the claimant’s national air fleet and had performed these services over many years. The claimant avoided the contract after discovering that bribes had been paid and demanded the repayment of the sums already paid (approx. USD 55,500,000). SOUTH AFRICAN law was applicable to the contract. The

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102 Ibid.: “The reason for this harsh rule, which works a complete forfeiture of the vendor’s interest, is to deter violation of the bidding statutes”.
104 Ibid., at para. 186.
106 ICC Case No. 11307 (final award) 2003, YbCA XXXIII (2008), 24 et seq.
arbitral tribunal permitted the claim on these grounds, but gave compensation to the respondent in respect of the services that had been performed. The amount was calculated by deducting from the total price of the contract the commission paid by the respondent to an external advisor to secure the contract.\textsuperscript{107}

The Supreme Court of the TURKS AND CAICOS ISLANDS was also posed with the question of the effect of bribery on unwinding a contract for land.\textsuperscript{108} In principle, there was to be a return of the performance that had been received: the bribe-giver would have received the purchase price back in exchange for the retransfer of the ownership of the land. However, the peculiarity in this case was that the property had since been charged to a mortgage fund. The defendant could not return the land without encumbrance, and accordingly, the Court ordered rescission without restitution.\textsuperscript{109}

At first glance it would appear that denying the bribe-payer restitution of what he has performed under the main contract is reasonable: If one compares the situation here with the bribe agreement, then the question of guilt can be answered much more easily. If, in relation to B and C, A suffers a permanent loss of his performance where both parties have acted illegally, it does not appear to be immediately evident that he should be in a better position vis-à-vis the law-abiding D by having a claim to restitution of the performance he has rendered or compensation for the value of his performance.

Unlike the parties to the bribe agreement, however, the parties to the main contract have not acted \textit{in pari delicto}, a factor which fundamentally changes the policy considerations in this case. In contrast to the payment of a bribe, the performance of the main contract is neither illegal nor immoral – from this latter perspective it displays a degree of neutrality. The extent of the pre-contractual wrong does not actually increase during the performance of the contract, and neither party suffers additional loss.

\textsuperscript{107} An English court later remitted the award to the tribunal for reconsideration on the issue of quantification of the fair value of the Defendant’s services under the contract, because the tribunal had not given the parties a fair opportunity to consider and address the issue; cf. \textit{Cameroon Airlines v Transnet Ltd} [2004] EWHC 1829 (Comm).

\textsuperscript{108} \textit{AG of the Turks and Caicos Islands v Star Platinum Islands Ltd et al}, Case No CL 89/2010, 6 June 2011.

\textsuperscript{109} An unencumbered amount remained after deduction of the charge, but the court was nonetheless convinced that the amount to which the Plaintiff was entitled on termination in form of damages and disgorgement would exceed the amount it would still have to pay in restitution.
Therefore, the exclusion of restitution can at most be justified as an instrument that punishes the corrupt bribe-giver and deters others from choosing this illegal path. Such a punishment would certainly have to be taken seriously in light of the conceivable financial consequences. However, what renders this concept unconvincing is its lack of link to the principle of proportionality. The permanent loss of the bribe under the contract providing for corruption can be justified, as the extent of the sum at issue directly correlates to the illegality of the act. Generally, the higher the amount of the bribe, the more criminal energy is invested by the wrongdoer and the more extensive are the losses caused by the act. The performance of the main contract does, however, lack such a relationship. It is merely a matter of coincidence whether the bribery is discovered at the start of the performance of the main contract and the bribe-giver’s loss is limited, or whether the bribe is discovered once the contract has already been performed in full. If the extent of the sanction no longer relates to the illegality of the act, then the result can be over-deterrence. In contracts of considerable commercial value, e.g., construction projects or in the armaments industry, the total loss of performance can lead to disastrous consequences for a business. This would, under some circumstances, require extreme avoidance through implementation of extensive, internal compliance measures. Malfunctions (in the sense of over-deterrence) arise when there is no longer a reasonable ratio between the costs and the benefits of deterring of corruption.\(^\text{110}\)

In turn, there is no apparent argument for why the principal should not have to pay for the performance received under the contract. It is indeed true that the law, by means of the illegality defences, allows the corrupt agent to make a windfall profit (at least in the short term), if he does not have to return the bribe to the bribe-giver. However, the law contains other mechanisms by which the agent’s short term profit can be forfeited to the benefit of the principal or the state treasury. This does not apply to the principal’s profit, as he would permanently keep the performance without the justification of the need to protect the victim. Not only would the principal be motivated to wait until he has received full performance before invoking the invalidity of the contract, he would even have to hope that his employees accept bribes and would be so motivated to enter into particular transactions prone to corruption that he would not focus too greatly on ensuring compliance.

V. Conclusion

\(^\text{110}\) With respect to the theory that the costs of tackling corruption can exceed the benefits see especially Klitgaard (\textit{supra} note 20), Controlling Corruption, 24 et seq.; and also in general G. Becker/G. Stigler, “Law Enforcement, Malfeasance, and Compensation of Enforcers”, 3 J. Legal Stud. 1 et seq. (1974).
(This part will be written after the Congress.)