CHAPTER 13

Ensuring Continuity of Contracts: Enforcing Self-Cleaning as a Tool to Combat Corruption Through Arbitration

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§13.01 INTRODUCTION

The arbitration law scholarship includes a great number of corruption-related writings. However, what is an uncovered area is the application of arbitration for enforcing self-cleaning. Self-cleaning is a term used especially in public procurement law but may be applied for other corporate compliance purposes relating to restoring reliability. This article introduces a novel approach to apply the principle of self-cleaning in an arbitration context by examining whether contracts and the business relationship can be saved by the parties' action in cases where corruption is evident by analyzing the applicability of arbitration as a method of self-cleaning for rehabilitation. Based on our findings, we demonstrate how this is possible.

In the last ten years, contractual approaches to fight corruption have emerged and these apply the principle of proportionality to the need to call a contract terminated in case corruption is discovered. We are using the landmark International Chamber of Commerce (ICC) Anti-Corruption Clause 2012 ("the ICC Anti-Corruption Clause")[1] as an example. The ICC Clause purports to preserve the validity and continuity of the contract by providing remedies to the violations of the ICC Rules on Combatting Corruption 2011 ("ICC Anti-Corruption Rules").[2] The parties of a contract adhere to these Rules explicitly with a view to create an impact on their relationship. The key idea

1. ICC, *ICC Anti-corruption Clause*, 2012, https://iccwbo.org/content/uploads/sites/3/2012/10/ICC-Anti-corruption-Clause.pdf (accessed May 25, 2022).
2. ICC, *ICC Rules on Combating Corruption*, 2011 edition, https://iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf (accessed May 25, 2022).

is that a party to a contract could, in many, although not all, cases remedy its breach of contract constituted by not adhering to the Rules.

We are not talking about the criminal law consequences of corruption for those involved, or in most cases measuring whether the violations of law have occurred, which considerations derive from the applicable criminal law and apply measures of proof "beyond reasonable doubt." These matters are obviously not arbitrable. They are tried before general courts in accordance with criminal law. The application of criminal laws is based on the territoriality of the criminal offense, but some legal systems, most notably the United Kingdom (U.K.), have extended the jurisdiction of their courts to hear corruption cases by using what in private international law would be called "connecting factors" such as the British nationality of the suspect to consider the crimes having taken place in the U.K.

Instead, we are dealing with the effects of corruption on contractual relationships. The performance of major contracts is taken care of by several people in a company, or it may be subcontracted once or many times in a chain. Therefore, corruption may not be at all, or is only indirectly, attributable to the "directing mind" of the company concerned. In more stringent systems, even lesser involvement may constitute corruption. The diligence of the management may be measured by the existence of a system to recognize, control and report corruptive practices.

An arbitral tribunal, or a court,[3] may be seized to enforce the ICC Clause or similar contractual provision allowing a party in breach to self-clean, or resort may be had on legal provisions or principles potentially leading to similar conclusions, most notably the doctrine of good faith and fair dealing.[4] In these situations, the arbitral tribunal may be asked to uphold the validity of the contract but ordering or evaluating self-cleaning or remedial measures by the party in breach. This may be of utmost practical business relevance in many circumstances. Companies have extended compliance programs and want to promote integrity but may be faced with a situation where corruption takes place by employees or subcontractors. This article builds on a hypothetical case, which is partly based on an actual case or cases. For the sake of convenience, we assume that the parties have concluded a distributorship agreement based on "ICC Model Contract: Distributorship" of 2016.[5] The distributor in country B uses local agents, one of which resorts continuously to bribing the manager of a public sector client with a view to obtaining excessive orders under an ongoing framework agreement. A jealous colleague finds this out, the police start investigations, soon the press gets to know it and a small scandal is created. The principal in country A wants to terminate the contract with immediate effect.

3. For the sake of convenience, we assume that disputes are to be settled by way of arbitration, either institutional or ad hoc.
4. *See* Art. 1.7 of the UNIDROIT Principles of International Commercial Contracts, Art. 1:212 of the Principles of European Contract Law, Book II, Art. 1:212 of the Draft Common Frame of Reference, Art. 7(1) CISG. *See also* national law provisions such as § 242 BGB for Germany and Art. 1134.3 Code Civil for France.
5. ICC Publication No. E776E.

§13.02 ARBITRATING CASES INVOLVING CORRUPTION

[A] Jurisdiction of Arbitral Tribunals on Corruption Cases in Retrospect

Arbitration has traditionally been considered to be an inappropriate forum for deciding the claims of bribery and corruption. This was largely due to a restrictive view of arbitral jurisdiction and to the arbitral tribunals' lack of authority to impose criminal penalties. When faced with such issues, arbitral tribunals would refuse jurisdiction. A landmark case in this respect was ICC Case 1110 decided by Swedish Judge Gunnar Lagergren in 1963.[6]

An agent was commissioned by an English company to exert influence over members of the Argentinian government when bidding for public works contracts. The agent was promised a commission of 5% of contracts won with an understanding that a substantial part of the commission would be passed as bribes to public officials.

Judge Lagergren relied on Article V(2)(b) of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The New York Convention grants the state courts the power to refuse the recognition or enforcement of foreign arbitral awards on the grounds of being contrary to public policy in the country where recognition or enforcement is being sought. Judge Lagergren examined whether under the laws of different legal systems involved a contract contrary to public decency and morality could be submitted to arbitration. In line with the New York Convention allowing the courts of the country of enforcement to decline jurisdiction, Judge Lagergren considered being entitled to decline jurisdiction on public policy grounds.[7]

Since the award in ICC Case 1110, attitudes have changed, under the influence of the doctrines of the separability of the arbitration clause, *Kompetenz-Kompetenz* and public policy. Hence, subsequent arbitral tribunals have recognized the arbitrability of allegations of corruption and the powers to examine the merits of such allegations. For instance, in ICC Case 7047,[8] the award, rendered in 1996, considered allegations according to which part of a fee paid to a consultant to secure the sale of military equipment was to be used to bribe defense ministry officials. The arbitral tribunal assumed jurisdiction, analyzed the allegations made and issued an award on the merits holding that (i) a "mere suspicion" of bribery is not enough, (ii) the performance of the agreement did not violate the public policy of the state involved and (iii) lobbying by companies to obtain public contracts was not in itself illegal under Swiss law which was applicable. The award was challenged in England and Switzerland by raising allegations of bribery, but both the courts rejected the challenge on the above grounds.

6. Christian Albanesi & Emmanuel Jolivet, *Dealing with Corruption in Arbitration: A Review of ICC Experience*, International Court of Arbitration Bulletin, Volume 24, Supplement (Tackling Corruption in Arbitration 2013), 29; As regards investment arbitrations, *see* Joachim Drude, *Fiat Iustitia, Ne Pereat Mundus: A Novel Approach to Corruption and Investment Arbitration*, Journal of International Arbitration, Volume 35, Issue 6 (2018).
7. Albanesi & Jolivet, *supra* n. 6, at 29.
8. ICC Award No. 7047, ASA Bull. 1995, 301; Case reproduced in, https://www.trans-lex.org/207047/_/icc-award-no-7047-asa-bull-1995-at-301-et-seq/ (accessed May 25, 2022).

Similarly, in an unpublished ICC award of 2003, an arbitration clause in a contract to bribe a public official to obtain a public works contract was held separate and valid.[9]

Nowadays, arbitral tribunals have a tendency to address issues of corruption by considering the admissibility of the claims, the legality of the contract or transnational public policy. Arbitral tribunals have consistently recognized that anti-corruption laws and treaties are an integral part of international public policy and have relied on these instruments to declare contracts tainted by corruption as being null and void.[10] National laws are criminal or civil laws, which must be taken into account as the applicable law (*lex causae*) or, as the case may be, as overriding mandatory laws of another state.[11] The public policy aspect relates to the recognition and enforcement of the arbitral award and is wider than the concept of overriding mandatory laws. International public policy is well covered by international conventions, which explicitly address the effect of corruption on contracts. For instance, Article 34 of the United Nations Convention against Corruption 2003[12] and Article 8 of the Council of Europe Civil Law Convention on Corruption 1999[13] ("Council of Europe Convention") do this. For the purposes of this writing, the Council of Europe Convention is more interesting as Article 8 (Validity of contracts) provides as follows:

(1) Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.
(2) Each Party shall provide in its internal law for the possibility for all parties 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 damages.

Without analyzing the actual adherence of states to the Council of Europe Convention, we could assume that it would define the limits of preserving contractual relationships in corruption cases. An arbitral tribunal could presumably not enforce a contractual term providing for corruption, or a contract obtained through corruption, at least against the will of the party whose consent has been undermined by corruption.

Yet, there remains a variety of situations in which corruption has "contaminated" the relationship by causing mistrust between the parties, although a big or major part of the contractual relationship has presumably not been affected by corruption. In our hypothetical case, a distributor in a country may be using agents locally and one of these has allegedly used bribes in his or her sales activity but the "directing mind" of

9. Albanesi & Jolivet, *supra* n. 6, at 27–30.
10. Albanesi & Jolivet, *supra* n. 6, at 30.
11. *See* Art. 9 of Rome I Regulation, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6; Overriding mandatory laws are referred to as "laws of immediate application" or "*lois de police*" in French.
12. General Assembly resolution 58/4 of October 31, 2003, *see* the Convention at, https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed May 25, 2022).
13. *See* the Council of Europe Convention at, https://rm.coe.int/168007f3f6 (accessed May 25, 2022).

the distributor is not aware of it. The parties have anticipated this type of situation by inserting contractual provisions, which allow a party to remedy the breach of contract committed by way of corruption. Corruption is made a breach of contract, e.g., by incorporating the ICC Rules on Combatting Corruption 2011 or by tailor-made provisions. In the absence of such provisions, corruption could be considered a breach on the grounds of public policy or substantive provisions such as Article 25 of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[14] In most cases, corruption in the transaction could turn off clients or investors, having also long supply chains in mind. Yet, it could nevertheless be reasonable to uphold the contractual relationship and clean it from the "contamination" caused by acts corruption.

[B] Mandate of the Tribunal

Arbitration is one of the oldest dispute settlement mechanisms, being referred to in the Roman law era.[15] H.L.A. Hart has pointed out that "disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation."[16] It is submitted that arbitration can be used to declare self-cleaning measures in case of certain types of contractual breaches.

To successfully carry out the self-cleaning of corruption, the arbitral tribunal needs to be mandated to do so and to avoid exceeding it. The mandate of arbitral tribunal origins from the party autonomy and the arbitration agreement, which features the consensual nature of arbitration.[17] This mandate can have its origin in the model arbitration clauses, such as the Stockholm Chamber of Commerce Arbitration Clause or the ICC Arbitration Clause. Pursuant to the separability doctrine, an arbitration agreement lives a life of its own and is separate from the commercial contract.[18] If the tribunal's mandate is activated, then the tribunal may possess jurisdiction and hear parties' claims, including remedying the self-cleaning.

14. This Article provides as follows: A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.
15. Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, University of Pennsylvania Law Review, Volume 83 (December 1934), 132.
16. H.L.A. Hart, *The Concept of Law* (Second Edition, Clarendon Press, Oxford, 1994), 93.
17. K. Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration* (Iustus Förlag, 88 Skifter från Juridiska fakulteten i Uppsala, 2001), 20.
18. The separability doctrine is often viewed in conjunction with the doctrine *Kompetenz-Kompetenz* meaning that an arbitral tribunal has competence to examine its own competence, *see* Art. 16(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006. The doctrine of separability has been included in national legislations or has been introduced by case law. In Sweden it was established by the Supreme

It is generally held that arbitral tribunals can have jurisdiction in corruption-related cases. Drude concluded in his investment arbitration-specific study that it is possible to afford protection to contracts (or investments) procured by corruption and not depriving the tribunal's jurisdiction or making the claims inadmissible, and thus, without going opposite to international (transnational) public policy.[19] The same analogy applies to the adjudication of commercial contracts,[20] especially if—based on the separability doctrine—the arbitration agreement is not infected by any illegality.[21] Respectively, these conditions include how domestic law regulates corruption and it means that the party autonomy is limited by the international public policy.[22] It goes without saying that the arbitration agreement is required to stay alive to enable the mandate of the tribunal, viz. it needs to stay within the limits of public policy.

An arbitral award is binding between the parties as a rule.[23] Such norms can be found in the domestic arbitration laws. The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) Article 32(2) states that the award "shall be final and binding on the parties" as well as requires that the parties "undertake to carry out the award without delay."[24] This also gives the effect to be committed with the tribunal's jurisdiction and findings to cover claims related to corruption.

[C] Public Policy and the Recognition and Enforcement

The effectiveness and wide recognition and enforcement are the cornerstones to use arbitration as a dispute settlement mechanism. Especially with cases having international elements, the New York Convention and *lex arbitri* become relevant. Analysis of the relevant recognition and enforcement norms is important to understand to what extent arbitration laws allow the recognition and enforcement of arbitral awards issued for self-cleaning purposes.

Court in 1936 in *AB Norrköpings Trikåfabrik v. AB Per Persson* (NJA 1936, p. 521). In Finland, reference could be made in this respect to the Supreme Court Cases KKO 1954 II 11, KKO 1988:55 and KKO 1996:61.

19. Drude, *supra* n. 6, at 718.
20. Michael Joachim Bonell & Olaf Meyer, *The Impact of Corruption on International Commercial Contracts: General Report*, in: Michael Joachim Bonell & Olaf Meyer eds., *The Impact of Corruption on International Commercial Contracts*, Ius Comparatum—Global Studies in Comparative Law, Volume 11 Springer (2015), 10–12.
21. Richard Kreindler & Francesca Gesualdi, *The Civil Law Consequences of Corruption under the UNIDROIT Principles of International Commercial Contracts: An Analysis in Light of International Arbitration Practice*, in: Michael Joachim Bonell & Olaf Meyer eds., *The Impact of Corruption on International Commercial Contracts*, Ius Comparatum—Global Studies in Comparative Law, vol. 11 Springer (2015), 397–399.
22. N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015), 197.
23. Hobér, *supra* n. 17, at 20.
24. United Nations, "*UNCITRAL Arbitration Rules*" (1998), General Assembly Resolution 31/98.

Around thirty years ago, Albert Jan van den Berg stated that the New York Convention had become "the most important Convention in the field of arbitration,"[25] applying to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."[26] Article III of the New York Convention provides for the binding effect of awards. The law of the award determines when the award is to be considered binding.[27] This binding effect is given in the *exequatur*, where a domestic court reviews the foreign award, with the aim of declaration of enforceability,[28] or as a "declaration of enforceability of the recognized arbitral award,"[29] following the possible execution phase.

As is well known, there are exceptions provided in Article V of the New York Convention. It has been said that Article V is the heart of the New York Convention.[30] Article V is structured into two paragraphs: the first paragraph states that enforcement *may be refused only if*, while the second paragraph states that enforcement *may also be refused*, in listed exhaustive cases.[31] The general understanding is that Article V does not give the right to refusal in a case of error in law or in fact(s) by the arbitral tribunal, except for those listed as exceptions.[32] Needless to say, that public policy threshold of domestic arbitration law is of relevance and needs to be met, in many jurisdictions being similar to Articles 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration (1985 and 2006) and mirroring New York Convention Article V.

Although there is a limited possibility to set aside an international arbitral award in the Member States of the New York Convention, a contract that has been procured through corruption can violate public policy and may trigger setting aside.

25. A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981).
26. Article I(1).
27. Dana H. Freyer & Hamid G. Gharavi, *Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, ICSID Review—Foreign Investment Law Journal, Volume 13, Issue 1 (Spring 1998), 106–107.
28. Christoph Liebscher, *Preliminary Marks*, in: Wolff, Reinmar ed., *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary,* Beck, Hart & Nomos (2012), 3.
29. Daniel Girsberger & Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, Third edition, Schulthess Juristische Medien AG (2016), 434.
30. Marike R.P. Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International (2016), 157.
31. In total, Art. V contains seven exhaustive grounds for refusal: five in para. 1 and two in para. 2. Grounds for refusal according to Art. V are: (1)(A) incapacity, or invalidity of the arbitration agreement; (1)(B) violation of due process; (1)(C) excess of mandate by the tribunal; (1)(D) violation of arbitration agreement in terms of the composition of the arbitral tribunal or arbitral procedure; (1)(E) the award has not yet become binding on the parties, or it has been set aside or suspended; (2)(A) the subject matter is not arbitrable; and, (2)(B) violation of public policy.
32. G.B. Born, *International Commercial Arbitration* (Second edition, Kluwer Law International, 2014), 3707.

Article V.2(b) of the New York Convention stipulates the *public policy* exception. In 2002, the International Law Association published recommendations on the application of public policy as a ground for refusing the recognition or enforcement of international arbitral award.[33] In principle, an award can be contrary to public policy for both procedural and substantive reasons.[34] As provided above, Article V.2(b) of the Convention states that recognition and enforcement of an arbitral award may also be refused by the competent authority if it would be contrary to the public policy of that country. An explicit reference is made to public policy "of that country," i.e., the country where the award is being recognized and enforced. There seems to be a general understanding that this refers to a national public policy.[35] However, it has been held that the recognition and enforcement of a foreign arbitral award can be refused, if that is otherwise against the international public policy.[36] The Committee on International Commercial Arbitration of the International Law Association (published following the 2002 Delhi Conference) stated that the test to refuse recognition and enforcement of international arbitral awards "should be that of 'international public policy',"[37] which reflects the international tenets and values.[38] Generally, corruption can be understood to fall within the international public policy (as a narrower concept than domestic public policy).

Already decades ago, Lagergren noted that "corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations."[39] Years after, the Committee on International Commercial Arbitration of the International Law Association stated that "bribery and corruption are generally considered to be *contra bonos mores*, and most courts will refuse to uphold agreements relating to corruption even when the parties and the acts of corruption are all foreign."[40] The Committee further noted that "Corruption might also be prescribed in legislation and have the status of *lois de police*," viz. being part of the mandatory provisions.[41] It is not sufficient to set aside an award based on a violation of a mere "mandatory rule," but there needs to be a violation of international public policy.[42]

33. International Law Association, *Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards*, Resolution 2/2002, New Delhi, India, 70th Conference, 2002, 1.
34. Reinmar Wolff, *Article V: [Grounds for Refusal of Recognition and Enforcement of Arbitral Awards]*, in: Reinmar Wolff ed., *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Commentary*, Beck, Hart & Nomos (2012), 413.
35. A.G. Maurer, *The Public Policy Exception under the New York Convention: History, Interpretation and Application* (Revisited Edition, JurisNet, 2013), 55–56.
36. International Law Association, *supra* n. 33, at 1.
37. International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference 2002, para. 18.
38. C.H. Schreuer, et al., *The ICSID Convention: A Commentary* (Second edition, Cambridge University Press, 2009), 566.
39. ICC Case No. 1110, para. 20.
40. International Law Association, *supra* n. 37, para. 32.
41. International Law Association, *supra* n. 37, para. 32.
42. International Law Association, International Commercial Arbitration, *Annex: International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards*, Resolution 2/2002, 3(a).

At first, it should be underlined that the possibility for public policy defense under the New York Convention has rarely caused refusal of enforcement.[43] However, that has not always been the case. In some ICC arbitrations, for instance, sanctions targeting bribery and corruption have been considered to either fall under international or Swiss public policy.[44] In Sweden, threatening physical security, bribery, and debts arising from gambling have been considered against Swedish public policy.[45] In *Robert G v. Johnny L,*[46] Supreme Court of Sweden refused to recognize and enforce a Slovenian arbitral award being against Swedish public policy because the legal relationships actually included simulated transactions. Although public policy arguments to refuse recognition and enforcement of arbitral awards have rarely been successful in Sweden[47] and many other states, it is generally held that corruption falls under international public policy.[48] A 2019 judgment by the Hague Court of Appeal in *Bariven S A v. Wells Ultimate Service LLC*[49] illustrates how an arbitral award can be set aside, if there is a contract procured through bribery or corruption violating public policy.[50] More than fifteen years ago, the arbitral tribunal in the World Duty Free Company held that:

> 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.[51]

The tribunal concluded that claims based on the contracts of corruption or on contracts obtained by corruption could not be upheld.[52] Based on these findings, corruption is a matter of public policy, and the tribunal needs to make sure that it does not adjudicate claims based on the contracts of corruption or on contracts obtained by corruption to meet the enforcement threshold. In any case, tribunal needs to carefully analyze relevant norms and apply them with reason on a case-by-case basis.[53] Yet, if we assume that the contract itself is unequivocally free from corruption, the tribunal has an avenue to render a binding and enforceable award.

43. Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, ICC International Court of Arbitration Bulletin, Volume 18, Issue 2 (2007), 18.
44. ICC Case No. 5622 (1988), s. 16; ICC Case No. 6248 (1990), s. 27.
45. K. Hobér, *International Commercial Arbitration in Sweden* (Oxford University Press, New York, 2011) 371; Government Bill 1998/99:35, 141, 150.
46. NJA 2002 C 45, Supreme Court of Sweden.
47. *See,* e.g., *Naftogaz v. IUGAS*, Decision of the Svea Court of Appeal, July 2, 2012, Case No. T 611-11: the Svea Court of Appeal rejected public policy argument in relation to gas supply issue.
48. Hobér, *supra* n. 45, at 59.
49. *Bariven S A v. Wells Ultimate Service LLC*, The Hague Court of Appeal, October 22, 2019.
50. J. Dunin-Wasowicz & S. Winters, *Does an Award Enforcing a Contract Procured Through Bribery Violate Public Policy? The Dutch Perspective*, Arbitration Committee Publications, https://www.ibanet.org/article/8d75e62e-0457-4e12-bca6-8118f13f955a (accessed May 25, 2022).
51. *World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award—October 4, 2006, para. 157.
52. *World Duty Free Company v. Republic of Kenya*, *supra* n. 51, at para. 157.
53. Drude, *supra* n. 6, at 717.

§13.03 CONTRACTUAL CONSIDERATIONS

[A] Key Principles: *Favor Contractus, Good Faith and Fair Dealing*

Preserving or ensuring the continuity and validity of contracts is an expression of the principle of *favor contractus*. This principle is said to be the underlying principle of international contract law instruments such as the CISG[54] and the UNIDROIT Principles for International Commercial Contracts[55] and probably of contract laws in general. The principle aims to preserve the contractual relationship by limiting the number of situations in which the existence or validity of the contract is questioned or in which it may be terminated.

Favor contractus appears in the provisions relating to contract formation and performance of contracts. In contract formation, it may appear as a reduced requirement for conformity between the offer and acceptance in the case of a battle of forms,[56] whereas in performance, it can be found behind the provisions concerning the grace period granted by the buyer to the seller to perform in Article 47 CISG.

For the purposes of this article, the treatment of hardship represents a benchmark to follow in f*avor contractus*. During the time of approximately one century since the end of World War I, statutory provisions have been shaped in national laws concerning the effects of changed circumstances on contractual relationships, the latest of them in France in 2016.[57] The need to address changed circumstances has created hardship clauses to be incorporated in contracts, and several compilations of contract law principles, such as the UNIDROIT Principles for International Commercial Contracts,[58] now address the issue. An increasing number of these rules of law provide that a court or arbitral tribunal may adjust the contract to restore its economic equilibrium.[59] Similarly, an arbitral tribunal could restore the integrity of a party by allowing self-cleaning measures in a corruption situation.

54. Bertram Keller, *Favor Contractus, Reading the CISG in Favor of a Contract*, in Camilla B. Andersen & Ulrich G. Schroeter eds., *Sharing International Commercial Law across National Boundaries*: Festschrift för Albert H. Kritzer on the Occasion of his Eightieth Birthday, Wildy, Sinnnons & Hill Publishing (2008), 247–266.
55. Nikole Cornet, *Evolving General Principles of International Commercial Contracts, the Unidroit Principles and Favor Contractus*, Maastrict European Private Law Institute Working Paper No. 2011/7.
56. Article 2.1.22 of the UNIDROIT Principles and § 2-207 of the Uniform Commercial Code of the United States.
57. *See* L. Railas, *Changing Circumstances and Contracts: Fairness in Action? University of Turku Covid-19 Supply Chain Update* at, https://sites.utu.fi/covid-supply-chains/wp-content/uploads/sites/714/2020/06/Changing-circumstances-and-contracts-fairness-in-action_10062020LR-1.pdf (accessed May 25, 2022) and T. Lutzi, *Introducing Imprévision into French Contract Law, Lessons to Be Learned from the German Codification in 2002* (Draft, Ius Commune Workshop on Contract Law, 2015), at 10, republished as amended in Multilatera Tobias Lutzi 2016, *Introducing Imprévision into French Contract Law A Paradigm Shift in Comparative Perspective*, in Styns/Jansen eds., *The French Contract Law Reform: A Source of Inspiration?* Intersentia (2016), 89–112.
58. Article 6.2 of the UNIDROIT Principles.
59. The ICC Model Hardship Clause 2020 makes it possible to opt the possibility by which a court or arbitral tribunal may adjust the contract to restore its equilibrium.

The observance of good faith and fair dealing are key in international contract law instruments. Provisions on hardship in national laws are partly the result of the application of good faith and fair dealing obligations.[60] In some countries, such as Italy, good faith provisions of the Civil Code may still be resorted to despite the existence of express provisions on the effects of changed circumstances on contractual relationships. Good faith and fair dealing can also be employed to tackle corruption through contracts in a way that not only condemns a conduct but helps to restore integrity in the relationship. It is submitted it would in some cases be against a party's good faith obligations not to allow a party to rehabilitate itself, considering the gravity of the offense.

[B] Why Is Corruption Relevant Also in a Contractual Context?

In the early 1760s, Adam Smith stated that a "greatly retarded commerce was the imperfection of the law and the uncertainty in its application."[61] Corruption is undoubtedly one of the biggest problems facing societies these days. It prevents natural competition in a marketplace and makes goods or services costlier. It has a detrimental effect on the morale, legality and transparency in a society and is an enemy to democratic decision-making. By undermining predictability in business transactions, corruption makes investments more hazardous and reduces growth and business opportunities. Corruption can take place in a business-to-government relationship, for example, by bribing representatives of a public procurement contracting authority. Also, the contemporary international business practice is moving toward a zero tolerance of corruption.[62] There may be no global definition of corruption, in the absence of which we restrict ourselves to what is stated in ICC Rules on Combatting Corruption 2011, which is largely based on the Organisation for Economic Co-operation and Development (OECD)[63] and United Nations Conventions. Although some national laws might be more stringent or permissive as regards corruption, particularly with regard to their application and enforcement, these international instruments should constitute benchmarks for the purposes of this article.

Combating corruption includes several measures, such as conventions, domestic legislation, and institutional arrangements. Companies are under increasing pressure to comply with anti-corruption laws that have been introduced by governments inspired by international conventions. These laws include the U.S. Foreign Corrupt

60. When it comes to the earliest expressions of *rebus sic stantibus* at the beginning of 1920's by the German doctrine of *Wegfall der Geschäftsgrundlage*, this doctrine requires a change of circumstances such that, acknowledging the possibility, the parties would not have concluded the contract and an equitable element meaning that it would not be equitable for a party (in line with his good faith obligations) to deny the other party any amendment of the contract to remedy the situation, Lutzi, *supra* n. 57, 10.
61. A. Smith, *Lectures on Jurisprudence* (Oxford University Press, 1978), 528.
62. Jeffrey R. Boles, *The Contract as Anti-corruption Platform for the Global Corporate Sector*, University of Pennsylvania Journal of Business Law, Volume 21, Issue 4 (2019), 809.
63. The OECD Convention on Combating Bribery of Foreign Public Officials (1997) https://www.oecd.org/corruption/oecdantibriberyconvention.htm (accessed May 25, 2022).

Practices Act[64] and Britain's Bribery Act of 2010.[65] Especially the latter has an international dimension stipulated in Article 12 which introduces a wider concept of territoriality by the involvement of persons having British citizenship or other connections with the U.K. wherever they are in the world. Persons having such a connection can be tried in criminal cases involving corruption before the U.K. courts. Moreover, multilateral development such as the World Bank issue procurement guidelines making lending to countries subject to the requirement that companies involved in corruption cases are blacklisted and excluded in public procurement award procedures in these countries, and companies wishing to participate in such procedures become sensitive of such a possibility. The issue has both a domestic and an international, cross-border dimension. As for the cross-border dimension, companies wishing to make their way with exports of goods or services are in some countries under pressure or tempted to offer bribes to the decision-makers of potential clients or other influential circles such as public authorities.

Irrespective of whether these actions are tried or penalized in the country where the bribery takes place, the domestic criminal legislation of the company may extend to such activity based on the nationality or domicile of the person committing the action. British law extends British criminal prosecution and jurisdiction to companies that operate in the U.K. irrespective of the nationality or domicile of the person committing the offense and the offense not having any other connection with the U.K. than the presence of the company there. The company has strict liability for the acts of any person associated with it (i.e., any employee, agent or subsidiary). However, a company can exonerate itself from liability by proving that it has put in place adequate procedures designed to prevent persons associated with it from undertaking this conduct.

[C] The ICC Anti-Corruption Clause 2012 as a Business Method to Tackle Corruption?

[1] The Need for a Contractual Solution

Based on increasing pressure from legislators and the public, companies are implementing policies to prevent corruption. Anti-corruption policies have found their way to corporate codes of conduct, which are usually incorporated into contracts by way of reference in the frame agreement or the general terms and conditions. Not adhering to such policies has become a ground for termination. Stringent policies are imposed on contracting partners, especially on agents and subcontractors. Many multinational companies impose extensive audit procedures on their subcontractors. Given these

64. The Foreign Corrupt Practices Act of 1977 (FCPA) (15 U.S.C. §§ 78dd-1, et seq.) is a United States federal law that prohibits U.S. citizens and entities from bribing foreign government officials to benefit their business interests, *see*, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf (accessed May 25, 2022).
65. The Bribery Act 2010, accessible: https://www.legislation.gov.uk/ukpga/2010/23/contents (accessed May 25, 2022).

developments, there was a need for a balanced contractual tool for anti-corruption. This contractual tool is typically an anti-corruption clause. One of the main functions of the anti-corruption clauses is to obtain protection from potential corruption conduct and shift possible damages, criminal penalties and fines to the corrupted parties and actors.[66]

[2] The Clause Incorporates the ICC Rules on Combatting Corruption

In September 2012, the Executive Board of the ICC adopted the ICC Anti-Corruption Clause 2012, a document prepared as a joint effort by two ICC Commissions:

(1) the Commission on Corporate Responsibility and Anti-corruption, and
(2) the Commission on Business Law and Practice.[67]

The ICC has published anti-corruption rules for forty-five years as a tool for corporate self-regulation. As already stated, the ICC Rules in their latest form reflect the provisions of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003).

The aim of the Anti-Corruption Clause 2012 is to help businesspeople make essential reference to the ICC Rules on Combating Corruption 2011, with the aim of creating trust and preventing their contractual relationship from being affected by corruptive practices. Companies may include this clause in their agreements, whereby they undertake to comply with the ICC Rules.

[3] Three Options

Two options are possible in this respect: either a short text with the technique of incorporation by reference of Part I of the ICC Rules on Combating Corruption 2011 (Option I) or the incorporation of the full text of the same Part I of the ICC Rules in their contract (Option II). Options I and II are essentially the same thing, but in some legal cultures, incorporation by reference may not be adequate to create legal effects.

Due to controversies about termination as a relief in the final days of preparations, a new Option III was added. According to this option, a company simply undertakes to maintain a corporate anti-corruption compliance program as described in Article 10 of the 2011 ICC Rules and not to abide by the full text of Part I of the Rules.

66. Boles, *supra* n. 62.
67. The drafting of the clause was done in a joint task force made up by François Vincke, Belgium, Vice Chair of the Commission on Corporate Responsibility and Anti-corruption; Jean-Pierre Méan, Switzerland, the Chairman of Amnesty International Switzerland and former Chief Compliance Officer of the European Bank for Reconstruction and Development; Christian Steinberger, Germany, Vice Chair of the Commission on Commercial Law and Practice and General Counsel of the German Metal Industry Federation; and Dr. Lauri Railas, a Finnish Attorney.

Companies adhering to Part I by choosing either Option I or Option II undertake that, at the date of the entering into force of the Contract, the company itself, its directors, officers or employees have not offered, promised, given, authorized, solicited or accepted any undue pecuniary or other advantage of any kind (or implied or inferred that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other third parties, subject to its control or determining influence, from doing so.

"Corruption" or "corrupt practice(s)," as used in the clause, include (1) bribery, (2) extortion or solicitation, (3) trading in influence and (4) laundering the proceeds of these practices. These breaches against the rules are defined in detail in the clause. This is soft law that is independent of any national law but has counterparts in the legislation of most countries.

The parties submitting themselves to the clause agree, at all times in connection with and throughout the course of the contract and thereafter, that they will comply with and will take reasonable measures to ensure that their subcontractors, agents or other third parties, subject to their control or determining influence, will prohibit bribery, extortion or solicitation, trading in influence or laundering the proceeds of corrupt practices at all times and in any form, in relation with a public official at the international, national or local level, a political party, party official or candidate to political office, and a director, officer or employee of a party, whether these practices are engaged in directly or indirectly, including through third parties.

[4] Interpretation of the ICC Clause

Practically all forms of corruption are caught by definition in the Clause. Additionally, the undertaking concerns both business-to-government and business-to-business relations. The undertakings of the parties relate to their activities by the time of the conclusion of the contract and during its entire lifespan and performance. It should be noted that the personnel of a party is subject to a definite undertaking whereas only reasonable measures should be taken to ensure that third parties, such as subcontractors or agents, subject to the determining influence of that company have not been involved in corruption or corrupt practices.

What this means is that a company is not required to prevent by all means any of its subcontractors, agents or other third parties from committing any corrupt practice. It shall, however, based on a periodical assessment of the risks it faces, put into place an effective corporate compliance program, adapted to its circumstances.

It shall also exercise, based on a structured risk management approach, appropriate due diligence in the selection of subcontractors, agents or other third parties, subject to its control or determining influence; and train its directors, officers and employees accordingly.

The clause contains both black-letter text and a commentary. In the commentary, detailed recommendations are made with a view to giving companies concrete advice on how to interpret the black-letter text.

For instance, the ICC recommends enterprises not to make "facilitation payments" (these are unofficial, improper, small payments made to a low-level official to secure or expedite the performance of a routine or necessary action to which the payer is legally entitled), unless their employees are confronted with exigent circumstances, such as duress or when the health, security or safety of their employees are at risk.

[5] Consequences of Non-Compliance

The failure to comply with the ICC rules may lead to consequences. It is possible that the officers of a company get caught by police and relevant criminal consequences follow. In the domestic laws of many countries, including Finland, a corporation may be prosecuted and face criminal sanctions, in practice, fines, and sometimes also confiscations. This obviously creates evidence for the consequences and sanctions in a contractual relationship but is not a precondition for that.

Paragraph 3 of both Options I and II provide that if a party, as a result of the exercise of a contractually-provided audit right, if any, of the other party's accounting books and financial records, or otherwise, brings evidence that the latter party has been engaging in (1) material or (2) several repeated breaches of the provisions of Part I of the ICC Rules, it will notify the latter party accordingly and require the party to take the necessary remedial action in a reasonable time and to inform it about such action.

If the latter party fails to take the necessary remedial action, or if such remedial action is not possible, it may invoke a defense by proving that by the time the evidence of breaches had arisen, it had put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organization. If no remedial action is taken or, as the case may be, the defense is not effectively invoked, the first party may, at its discretion, either suspend the contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the contract will remain payable, as far as permitted by applicable law.

As is clear from the preceding paragraph, the threshold of corruption having an impact on the sustainability of the contract is quite high. The consequences of minor violations of the ICC Rules than those envisaged above are not covered by the clause. The effect of such violations may have to be judged by other parts of the contract.

A question may arise as to what is meant by remedying a breach. How could one remedy a crime committed? The answer is not a simple one, and not all breaches can be remedied as such. The Commentary to the ICC Clause contains some examples of how a breach of a non-corruption obligation could be remedied. It is submitted that offenses that are not attributable to the "directing mind" of a company could be remedied by reorganization of work, increasing surveillance or, in worst cases, firing the people having committed the offense.

[6] Parameters of Option III

Option III, which was added to the clause in the final part of the preparation, has a sanction mechanism. It essentially differs from Options I and II in that a company does not undertake that no corruption has taken place prior to the conclusion of the contract, during its validity or thereafter. There was a fear that random actions of insignificant employees would jeopardize the existence of a long-term contractual relationship in a situation where a contracting partner wants to get rid of a binding contract that has become disadvantageous due to commercial developments.

The obligation imposed by Option III on a company consists of the parties putting into place a corporate anti-corruption compliance program adapted to its circumstances and capable of detecting corruption and of promoting a culture of integrity in the organization. The program must be maintained and implemented throughout the lifetime of a contract, and the contracting partner must be informed regularly about the implementation of the program through statements of a qualified and named corporate representative (such as a compliance officer). Should the statements of the representative contain material deficiencies, the other party may trigger the remedy mechanism, failing which the contract may be suspended or terminated.

It is thought that the application of Option III will, in practice, lead to the same type of considerations. If a company gets caught in serious or repetitive corruption, its prevention systems are evidently not working very well. It is arguable, however, that remedy mechanisms are easier if the undertaking of a company is significantly less onerous.

Since the inception of the ICC Clause, it has been included in several ICC model contracts such as those for distributorship,[68] agency[69] and consultancy.[70] The ICC has chosen to incorporate the Clause by applying Option II, which could be construed to give Option II universal significance, even in cases where the ICC Clause is not incorporated, in other words as an expression of *lex mercatoria*.

It must be stressed that the clause does neither envisage nor in any way promote the idea of audit rights vis-à-vis the contracting partner. In fact, the clause is built on the idea that each party keeps its own yard clean, but indications of non-compliance may trigger the mechanism mentioned in paragraph 3 whereby a party needs to address the concerns of the other party in a suitable way.

§13.04 EU PUBLIC PROCUREMENT AS A MODEL WAY FORWARD

[A] The Emergence of Self-Cleaning

Self-cleaning as a concept was originally linked to physical substances but has got a meaning in the context of compliance as well. The fundamental idea behind

68. *See supra* n. 5.
69. ICC Model Commercial Agency Contract, ICC Publication No. E766E.
70. ICC Model Contract, International Consulting Services, ICC Publication No. 787E.

self-cleaning in public procurement is to restore the candidate's reliability. The underlying idea is that an undertaking can restore the opportunity to participate in public tenders if it demonstrates that it has taken effective and preventive measures to ensure that wrongful acts will not occur again.[71]

It is common practice across Europe that candidates or tenderers who have committed criminal offenses or have proven to be unreliable on other grounds can be excluded from participating in public procurement procedures. This right of exclusion is enshrined in the European public procurement directives, and is based on the premise that criminal behavior, professional misconduct, and similar compliance breaches can render a candidate's integrity questionable and, therefore, the candidate unsuitable to be awarded a public contract. Having said that, the European legislators recognize that everyone deserves a second chance, also within the context of tender procedures, by introducing the "self-cleaning" option. This enables candidates or tenderers who have exhibited such misbehavior that would generally make them unsuitable for public contracts to demonstrate that they have changed for the better, by proving that they have adopted compliance measures remedying the consequences of their past behavior and preventing future misbehavior. The European Union (EU) system is a level playing field on the concept of self-cleaning. The European legislators mention specific measures to be taken follow Article 57 section 6 paragraph 2 of the Public Procurement Directive 2014/24/EU:

(i) compensation of damages caused by the criminal offense or misconduct;
(ii) a clarification of the facts and circumstances by means of active collaboration with the investigating authorities;
(iii) appropriate personnel, technical and organizational measures to prevent future misbehavior (e.g., the severance of all links with persons or organizations involved in the misbehavior, staff reorganization measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules).

Article 57(6) can be understood as "the mechanism for adopting corrective measures" (i.e., *self-cleaning*).[72] When analyzing the situation, the measures shall be evaluated "taking into account the gravity and particular circumstances."[73] In other words, the analysis should be done on a case-by-case basis.[74] Although some EU Member States require these conditions to be met cumulatively, some Member States

71. Sue Arrowsmith, Hans-Joachim Priess & Pascal Friton, *Self-Cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?*, Public Procurement Law Review, Volume 6 (2009), 2.
72. CJEU, June 19, 2019, Case C-41/18 (*Meca Srl v. Comune di Napoli*) ECLI:EU:C:2019:507, para. 40.
73. Directive 2014/24/EU of the European Parliament and of the Council of February 26, 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, OJ L 94, 28.3.2014, pp. 65–242, Art. 57 s. 6 para. 2.
74. European Commission, *Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground* (2021/C 91/01), Official Journal of the European Union, May 18, 2021, C 91/1, s. 5.7.

consider it sufficient that only one (including Italy, Czech Republic, Romania, and the Netherlands) or two (e.g., Spain) conditions are met.[75] Even in the latter cases, the likelihood of successful self-cleaning increases when all three conditions are met.[76]

The burden of proof rests on the party seeking self-cleaning. To increase the likelihood of success, extensive evidence should be submitted.[77] It is easy for a company to prove that it has paid damages or undertaken organizational measures to prevent further corruption or bribery. The Court of Justice of the European Union (CJEU) held in Case C-387/19 that the threshold for self-cleaning includes that a party is "able to establish, to the satisfaction of the contracting authority, that the corrective measures taken restore its reliability."[78] If we follow the analogy provided by the CJEU, then it would be the party seeking self-cleaning from corruption to meet the burden of proof threshold before an arbitral tribunal.

[B] Application of the ICC Clause Option II in Arbitration in a Hypothetical Self-Cleaning Case

In line with what has been stated above about *favor contractus* in hardship cases and allowing arbitrators to adapt the contract, it is submitted that arbitrators can also enforce contractual provisions such as the ICC Model Anti-Corruption Clause 2012 and allow self-cleaning to happen with a view to restore the cooperation between the parties in a situation where a party requests the arbitrators to declare the contract terminated. The idea behind self-cleaning in *favor contractus* context is to enhance the reliability and loyalty of the party.

When disputes relating to a contract are settled by arbitration, it is ultimately for an arbitral tribunal to determine whether a party has committed a material or several repeated breaches of ICC Rules, whether it has remedied the breaches or whether it is able to put up a defense of an effective corporate anti-corruptive mechanism. For the sake of clarity and our purpose, it is not relevant which mainstream arbitration agreement or rules are used. We submit that all those—combined with an anti-corruption clause—enable self-cleaning of corruption.

It is submitted that remedying breaches has its limits. If corruption is spelled out or presupposed in the contract, or an act of corruption has played a significant role by undermining the consent of a party, it would be against international public policy to enforce the contract or award the possibility for self-cleaning. In our hypothetical case, these were not at issue. The breach of ICC Rules by the distributor's regional agent could be evaluated in light of the ICC Rules.

75. Dentons *Guide to Self-Cleaning in European Public Procurement Procedures* (2021) available at https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2021/april/13/guide-to-self-cleaning-in-european-public-procurement-procedures, accessed May 25, 2022, later 'Dentons', at 7.
76. Dentons, *supra* n. 75, at 7.
77. Dentons, *supra* n. 75, at 7.
78. CJEU, January 14, 2021, Case C-387/19 (*RTS infra BVBA Aannemingsbedrijf Norré-Behaegel BVBA v. Vlaams Gewest*) ECLI:EU:C:2021:13, para. 49.

In our example, the distributor's agent has bribed a client's manager continuously, and this would probably trigger the application of the ICC Clause Option II as several repeated breaches of the ICC Rules had occurred.

The ICC Rules, however, state that only reasonable measures should be taken by a company to ensure that third parties, such as subcontractors or agents, subject to the determining influence of the company, have not been involved in corruption or corrupt practices. The company is not required to prevent by every means any of its subcontractors, agents or other third parties from committing any corrupt practice. It shall, however, based on a periodical assessment of the risks it faces, put into place an effective corporate compliance program, adapted to its circumstances. It shall also exercise, based on a structured risk management approach, appropriate due diligence in the selection of subcontractors, agents or other third parties, subject to its control or determining influence; and train its directors, officers, and employees accordingly.

The burden of proof issue is of utmost importance. Unlike in the UK Bribery Act 2010, it would have to be the party invoking breach of the ICC Rules to prove that this has happened. The arbitrators would have to decide burden of proof issues on the basis of the rules of law applicable to the merits of the case. It is, therefore, up to the arbitrators to determine whether the requirement of "beyond reasonable doubt" or any other level of proof would apply. Arbitrators would have to consider whether an act of corruption is attributable to the company as such or not. The UK Bribery Act imposes strict liability on the company for persons associated with it, whereas the United States and Finnish laws limit corporate criminal liability to circumstances in which a person who is the "directing mind" of the company is guilty of the offense. Therefore, although the arbitrators do not apply criminal law to award penalties, they may have to apply it in a contractual setting.

Once a breach is established, it would be up to the party in breach of the ICC Rules to prove that a possibility of self-cleaning is possible and to suggest remedies for the breach. The arbitral tribunal would have to evaluate the proposed measures and the ultimate compliance with them. When it comes to remedying a breach or putting up a defense of an effective anti-corruptive mechanism, the party invoking these should eventually bear the burden of proof of their effectiveness subject to the rules of law applicable to the merits of the case.

What happens, in effect, is that an arbitral tribunal would apply criminal law in a contractual context. The characterizations of offenses are given in an ICC document which largely reiterates international conventions. The traditional approach of contract law requiring a fundamental breach for the termination of contract is largely useless since the concept as known, for example, by Article 25 CISG builds on commercial expectations relating to the contract. Breaches of ethical values can obviously lead to sinister economic consequences by way of sanctions, blacklisting or public condemnation, but can also operate independently of such considerations. If the tribunal would then consider that not all conditions to self-cleaning are met, meaning that the

measures are insufficient, then a statement of the reasons should be elaborated in the award.[79]

If we now consider that the arbitral tribunal would render an arbitral award to declare whether the party complies—or not—with the self-cleaning requirements, the tribunal needs to avoid going to the area of "international public policy" to render an enforceable award. Following a clue from previous practice, these parameters include that the claims are not based on the contracts of corruption and contracts may not have been obtained by corruption. In other words, the contract needs to be alive and not contrary to international public policy.

As with hardship, where the arbitral tribunal might adjust the contract to restore its equilibrium, the arbitral tribunal in a self-cleaning case would help to restore the integrity of a party. In the end, however, it falls on the rules of law applicable to the merits of the case to determine, whether a party must in practice remain in a contractual relationship, or whether it can terminate the contract and incur liability.

§13.05 CONCLUSIONS

Arbitration has survived at least from the Roman era and there are no signs that the flame will be extinguished. Quite the opposite, we have noted a global trend of emerging the scope of arbitration practice to various ambiences, including the disputes of international taxation and adjustment of contracts, and especially operating between public and private laws is axiomatic. Arbitrators are empowered with an imperative role to ascertain disputes of a varying kind with final and binding effect. At the end of the day, the arbitration business serves society and keeps the ball rolling.

It is submitted that there are situations in which arbitrators have a role in enforcing self-cleaning measures at least based on contractual commitments by the parties which are in line with international public policy. By doing so, arbitrators ensure the continuity of such contracts by building on the sound parts of the contract and "picking up, throwing into the fire, and burning up unsound branches"[80] of it, meaning the unsound parts.

Our findings suggest that the tribunal can have jurisdiction in most cases to hear claims with self-cleaning purposes, unless the international public policy is violated. A European Procurement self-cleaning framework provides a recognized cumulative threshold to be met, viz. damages caused by offense have been compensated, there is evidence of active collaboration with the investigating authorities, and the party has taken appropriate measures to prevent future misbehavior. Burden of proof to meet that threshold is on the party to be self-cleaned. These criteria may offer guidelines, or at least inspiration, to arbitrations addressing corruption. The tribunal may render an enforceable award in this remedy under certain conditions. This means that the claims are not based on a contract or on contracts obtained by corruption, viz. respecting the

79. Cf. Public Procurement Directive 2014/24, Art. 57 s. 6 para. 3.
80. John 15.

public policy domain. This can be done on a case-by-case basis, applying relevant norms with a sound application.

Arbitrators may hear the request of a party to allow for remedying a breach committed through corruption by fixing such measures, including a timetable and sufficient proof of complying with the orders contained in the award. At the same time, the arbitrators should be able to award other remedies, most notably damages sustained by the aggrieved party through loss of reputation or other consequences. It could be possible that the arbitral tribunal or another one could be resorted to evaluate compliance with the orders at a later stage.