

‘TO BE OR NOT TO BE’ – THE CONUNDRUM OF ARBITRABILITY OF CORRUPTION AND SUBSEQUENT ENFORCEMENT†

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I. INTRODUCTION

The advancement of global wealth and business opportunities has led to contracts between private corporations and States as well as State related entities being commonplace. In case of commercial disputes, arbitration has a reputation of providing a simple, effective, efficient and speedy disposal. Against this background, allegations of corruption in transactions are increasingly being encountered in both international and domestic commercial arbitrations. Although there is no common consensus on the definition of ‘corruption’,¹ acts of corruption include bribery of foreign public officials², trading in influence³ and embezzlement, misappropriation of property and obstruction of justice.⁴ Corruption is normally considered to be *contra bonos mores*⁵ and most

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¹ One of the challenges of defining corruption is distinguishing illegal trading in influence from legal lobbying. See OECD ‘Defining corruption’ (March 2007) *OECD Observer*, available at http://oecdobserver.org/news/archivestory.php/aid/2163/Defining_corruption.html#sthash.r5YY3WgG.pdf (last visited 30 September 2016).

² *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997* (adopted 17 December 1997, entered into force 15 February 1999) 37 ILM 1, article 1.

³ *Civil Law Convention on Corruption* (adopted 4 November 1999, entered into force 1 November 2003) ETS 174 Strasbourg, 4.XI.1999, article 2.

⁴ *The United Nations Convention against Corruption (2003)* (adopted on 31 October 2003, entered into force on 14 December 2005) UNGAA/58/422, the first global legally binding international anti-corruption instrument, criminalises these acts, but does not define the term ‘corruption’.

⁵ *Agent (Iran) v. Greek Company / Iran*, ICC Award No 3916, Coll ICC Arb Awards (1982), 507.

courts have refused to uphold agreements tainted with corruption. While it is inevitable that there will be a conflux of domestic law as well as judicial machinery of States in dealing with corruption, the present article seeks to establish whether the allegations of corruption in the context of international and domestic arbitration can be arbitrated upon, despite the procedural and investigative hurdles faced by arbitrators. Part II of the article discusses the initial procedural hurdles faced by the arbitrators while proceeding with arbitral proceedings where some form of corruption is involved, more particularly with regard to severability of the arbitration agreement from the main contract and the factors involved in receiving evidence by the arbitral tribunal when corruption is alleged by one of the parties to arbitration. Part III of the article goes on to expound the effect of allegations of corruption at various stages of procurement as well as performance of the contract and how the allegations are arbitrated upon. Part IV of the article addresses the key position of transnational public policy and international public policy with reference to enforcement of arbitral awards. Lastly, Part V of the article discusses the effect of parallel court proceedings on arbitration when allegations of corruption are raised.

II. INITIAL HURDLES TO ARBITRAL PROCEEDINGS

A. *Sense and Severability*⁶

Although national laws define bribery variably, the treatment of bribery is uniform—contracts aimed at bribery are illegal and are therefore null and void.⁷ Corruption, like fraud vitiates the agreement.⁸ However, under the doctrine of severability, the arbitration agreement can be considered distinct from the main contract and will not perish even if there are allegations of corruption pertaining to the main contract, thus the arbitration proceedings may continue.⁹ On the other hand,

⁶ For a more case specific and detailed analysis of severability in the context of agreements central to disputes involving allegations of corruption, see the proceeding Part III entitled ‘Implications of allegations of corruption on a contract on various stages and procedure thereafter’.

⁷ Vladimir Pavić, ‘Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy’ (2012) Vol 43 *Victoria University of Wellington Law Review* 661, 679.

⁸ *Swiss Timing Ltd v. Organizing Committee Commonwealth Games* AIR 2014 SC 3723.

⁹ *P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation and Ors* (2009) 2 SCC 494.

where under the governing law, the nature of corruption is such that it voids the contract in its entirety *ab initio*, then the question arises whether the arbitration clause ever existed and consequently whether the arbitral tribunal has jurisdiction to adjudicate at all.¹⁰ Therefore, the arbitral tribunal is required to first ascertain whether the matters affecting the validity of the main contract also affect the validity of the arbitration clause under the contract before continuing the proceedings. Section 5¹¹ read with sub-section (1) of section 16¹² of the *Arbitration and Conciliation Act, 1996* lays down the basis for the doctrine of severability under Indian Law. A bare reading of these two sections makes it clear that the issue as to whether the main contract itself is void or voidable may be referred to arbitration. In *Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games* (Swiss Timing Case),¹³ the Supreme Court held that where upon reading the contract and without the need to admit any further evidence, the Court is of the view that the contract is void *ab initio* under the *Indian Contract Act, 1872*, then the Court would be justified in declining to refer the dispute to arbitration.¹⁴

¹⁰ Karen Mills and Karim Sani 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2006) *Transnational Dispute Management*, available at <https://www.transnational-dispute-management.com/article.asp?key=708> (last seen 30 September 2016).

¹¹ Section 5 of the *Arbitration and Conciliation Act, 1996* reads: 'Extent of judicial intervention—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part'.

¹² Sub-section (1) of section 16 of the *Arbitration and Conciliation Act, 1996* reads: 'Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause'.

¹³ *Swiss Timing Case*.

¹⁴ *Swiss Timing Case*, 28.

The Court has, however, noted that such cases would be few and isolated. For example, contracts which are void for reasons such as incapability of the party to enter into the contract or for having their principle objective activity which is prohibited by law are void *ab initio* and hence are rendered unenforceable.

The take away from the bright line test established by the *Swiss Timing Case* is that if pursuant to reading the terms of a contract, it is clear that the contract is aimed at bribing a public official, such that the Court would not need to call for any further evidence in that regard, the contract would be held void *ab initio* and would be rendered unenforceable. In such cases the refusal to refer the contract to arbitration would naturally be justified.

B. Evidence in Arbitration

Erstwhile arbitral tribunals held the view that parties involved in corruption were debarred from asserting ‘any right to ask for assistance from the machinery of justice’¹⁵ and therefore, tribunals refused to entertain any dispute if allegations of corruption were made by either parties to arbitration. However, this stance was detrimental to the very essence of arbitration and party autonomy as any party who desired not to be governed by the arbitration agreement was then at liberty to make mere bald allegations of corruption in an attempt to wriggle out of it. Therefore, subsequently, in a more pro arbitration stance, arbitrators have formulated an approach to deal with this issue.

1. Standard of Proof

a. International Arbitration

Under criminal law, the standard of proof required by the court of law for establishing corruption is that of ‘proof beyond reasonable doubt.’ On the other hand, in international arbitration, there exists no established standard of proof for the purpose of leading evidence.¹⁶ Notwithstanding the absence of a standard of evidence, sufficient evidence will still be required to prove the allegations. Perhaps the initial reluctance displayed by arbitrators to arbitrate upon disputes involving allegations of corruption stems from the requirement of presentation of very clear and absolute evidence. Corruption is problematic to prove and the inability of arbitral tribunals to demand

¹⁵ Gunnar Lagergren, ICC Award No 1110 of 1963, *Yearbook of Commercial Arbitration* 1996 (1963), 47.

¹⁶ George M Von Mehren and Claudia Salomon, ‘Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide’, (2003) *Journal of International Arbitration* 285, 289-290.

the production of evidence further adds to this problem.¹⁷ The standard of proof required for a case involving corruption has been compared to that required where fraud is alleged,¹⁸ in relation to which, it has been observed that corruption requires a 'higher' standard of proof.¹⁹ However, it must be noted that although proving corruption requires a high standard of proof, the implications of a finding of corruption in arbitration proceedings has no penal consequences. When allegations of corruption are raised in an arbitration, the decision of whether corruption has taken place is always made in the context of deciding whether there has been a breach of the underlying contract and consequently whether the party alleging the breach is entitled to damages. Therefore, a lower standard of proof (*vis-à-vis* the standard required in a criminal trial) maybe resorted to whilst dealing with the issue.

Over the years, it appears that arbitral tribunals have followed certain theories which have evolved for addressing the issue of standard of proof. Some arbitral tribunals follow the standard of proof of the 'more likely than not' rule.²⁰ The 'more likely than not' rule requires the allegation of corruption to be proved on the balance of probabilities, which is a lower threshold to meet and is therefore usually applied in civil cases.²¹ Another frequently used theory is that of 'clear and convincing proof', which tribunals have described to be a midway approach between 'balance of probabilities' and 'beyond reasonable doubt'.²² In *EDF v. Romania*, the arbitral tribunal recognised the difficulty

¹⁷ Cecily Rose, 'Questioning the Role of International Arbitration in the Fight against Corruption', (2014) Vol 31(2) *Journal of International Arbitration* 183-264, 183.

¹⁸ ICC case no 6401, *Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines*, (Award of 19 December 1991) *Mealey's International Arbitration Report*, 7(1) (1992) 31, 34.

¹⁹ The laws of the Philippines and the United States were the relevant jurisdictional laws.

²⁰ Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration—Law and Reality' (2012) 14 *International Council for Commercial Arbitration (ICCA)*, available at http://www.arbitrationicca.org/media/4/97929640279647/media013261720320840corruption_in_arbitration_paper_draft_248.pdf (last visited 30 September 2016). See also, Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009), 1857-1858.

²¹ Kevin M Clermont and Emily Sherwin, 'A Comparative View of Standards of Proof' (2002) *The American Journal of Comparative Law* 243, 243.

²² Matthias Scherer, 'Circumstantial Evidence in Corruption before International Tribunals' (2002) Vol 2, Issue 2 *International Arbitration Law Review* 29, 30.

of proving corruption as it is inherently latent and therefore held that 'clear and convincing evidence' was required to prove the allegations.²³ This midway approach applied by the arbitral tribunals seeks to strike a balance between the two rules. On a scrutiny of various awards,²⁴ it is believed that if an arbitral tribunal is faced with the decision of choosing one of the two tests discussed, it is most likely to choose and apply 'clear and convincing proof' test or a higher test, as opposed to the 'more likely than not' rule.

In *Hilmarton*,²⁵ it was acknowledged by an International Chamber of Commerce (ICC) tribunal that although proof beyond reasonable doubt was required for adjudicating upon allegations of corruption, it was possible to prove something through 'indirect evidence'. Such indirect evidence was further qualified with the need to collect a 'sufficient ensemble of indirect evidence, to allow the judge to base his decision on something more than likely facts, ie, facts which have not been proven'. ICC Case No 8891²⁶ is another example where the arbitral tribunal concluded that corruption had taken place, in part by drawing upon circumstantial evidence, which it described as 'indicia'. These 'indicia' were accompanied by an examination of witnesses and included indicators like duration of the consultancy agreements under scrutiny, remuneration, etc. When the facts of an ICSID case were held 'difficult to establish with absolute certainty', it was opined by the arbitrators that they could be 'best judged under a standard of proof allowing the tribunal "discretion in inferring from a collection of concordant circumstantial evidence (*faisceaud'indices*) the facts at which the various indices are directed."²⁷ The arbitral panel in *Mohamed Bin Hammam v.*

²³ *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award (October 8, 2009), para 221.

²⁴ *Himpurna California Energy Ltd v. PT (Persero) Perusahaan Listrik Negara*, UNCITRAL Ad Hoc Award of 4 May 1999, *Yearbook of Commercial Arbitration XXV 2000* and *EDF (Services) Limited v. Romania and Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines*.

²⁵ *Hilmarton (Agenz) v. Omnium/Algeria*, ICC Case No 5622 XIX *Yearbook of International Commercial Arbitration 1994* (1988), 105.

²⁶ ICC Case No 8891, *JDI - Clunet* 4/2000, 1076 (1998).

²⁷ *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009).

FIFA concluded that the standard of proof that was to be applied in arbitration before them is that of 'comfortable satisfaction'.²⁸

Interestingly, the *Metal-Tech*²⁹ award is much lauded in so far as it overcame the dichotomous practice of condemning corruption on one hand and then refraining from exercising jurisdiction in matters involving state corruption on various grounds. In the said award, the arbitrators relied, *inter alia*, on circumstantial evidence, on so-called 'red flags', and concluded that the contracts under scrutiny were marked with corruption at the stage of implementation of the contract.

b. Indian Law

Indian evidentiary law requires the guilt of the accused to be proved beyond reasonable doubt.³⁰ It is, however, a generally accepted principle that circumstantial evidence is admissible, if it conforms to certain standards as laid down by courts from time to time.³¹ Further, the Supreme Court has held that in a civil case involving allegations of charges of fraudulent character, it is not required to prove the fact that corruption has taken place 'beyond reasonable doubt' as is required in a criminal case. It was observed that the fact that the party is alleged to have accepted a bribe in a civil case does not convert it into a criminal case and ordinary rules applicable to civil cases apply.³²

Over the years, arbitrators have thus overcome the difficulty of adducing evidence and proving corruption in arbitration proceedings in various cases,³³ by accepting circumstantial evidence, formulating an approach that relaxes the conventional standard of proof for criminal offences and have proceeded to render an award. However, there are

²⁸ *Mohamed Bin Hammam v. Fifa*, Court of Arbitration for Sport Case No CAS 2011/A/2625, Arbitral Award, para 155.

²⁹ *Metal-Tech Ltd v. Uzbekistan*, ICSID Case No ARB/10/3, Award (30 September 2013), para 290.

³⁰ *Jaikrishnadas Manohardas Desai and Anr v. State of Bombay* (1960) 3 SCR 319.

³¹ *Padala Veera Reddy v. State of AP* AIR 1990 SC 79.

³² *Gulabchand v. Kudilal* AIR 1966 SC 1734.

³³ Mohamed Abdel Raouf, 'How Should International Arbitrators Tackle Corruption Issues' (2009) Vol 24 Number 1 *ICSID Review Foreign Investment Law Journal* 116. The author in the course of his article reviews various arbitral awards and concludes that even with limited means, arbitrators can tackle corruption.

cases, where it appears that the parties, which raised allegations of corruption have either never intended to expound on their claims or have altogether refused to produce evidence in support of such claims.³⁴ Thus, a few exceptions remain where, in arbitral proceedings enough evidence cannot be found to decisively uphold or dismiss allegations of corruption.

2. Reversing the Burden of Proof

a. *International Arbitration*

In addition to admitting indirect evidence in various cases,³⁵ tribunals have also suggested reversing the burden of proof to facilitate speedy and effective adjudication of disputes.³⁶ It has been proposed that subject to certain conditions, a tribunal ought to make it easier for parties to establish the existence of corruption, by requiring a party to disprove its involvement in corrupt activities, where *prima facie* evidence of corruption exists, thus lowering the default ‘balance of probability’ standard of proof, instead of letting the burden of proof rest on the party alleging corruption.³⁷

Fortier³⁸ makes an interesting suggestion for assessing evidence after impartial investigation in an arbitral proceeding. He proposes that international arbitration can have an investigating and fact finding body like the Integrity Vice Presidency (INT), which is a part of the Sanctions Board³⁹ of the World Bank. The arbitral proceeding should be

³⁴ *FW-Oil Interests Inc v. Trinidad & Tobago*, ICSID Case No ARB/01/14, Award (3 March 2006); *International Thunderbird Gaming Corp v. United Mexican States* (Award) (26 January 2006) and *UNCITRAL and Agent (FL/Arab) v. Company (S-Korea)*, ICC Award No 4145 (Second Interim Award), *Yearbook of Commercial Arbitration*, 1987 (1984).

³⁵ ICC Award No 3916 and *Consultant (FL) v. Contractor (Germany) / Middle Eastern country*, ICC Case No 6497 (Final Award), *Yearbook of Commercial Arbitration* 1999 (1994) 71, 74.

³⁶ ICC Case No 6497, 74.

³⁷ ICC Case No 6497, 74.

³⁸ Yves Fortier, ‘Arbitrators, Corruption and the Poetic Experience (“When power corrupts, poetry cleanses”)’ (2014) *Kaplan Lecture*, available at <http://neil-kaplan.com/wp-content/uploads/2014/11/Kaplan-Lecture-Yves-Fortier.pdf> (last visited 30 September 2016).

³⁹ The Sanctions Board is an independent body that imposes sanctions on parties that have been corrupt, after such party has been given reasonable opportunity to present its case, witnesses and arguments.

preceded by an investigation by the INT, which examines documents, interviews witnesses and reviews contracts. After INT has discharged its initial burden of proving that it is 'more likely than not' that a practice warranting sanction by the Sanctions Board has been committed by the Respondent, the burden of proof is transferred to the Respondent who must show, that it did not engage in such practices. This procedure thus combines two principles of evidence—the 'more likely than not' rule and that of the reversal of burden of proof, both of which have found approval in various arbitral awards as discussed above. This may be an effective method to gather evidence in institutional arbitrations but setting up an impartial panel in private international commercial arbitrations may be impractical.

b. Indian Law

Reversal of burden of proof from the prosecution to the accused also falls within the contours of the Indian Constitution and evidentiary law and although the presumption of innocence cannot be thrown aside, the principal of reversal of burden of proof may be applied subject to exceptions.⁴⁰ One must, however, be mindful that reversal of burden of proof is permitted only in a few statutory exceptions and the thumb rule of evidence remains that the burden of proof lies on the party who asserts the issue affirmatively and not on the party who denies it, although the onus of proof keeps shifting in the course of the proceedings. One of the statutory exceptions mentioned above can be found in the *Prevention of Corruption Act, 1988* (PC Act), the penal law governing prevention of corrupt practices in India. The PC Act raises a presumption against the accused, wherein the burden of proof is on the accused to establish his innocence. This rule of presumption is embodied in sub-section (1) of section 20 of the PC Act.⁴¹ To raise

⁴⁰ *Noor Aga v. State of Punjab and Ors* (2008) 16 SCC 417.

⁴¹ Section 20 of the PC Act reads:

'Presumption where public servant accepts gratification other than legal remuneration

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted

the presumption under sub-section (1) of section 20 of the PC Act, the prosecution has to prove that the accused has received 'gratification other than legal remuneration'. When it is shown that the accused has received a certain sum of money, which was not his legal remuneration, the condition prescribed by the section is satisfied and the presumption must be raised. It has been held that mere receipt of 'money' is sufficient to raise the presumption.⁴² The presumption continues to hold the field unless the contrary is proved, that is to say, unless the court is satisfied that the statutory presumption has been rebutted by cogent evidence.⁴³

The above decisions demonstrate how the concepts of reversal of burden of proof and circumstantial evidence used by international arbitral tribunals in cases of allegations of corruption are couched in Indian statutory law. However, this does not necessarily imply that the arbitral tribunals may proceed with application of principles of reversal of burden of proof. The reason for this is two-fold. Firstly, the reverse burden clauses are statute specific and do not come into play in the case of civil proceedings where allegations of corruption have to be adjudicated upon only for the purpose of determining breach of contract. Secondly, it is established law that domestic Indian arbitration is not required to conform to the statutory provisions of evidence⁴⁴ and

or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn'.

⁴² *VD Jhingan v. State of UP* AIR 1966 SC 1762.

⁴³ *CSD Swami v. The State* AIR 1960 SC 7.

⁴⁴ *Hindustan Prefab Ltd. v. Dossanjh and Co.*, (Arb LR 91) Del (2004); *Ganges Waterproof Works Pvt. Ltd. v. Union of India* (1999) 4 SCC 33 and Dr PC Markanda, *Law Relating to Arbitration and Conciliation* (6th edn Wadhwa and Co Nagpur 2006).

procedure.⁴⁵ Hence, the arbitral tribunals with the consent of parties are at liberty to decide upon the procedure for adjudication of dispute albeit preserving the principles of natural justice.

III. IMPACT OF ALLEGATIONS OF CORRUPTION ON A CONTRACT AT VARIOUS STAGES AND PROCEDURE THEREAFTER

In this section, the article discusses the implications of allegations of corruption on a contract at various stages and how, in each case, arbitral tribunals have proceeded to adjudicate upon the same. Contracts aimed at bribery are illegal and are therefore null and void.⁴⁶ Arbitral tribunals have been known to adjudicate upon disputes by virtue of the doctrine of severability and *Kompetenz-Kompetenz*⁴⁷ and proceed with arbitration, consequently holding that claims based on such contracts cannot be sustained. Thus, in numerous cases, arbitration is conducted even where issues of corruption are raised and the agreement central to the dispute is held void.⁴⁸ This method protects the interests of the party that suffers the effects of improper influence and it seeks to ensure that 'international commerce retains a certain degree of morality'.⁴⁹ If an allegation of corruption is made in plain language in the course of the arbitral proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proved.⁵⁰

⁴⁵ Sub-section 1 of section 19 of the *Arbitration and Conciliation Act, 1996* provides that the code of civil procedure shall not be applicable before the arbitral tribunal. See also *Unit Office, NPCC v. Madhusudhan Devbarma* AIR 1979 Gau 62 (DB); *Central Coalfields Ltd v. Ashok Transport Agency* AIR 1987 Ori 287 and *McKenzies Ltd v. State of Mysore* AIR 1987 Kant 89.

⁴⁶ *UK Company v. French Company / African country*, ICC Case No 3913 Collection of ICC Arbitral Awards 197485, 497, 562 (1981).

⁴⁷ See Gary B Born, *International Commercial Arbitration* (1st edn Kluwer Law International 2009) 311–407.

⁴⁸ ICC Case No 5622; *Consultant v. Contractor*, ICC Case No 6248 XIX Yearbook of International Commercial Arbitration 1994 (1990), 124 and ICC Case No 3913.

⁴⁹ John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999).

⁵⁰ Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* in Nigel Blackaby and Constantine Partasides (eds), *Redfern and Hunter on International Arbitration* (5th edn Oxford University Press 2009).

However, there are limits to this doctrine of severability in commercial arbitration. Where under the governing law of the dispute, the nature of the alleged corruption renders the contract in its entirety void *ab initio*, then the question becomes whether the arbitration clause ever existed and consequently whether the tribunal has jurisdiction to adjudicate at all.⁵¹

A. *Corruption at the Time of Procurement of the Contract*

A contemporary approach towards the arbitrability of disputes involving allegations of bribery is reflected in *Westacre Investments Inc. v. Jugoimport SPDR Holding Co Ltd.*⁵² In this case, despite an allegation that the agreement at issue had been procured by bribery, the tribunal decided the dispute, investigated and rejected the bribery allegations and issued an award on merits.⁵³ This reflects a pro arbitration stance, as against the erstwhile line of thought propagated by Justice Lagergren.⁵⁴ Thus, if an investment tribunal finds that the investor obtained its investment through corruption, the tribunal will conclude that the investor's claims are inadmissible. The fact of corruption is not treated as a jurisdictional issue, due to the 'well-established legal principle of separability, it noted that it was "operating on the assumption that the ... arbitration agreement remains ... valid and effective."⁵⁵

B. *Corruption as a Defence by a Party*

The defence of corruption has been raised by parties to a contract either unilaterally or mutually. Such a defence usually enables host States to invoke corruption in the formation of a contract as a reason to consider the contract void, thereby precluding any claims by the investor that may arise from the contract.⁵⁶ Multiple tribunals have allowed the

⁵¹ *Supra* n. 10.

⁵² *Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd* [1999] APP.L.R. 05/12.

⁵³ Gary B Born, 'Bribery and an Arbitrator's Task' (2012) *Kluwer Arbitration Blog*, available at <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/> (last visited 30 September 2016).

⁵⁴ *Supra* n. 17.

⁵⁵ *World Duty Free Company Ltd v. Kenya*, ICSID Case No ARB/00/7, Award (31 August 2006).

⁵⁶ Michael Losco, 'Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction' (2014) Vol 63 *Duke Law Journal* 1201.

Respondent-host State to assert the corruption defence in response to unilateral corruption.⁵⁷ In such cases, the contract is tainted with illegality and is terminable by the State. If the corruption or illegality tainting the contract is of a nature that gives rise only to a right to invalidate the contract, under the doctrine of severability, the arbitral tribunal has jurisdiction, as long as the arbitration agreement is based on mutual consent and is undisputed. In other words even in cases where illegality hits the underlying contract, the 'adjudicatory authority of the arbitral tribunal remains undiminished'.⁵⁸ *World Duty Free*⁵⁹ is illustrative of a dispute where allegations of corruption were involved, and the State of Kenya took up the defence of corruption against the adverse party. After a scrutiny of domestic laws, international conventions relating to corruption, decisions taken by courts and arbitral tribunals, the tribunal held in no uncertain terms that bribery is contrary to international public policy of most, if not all, and to transnational public policy. Therefore, claims based on contracts of corruption or on contracts obtained by corruption were not upheld by the tribunal.

It has been opined that investment arbitration tribunals ought to proceed with care when allowing a corrupt host state to rely on the corruption defence, and they ought to concoct alternative solutions to the complete rejection of the investor claims where investor corruption is established.⁶⁰ Notably, it has also been suggested that where State parties raise allegations that implicate their own officials in illegal conduct subsequent to a change in the economic or political regime, the arbitral tribunal must not proceed to accept such a line of argument without adequate scrutiny.⁶¹

⁵⁷ See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), para 345 and *Inceysa Vallisoletana S L v. Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006), para 154.

⁵⁸ Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) Vol 29 *ICSID Review* 155–186.

⁵⁹ *World Duty Free Company Ltd v. Kenya*.

⁶⁰ Tamar Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration' (2013) Vol 30 *Journal of International Arbitration* 267–281.

⁶¹ *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, UNCITRAL Ad Hoc Award of 4 May 1999, Yearbook of Commercial Arbitration XXV 2000.

Thus where allegations of corruption have been raised as a defence, the tribunal must tread cautiously in order to arrive at an enforceable decision.

However, there have been instances where tribunals have declined to delve into allegations of corruption in spite of finding that the tribunal did have jurisdiction of the matter.⁶² This may be as a result of the apprehension of arbitrators to decide matters against the state, which involve important government officials. It seems founded on the plausibility of diplomatic relations of the arbitrators being adversely affected.⁶³

C. *Corruption Deduced Suo Moto by the Tribunal*

Arbitrators may, at their discretion, examine corruption even in proceedings where the parties have not raised issues of corruption, if they suspect that corruption may be involved. This power to investigate suspected or manifest illegality *sua sponte* is well within their authority, as well as their duties, provided that the alleged or patent illegality would cast repercussions upon the final decision.⁶⁴

D. *Judicial Recognition of Arbitrability of Corruption in India*

Under Indian law, if any part of the contract has been performed illegally or in a manner that defeats the provisions of law, then, the contract is voidable as against the innocent party.⁶⁵ Further, any party claiming under such a contract cannot succeed if reliance has to be placed upon the illegal act. Therefore, if allegations of corruption in the performance of the contract are involved, the contract is voidable.

⁶² See *Bayindir v. Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005).

⁶³ Andreas Reiner, 'The Standards and Burden of Proof in International Arbitration' (1994) Vol 10 *Arbitration International* 335.

⁶⁴ Dr Richard H Kreindler, 'Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, etc.?' discussed in Theodore H Moran, 'The Arbitrator as Accomplice – Sham Proceedings and the Trap of the Consent Award in Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools' (2008) *Center for Global Development, Washington DC* 1, 26.

⁶⁵ *Bank of India Finance Ltd v. The Custodian and Ors* (1997) 10 SCC 488.

It has now been laid down in a plethora of judgments that arbitration agreements are severable from the principle contract even though they are physically embodied in the same instrument. In *Olympus Superstructures v. Meena Vijay Khetan*,⁶⁶ it has been held that disputes, which the parties to an arbitration agreement agree to refer must consist of a 'justiciable issue triable civilly'. Certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration.⁶⁷

In *Ram Kishan Mimani v. Govardhan Das Mimani*⁶⁸ and *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd*,⁶⁹ it has been clarified that the *N Radhakrishnan*⁷⁰ judgment cannot be read to imply that every time allegation of fraud or malpractice is made, there can no longer be adjudication of such matters in an arbitration reference. An exception may be made to the general rule when it appears to a court, that a matter involving serious charges with heavy documentary and oral evidence may not be referred to arbitration notwithstanding the disputes being covered thereby.

In *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd*, the Supreme Court held that an arbitration agreement does not become 'inoperative or incapable of being performed' where allegations of fraud have to be inquired into.⁷¹ The Court, *inter alia*, relied upon *Premium Nafta*⁷² and stated that the ground of challenge to the contract (that was under consideration in the said case) did not in any manner affect the arbitration agreement contained therein, which is independent of and

⁶⁶ *Olympus Superstructures Pvt Ltd v. Meena Vijay Khetan* (1999) 5 SCC 651.

⁶⁷ *Booz Allen and Hamilton Inc v. SBI Home Finance Limited and Ors* (2011) 5 SCC 532.

⁶⁸ *Ram Kishan Mimani v. Govardhan Das Mimani* (2010) 4 CHN 527.

⁶⁹ *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd* (High Court of Bombay 22 January 2014).

⁷⁰ *N Radhakrishnan v. M/S. Mastero Engineers* (2010) 1 SCC 72.

The judgment of the Supreme Court of India in *N Radhakrishnan v. M/S Mastero Engineers & Ors*, considered whether allegations of corruption may be arbitrated upon. The court answered in the negative, on the ground that where complicated question of fact or law is involved or where allegation of fraud is made, a civil court may refuse reference to arbitration.

⁷¹ Decision of the Supreme Court dated 24 January 2014 in Civil Appeal No 895 of 2014.

⁷² *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. and Ors* (2007) UKHL 40.

separate from the main contract. In the event one of the parties rescinds a contract, the arbitration clause contained therein does not become ineffective.

Further, in the *Swiss Timing Case* it was held that an arbitration clause is severable from the underlying contract, under section 16 of the *Arbitration and Conciliation Act, 1996*. The exception carved out by *Swiss Timing* to the disputes that can be referred to arbitration by a court is the class of disputes wherein the contract is *prima facie* void *ab initio*.⁷³ The above decision of *Swiss Timing* was upheld by the Bombay High Court in *National Spot Exchange*, wherein the learned Single Judge upheld that the allegation of corruption could be arbitrated upon by the arbitral tribunal.⁷⁴

An arbitration clause is thus considered as a separate contract which survives even if the underlying contract is voidable. Allowing an arbitration agreement to be automatically terminated along with the main contract would be akin to destroying what the parties sought to create as a dispute resolution device. To surmise the findings of courts and tribunals discussed above, it may be stated that when a contract is tainted with corruption, either at the stage of procurement or performance, the arbitration agreement encapsulated within it survives, by virtue of the doctrine of severability.

IV. ENFORCEMENT OF THE ARBITRAL AWARD

Although various international anti-corruption treaties⁷⁵ seek to combat corruption, they suffer from a lack of enforcement mechanisms at the international level.⁷⁶ In *HUBCO*,⁷⁷ the Supreme Court of Pakistan held

⁷³ *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. and Ors*, para 27.

⁷⁴ *National Spot Exchange Ltd. v. National Spot Exchange Ltd.* (High Court of Bombay 10 September 2014).

⁷⁵ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997* (adopted 17 December 1997, entered into force 15 February 1999) 37 ILM 1; *Europe's Civil Law Convention on Corruption* (adopted on May 1 1999) CETS 174; *African Unions' Convention on Prevention and Combating Corruption* (adopted on July 1 2003, entered into force on 5 August 2011) and *United Nations Convention against Corruption* (adopted on 31 October 2003, entered into force on 14 December 2005) UNGA A/58/422.

⁷⁶ ICC Case No 3913.

⁷⁷ *Hub Power Company Ltd v. Pakistan, WAPDA* (PLD 2000 SC 841).

that cases which, *prima facie* involve corruption cannot be arbitrated upon and that a corruption claim cannot be referred to an arbitral tribunal on grounds of public policy. If a tribunal proceeds to grant an award where allegations of corruption are raised, this itself may lead to a challenge and setting aside of such an award if it is later found that the arbitral tribunal had not performed its functions with due diligence and thereby, had failed to adequately investigate issues of corruption. Article V(2)(b) of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) and article 36 of the *UNCITRAL Model Law* enshrine the public policy of the forum as grounds upon which arbitral awards may be refused enforcement by the courts. They provide that: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country'.

One of the reasons for this is that the definitions of corruption, bribery and allied practices are different across nations. To one country or custom, lobbying or even making grease payments may be acceptable, while in some others, these practices may amount to corruption.⁷⁸ Vogel opines that in the 'wild west of international trade, the slogan 'anything goes' seems to have had wide application.'⁷⁹ What is meant to embody 'corruption' and 'bribery' differs greatly from one jurisdiction to another.⁸⁰ The catena of awards discussed in *World Duty Free*⁸¹, recognised and agreed that in certain jurisdictions or sectors of activities, corruption is a common practice without which the award of a contract is difficult or even impossible. The term 'international public policy', however, is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora and it has been proposed to cover that concept in referring to 'transnational public policy' or 'truly

⁷⁸ Stephen H Unger, 'Ethical Aspects Of Bribing People in Other Countries', (1998) Vol 4 *Science and Engineering Ethics* 287–290, available at www.cs.columbia.edu/~unger/articles/bribery6-98.html (last visited 30 September 2016).

⁷⁹ Vogel, 'The Supply Side of Global Bribery', (1998) *Finance & Development* 35.

⁸⁰ *Swiss Timing Case*, 663.

⁸¹ *World Duty Free v. Kenya*.

international public policy'.⁸² It is trite that tribunals must apply the law which is determined to be applicable in the dispute before them, which could be the parties' chosen law or some other foreign mandatory law or public policy, unless it is contrary to 'transnational public policy'.⁸³ Thus, parties cannot contravene principles of transnational public policy, to escape from their obligations so long as they are valid under the parties' chosen law, and any mandatory laws of the place of performance or arbitral seat which prohibit them do not override the parties' chosen law.⁸⁴ However, prior to deciding if a claim violates a transnational principle, an arbitral tribunal ought to satisfy itself if a particular issue constitutes a part of the transnational public policy. This is based on a subjective satisfaction of whether there is a 'broad consensus' amongst nations, to elevate a particular concern to a transnational level.⁸⁵ Arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognised.⁸⁶ 'Public policy' is one of the narrow group of grounds available for denying enforcement to an arbitral award, both under the *New York Convention* and under the various domestic arbitration statutes, that follow the *UNCITRAL Model Law* by which an award can be denied enforcement.⁸⁷ National courts can rightly be expected to see corruption as an issue which goes to the heart of public policy and may refuse to allow the enforcement of an award that might further corruption. However, the courts would then have to solve the difficult issue of balancing the cardinal principles of

⁸² *World Duty Free v. Kenya*, para 139 and see also P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', (1986) Vol 3 *ICCA Congress Series* 257.

⁸³ *Westacre (UK) v. Jugoimort (Yugoslavia)* ICC Case No 7047 [1995] ASA Bull 301 (1994); *Wena Hotels Ltd v. The Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (December 8, 2000) and ICC Case No 3916.

⁸⁴ ICC Case No 8891.

⁸⁵ 'International Law Association Recommendations on the Application of Public Policy as a Ground for refusing Recognition or Enforcement of International Arbitral Awards' *International Law Association*, Resolution 2/2002 – International Commercial Arbitration (2002).

⁸⁶ Abdulhay Sayed, 'Corruption in International Trade and Commercial Arbitration', (2004) *Kluwer Law International* 89–92.

⁸⁷ *Honeywell v. Meydan Group* [2014] EWHC 1344 (TCC).

finality of arbitral awards with the imperative of safeguarding public policy.⁸⁸

V. PARALLEL COURT PROCEEDINGS – THE CATCH 22 OF ARBITRATION?

Allegations of corruption lead to initiation of proceedings in domestic forums, in accordance with national law. The jeopardy of conflicting findings on facts by the arbitral tribunal and courts may result in rendering the arbitral proceedings futile at the stage of enforcement. Although the subject matter and nature of dispute under the consideration of an arbitral tribunal differs greatly from the questions of law involved in domestic proceedings, the factum remains the same. Arbitral tribunals may benefit from the findings on fact by domestic courts, as the later inarguably have more authority to investigate and probe into allegations of corruption.⁸⁹ For instance, in *Niko Resources v. People's Republic of Bangladesh et al*, the arbitral tribunal had based its findings of corruption on facts that were arrived at in the course of parallel court proceedings.⁹⁰ However, domestic court proceedings are often prolonged and arbitral tribunals may be averse to waiting for proceedings to end, so that they can draw from the proceedings. Therefore, one of the prime issues that a tribunal must consider before assuming jurisdiction is the effect, which parallel court proceedings may have on the award and its enforcement.

As regards the Indian position, it has been observed that there is no inherent risk of prejudice to any of the parties in allowing both criminal proceeding in court and arbitration proceedings simultaneously. If there is an outcome where an award is rendered by an arbitral tribunal and the criminal proceedings result in conviction rendering the underlying contract void, an appropriate plea can be taken to resist the enforcement of the award.⁹¹ The court, in holding so, has indicated an inclination

⁸⁸ *Swiss Timing Case*.

⁸⁹ Inan Uluc, 'Corruption in International Arbitration' (2016) *SJD Dissertations* 1.

⁹⁰ *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos ARB/10/11, ARB/10/18, Decision on Jurisdiction (19 August 2013).

⁹¹ *P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation and Ors*.

towards arbitration. This reasoning would not be tenable in the case of international arbitration seated in India. It is settled that for an award to be enforceable, it must not contravene anti-corruption rules and public policy and there is an obligation on the arbitrator to ensure that the parties do not arbitrate in vain.⁹² In *Maharashtra Film Stage and Cultural Development Corporation Ltd v. Multi-Screen Media Pvt Ltd*,⁹³ it was observed that if mere allegations of fraud were to oust the jurisdiction of the arbitral tribunal, the efficacy of arbitration as an alternate dispute resolution mechanism would be eroded and undermined. It can be inferred that in a domestic arbitration, mere existence of allegations of either moral dishonesty or moral misconduct would not be sufficient for the court to exercise jurisdiction over a claim subject to an arbitration agreement. Thus, it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum, which the parties themselves have chosen. However the measure to determine what falls under the purview of ‘serious allegations’ has been left to the discretion of courts, which is to be decided based on the circumstances surrounding each and every case.

Further, parallel criminal court proceedings are not a ground for stay or refusal for execution of an arbitral award rendered in the course of international commercial arbitration. The grounds for refusal to enforce a foreign award under sub-section(2)(b) of section 48 are restricted and it has been held that enforcement would be refused only if such enforcement would be contrary to – (i) fundamental policy of Indian law; (ii) the interests of India and (iii) justice or morality.⁹⁴

VI. CONCLUSION

In the recent years with an advent of commercial transactions, arbitration has greatly evolved as an effective global dispute resolution mechanism. Conscious efforts are being made all over the world to

⁹² Article 35 of the *ICC Rules* stipulates that: ‘In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure the Award is enforceable at law’.

⁹³ *Maharashtra Film Stage and Cultural Development Corporation Ltd v. Multi-Screen Media Pvt Ltd* (High Court of Bombay 3 July 2013).

⁹⁴ *Shri Lal Mahal Ltd v. Progetto Grano Spa* (2013) 8 SCALE 489.

develop the law of arbitration to fulfil the objective for which it was introduced. There are various issues involved when allegations of corruption are made by either party to arbitration at any stage of the transaction. Many countries including India however, are inclined towards arbitrability of allegations of corruption, overcoming the many procedural issues which are involved. Contrary to the highest standard of proof, which is required for proving allegations of corruption otherwise, arbitral tribunals have lowered the standard of proof required and have found a midway approach so as to exercise its substantive jurisdiction to make determination upon the allegations of corruption. Tribunals have also recognised the well cemented principles of 'doctrine of severability' and have held that the tribunals will have jurisdiction to determine the dispute. However, exception being when the allegations of corruption are inextricably related to the main contract and would affect the arbitration clause equally. In any event, a high standard of proof would be required to show the same and hold that the agreement to arbitrate is also invalid. Recent judicial pronouncements also encourage arbitral tribunals to proceed with arbitration, inspite of on going parallel court proceedings and the same are no longer held to be a sufficient ground for a stay or refusal of proceeding with the arbitration proceedings. However, even if a tribunal overcomes all these procedural hurdles and proceeds to pass an award in an arbitration where allegations of corruption are raised, this itself could be a ground for resisting enforcement of the award. Courts would then have to carve a balance to safeguard the finality of an arbitral award and public policy. Although judicial intervention cannot be avoided where serious issues of public interest are at stake, it would not be *ultra vires* for arbitral tribunals to handle allegations of corruption. Utmost precaution and every reasonable effort must be made by arbitrators to ensure the enforceability of an award. It is therefore advisable that they delve into the allegations of corruption and pass a reasoned award, taking into considerations all the ancillary issues of evidence, parallel court proceedings and enforcement of award when such allegations of corruption are made by either party.