The Civil Law Effects of Corruption in International Commercial Arbitration to a Contract Governed by Scandinavian Law[1]

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1 Scandinavian law refers to the law of the five Nordic countries, Denmark, Finland, Iceland, Norway and Sweden as explained in Section 2 of this article.

1 Introduction

Corruption is today held to be one of the greatest enemies of international trade. Corruption is estimated to cost the European Union economy over one hundred billion EUR per year and close to one trillion EUR per year if one includes also the indirect effects.[2] On a global scale the World Bank has estimated that currently one trillion USD in bribes are paid each year. Corruption is said to increase the total cost of doing business globally by up to 10 % and in developing countries by up to 25 %.[3]

Not only is corruption a financial problem. As described in the EU Anti-Corruption Report, corruption seriously harms the economy and society as a whole. Many countries around the world suffer from deep-rooted corruption that hampers economic development, undermines democracy, and damages social justice and the rule of law. It impinges on good governance, sound management of public money, and competitive markets. Corruption at the end of the day risks undermining the trust of citizens in democratic institutions and processes.[4] Corruption varies in nature and extent from one country to another and affects also the Nordic countries, although they all are found at the top of the list among the least corrupt countries in the world.[5]On the other hand it is today held that structural corruption is present at least in Finland in the form of cronyism.[6]

The battle against corruption is difficult. In the global world and market a harmonized anti-corruption policy is desirable, but cultural differences can make it challenging to draw the line between business custom and reprehensible behavior.

Criminal law has for long been considered the most effective way to fight corruption. The international anti-corruption conventions provide that the sanctions for corruption shall be *"effective, proportionate and dissuasive"*.[7]

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2 European Commission, *Report from the Commission to the Council and the European Parliament - EU Anti-Corruption Report*, 2014, p. 3. "ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf" (21.10.2016) and European Parliament, *The Cost of Non-Europe in the area of Organised Crime and Corruption, Annex II: Corruption*, 2016. p. 9. "www.europarl.europa.eu/RegData/etudes/STUD/2016/579319/EPRS_STU(2016)579319_EN.pdf" (21.10.2016). See also the Finnish anti-corruption network's strategy, Luonnos Korruption vastaiseksi strategiaksi (2016-2020), 20 September 2016.

3 Bonell, Michael Joachim and Meyer, Olaf, *The impact of corruption on international commercial contracts – General report*, in The impact of corruption on international commercial contracts, Springer International Publishing Switzerland, 2015, p. 1-2.

4 *See e.g. Report from the Commission to the Council and the European Parliament - EU Anti-Corruption Report*, 2014.

5 Transparency International annually ranks countries by their perceived level of corruption. In the 2015 Corruption Perceptions Index the Nordic countries ranked as the least corrupt: Denmark (1), Finland (2), Sweden (3), Norway (5) and Iceland (13).

6 In Finland the phenomenon is known as *hyvä(- ja paha)veli verkosto*, a term that translates into English rather as "best buddy networks". *See e.g.* Laukkanen, Erkki, chairman of Transparency Finland, *Onko meillä rakenteellista korruptiota?*, 2013 "www.transparency.fi".

7 *See e.g.* Council of Europe Criminal Law Convention on Corruption (ETS No. 173), 1999, Article 19 and OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999, Article 3.

Civil law has also been introduced into the battle against corruption. So far, however, civil law regulation seems to have been utilized mainly as a complement to or alongside the criminal justice system to fight corruption and to provide protection for victims of corruption. This article concludes that also civil law regulation may be an effective anti-corruption tool, even when used discriminately on contractual relationships affected by corruption.

In addition to criminal and civil law enactments, self-regulation as an alternative to criminalization emerges into the debate from time to time and in the private sector decriminalization in favor of self-regulation as within company law has been proposed e.g. in Sweden.[8] Self-regulation will not be addressed herein.

Still, criminalization and rigid sanctions remain the main means of fighting corruption today, usually with the effect that any sign of corruption immediately contaminates all legal relations and transactions it touches. In court proceedings and arbitration situations regularly arise where a respondent invokes corruption as a defence ("*the illegality defence*")[9]. A party may argue that it is not liable for a claim for breach of contract, brought by the other party thereto, since the contract was procured through corruption. This would, in many instances, have the judge or arbitral tribunal dismiss the case upfront without trying the full merits of the case on the basis that the contract lacks protection of the law due to it being illegal or immoral.[10]

The question before us here is whether there is a need for us to make *in casu* determinations to a greater extent and have a more nuanced view of the consequences of findings of corruption in arbitration? This risks being a controversial question and also a challenging one, but experience shows that although the practice of ascribing to corruption a widespread contaminating effect may be efficient in preventing, tackling and fighting corruption, *the illegality defence* can also be misused and can have unintended and potentially even counterproductive consequences.

It is also recognized that in combatting such corruption that for long has been considered inevitable in many parts of the world, the international conventions have allowed the effects of criminalization to sometimes operate to the advantage of the most dishonest at the expense of the innocent, all *for the greater good*.[11] While it is probably generally recognized that regulation eventually affects behavior – i.e. that morality to some extent follows regulation – and while the authors obviously are not in a position to express opinions on the expected efficiency of the legal policies involved, experience from for example the

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8 For a discussion on decriminalization and self-regulation *see e.g.* Sandgren, Claes, *Att bekämpa korruption – ett rättsligt perspektiv*, Juridisk Tidskrift, Stockholms universitet, 2008, p. 283 ff., Oldenstam, Robin, *Bestikkelse (mutor) og korruption – hvor skal grænsen gå?* in Forhandlingene ved Det 38. nordiske Juristmøde i København, Bind 1, 2008, p. 425ff. and for a more recent contribution Sundén, Helena, Generalsekreterare på Institutet Mot Mutor, *Korruption i näringslivet bekämpas bäst genom självreglering – och vår kod gäller alla*, 19 May 2015 debattartikel för Dagens Juridik.

9 *See e.g.* Bonell and Meyer, 2015, p. 14.

10 Although the categorization of the violation may differ between jurisdictions, corruption is generally considered illegal and/or immoral and thereby lacking protection of the law.

11 *See e.g.* Bonell and Meyer, 2015, p. 12-13.

corporate governance strict regulations introduced after the corporate scandals[12] seems to indicate that also adverse effects could follow from too broad a brush. Meaningful compliance or rather a desire to engage in clean and best practices will require that the system of sanctions is considered to be reasonably fair and not indiscriminate.

The authors' interest in the topic was spurred by a session at the Annual Meeting of the ICC Institute of World Business Law in Paris on 24 November 2014 where one of the authors[13] moderated a session on the civil law consequences of a finding of corruption in arbitration, as reported in the ICC Dossier XIII[14], followed by an article on how national company law and corporate governance regulation are accounted for when determining such consequences.[15] Much of the debate today in the world of arbitration has, equal to the discussions on Company Boards and the risk-management programs implemented by their compliance officers, been on the necessity, obvious as it is, to identify and combat corruption and to a lesser degree on the civil law effects of any such finding to the merits of a dispute *inter partes*.[16] There are situations where one can ask whether, from the point of view of combatting corruption, the whole legal relationship between the parties really needs to be denied protection of the law due to its any connection to any corrupt act. Could certain contracts or parts thereof still deserve legal protection and be enforceable?

As a working hypothesis it would seem that the civil law effects of corruption would lend themselves to a particularly interesting examination in a Scandinavian setting against the largely aligned and rather principled contract laws of the Nordic countries that generally allow for a holistic and non-technical interpretation. While global anti-corruption regulation today is governed by the provisions of the relevant international conventions, as implemented by the countries that have ratified them, the civil law effects of a finding of corruption would be found in the national laws and legal principles of a particular country, as introduced into local law from a convention or as existing in general contract law. The theme of this article therefore becomes to look at the options that the Nordic countries offer in this respect for a contract governed by Danish, Finnish, Icelandic, Norwegian or Swedish law, with a focus on Finland.

Although by necessity any initial study of this diverse and complex topic can only amount to a mapping exercise, what we would hope to identify are possibilities to nuance an *all-or-nothing* approach to contractual remedies in situations where corruption has been found to have tainted contractual formation or implementation. We believe that possibly "rectifying" unintended adverse

12 The fall of corporations at the turn of the millennium such as Enron Corporation, American energy company, that went bankrupt on 2 December 2001.

13 Wallgren-Lindholm, Carita.

14 Wallgren-Lindholm, Carita, *Consequences and effects of allegations or of a positive finding of corruption*, Chapter 13, in Dossier XIII Addressing Issues of Corruption in Commercial and Investment Arbitration, ICC Institute of World Business Law 2015.

15 Wallgren-Lindholm, Carita, *How is National Company Law and Corporate Governance Regulation accounted for when determining Consequences of Findings of Corruption in International Arbitration – When shall a Company that is Party to the Dispute be deemed to have given a Bribe*, in Festschrift für Siegfried H. Elsing zum 65. Geburtstag, Verlag Recht und Wirtschaft GmbH, Frankfurt am Main, 2015.

16 Wallgren-Lindholm, Carita, ICC Dossier, 2015.

consequences and asymmetry that may follow from an indiscriminate remedial approach to any form of corruption need not jeopardize the efficiency of the anti-corruption combat. More nuance may even strengthen the perceived legitimacy of the outcome of a corruption tainted contractual dispute as it may allow for taking account not only of varying degrees of clean hands among the contractual players but also of the degree of the reprehensible act and the manner in which the contract(s) has (have) been affected. In this our mapping exercise we will be assuming that the law applicable to the merits of the arbitrated dispute will be a Nordic law, accepting (without further scrutiny) that any criminal law that may apply in parallel may in an international arbitration have to be sourced from a different jurisdiction. Also other laws may compete for application. The scope of this examination will not, however, allow for a deeper study of related private international law questions regarding the choice of law(s) from time to time.

The setting that we have chosen for our evaluation is an international commercial arbitration where, contrary to an investment arbitration, the alleged corruption often becomes part of settling the dispute on its merits and not a "gateway issue", one of admissibility of the claim.[17] There have also been allegations that international arbitration may have become a safe harbor for settling corrupt disputes in secret. The corruption topic has therefore been high on the agenda of the international arbitral community in an effort to dissipate related concerns.[18] There has also been much debate on the investigatory mandate of an arbitral tribunal if it suspects corruption in the matter before it: as arbitrators generally speaking are chosen to settle a matter as brought to them by the parties, there are different views on the rights and obligations of the arbitrators to explore aspects of the dispute that the parties have chosen not to bring before them. We know that legal cultures also vary in relation to arbitrator inquisition. In all events it is clear, and we will take as a departing point without further expansion on the topic, that the arbitrators' mandate to settle a civil law commercial dispute is more limited than that of a national judge in the above respect.

2 Corruption - Definition and Statutory Framework

What is then corruption and what do we mean by *the civil law effects of corruption in commercial arbitration to a contract governed by Scandinavian law*?

Corruption can take many forms, and an exhaustive analysis could fill a book. We will here use the short and practical definition *"abuse of power for private gain"*.[19] The Civil Law Convention on Corruption, which has significance for this article, sets out the following definition: "*For the purpose of this Convention, 'corruption' means requesting, offering, giving or accepting,*

17 Wallgren-Lindholm, Carita, ICC Dossier, 2015, p. 185.

18 *See e.g.* Derains, Yves *Foreword* to ICC Dossier XIII Addressing Issues of Corruption in Commercial and Investment Arbitration, International Chamber of Commerce 2015.

19 *See e.g. European Parliament, The Cost of Non-Europe in the area of Organised Crime and Corruption, Annex II: Corruption,* 2016. p. 8 and *Report from the Commission to the Council and the European Parliament - EU Anti-Corruption Report,* 2014, p. 2.

directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof."[20] The most common form of corruption is a "traditional bribe", whereby someone offers something of value in return for a gain. The terms *corruption* and *bribery* will be used interchangeably herein.

When we speak of the civil law effects of corruption we refer to the part of the law that is not public law (Sw: *offentlig rätt*), such as constitutional law, administrative law or criminal law. It is the area of law that regulates the relationship between private persons (legal or natural) as opposed to the relationship between a private person and the state or the public sector (Sw: *det allmänna*).

The term *Scandinavian law* also warrants for an explanation. For the history of the usage of the term and the underlying reasoning we refer to what has been written during the history of this publication, *the Scandinavian Studies in Law*, and in particular to the article *What is Scandinavian Law?* by Ulf Bernitz.[21] We will follow suit and let Scandinavian law refer to the law of the five Nordic countries, Denmark, Finland, Iceland, Norway and Sweden.[22] Although not uniform, not even in the area of contract law any longer, the Nordic countries still share a legal tradition and culture which allows for grouping their individual laws together for the purpose of an overview of the civil law contractual effects of and remedies for corruption within the framework of Scandinavian law as currently in effect.

There are innumerable sets of internationally applicable rules that have emerged in the past twenty years in the global battle against corruption. For an analysis of the civil law effects of corruption in commercial arbitration to a contract governed by Scandinavian law, the first stop should probably be at the *Council of Europe Civil Law Convention on Corruption*[23]. The Civil Law Convention is the only set of rules so far that focuses entirely on the civil law aspects of corruption. It is not self-executing and requires implementing legislation. So far it has been signed by all Nordic countries but not been ratified by Denmark or Iceland. The convention constitutes a general framework which grants the member states considerable leeway in their respective transpositions leaving it up to each state to decide how it will implement the general provisions contained therein.[24]

Among the other international conventions of significance (without any particular order of priority) the following can be mentioned from a Scandinavian perspective and for the purpose of this article:[25] the *United Nations Convention*

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20 Council of Europe Civil Law Convention on Corruption (ETS No. 174). 1999, Article 2.

21 Bernitz, Ulf, *What is Scandinavian Law?*, in Scandinavian Studies in Law Volume 50, 2007, p. 15 ff..

22 The term *Scandinavia* (Sw. *Skandinavien*) refers both to a geographical and to a cultural region that strictly speaking is held to include Sweden, Norway and sometimes Denmark and Finland or parts thereof. The term also has a broader content in its English use.

23 Council of Europe Civil Law Convention on Corruption (ETS No. 174), 1999.

24 *See e.g.* Bonell and Meyer, 2015, p. 4.

25 Certain declarations, reservations and territorial applications accompany the Nordic countries' respective signings and ratifications of these international conventions.

Against Corruption,[26]ratified by all the Nordic countries; the *Council of Europe Criminal Law Convention on Corruption,*[27] ratified by all the Nordic countries; the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,*[28] ratified by all the Nordic countries and the *Council Framework Decision on combating corruption in the private sector,*[29] which applies to all EU member states.[30] The Framework Decision was the first legal instrument explicitly addressing corruption in the private sector. Its purpose is to ensure that both active and passive corruption in the private sector are criminalized in the EU member states and also that legal persons may be held responsible for such offences.

These conventions are complemented by internationally influential national legislation like the old USA Foreign Corrupt Practices Act (FCPA)[31] and the more recent UK Bribery Act.[32] Rules and recommendations of non-governmental and professional organisations include the UNIDROIT Principles, which have a new section devoted to illegal contracts;[33] the ICC Rules on

26 United Nations Convention Against Corruption (UNCAC), 2004.

27 Council of Europe Criminal Law Convention on Corruption (ETS No. 173), 1999, and the Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191), 2003.

28 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1999 and OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, including Annex II Good Practice Guidance on Internal Controls, Ethics and Compliance, 2009.

29 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. The following anti-corruption legal instruments by the European Union are also noteworthy: Resolution on combating corruption in Europe, 1995; The protocol of the Convention on the protection of the European Communities' financial interests, 1996; The Council of the European Union Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector (98/742/JHA); Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests - Joint Declaration on Article 13 (2); Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

30 At the time of writing this article, Denmark, Sweden and Finland are members of the European Union and Iceland and Norway are not.

31 USA Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.).

32 UK Bribery Act 2010 Chapter 23.

33 The International Institute for the Unification of Private Law Principles of International Commercial Contracts, 2010. The UNIDROIT Principles set forth general rules for international commercial contracts. As set out in the preamble to the Principles, they shall be applied when the parties have agreed that their contract be governed by them; they may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like; they may be applied when the parties have not chosen any law to govern their contract; they may be used to interpret or supplement international uniform law instruments; they may be used to interpret or supplement domestic law and they may serve as a model for national and international legislators.

Combating Corruption;[34] the Principles of European Contract Law (PECL)[35] and ISO 37001 Anti-Bribery Management System Standard.[36] All the Nordic countries are also members of GRECO (The Group of States against Corruption, established 1999) and Transparency International, a nongovernmental organization with local chapters in all Nordic countries.

In Finland there are no specific laws or separate enactments under the heading of corruption.[37] The implementation of the international conventions' criminalization of behaviour categorized as corruption therein is scattered among several acts as it is also in the other Nordic countries.

The Finnish Criminal Code[38] contains the following criminalizations listed in the anti-corruption strategy prepared by the Finnish anti-corruption network:[39] Electoral bribery: Chapter 14, Section 2 §; Giving of bribes: Chapter 16, Section 13 §; Aggravated giving of bribes: Chapter 16, Section 14; Giving of bribes to a member of Parliament: Chapter 16, Section 14 a §; Aggravated giving of bribes to a member of Parliament: Chapter 16, Section 14 b §; Giving of bribe in business: Chapter 30, Section 7 §; Aggravated giving of bribe in business: Chapter 30, Section 7 a §; Acceptance of a bribe in business: Chapter 30, Section 8 §; Aggravated acceptance of a bribe in business: Chapter 30, Section 8 a §; Acceptance of a bribe: Chapter 40, Section 1 §; Aggravated acceptance of a bribe: Chapter 40, Section 2 §; Bribery violation: Chapter 40, Section 3 §; Acceptance of a bribe as a member of Parliament: Chapter 40, Section 4 §, and Aggravated acceptance of a bribe as a member of Parliament: Chapter 40, Section 4 a §. In addition, regulation on corruption is found in the Constitution of Finland; the Act on a Candidate's Election Funding; the Act on Political Parties; the Election Act; the Act on Income from Professional Activity; the Act on the Openness of Government Activities; the Administrative Procedure Act as well as to some extent in the State Civil Servants Act; the Local Government Act; the Act on Municipal Civil Servants; the Act on Public Contracts; the

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34 ICC Rules on Combating Corruption, 2011. The International Chamber of Commerce has also published related guidelines such as the ICC Handbook *Fighting Corruption: A Corporate Practices Manual*, 2008.

35 The Principles of European Contract Law, 2002.

36 The International Organization for Standardization (ISO) 37001: Anti-Bribery Management Systems Standard, 2016.

37 Throughout this article we use Finland as an example, as the authors' home jurisdiction. We will often refer generally to Scandinavian law (without pointing to differences). The Nordic contract laws share a common history and the countries share a legal culture, which in our view allows for such summary treatment.

38 Sw. *Strafflag 19.12.1889/39).*

39 Other crimes in the Criminal Code that according to the Finnish anti-corruption network can be held to sometimes contain eleents of corruption: Embezzlement: Chapter 28, Section 4; Violation of a business secret: Chapter 30, Section 5; Misuse of a business secret: Chapter 30, Section 6; Money laundering: Chapter 32, Section 6; Fraud: Chapter 36, Section 1; Misuse of a position of trust: Chapter 36, Section 5; Breach and negligent breach of official secrecy: Chapter 40, Section 5; Abuse of public office: Chapter 40, Section 7; Aggravated abuse of public office: Chapter 40, Section 8; Violation of official duty: Chapter 40, Section 9; Negligent violation of official duty: Chapter 40, Section 10; Abuse of insider information: Chapter 51, Section 1; Aggravated abuse of insider information: 51, Section 2; Acting on behalf of a legal person: Chapter 5, Section 8; and Corporate criminal liability: Chapter 9, Section 1.

Accounting Act; the Act on Discretionary Government Transfers; the Police Act; the Limited Liability Companies Act; the Act on Detecting and Preventing Money Laundering and Terrorist Financing; the Auditing Act; the Parliamentary Civil Servant's Act; the Competition Act; the Act on Equality between Women and Men; and the Non-Discrimination Act.[40] The Criminal Codes of the other Nordic countries have similar provisions. Finland has not criminalized *trading in influence* in accordance with Article 12 of the Criminal Law Convention on Corruption and many interested parties, such as the Confederation of Finnish Industries and the Finnish Bar Association, have raised doubts as to the possible effects of such criminalization.[41]

Likewise, specific statutory regulation of the civil law consequences of corruption in the Nordic countries are lacking. Thus, the civil law consequences, as well as the remedies available to a party, will follow from the general principles of contract and tort law. (In some countries the private law provisions on corruption and the remedies will be found in the legislation on unfair competition.[42])

3 The Scope of the Article

For the XIXth International Congress of Comparative Law in Vienna 2014 an extensive report was made on the impact of corruption on international commercial contracts, based on which a book with the same title was published by Michael Joachim Bonell and Olaf Meyer.[43] The book gives an insight into the national laws and legal practice of the countries of the national reporters, among which also one Nordic country, Denmark.[44] The report critically examines the impact of corruption on international commercial contracts and although it does not go in depth into the subject matter of this article, it has served as a source both of inspiration and fact and will be extensively referred to herein.

The Report by Bonell and Meyer features the various approaches that different jurisdictions have taken relative to the manner in which a finding of corruption impacts a commercial contract. There are typically two angles of approaching the deployment of civil law regulation in the context of corruption: 1) from the victim's point of view on the argument that civil law regulation can offer maximum protection for the victim, since criminal law does not offer

40 See The Finnish anti-corruption network's strategy, Luonnos Korruption vastaiseksi strategiaksi (2016-2020), 20 September 2016, p. 61 ff.

41 At the time of writing this article, Norway and Iceland have criminalized trading in influence, whereas the other Nordic countries have not.

42 Bonell and Meyer, 2015, p. 4.

43 Bonell, Michael Joachim and Meyer, Olaf, *The impact of corruption on international commercial contracts – General report*, in The impact of corruption on international commercial contracts, Springer International Publishing Switzerland, 2015, (the "Report"). Bonell is also consultant to UNIDROIT and has been the Chairman of the Working Group for the preparation of all editions of the UNIDROIT Principles.

44 Peter Damsholt Langsted and Lars Bo Langsted were the national reporters for Denmark and are the authors of Chapter 5 *The Civil Law Consequences of Corruption According to the Laws of the Least Corrupt Country in the World - Denmark*.

compensation for losses, 2) from a prevention of corrupt behavior point of view on the argument that civil law is effective because it can directly target the perpetrator's financial assets, something that has the potential of affecting the perpetrator just as severely as a criminal punishment.

This article has a more individualistic focus, namely to examine the available tools under civil law to allocate the consequences of corruption more evenly and even justly *inter partes*.

We will in particular deal with the allocation of the commercial risk among the contractual parties by examining the remedies available to them under substantive (Scandinavian) law where their contract has been procured by or otherwise been potentially tainted by corruption. The position of and remedies available under tort law to third party victims of corruption e.g. from a competition law perspective (the one that did not get the contract in the public procurement), and other further reaching consequences of corruption will fall outside our scope.

We will to some extent touch upon how national company law and corporate governance regulation need to be accounted for when determining the consequences of corruption.

The discussions in this article will be mirrored against a fictitious example to illustrate the contractual issues to be dealt with, without necessarily "solving" the cases. All scenarios will assume that a finding of corruption has already been made in the arbitration. While the means by which a positive finding of corruption has been made is also worthy of examination, there will not be room to deal with it here. Such analysis would relate to the duties and/or mandate of an arbitral tribunal when suspecting corruption and the degree of inquisition mandated for.[45] It will be assumed that the arbitral tribunal will consider itself competent to deal with the matter irrespective of an initial allegation of corruption since in commercial arbitration such allegation will not normally amount to a jurisdictional issue. This also since the arbitration clause will often prevail under the *separability doctrine*[46] unless the corruption has directly affected such clause. By contrast as regards investment arbitration, although not part of the scope of this article, we wish to note that *"[I]n investment treaty arbitration an allegation that the investment has been procured, effected or maintained by corruption will normally become a gateway issue for the Arbitral*

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45 For a discussion on these matters *see e.g.* Hwang, Michael, S.C. and Lim, Kevin, *Corruption in Arbitration – Law and Reality*, published on "www.arbitration-icca.org/ media/" in 2012, and the reasoning of judge Lagergren in ICC Case No. 1110 (1963) (the "Lagergren Award"), which is also discussed therein.

46 *See e.g.* UNCITRAL Model Law, 2006, Article 16 (1) and UNCITRAL Arbitration Rules, 2010, Article 23 (1). See also Hwang and Lim, 2012, para 91, and their further sources: "*The principle of separability…means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement."* and Fernández-Armesto, Juan, *The Effects of a Positive Finding of Corruption*, Chapter 11, in Dossier XIII Addressing Issues of Corruption in Commercial and Investment Arbitration, ICC Institute of World Business Law 2015, p. 170, with a more direct statement: "*Allegations that the contract was tainted by corruption do not affect the tribunal's jurisdiction: in accordance with the principle of separability, the arbitration agreement between the parties remains valid and effective, and the arbitral tribunal retains jurisdiction to adjudicate any civil dispute.*"

Tribunal's authority to rule on the dispute before it. This since the legality of the investment can be deemed to constitute a prerequisite for jurisdiction based on an investment treaty, which only protects non-corrupt investments."[47] Also any ancillary duties such as any reporting obligations as members of the Bar of the members of the arbitral tribunal under money laundering legislation will need to remain unaddressed in the limited scope of this article.[48]

4 The Impact of Corruption on Commercial Contracts

When it comes to commercial arbitration a finding of corruption will as a rule affect the merits of the dispute. To facilitate our analyses we will – as is often done – use a simplified triangular model of a typical corrupt transaction. This simple graph can serve to illustrate the division of the contracts into three categories based on the relationship between the parties and the subject matter of the contract, as follows: 1) a contract *providing for* corruption, which would under most laws be considered void; 2) a contract *procured by* corruption, which would generally be considered void or at least voidable and 3. a contract *(potentially) tainted by* corruption in a multi-contractual project by virtue of constituting one axis in the contractual structure covering the economic whole.[49] Traditionally the second and third category have been treated together, but the third category has in our view sufficiently distinct features to be merit treatment as a category of its own.[50]

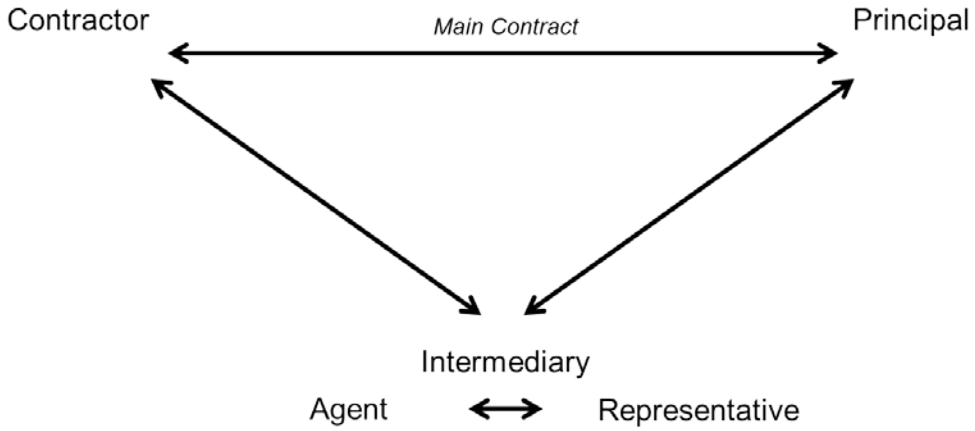
In the triangular model the parties to the "*Main Contract*" (the contract providing for the main respective performances under the transaction, its *essentialia negotii*) are found in each of the two upper corners and one or several intermediaries at the bottom of the triangle, acting for one or both of the parties, or independently, as the case may be.

47 Wallgren-Lindholm, Carita, ICC Dossier, 2015, p. 185.

48 See the Finnish Act on Detecting and Preventing Money Laundering and Terrorist Financing (18.7.2008/503) and the Finnish Bar Association's *Handbok om förhindrande av penningtvätt och finansiering av terrorism* (27.2.2009, Bilaga 22.4.2009).

49 See Wallgren, Carita, *Letters of Intent – Avsiktsdeklarationer, principöverenskommelser och andra preliminärdokument i internationella avtalsförhandlingar och avtalsslut*, University of Helsinki, Department of Comparative Law, 1983, p. 20-22 as to the notion that when determining what is covered by a contract the same subject matter can sometimes be allocated between several contractual instruments while inversely several subject matters can be encompassed by one contractual umbrella.

50 Most national systems of law draw a distinction between contracts that are procured by corruption, and contracts that provide for corruption. *See e.g.* Hwang and Lim, 2012, para 95 and Bonell and Meyer, 2015, p. 6.



In our example case we have the following constellation: a construction company, the *Contractor*, is bidding for a project for the construction of a factory. It uses an *Intermediary*, the *Agent*, to induce the purchaser (or the employer), the *Principal*, to be awarded the contract. The Agent approaches the Principal directly or through a *Representative* of the Principal.[51] The arrow from the Contractor to the Intermediary would be a contract for "consultancy/agency services", the fees of which to some part would be used for payment of a bribe – with or without the Contractor's full knowledge – to the Principal or its Representative along the arrow from the Intermediary to the Principal.

Many intermediary transactions can be perfectly legitimate and even necessary in some parts of the world and all fees paid to Agents are not shady. Payments to Intermediaries may also not in the Principal's mind be intended for a bribe or for inappropriate facilitation but to constitute consideration for services performed, always provided obviously that services can be identified and that the agency fee appropriately reflects the service rendered.[52] Hence, the amounts passing from the Principal to the Intermediary/Agent, the nature of the service allegedly rendered and the country in which activities are performed by the local Agent are all indicia as to the legitimate nature of the payment in the eyes of a future arbitral tribunal, as they are regarding the Principal in determining its good faith vis-à-vis the undertakings by the Agent.

As we analyse the various contractual axes for purposes of the civil law effects of corruption on the terms of the contract(s) we will pay particular attention to causality, proportionality (of effect on all parties) as well as to the intent and knowledge of the parties.

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51 A very typical case of corruption to come before an arbitral tribunal is in relation to an international commercial construction or infrastructure contract. The choice of construction business as our fictitious example case is appropriate also since according to a Finnish study the construction industry is one of the central risk areas when it comes to corruption in Finland. *See* the Finnish anti-corruption network's strategy, Luonnos Korruption vastaiseksi strategiaksi (2016-2020), 20 September 2016, p.2.

52 Directions exist regarding acceptable levels of agency commissions e.g. as regards state supported development projects.

4.1 A Contract Providing for Corruption

A contract providing for corruption is a contract whereby the parties have agreed on a corrupt act, e.g. on the payment of a bribe. The related written agreement is often a sham and can for example take the form of a consultancy agreement without *de facto* performance of any services and/or without intent to this effect.

In our fictitious example a contract providing for corruption is the contract between the Contractor and the Agent for the purpose of the Agent bribing the Principal to grant the construction project to the Contractor. Any subsequent contract between the Agent and the Representative or Principal mirroring the first contract would in our view also fall into this category even though it is rarely addressed in related discussions.

A contract for corruption in most jurisdictions, under most international conventions as well as under general principles of law is void directly under law or at least cannot, which has the same result, serve as the basis for an action in law.

The Civil Law Convention which requires European member states to provide for civil law remedies for, *inter alia*, contracts tainted by corruption, and which also distinguishes between contracts providing for corruption and contracts procured by corruption, provides in its Article 8 (1) that: *"Each Party* [to the Convention] *shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void."*

It is also clear under Scandinavian law that you cannot enforce a contract with an illicit purpose, i.e. one that is illegal or contrary to public order or morals. Different countries use different wording – e.g. the contract is unethical or illegal, or has an illegal or immoral cause – but they all agree that a contract providing for corruption does not have the protection of the law. Many have stated that corruption is in violation of *transnational* or *international public policy*, although there is not unanimity as to the existence or specific contents of such concepts.[53]

It is one of the fundamental principles of legal systems that contracts with an illegal or immoral purpose (*pactum turpe*) are not binding. Gambling and betting amongst private persons or a promise to undertake a criminal act are often quoted as examples. An unlawful act cannot serve as the basis for an action in law (*ex delicto non oritur actio*) and no one can be allowed to take advantage of his own wrong (*nullus commodum capere potest de injuria sua propria*) are other alike good faith principles of Roman law.[54] Contracts with such *cause* are held to be invalid in themselves, *ipso facto,* regardless of any action to this effect by a party, and this from the beginning, *ab initio.*

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53 Kreindler, Richard, *Corruption and International Arbitration – Is Anything Broken or Otherwise Worth Fixing?* Concluding Remarks, in Dossier XIII Addressing Issues of Corruption in Commercial and Investment Arbitration, ICC Institute of World Business Law 2015, p. 191. For one definition of the concepts see Hwang and Lim, 2012, footnotes 86 and 165.

54 Wallgren-Lindholm, Carita, Festschrift, 2015, p. 623.

In *World Duty Free v. Kenya*,[55] one of the few arbitral awards in relation to corruption, World Duty Free admitted to having paid a bribe to the Head of State, president Moi in order to do business with the Government of Kenya and obtain the right to run duty free shops at Kenya's international airports, the arbitral tribunal uses the term *entirely ineffectual* for a void contract that from the outset is empty of content as opposed to a voidable contract that is *intrinsically valid* but due to the circumstances of its making will not be enforced by a court.[56]

The prevailing view also appears to be that a contract for corruption is devoid of any effect in all circumstances and also when it is not performed successfully, i.e. does not lead to the desired result. This means that the Contractor cannot demand restitution, i.e. reimbursement of the moneys it paid to the Agent. Likewise, no action is possible for the Agent if the bribe brings the desired result and the Contractor enters into a construction agreement with the Principal, but then refuses to pay the Agent's commission by invoking corruption and claiming that the Agency contract thereby is void. This outcome follows from the fact that the principles of illegality and immorality are held to take precedence before any principles of unjust enrichment or the like.[57] These respective imbalances between the Contractor and the Agent from time to time (i.e. impossibility for the Contractor to claim restitution of the bribe for an unsuccessful bid or for the Agent to claim payment for a successful bid) has been justified by the desirable effect it is argued to have in depriving the party which first executes an immoral or illegal contract of all protection.[58]

So should our assessment change – and if in the affirmative, how – if the Contractor is in good faith about its consultancy agreement with the Agent and unaware that the consultancy fee includes moneys for a bribe that the Agent intends to pay to the Principal on behalf of the Contractor. While the contract by category probably remains one for corruption, it is in our view arguable that the Contractor could deserve some protection under law if it justifiably was in good faith, i.e. it also should not have known about the bribe, or if the Agent was in fact acting on its own authority. Bonell and Meyer hold that different levels of guilt between the parties could justify an exception to the rule that the loss remains where it has occurred and, e.g., that no recovery is possible.[59] Others, however, are of the opinion that there are no remedies available to either party, as both parties are equally at fault (*pari in delicto*).[60] The wording of Civil Law Convention Article 6 appears to suggest that an *in casu* assessment can be made

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55 ICSID Case No. ARB/00/7, World Duty Free Company Limited v. The Republic of Kenya, Award of 4 October 2006.

56 See Spalding, Andrew Brady, *Deconstructing Duty Free: Investor-State Arbitration as Private Anti-Bribery Enforcement*, University of California, Davis Vol 49:443, 2015, p. 478 and Hwang and Lim, 2012, para 95 and their further sources therein.

57 The unjust enrichment issue has in some jurisdictions been addressed by forfeiture of the bribe to the treasury. In many legal systems, however, a betrayed Principal has the right to claim the bribe and such claim would often have priority over the state's right of confiscation. These scenarios will be left outside the scope of this article. See Bonell and Meyer, 2015, p. 18.

58 Bonell and Meyer, 2015, p. 12-15.

59 Bonell and Meyer, 2015, p. 16-17.

60 See e.g. Fernández-Armesto Juan, 2015, p. 167 ff. and his further sources.

taking account of the varying degrees of guilt in each party. The Article titled *Contributory negligence* reads as follows: *"Each Party shall provide in its internal law for the compensation to be reduced or disallowed having regard to all the circumstances, if the plaintiff has by his or her own fault contributed to the damage or to its aggravation."* The UNIDROIT principles contain a right of repentance that also could serve as a way to recover the bribe in certain instances.[61] This would mean that some remedies in certain circumstances could be available even to a party to a contract providing for corruption.

4.2 A Contract Procured by Corruption[62]

A contract procured by corruption is a contract where the purpose of the contract is legitimate *per se*, but the entry into the agreement has been enabled by a corrupt act. Such act can consist e.g. in a contract providing for the payment of a bribe, as described under Section 4.1. *A contract providing for corruption.*

In our fictitious example the contract procured by corruption would be the Main Contract between the Contractor and the Principal, allegedly entered into as a result of the bribe having been paid by the Agent to the Principal or to Representative on behalf of the Contractor (or, as the case may be, directly by the Contractor).

While the international conventions and most jurisdictions agree that a contract providing for corruption is always null and void, the views vary on how to deal with a contract that has been procured by corruption. In their Report, Bonell and Meyer note that there are three different solutions: first, the contract could, in the same manner as a contract providing for corruption, be considered void in all circumstances. Second, the contract could be voidable and the choice between invalidity and continuance of the contract could be left to the immediate victim, in Bonell and Meyer's examples, the Principal.[63] (Such immediate or direct victim is also often referred to as the innocent party.)[64] If, however, the victim elects to keep the contract alive with knowledge of the corruption it may lose its right to set aside the contract as also to avoid its own obligations.[65] The

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61 *ibid.* and UNIDROIT Principles, 2010, Article 3.3.1, Illustration 21, as applied to our example: If the Contractor after having paid the Agent the agreed fee, but before the Agent pays the bribe to the Representative, decides no longer to pursue the illegal purpose and withdraws from the contract, the Contractor may be granted the right to recover the fee from the Agent.

62 In legal writings a contract *obtained by* corruption is also commonly used. *See e.g.* Derains, Yves *Foreword* to ICC Dossier XIII Addressing Issues of Corruption in Commercial and Investment Arbitration, International Chamber of Commerce, 2015.

63 As the bribe is usually obtained as a personal favour to a representative or employee of the Principal, the Principal would normally not gain anything, rather lose, from the corrupt act and is therefore considered to be a victim. According to Bonell and Meyer, based on the Report, a trend can cautiously be detected toward a solution that places the fate of the contract in the hands of the Principal that as the direct victim of the corruption can decide to avoid it or adhere to it. Bonell and Meyer, 2015, p. 32.

64 Examples of other victims could be third parties who e.g. have lost the contract in a procurement.

65 Hwang and Lim, 2012, para. 195 (d).

third approach would be to treat the contract as binding, thereby effectively limiting the choices of the Principal to other remedies such as damages or price reduction.[66] The international conventions seem to leave the choice between these solutions quite open to be decided by national legislation.

The Civil Law Convention Article 8 (2) provides that "*Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages."*[67]

The Explanatory Report to the Civil Law Convention clarifies that *"Paragraph 2 of this article strengthens the civil law application to the fight against corruption by providing for an additional remedy to be available to those who have suffered damage as a result of an act of corruption. Notwithstanding the right to sue for compensation for damage, any party whose consent to enter into a contract has been undermined by an act of corruption, shall have the right to apply to Court for the contract to be declared void. It remains open to the parties concerned to continue with the contract if they so decide. The drafting clearly provides that the applicant for such a declaration must be one of the parties to the contract. It remains for the court to decide on the status of the contract, having regard to all the circumstances of the case."*[68]

As applied *inter partes* the above convention text seems to presume that there is at least one contractual party that is aware of the corrupt act that procured the contract. In this scenario it seems to be a reasonable departing point to allow the contractual party/ies with victim status to decide whether to invoke invalidity or treat the contract as binding and resort to the civil law remedies that may become applicable depending on the effect that the corruption has had on the terms of the contract. This seems even more called for since in long term construction or infrastructure projects, where corruption has been most detectable, there can often be an interest for the Principal to have the Contractor finish the Main Contract.

The UNIDROIT Principles seem to take the same approach, setting out that if a party (in our example the Principal), who at the time of the conclusion of the main contract neither knew nor ought to have known of the bribe, subsequently becomes aware of the payment of the bribe, it may choose whether or not to treat the contract as effective. If it chooses to treat the contract as effective the other party (in our example the Contractor) will be obliged to perform and the Principal will have to pay the price, subject to an appropriate adjustment taking into account the payment of the bribe (i.e. the difference between the price paid and the presumed price without increase for the amount of the bribe). If, on the other hand, the Principal chooses to treat the contract as being of no effect, neither of the parties has a remedy under the contract i.e. "the bricks lie where

66 Bonell and Meyer, 2015, p. 20-21. Bonell and Meyer note that several national reporters avoided clearly determining one particular dogmatic solution for their respective national law. They further noted that in several jurisdictions – also European – the illegality of the bribe agreement would penetrate through to the cause of the Main Contract. Others have adopted the approach that the contract is void if the bribe has had an effect on its content.

67 Although addressed by the Civil Law Convention, the position of third party victims is outside the scope of this discussion.

68 Explanatory Report to the Civil Law Convention on Corruption, 1999, para 64.

they have fallen"[69]. This is stated to be without prejudice to any restitutionary remedy that may exist.[70]

A solution is also offered by the UNIDROIT Principles whereby the rest of the contract can remain, with suitable changes, if grounds for invalidity (i.e. corruption) affect just part of the contract. Price reduction could come into play to restore the contractual balance.[71] This solution seems to meet the rule of reason and be both just and economically efficient.[72]

The UNIDROIT Principles further provide in a flexible fashion that where the infringed mandatory rule is silent, parties to an illegal contract (a) may exercise the contractual remedies that are reasonable under the circumstances; and (b) where the contract has been performed, may still claim restitution (of the performance) if it is reasonable in the circumstances, and even where they are denied any remedies under the contractual provisions.[73]

Then what about a situation where both parties to the contract are aware of the corrupt act that procured the contract. Could any form of legal protection under civil law be given to a contract procured by corruption where both parties are corrupt, e.g. in the following scenario: the Contractor bribes the Principal and gets awarded the construction project. The Contractor then builds a factory and when it is ready the Principal refuses to pay the last installment and invokes invalidity due to corruption as a defence when the Contractor initiates arbitration to recover such installment. The traditional approach appears to have been that in a situation of *pari in delicto*, equally at fault, the parties knew what they were getting themselves into and took a chance knowing that they do not enjoy protection of the law. If no remedies are available they only have themselves to blame.[74]

Under this heading 4.2. we have discussed the possibility generally in deviation of a traditional approach to make remedies available to the parties to a

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69 An expression used in English legal reasoning, excluding any further remedies.

70 UNIDROIT Principles, 2010, Article 3.3.1., Illustration 16.

71 UNIDROIT Principles, 2010, Article 3.3.1., official comment (h) and Bonell and Meyer's interpretation thereof in Bonell and Meyer, 2015, p. 24.

72 In the discussion hereinabove we have been assuming that the substantive matter consisting in the contractual dispute is arbitrable. As stated earlier (see above footnote 45) when addressing the question whether the corruption in the procurement strikes the agreement to arbitrate in the underlying contract – i.e. whether the separability doctrine can be upheld and a dispute thereunder arbitrated – we concluded in the affirmative regarding commercial arbitration.

73 Kreindler, Richard H. and Gesualdi, Francesca, *The Civil Law Consequences of Corruption Under the UNIDROIT Principles of International Commercial Contracts: An Analysis in Light of International Arbitration Practice*, in The impact of corruption on international commercial contracts, Springer International Publishing Switzerland, 2015, p. 403-404.

74 *See e.g.* Hwang and Lim, 2012, para. 98 and their further sources: *"[…]in pari delicto potior est conditio possidentis (where the parties are both blameworthy, the defendant has the stronger position). These maxims are expressions of the "Clean Hands Doctrine", which bars a claimant's claims due to its illegal or improper conduct in relation to those claims. Claims tainted by wrongdoing therefore will not succeed, and the loss lies where it falls. As the Clean Hands Doctrine can be traced back to Roman law, it is also applicable under the law of many civil law jurisdictions. It operates, conceptually speaking, as a procedural bar to the admissibility of a claim."*

contract procured by corruption. Such remedies could be claimed in an arbitration both when the contract has been voided (at the request of a party or *sua sponte* by the arbitrators[75]) or in a situation where the innocent/non-corrupt party insists on (continued) contractual performance. We will in Section 5 below examine the essence of the topic of this article namely the contractual remedies that could be available to corrupt and non-corrupt parties to a contract governed by Scandinavian law in commercial arbitration. First we will here, for the sake of preparatory completeness, look at the third category of contracts, a category in which the parties to the contract potentially tainted by corruption, or some of them, may have neither intent nor even knowledge of the bribe. Under this topic we will also discuss whether the proportionality between the bribe and the obtained Main Contract is a matter of significance, as also the causality between the corrupt act and the contract at hand.

4.3 A Contract (Potentially) Tainted by Corruption

The third category namely a contract potentially tainted by corruption is the most diverse in the realm of contracts affected by corruption. It is intended to cover all situations where a corrupt act has taken place but the effects of that corruption may not attain the contractual relationship subject to arbitration (although so alleged). We will add features to our fictitious example in an effort to nuance the discussion to account for variables to the quite simplistic triangle. Ancillary contracts, which can also have parties different from those to the main contract, may need to be evaluated for any effects of the corruption.

Intent and knowledge of the parties

A prerequisite for a criminal act to have occurred is that intent or some level of negligence can be ascribed to the person allegedly guilty of such act. If intent or negligence is to be ascribed to a legal person, such as a company, the intent or negligence must have occurred in such corporate bodies whose acts or omissions are relevant to constitute acts or omissions of a company.[76]

Where it can be shown that the bribing party did not have an intention to bribe – in the example under Section 4.1. that the Contractor justifiably (in view e.g. of the amount of the consultancy fee) thought it was paying adequate compensation for services rendered by the Agent and did not know, and should not have known, that the fee included the money for bribing the Principal – is the main contract then always tainted by corruption under a civil law evaluation? And what relevance shall, when assessing contractual remedies, be attributed to evidence that the contractual price had not been increased because of the bribe? And even where the Contractor's employees and the Agent have been found guilty of active and passive bribery under criminal law, do these corrupt acts always need to affect the remedies available under the contract?

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75 *See* the Lagergren Award ICC Case No. 1110 (1963).

76 For a more detailed account on intent and negligence of a legal person see Wallgren-Lindholm, Festschrift, 2015, p. 634 ff.

As regards companies as legal persons being party to a contract, they can today be subjected to corporate penalties as a criminal sanction for corruption.[77] If a company has been sanctioned by a corporate penalty under criminal law for having participated in a corrupt scheme, such fact is likely to have unfavorable bearing upon the civil law consequences for that company as a party to a contract. But where it cannot be shown that the relevant decision-making bodies in a corporation were aware of the corrupt practices nor that their compliance schemes were inadequate, should such company necessarily suffer all negative consequences of the corrupt act as a contractual matter? While the conventions provide that companies have a duty to put into place adequate procedures to prevent corruption within their companies or by their employees, the related corporate liability is not strict.[78] Even where the checks and balances put into place by a company fail in an individual case, corporate negligence need not follow if the company can show adequate efforts to ensure compliance.[79]

Finally, as regards corporate liability, we will quote a prior writing by one of the authors hereof calling for a more nuanced assessment of allegedly corrupt behavior by corporations: *"While we obviously should support and enhance all incentives for corporations to create in-house cultures that require and stimulate non-corrupt business practices and detect those that are not up to standard, I am inclined to conclude that it is questionable whether a company in a commercial arbitration automatically shall be attributed contractual liability towards its counterparty for bribery, in its sphere of risk, connected to the contract in dispute, in a situation where the bribe in itself cannot be attributed to the company under the applicable national company law, nor under the criminal regulations on corruption that govern its activities. A requirement of intent or negligence is reasonable and in line with most European legal tradition. It is also reasonable to question whether good morals and best practices in international trade and investment, and fulfilment of the aim of international legal instruments against corruption, would indeed be served by an interpretation of the relevant regulation to the effect that a company would*

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77 *See* the Finnish Criminal Code Chapter 9 Section 1 (1) *"A corporation, foundation or other legal entity in the operations of which an offence has been committed shall on the request of the public prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code for the offence."* and Chapter 30 Section 13 *"The provisions on corporate criminal liability apply to marketing offences, alcoholic beverages marketing offences, unfair competition offences, business espionage, misuse of a business secret, giving of a bribe in business, aggravated giving of a bribe in business, acceptance of a bribe in business and aggravated acceptance of a bribe in business"*.

78 *See* Wallgren-Lindholm, Festschrift, 2015, p. 630 ff. and the further sources provided therein. Cf. the UK Bribery Act that seems to go further, providing for a virtually strict liability for a commercial organization for bribery committed in its business.

79 The Explanatory Report to the Civil Law Convention on Corruption, para 42: *"Those who directly and knowingly participate in the corruption are primarily liable for the damage and, above all, the giver and the recipient of the bribe, as well as those who incited or aided the corruption. Moreover, those who failed to take the appropriate steps, in the light of the responsibilities which lie on them, to prevent corruption would also be liable for damage. This means that employers are responsible for the corrupt behaviour of their employees if, for example, they neglect to organise their company adequately or fail to exert appropriate control over their employees."*

be liable for acts or omissions that under no civil or criminal theory could be attributed to it."[80]

Our tentative conclusion here needs to be that there can be reason to question an approach whereby corruption in a company's risk sphere will invariably deprive it of all further contractual rights even if intent or negligence cannot be attributed to it as a "bribing party".

Disproportion between the bribe and the Main Contract procured – de minimis rules

Another situation where there could be room for a more relativistic approach to contractual remedies is the magnitude of the alleged offence in relation to the contract tainted by corruption. Relativism may not be a popular approach in the fight against corruption but what if the Main Contract with a legitimate purpose has a value of one billion EUR and the bribe that procured the contract was a thousand EUR vacation trip for the Representative of the Principal or some expensive wine. Should the consequences of that corruption to the contract be affected by the limited value of the bribe, by an objective standard and in relation to the value of the contract? Should there be a *de minimis* rule which would exclude, or at least mitigate, contractual effects where the illegal acts are limited in relation to the scope of the contract?[81]

There could in our view be such situations. But then again, if it can be shown that the contract – on unfavorable terms to the innocent party – would not have been entered into absent even the small bribe, the bribing party should probably suffer the full contractual consequences of the corruption.

The *de minimis* rule can also apply to the contractual terms of the contract entered into, by e.g. its greater of lesser effect on the contract price. Where an act of bribery can be shown to have affected the price to an insignificant degree there may also be reason to mitigate the civil law consequences to be suffered by the bribing party, as set out under the following heading.

Causality between the corrupt act and the contract at hand

A further consideration in a nuanced examination of the civil law consequences of corruption relates to the establishment of causality: does there need to be causality between the corrupt act and the substantive provisions of the contract alleged to be tainted by corruption? And, as stated under the previous heading, should there be a threshold requirement so that *de minimis* corruption effects could in certain circumstances be disregarded.

Where, in our example, it could be shown that the Principal would have entered into the construction contract with the Contractor irrespective of the bribe and on substantially equal terms – including the price – how shall these circumstances be taken account of in determining the civil law consequences of the bribe in a subsequent arbitration?

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80 Wallgren-Lindholm, Festschrift, 2015, p. 637.

81 Fernández-Armesto, Juan, 2015, para 30, also raises the point of a *de minimis* rule.

A nuanced assessment of the above situation but where the contract indeed would have been entered into irrespective of the bribe but at a different price could consist in adjusting the relevant terms of the contract to be aligned with the situation absent the bribe.

Extension of the corrupt act

The effects of a corrupt act obviously extend beyond the *inter partes* relationships now under scrutiny. If the Principal in our example has overpaid for his plant as a result of an inflated price increased by the bribe, its shareholders, clients and their clients etc. will obviously also suffer the consequences of lesser dividend and increased prices, etc.

Also the fate of ancillary agreements to the Main Contract, that may even have constituted preconditions therefor, and between the same and/or different parties, as also provisions provided to survive the agreement such as confidentiality, joint workers' protection and other employment matters, may need to be determined in a corrupt scenario, as also third party claims in private enforcement situations. Some such agreements or provisions may indeed deserve some protection also in the presence of corruption.

To assess whether circumstances such as the ones mentioned above call for allowing the contract potentially tainted by corruption some standing under civil law/contract law (i.e. upholding of some of its provisions) requires, in addition to the establishment of causality, revisiting the question of the legal interests that the anti-corruption regulations are intended to protect.

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Looking at the criminal legislation of corruption, there is a clear distinction between the different interests to be protected: the interest of the transaction being arbitrated (including the element of trust between an employer and its employee) on the one hand and the interest of the market, on the other – the latter extending as far as to the world economy. In the global fight against corruption and all its devastating effects on the world economy and on predictability of the market, the interest of the market has clearly taken precedence, at the expense of the interest of the transaction and even the victim of corruption. It has been held that sacrificing individual interest is justified for the "greater good".

This article has set out to examine the effects of corruption under civil law, on the contractual rights of the parties to a contract. It does not purport to address legal policy on a national or international level. However, the *inter partes* relationship need not in our view conflict with broader anti-corruptive policies. It is even possible that the legitimacy of the fight against corruption may gain long term if consequences of a finding of corruption are not perceived as indiscriminate, a perception that may enhance compliance and best practices long term. Until now it appears to have been accepted for policy-setting purposes that the maybe most corrupt party to a transaction may stand to gain since recovery of bribes are often disallowed as also a claim for payment for deliveries made under a contract tainted by corruption. As the final stage in our mapping

exercise we will now have a look at how Scandinavian law, as in effect, could offer the tools for dealing with the consequences *inter partes* of a contract (or a contractual whole) that is found by an arbitral tribunal to be tainted by corruption.

5 Civil Law Effects and Remedies Available in Arbitration to a Contract Governed by Scandinavian Law and Potentially Tainted by Corruption

As has been noted above, it is accepted today that issues of corruption are arbitrable. It is also accepted that the corruption that taints the underlying contract does not invalidate the arbitration agreement therein unless the corruption has been directed to the arbitral clause, a rare occurrence, or in certain instances where the contract is void *ab initio*. The separability doctrine is thus generally upheld in commercial contracts that may be voidable for corruption.

When discussing corruption – the various forms of which as a rule are criminalized offences in most jurisdictions – there will often be pending parallel criminal investigations or proceedings in one or several countries at various stages of maturity. It will not be possible here to deal with the effects to the arbitration of such proceedings or their outcome in any detail. Suffice it to say generally as far as the Nordic countries are concerned that an arbitral tribunal seated in any such country most likely can assess, under free evaluation of evidence, the existence of a corrupt act from a record before it, which may or may not include materials from pending or concluded criminal investigations or trials, and determine the existence of corruption by all available means as a preliminary question in the arbitration. Any monetary consequences of a criminal proceeding, such as forfeiture of the bribe to the state, would probably be treated as not affecting the arbitration. When faced with an allegation of corruption it is likely that an arbitral tribunal, in assessing the seriousness thereof, would look to whether the corrupt behavior has been reported to the police by the alleged victim.

It is probably undisputed today that arbitral tribunals seated in at least Finland or Sweden, in particular if chaired by a legal native of these countries, are generally not held to be inquisitorial (always obviously subject to personal style). This means that it is not obvious that such a tribunal would subject the parties to detailed scrutiny for the event that the tribunal's light "sniffing test" (ascribed to Michael Hwang on a GAR Live panel)[82] would indicate that the parties' contract could be tainted by corruption.[83]

The frequently referred to judge Lagergren's refusal to grant jurisdiction (or rather to refuse the protection of the law) in an ICC arbitration in relation to a transaction found to be corrupt concerned a contract for corruption which we

82 See Thomson, Douglas, *Watchdogs or bloodhounds: Is it an arbitrator's role to sniff out corruption?*, "www.globalarbitrationreview.com", 1 July 2014.

83 Space will not allow for a discussion also of the question whether a Finnish member of the Bar sitting as an arbitrator will have a reporting obligation to the authorities if corruption, often closely related to money laundering, is found and this on the assumption that certain obligations of a member of the Bar will apply also when such member sits as an arbitrator.

have already noted is invalid *ipso iure*. What we address in this section is a contract tainted by corruption.[84]

The question that we will now, as already stated, try to answer is whether there are situations where a contract/parts of a contract/the rights and obligations in a legal relationship can still obtain some legal protection upon a finding of corruption, instead of "leaving the loss to lie exactly where it has fallen", to the effect that no remedies will be available from that point onwards. The idea is to explore if there is a way to apply civil law to balance out the inequalities that necessarily follow from denying all remedies, without thereby lessening the deterrents to corruption.

As the topic suggests, we are looking at a commercial contract governed by Scandinavian law. The law applicable to the merits of the case is not, however, the only law of relevance in an international arbitration, especially not if corruption is involved. We therefore need to commence by identifying other laws, not necessarily in an exhaustive fashion, that may become relevant in the context:

lex arbitri and related procedural requirements:
(the law of the arbitral seat i.e. the arbitration law of the seat of the arbitration together with any institutional rules and best practice guidelines that may apply in the arbitration; also the rules for enforcement of any arbitral award, such as the *New York Convention*,[85]may need to be considered.)

lex materiae; lex causae
(the substantive national law applicable to the merits of the dispute chosen by the parties or determined to apply; can also be *lex mercatoria* (see below).)

lois d'application immediate; lois de police
(laws that necessarily apply alongside the law applicable to the merits such as the criminal law in the country of contractual performance or applicable national or transnational competition law.)

lex mercatoria
(a system of custom and best practice that functions as the international law of commerce, such as the UNIDROIT Principles and PECL.)

The law of the domicile/country of incorporation of a party (the company/ies) will, under private international law,[86] regulate the company law rules that become applicable for example in determining when the company should be deemed to have known of the corrupt act committed by its employee. In the determination of the company's liability, and assessment of its knowledge, other

84 Lagergren Award, ICC Case No. 1110 (1963).

85 The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

86 It will not be possible herein to go into further detail with respect to the private international law rules that determine applicability of various national laws to various aspects of a transaction and related conflicts of law.

rules may also come into play, such as Corporate Governance guidelines etc. adopted by or applicable to the company.

Looking at the laws of relevance in an international arbitration from a corruption viewpoint raises many further questions. What if the corrupt act is not illegal under the law applicable to the substance as chosen by the parties – or determined as applicable –or according to the public policy of the seat of arbitration, but under the laws of the country where the agreement or acts were performed, or under another law with which the dispute between the parties has a direct connection? Is it of significance if it is evident that the parties wished precisely to avoid the application of that law under which their arrangements are reprehensible? Does it alter the burden of proof or the standard of proof in the arbitration? What about the law of the country where the award might be enforced? These are all questions that have been answered in very different ways in legal writings and available arbitral awards.[87] It is, however, indisputable that the territorial scope of domestic criminal law has been expanded and in addition to looking at the country of performance, also the supply side of the corruption, i.e. the home country of the bribe-giver, is today given significance.[88] From the perspective of functional international commercial arbitration, enforceability under the *lex arbitri* should remain the first and perhaps last port of call under the territorial principle, since otherwise the *lex arbitri* would be denuded of importance, as also noted and discussed at the Annual Meeting of the ICC Institute of World Business Law in 2014.[89]

Within the ambit of all the above choices of law, as also the international anti-corruption conventions that not only dictate our national legislation directly or by implementation but also set the framework for the applicability thereof, we will now look at the civil law effects of corruption in commercial arbitration to a contract governed by Scandinavian law. We will continue to use the civil law legislation in Finland as an example when exploring how to apply Scandinavian law and legal principles of contract and torts law in the presence of corruption.[90]

The Nordic countries have over the years chosen different paths to implement international conventions, e.g. CISG[91], and it is fair to say that the national contract laws of the Nordic countries have grown apart. Consequently, Scandinavian contract law is not the same as when the respective national laws entered into force in the first part of the twentieth century. However, the common basic principles remain as a foundation of legal transactions in our countries based upon *pacta sunt servanda*, agreements must be kept (Sw: *avtal skall*

87 Baizeau, Domitille, *Definitions and Scope of the Topic*, Introduction in Dossier XIII Addressing Issues of Corruption in Commercial and Investment Arbitration, ICC Institute of World Business Law 2015, p. 10.

88 See Bonell and Meyer, 2015, p. 2.

89 Kreindler, Richard, *Corruption and International Arbitration – Is Anything Broken or Otherwise Worth Fixing?*, in ICC Dossier 2015, p. 193.

90 The provisions that we will look at are similar if not identical in the contract laws of the other Nordic countries and often even found under the same paragraph number, such as, for example Sections 30 ("Fraud"), 33 ("Contractual Fairness") and 36 ("*Unfair Contract Terms*").

91 United Nations Convention on Contracts for the International Sale of Goods, 1989.

hållas).[92] It is tempered by requirements of honest and decent (loyal) behavior, together with reasonability.

The principle of *pacta sunt servanda* is hence not absolute. Parties to an illicit contract also cannot, as concluded earlier in this article, ratify or validate an invalid contract. However, if the contract is voidable by a party and that party chooses not to void it, it becomes ratified. Partial ratification – or rather partial avoidance – is also possible. There are also provisions that are provided to survive the agreement, or by their nature will or can survive – regardless of its fate in other respects. We have already mentioned the agreement to arbitrate that, under the separability doctrine, will not necessarily follow the contract in which it is inserted. Other clauses could provide for confidentiality or penalties/ liquidated damages for certain occurrences, for example a breach of a representation by a party that no corruption has occurred in the making or implementation of the contract.

The provisions in the Finnish Contracts Act[93] that in our view could become applicable to a contract upon a finding of corruption are found in Chapter 3 *Invalidity and adjustment of contracts* and in particular Sections 30, 33, 36,[94] which read as follows:[95]

> *Section 30 ("Fraud")*
> *"A transaction into which a person has been fraudulently induced shall not bind him/her if the person to whom the transaction was directed was himself/herself guilty of such inducement or if he/she knew or ought to have known that the other party was so induced."*
>
> *Section 33 ("Contractual Fairness")*
> *"A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honour and good faith for anyone knowing of those circumstances to invoke the transaction and the person to whom the transaction was directed must be presumed to have known of the circumstances."*
>
> *Section 36 ("Unfair Contract Terms")*
> *"(1) If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.*

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92 The respective contract laws of the Nordic countries entered into force 1915 in Sweden, 1917 in Denmark, 1918 in Norway, 1929 in Finland and 1936 in Iceland. For a discussion on Scandinavian contract law and its importance for Nordic legal culture and legal cooperation, see Andersen, Mads Bryde; Bärlund, Johan; Flodgren Boel; Håstad Torgny, *Den Nordiske aftalelov 100 år – Festskrift i et samlet tobindsværk*, DJØF, 2015 and Anderson, Magnus, *Avtalslagen firar 100 år*, in Advokaten No. 6, 2015.

93 (Sw. *Lag om rättshandlingar på förmögenhetsrättens område 13.6.1929/228*).

94 There are other provisions that also could become applicable, like Section 28 ("Coercion"), but we will look at the ones directly relevant for our fictive example.

95 Unofficial translation by the Finnish Ministry of Justice.

> *(2) If a term referred to in paragraph (1) is such that it would be unfair to enforce the rest of the contract after the adjustment of the term, the rest of the contract may also be adjusted or declared terminated.*
>
> *(3) A provision relating to the amount of consideration shall also be deemed a contract term.*
>
> *(4) The provisions of the Consumer Protection Act (38/1978) apply to the adjustment of consumer contracts. (1260/1994)"*

Section 30, fraud, could for example become applicable in a situation where one of the parties to the Main Contract is not aware of the bribery and such innocent party has concluded that (main) contract without this information. Such a theory relies on the fraudulent behaviour of the bribing party in not informing the innocent party of a circumstance of importance for the conclusion of the contract.[96] The more general Section 33, in turn, could provide the innocent party with a tool to claim non-enforceability of the related contract due to the detected corruption element. Perhaps the most interesting provision is Section 36 which could allow for both a partial and a full adjustment or setting aside of the contract by taking into consideration all circumstances that are relevant for such determination. This could, in our opinion, allow for separating the corrupt act (e.g. the bribe agreement) from the Main Contract, invalidating the first while keeping the latter in force, with its content adjusted as deemed necessary as a consequence of the fraud.

A party could also, if innocent, argue breach of contract as a result of the corruption and claim contractual or statutory remedies from such breach. The legal remedies available in case of breach of contract would usually be specific performance, avoidance/rescission, price reduction, cure of defects and damages, independently or together with other remedies. If the corrupt act is a breach of either the specific provisions in the contract itself or under law, such remedies become available to the innocent party, which can choose the best suited remedy or, if the breach strikes to the core of the contract, its *essentialia negotii*, avoid the contract. The non-breaching party is entitled to contractual damages to put such party into the financial position it would have been in, should the contract not have been breached (Sw. *positivt kontraktsintresse*). These civil law provisions could thus allow for avoidance of the contract by a party, but also provide means for the harmful effects of the corruption to be corrected as between the parties.

It is also conceivable that an innocent party to an invalid contract could claim damages for fault in the conclusion of a contract, *culpa in contrahendo*, at least for the costs incurred to such party for concluding the contract (Sw. *negativt kontraktsintresse*). The principles of the Finnish Tort Liability Act regulating extra-contractual damages (Sw. *utomkontraktuellt skadestånd*) can provide relevant guidance in deciding on such damages.[97]

So what remedies does Scandinavian contract law make available to a party if the contract is declared invalid? While contractual remedies are not available

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96 *See* Bonell and Meyer, 2015, p. 22 for a similar reasoning relating to the impact of the asymmetry of information.

97 (Sw. *Skadeståndslag 31.5.1974/412*).

under an invalid contract, a party could claim restitution of consideration given. In fact, if a contract is declared invalid or avoided under Finnish law, all rights and obligations of the parties are null and void and the parties shall, to the extent possible, return any performances that they have made thereunder. Restitution, wholly or partially, is not always possible or practical in practice, for example in a construction project.[98] Where it is not physically possible or economically sensible to make restitution, the obvious question is then whether restitution can be made by monetary compensation, be it called damages or compensation for performance made (i.e. consideration for that part of the factory that constitutes a benefit to the Principal).

According to the Report by Bonell and Meyer there is at both a domestic and an international level an increasing tendency to try to overcome the traditional rigidity concerning the lack of restitutionary remedies, not only in cases of corruption, but with respect to illegal contracts in general. Under New York state law, for example, this has been done by making exceptions from the all-or-nothing-approach with reference to a principle of proportionality.[99]

Also the UNIDROIT Principles have opted for a flexible approach – which not only applies to contracts tainted by corruption, but to illegal contracts in general – provising for an *in casu* assessment of what should reasonably follow. Under the UNIDROIT Principles restitution may be granted where it is reasonable in the circumstances of the case taking into account, among other things, the purpose of the rule infringed by the contract.[100] In the vast majority of cases the parties to a contract tainted with corruption would still be denied any contractual remedies.[101] Overall when reading the UNIDROIT Principles with commentary regarding contractual effects of illegality, much of the reasoning could in the authors' view also be used under Scandinavian law.

Regarding extra-contractual remedies also other principles could come into play under Scandinavian contract law to level the imbalances of the contractual relationship following a finding of corruption, such as e.g. unjust enrichment, *condictio indebiti* (Sw - *läran om obehörig vinst*). In the Nordic countries there are no specific enactments relative to unjust enrichment, but a principle exists that no-one shall be allowed to gain from their own wrongdoing. Also the gain from a crime is forfeitable. According to Langsted and Langsted (Denmark) funds or property subject to confiscation under criminal law may, at least in

98 In Switzerland there was a case where the effect of the avoidance was *ex nunc*, i.e. the contract remained valid until the moment it was rescinded. This way the difficulty of winding up a long term contract was avoided. See Bonell and Meyer, 2015, p. 24. In Denmark, on the other hand, Langsted and Langsted do not think that the Danish courts would be likely to grant restitution in cases involving bribery "*primarily due to their natural reluctance against 'condoning' any corrupt actions"*. See Langsted and Langsted, 2015, p. 138 and their further sources therein.

99 Bonell and Meyer, 2015, p. 29.

100 The Report of Bonell and Meyer, 2015, p. 25-27 notes that there is no uniform answer among the countries that provided reports on the right to restitution. In some cases the right to restitution have only been granted to the innocent party (e.g. World Duty Free v. Kenya and S.T: Grand, Inc. v. City of New York, 298 N.E.2d 105, 107 (NY 1973)), whereas in some countries, as in England, the bribe-giver can in principle demand reimbursement of the performance, but the amount of the bribe is deducted.

101 Kreindler, Richard H, and Gesualdi, Francesca, 2015, p. 391.

theory under Danish law, be deployed to pay compensation/financial restitution to a victim of corruption.[102]

A corrupt act could also constitute a breach of specific provisions in the contract itself. In fact, anti-corruption clauses have found their way into commercial contracts, normally in the form of a representation that no corruption has tainted the contract. According to Bonell and Meyer the anti-corruption clauses have so far not really played a role in jurisprudence. Such clause could e.g. grant a party the right to terminate the contract in cases of corruption, which the party usually would have also under law, if the contract were not already *ipso iure* void.[103] We would cautiously take the view that anti-corruption clauses need not be looked at as boilerplate but could in fact become of significance in international arbitration as they provide both parties to a contract and the arbitral tribunal with tools to address corruption in arbitration which will thereby at least constitute a contractual breach. In addition, such clause will bring the issue of (non) corruption to the table and raise general awareness among all negotiators. ICC already offers an anti-corruption model clause under which the primary legal consequence is a right for the party convicted of bribery to cure the defect and only in the second instance does will the innocent party have the right to terminate,[104] a model that undoubtedly supports economic efficiency.

6 Conclusion

As stated in the introductory part corruption remains a huge worldwide problem, not only financially but as a bar to the development of social justice and the rule of law. The global fight against corruption has concentrated on systems for prevention and sanctions as international legal policy matters. Deterrence so far having been the main focus, lesser attention has been paid to the sometimes uneven civil law consequences between the parties to a contract tainted by corruption. The traditional approach consisting in disallowing all contractual or other remedies in relation to a tainted contract has often worked to the benefit of the most corrupt party or in all events to the benefit of a respondent in an arbitration, successfully invoking the corruption defense irrespective of its own participation therein.

National legislation is forthcoming in many parts of the world also with respect to the civil law consequences of corruption to contractual and third parties, following international efforts and conventions that set the principles and the umbrella for national implementation. As described above the UNIDROIT Principles now have introduced a proportional approach to the civil law consequences of illegal contracts, and hence contracts for or tainted by corruption, introducing the principle of restitutionary remedies. We have in this article tried to initiate a discussion on how a proportionate civil law response to corruption could be found under Scandinavian law under contract or in the form of restitution, when such matter comes before an arbitral tribunal applying a Nordic law to the substance of the dispute. The questions are complex and we

102 Langsted and Langsted, 2015, p. 140.

103 Bonell and Meyer, 2015, p. 25.

104 *ibid.*

have at best managed to map out, and hardly in an exhaustive fashion, some reasonable and proportionate responses.

With some experience from implementation of the post-Enron governance regulation in a similar effort to prevent financial fraud and also for the purpose of serving justice on an individual level, *inter partes*, it would seem preferable also from a legal policy standpoint to allow for a nuanced and proportionate response to corruption, which could also be perceived as legitimate by the parties involved. A nuanced examination and resolution of cases would also hopefully – instead of spurring technical compliance with procedures and box-ticking as a response to the increased awareness and deterrents – support true best practices to prevent that contracts are procured by corruption.

In our view Scandinavian law offers the tools to deal with the civil law consequences of corruption in a proportionate and economically efficient fashion. We look forward to a continued and fruitful discussion.