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International arbitration is both effective and efficient way to resolve complex international business disputes. Modern day society and economy rely on fast connections and efficient international trade all around the world. But when trade is conducted and contracts are formed, some disputes will always arise. International arbitration provides a widely-accepted forum for resolving those disputes.

International commercial arbitration is intended for resolving disputes occurring in international commercial transactions. Unfortunately, arbitrators may find themselves in a situation, when they are faced with issues that go into the territory of criminal law. Corruption and bribery, for example, are not unknown issues in international trade.

The objective of this paper is to examine how should arbitrators deal with the issue of suspected or alleged criminal conduct, when faced with these questions in arbitral proceedings. Are these matters arbitrable, since conducting criminal investigation and criminal proceedings belong to public authorities and state courts? What can arbitrators do with allegations of criminal conduct, if they cannot impose a criminal sentence? Which law is to be applied to these allegations, is it the law of country where criminal act has been done or are there other possibilities? Are there consequences, if arbitrators decide not to address any issues of criminal conduct? Are arbitrators required to report any suspicions to public authorities, despite arbitration being confidential? What happens to arbitration, if parallel criminal proceedings are commenced in a state court? In this thesis, I seek to find answers to these questions.

Avainsanat – Nyckelord – Keywords
international arbitration, criminal conduct, public policy, arbitrability, judicial review of arbitral awards, New York Convention, arbitration agreement, arbitral tribunal's mandate

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Allegations of Criminal Conduct in International Commercial Arbitration

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1 Introduction

1.1 Background for the topic and research question

International arbitration is both effective and efficient way to resolve complex international business disputes. Modern day society and economy rely on fast connections and efficient international trade all around the world. But when trade is conducted and contracts are formed, some disputes will always arise[1]. International arbitration provides a widely-accepted forum for resolving those disputes.

International commercial arbitration is intended for resolving disputes occurring in international commercial transactions[2]. Unfortunately, arbitrators may find themselves in a situation, when they are faced with issues that go into the territory of criminal law. Corruption and bribery, for example, are not unknown issues in international trade[3]. These so-called "business crimes"[4] include also fraud, money laundering, perjury and forgery to name a few. Arbitrators may discover the existence of criminal issues on their own during arbitral proceedings or alternatively the issue may be raised by one of the parties. If the issue is raised by a party, it is often because that party is accused of non-compliance of the agreement between the parties and therefore that party is trying to use the illegality of the agreement as a defence in arbitration.

The objective of this paper is to examine how should arbitrators deal with the issue of suspected or alleged criminal conduct, when faced with these questions in arbitral proceedings. Are these matters arbitrable, since conducting criminal investigation and criminal proceedings belong to public authorities and state courts? What can arbitrators do with allegations of criminal conduct, if they cannot impose a criminal sentence? Which law is to be applied to these allegations, is it the law of country where criminal act has been done or are there other possibilities? Are there consequences, if arbitrators decide not to address any issues of criminal conduct? Are arbitrators required to report any suspicions to public authorities, despite arbitration being confidential? What happens to arbitration, if parallel criminal proceedings are commenced in a state court? As we can see, there are numerous questions that need answers. For clarity, this paper only deals with international commercial arbitration and thus issues concerning domestic arbitration are not addressed.

[1] Lew -Mistelis - Kröll, Comparative International Commercial Arbitration, page 1
[2] Id.
[3] Hwang - Lim, Corruption in Arbitration - Law and Reality, 2012, page 1
[4] Kurkela, Criminal laws in International Arbitration – the May, the Must, the Should and the Should Not, 2008, page 285

1.2 About structure and sources

In chapter 2 there is an introduction to what arbitration is about as a concept and as a method of dispute resolution. Some advantages and disadvantages of arbitration are also presented. Then the concept and importance of arbitration agreement is examined along with concept of arbitrability, as they are both essential in considering whether a matter can be resolved in arbitration. Arbitrability of criminal issues is also addressed (chapter 3). After that the concept of public policy is examined in detail as well as its significance regarding allegations of criminal conduct (chapter 4). In chapter 5 arbitral tribunal's mandate to investigate criminal issues is examined along with the question how arbitrators are equipped to investigate issues of criminal conduct. Attention is also paid to questions whether arbitrators have a duty to disclose suspected criminal activities to public authorities and how are arbitrators equipped to investigate issues of criminal character. After that the most relevant crimes that can appear in arbitration are presented in chapter 6. Then the issue of burden and standard of proof is examined in detail regarding international arbitration in general and if different standards should be applied when dealing with criminal issues. (chapter 7). Conflict of law issues and their effect on arbitral proceedings are examined in chapter 8. In chapter 9, it is examined what kind of legal consequences follow, if arbitrators are able to establish that criminal or illegal acts have been committed. Since it is also possible that criminal proceedings are commenced (on a state court) while arbitral proceedings are still pending, the effect of parallel proceedings on arbitration needs to be addressed (chapter 10). Chapter 11 examines the issue whether arbitrators have a duty to disclose suspected criminal acts to public authorities. Judicial review of arbitral awards along with different approaches applied in different countries are examined in chapter 12. Finally, conclusions are presented in chapter 13.

This study is conducted as legal-dogmatic research. I have used legal literature, both volumes and articles, as well as arbitral awards and court decisions as my primary sources in this paper. Especially with arbitral awards and also with some foreign court decisions I faced the problem of accessing the original source. Arbitral awards are not public like court decisions and while they are sometimes published afterwards in a legal publication, they can still be hard to get access to. Sometimes only a summary is published instead of the whole award. Due to these problems, I have had to resort to secondary sources as arbitral awards are often described at length in arbitral literature. This may not be an ideal situation or method of study, but I found it to be the only reasonable solution at my disposal to conduct this research.

2 Arbitration – what is it?

Arbitration is a dispute resolution method and in some ways similar to court litigation. In arbitration parties submit their dispute to an individual or individuals whose judgement they are willing to trust[5]. These individuals, called arbitrators, are essentially acting as judges in the dispute. Their job is to listen to the parties, consider the facts and the arguments and ultimately provide a decision[6]. That decision is called an arbitral award. That decision, award, is both final and binding on the parties[7]. Since arbitrators do not represent any public or official authority as they are private individuals appointed by the parties, they cannot force parties to obey the award. Essential feature of arbitration is that it is based on mutual agreement of the parties rather than public authority[8]. Mutual agreement is mandatory also because by submitting their dispute to arbitration parties waive their right to have their dispute resolved in a national court[9].

Access to court is a fundamental right, according to which every person shall have the right to have justiciable disputes settled by a court of law[10]. Resorting to arbitration instead of litigation in a national court, the parties make a conscious decision of settling their dispute outside of public court of law. That is the reason why a valid arbitration agreement is required for commencing any arbitration. The arbitration agreement must usually be made in written form and for example UNCITRAL Model Law on International Commercial Arbitration provides that "the arbitration agreement shall be in writing"[11]. The requirement of written form is generally fulfilled if the arbitration agreement's content is recorded in any form[12]. The arbitration agreement must be done and it must be valid in order to an arbitral tribunal to have mandate to handle and resolve the dispute submitted by the parties. If there is no arbitral agreement, the arbitral tribunal cannot render any binding award either.

While arbitration is based on the parties' agreement to arbitrate, it does not mean that arbitration is a consensual method of dispute resolution similar to mediation for example. In arbitration the parties do not agree on the outcome. The parties only agree to arbitrate and under which conditions arbitration

[5] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 1 A (b) 1.04
[6] Id.
[7] Id.
[8] Id.
[9] see Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 A (a) 2.01
[10] see for example Convention for the Protection of Human Rights and Fundamental Freedoms 6.1 Article or International Covenant on Civil and Political Rights 14.1 Article
[11] UNCITRAL Model Law Article 7 (2)
[12] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 B (a) 2.20

is going to be done. It is the arbitrators' duty to make a final decision based on applicable laws, arguments and evidence presented by the parties. Although, a consent award is also possible[13].

It is possible that the losing party will refuse to act according to the arbitral award. However, there are mechanisms to help in the enforcement of the award. That is not the concern of the arbitral tribunal though. When the award has been rendered, the arbitrators have fulfilled their task. The rest is up to the parties and often also national courts.

2.1 Pros

Why would one choose arbitration over litigation in court? There must be some good reasons, since it is said that "arbitration is now the principal method of resolving international disputes involving states, individuals and corporations"[14]. First, arbitration is effective because it is final and binding to the parties[15]. There is no possibility to appeal and a dispute settled in arbitration cannot be settled again in court. In court litigation instead, there is usually a possibility to appeal for a higher instance and maybe even another possibility after that instance. In business world time is often money and here arbitration usually prevails over national courts. In institutional arbitration the institution often provides rules which contain a time limit for the arbitral tribunal to render the award. In the arbitration rules of the International Chamber of Commerce (ICC) it is stated that "the time limit within which the arbitral tribunal must render its final award is six months"[16]. That is significantly less than litigating in different court instances for several years.

Second, arbitration is neutral[17]. Arbitration is not conducted under any state authority and arbitrators are not public officials, but experts chosen for resolving that particular dispute. The parties may want to have a truly neutral forum, instead of home country of one party or the other[18]. Also expertise plays a factor. The problem with court litigation is that many national courts are not that capable of resolving complex international commercial disputes[19].

Third, in arbitration it is possible for the parties to appoint their own arbitrators. It is common that if an arbitral tribunal consists of three arbitrators and two of them are appointed by the parties[20]. Then

[13] for example ICC Arbitration Rules Article 32
[14] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 1 A (a) 1.01
[15] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 1 A (b) 1.04
[16] ICC Arbitration Rules Article 30 (1)
[17] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 1 B (i) 1.100
[18] Id, Chapter 1 B (i) 1.99
[19] Born, International Arbitration: Law and Practice, 2015, Chapter 1.02 D 20
[20] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 1 B (i) 1.100

the two arbitrators together appoint a third one to act as a president of the arbitral tribunal. If there is only single arbitrator, he or she may be chosen by agreement of the parties[21].

Fourth, arbitration has the advantage of wide international enforceability compared to national courts. Enforcing foreign court judgements can be challenging. According to Born: "There are again only a few regional arrangements for the enforcement of foreign court judgments and there is currently no global counterpart to the New York Convention for foreign judgments"[22]. In today's high speed global economy, business demands reliable and efficient solutions. Winning in an important case does not do much good, if the winning party cannot effectively make the losing party obey the court decision. I am reluctant to believe that the losing party would just obey the final decision, if the winning party did not have any really effective way to actually enforce that decision. In arbitration, there is a treaty called Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention is a truly global treaty with 156[23] States being party to the Convention. The basic principle of the Convention is that foreign arbitral awards are recognized and enforced in courts, as refusal can be done only on limited grounds[24]. Thus national courts are not allowed to re-evaluate foreign arbitral awards. Courts still have to ensure that an arbitral award does not violate any fundamental legal rights or principles (public policy control), but otherwise evaluation of the award's contents is not allowed[25].

The New York Convention makes arbitration effective and flexible. Once a party has obtained the arbitral award, it is possible, at least in principle, to seek enforcement of the award anywhere in the world. This can be really useful especially when the losing party has assets in multiple countries. The principle of the New York Convention that foreign arbitral awards shall be recognized and enforced, if there is not a specific ground not to, has great significance. In reality, everything may still not go always smoothly. But all in all, the New York Convention is considered "a treaty of great legal and practical importance" and most importantly "it works"[26].

2.2 And cons

So far there are many advantages listed in favour of arbitration. So are there any real disadvantages choosing arbitration over litigation? Courts have better tools at their disposal, if one of the parties refuses to cooperate. Courts are able to make use of public authority and request assistance of the

[21] Id.
[22] Born, International Arbitration: Law and Practice, 2015, Chapter 1.02 C 19
[23] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, last visited 22.12.2016
[24] Born, International Arbitration: Law and Practice, 2015, Chapter 1.02 C 19
[25] Lew -Mistelis - Kröll, Comparative International Commercial Arbitration, page 706
[26] Schwebel, Stephen M., Foreword in Marike R. P. Paulsson, The 1958 New York Convention in Action, 2016, page xx

police if needed. Courts can issue orders to freeze assets or order a person not leave the country. An arbitral tribunal does not have that kind of coercive measures[27] and must seek assistance of local courts if such measures are required. On the other hand, courts can act only inside their own jurisdiction. In a dispute with international character, where parties come from different countries, courts may also have to deal with the fact that they cannot directly force a party, who is located in different country, to do something that party is not willing to do. Then the court is in pretty similar position compared to an arbitral tribunal.

What is sometimes criticised about arbitration is that it can be considered expensive[28]. Naturally, there is the difference compared to litigation that in litigation parties do not pay the salary of the judge. In arbitration parties, or the losing party, pay all expenses and fees of the arbitrators. After all, arbitration is a private dispute resolution mechanism not run by public funds. So how much does it pay then? The short answer is, it depends. For example, Swiss Chamber of Commerce's Arbitration Institution (SCAI) lists its cost of arbitration as follows: "Cost of Arbitration consists of: 1. Registration fee. 2. Arbitrators' fees and expenses. 3. Administrative Costs (if applicable)."[29] All the fees are estimated based on the amount of money in or value of the dispute so that the fee is a certain percentage of the value of the dispute. A multiplier of the percentage is used depending on the difficulty and other factors of individual case. The final costs are determined by the arbitral tribunal and SCAI[30]. To give a better estimation of the costs there is a calculator at SCAI's website where one can type amount in dispute, number of arbitrators (sole or three) and currency used. A hypothetical dispute of 5 000 000 euros in amount and a panel of three arbitrators would according to the calculator result total costs between 114 907 euros and 411 389 euros, the average being 263 148 euros. Therefore, arbitration in that case would cost approximately 5 % of the value of the dispute on average. That figure does not include parties own expenses and legal costs. Thus we can conclude that arbitration is not exactly cheap, but is it really expensive either? It is probable that several years of litigation in courts would ultimately cost more in legal expenses than arbitration and such is the view also in legal literature[31].

To conclude this comparison, it is safe to say that in international commercial disputes arbitration is generally the better choice for dispute resolution. It has many advantages over court litigation and

[27] Yesilirmak, Provisional Measures in International Commercial Arbitration, 2005, page 8
[28] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 1 B (d) (v) 1.123
[29] https://www.swissarbitration.org/Arbitration/Cost-of-Arbitration
[30] Id.
[31] Lew -Mistelis - Kröll, Comparative International Commercial Arbitration, page 9

few weaknesses. Arbitration is both effective and professional and arbitral awards have wide recognition and enforceability around the world.

3 Arbitration agreement and arbitrability

As already mentioned, a valid arbitration agreement is required for any arbitration to take place. Besides being in writing, what other requirements there are for an arbitration agreement? According to Redfern and Hunter, an arbitration agreement that provides for international arbitration must meet international requirements. Otherwise, the arbitration agreement and any award related to it, may not be recognized and enforced internationally.[32] They also state that in establishing "the international requirements" the New York Convention must be the place to start[33]. The New York Convention Article II (1) provides the following requirements under which each contracting state shall recognize and give effect to an arbitration agreement:

- the agreement is in writing;
- it deals with existing or future disputes;
- these disputes arise in respect of a defined legal relationship, whether contractual or not;
- concerning a subject matter capable of settlement by arbitration.

There are also two more requirements provided by provisions of Article V (1)(a) according to which recognition and enforcement of the award may be refused if the arbitration agreement was made by a person under incapacity or if the agreement is not valid under the applicable (national) law. It should be pointed out that the court where enforcement is sought does not apply these last two requirements on its own motion, ex officio, rather it is the responsibility of the resisting party to prove these allegations. Redfern and Hunter have expressed these last two requirements also positively:

- "the parties to the arbitration agreement must have legal capacity under the law applicable to them;
- the arbitration agreement must be valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. (In the words used earlier in the New York Convention, in Article II (3), the agreement must not be 'null and void, inoperative or incapable of being performed'.)"[34]

[32] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 A (d) 2.10
[33] Id, Chapter 2 A (d) 2.11
[34] Id, Chapter 2 A (d) 2.12

In regard to the requirement of agreement dealing existing or future disputes, there are two basic forms of arbitration agreements: The arbitration clause and the submission agreement. The arbitration clause deals with disputes arising in the future. The submission agreement instead, deals with the past. It is an agreement to submit an existing dispute to arbitration.[35] According to Redfern and Hunter, "most international commercial arbitrations take place pursuant to an arbitration clause in a commercial contract."[36] They also call arbitration clauses as "midnight clauses"[37], because they are often the last thing considered and added to a business contract. In some cases, the clause may be added almost as an afterthought after long negotiations about the main contract. It may feel unpleasant to think about how to resolve future disputes if such arise. Anyway, it is unwise to not pay attention to the arbitration clause, if one is included in the contract. Many problems may later be avoided, if parties take the extra moment to think about what they want to include in their arbitration clause and what kind of arbitration clause serves them best. Reaching a mutual understanding is likely to be much more difficult after a dispute has already arisen.

"These disputes arise in respect of a defined legal relationship, whether contractual or not". Normally international arbitrations arise out contractual relationships between partners. However, as Redfern and Hunter point out, the New York Convention and the UNCITRAL Model Law only demand a "defined legal relationship" to exist between the parties. That relationship may or may not be a contractual one. In practice, there needs to be some kind of contractual relationship, because there must be an arbitration agreement in order any arbitration proceedings to exist.[38] Ultimately, the arbitration agreement also sets the boundaries to the arbitral tribunal's jurisdiction and powers in any particular case, together with the relevant applicable law. It is up to the arbitral tribunal to consider the dispute in question and decide based on the wording of the arbitration agreement, if the parties intended that kind of dispute to be resolved by arbitration.[39]

"Concerning a subject matter capable of settlement by arbitration." This is essentially a question of arbitrability which will be contemplated in greater detail in Chapter 3.2. In general, all matters where settlement is allowed can be brought to arbitration just as they can be taken to be settled in court. However, some matters are reserved for national courts only and thus nonarbitrable, like matters related to family law or imposing criminal sentences[40]. These matters have also a public interest, so they cannot be resolved in a private process like arbitration. If a dispute is not arbitrable under national

[35] Hober, International Commercial Arbitration in Sweden, 2011, page 90
[36] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 A (b) 2.04
[37] Id.
[38] Id, Chapter 2 B (b) 2.25
[39] Id, Chapter 2 B (b) 2.28
[40] Mistelis, in Arbitrability: International and Comparative Perspectives, 2009, page 15

law, then the dispute cannot be resolved by arbitration even if there is otherwise valid arbitration agreement. Which matters are arbitrable and which are not, may vary between different countries[41].

3.1 Arbitration agreement and separability presumption

It is impossible to talk about arbitration agreements without mentioning the separability presumption. As Gary Born says: "The separability presumption is one of the conceptual and practical cornerstones of international arbitration."[42] The separability presumption is described by English High Court in the famous case Westacre as follows:

> "The characteristics of an arbitration agreement…are in one sense independent of the underlying or substantive contract and have often led to the characterization of an arbitration agreement as a 'separate contract.' (An arbitration agreement) is ancillary to the underlying contract for its only function is to provide machinery to resolve disputes as to the primary and secondary obligations arising under that contract."[43]

In other words, the arbitration agreement is considered to be separate from the main contract. That is significant, because otherwise any ground for making the main contract not valid would also affect the arbitration agreement. Without the separability presumption invalidity of the main contract would always cause the arbitration agreement to be invalid too. It would also make claiming the main contract to be invalid an appealing guerrilla tactic, when a party tries to avoid arbitration proceedings. In order to avoid that, the arbitration agreement is generally understood to be "autonomous and juridically independent from the main contract". Such view was held by the arbitrators in the final award of the ICC case number 8938 from 1999[44].

The separability presumption is accepted and applied both in common law court praxis, as mentioned above, and in civil law systems. In his book Born cites both French and Swiss court decisions, where the separability presumption or doctrine is recognized[45]. However, despite wide recognition, there are uncertainties regarding basis, content and effect of the separability presumption. Even the appropriate name for the doctrine is up to discussion. The separability doctrine, severability doctrine, autonomy or independence of the arbitration clause all refer to the same principle. According to Born, the expression separability presumption should be preferred. He thinks that the separability doctrine

[41] Lew -Mistelis - Kröll, Comparative International Commercial Arbitration, page 188
[42] Born, International Commercial Arbitration, 2014, page 350
[43] Westacre Invs. Inc. v. Jugoimport-SDPR Holdings Co., English High Court, 1998; case cited in Born, International Commercial Arbitration, 2014, page 350
[44] ICC Case N.o 8938, XXIVa Y.B. Comm. Arb. 174, 176 (1999); case cited in Born, International Commercial Arbitration, 2014, page 350
[45] Born, International Commercial Arbitration, 2014, page 350

does not adequately reflect "the parties' ability to negate or alter the separable status of their arbitration clause by agreement".[46] Furthermore, he considers calling the arbitration clause "autonomous" or "independent" inaccurate, because the arbitration clause is actually closely connected to the main contract and is meant to support it. Although being considered separate from the main contract, it does not mean that the arbitration agreement can be completely autonomous or independent from it.[47]

The separability presumption can also work the other way around. In the event that the arbitration agreement must be deemed invalid, that does not automatically make the main contract invalid. Only if the same defects extend to both contracts, they both need to be considered invalid.

Is the separability presumption recognized in intenational arbitration conventions? The New York Convention does not directly refer to the separability presumption, but it recognises the idea that the arbitration agreement can be separated from the main contract. In the Convention's Article II (1) an arbitration agreement is referred to as "an agreement is writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them…" In Article II (2) it is stated that "the term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement…". It can be derived that the Convention sees an arbitration agreement to be an agreement in itself which deals with the subject of arbitration. Still this does not necessarily mean that an arbitration agreement is truly separate from the underlying contract.

The Convention's Article V (1)(a) works in a similar fashion. It provides that recognition and enforcement of an arbitral award may be refused if the arbitration "agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". So the article recognises that validity of the arbitration agreement can be reviewed separately from the main contract. If a different set of national laws and legal rules can be used to evaluate the validity of arbitral agreement than to evaluate the underlying contract, it very much implies the arbitration agreement to be separate from the underlying contract.

According to Born, there are different opinions whether the New York Convention compels recognition of the separability presumption. Some views take the positions that the Convention is "indifferent" to existence of the separability presumption. While others think that the Convention implicitly requires the application of the separability doctrine.[48] Born considers that both of these

[46] Born, International Commercial Arbitration, 2014, page 353
[47] Id, pages 352-353
[48] Id, page 356

views are mistaken. According to him, "the Convention rests on the premise that arbitration agreements can, and will ordinarily, be separate agreements and these agreements therefore will often be treated differently from, and subject to different rules of validity and different choice-of-law rules than, the parties' underlying contracts".[49] He sees that parties to international arbitration agreements usually intend arbitration agreements to be separable from the underlying contracts and the New York Convention mandates that[50].

As already mentioned above, the separability presumption has great significance in international arbitration process. Born lists several consequences of the separability presumption:

a. the possible validity of an arbitration agreement, notwithstanding the non-existence, invalidity, or illegality of the parties' underlying contract
b. the possible application of different national law to the arbitration agreement than to the underlying contract
c. the possible application of different legal rules within the same legal system to the arbitration agreement than to the underlying contract
d. the possible validity of the underlying contract, notwithstanding the invalidity, illegality, or termination of an associated arbitration clause.[51]

The first consequence on the list distinguishes a difference between validity of an arbitration agreement and the underlying contract. The arbitration agreement may survive despite the fate of main contract. On the other hand, a challenge against the underlying contract (based on its existence, validity or legality) does not affect the arbitration agreement and thus that challenge needs often be referred to arbitration.

Born points out that it is important to make a distinction between issues of separability and competence-competence[52]. I will contemplate competence-competence in detail later on, but here can already be said that competence-competence in arbitration refers to the arbitral tribunal's power to rule on its own jurisdiction[53]. Hence the arbitral tribunal may decide on its own discretion which issues, based on the wording of the arbitration agreement, belong under the arbitral tribunal's mandate and which do not. Only after an arbitral award has been rendered, can the question be brought before a court, whether the arbitral tribunal has acted outside its jurisdiction.

[49] Born, International Commercial Arbitration, 2014, page 357
[50] Id, page 357
[51] Id, page 401
[52] Id, page 469
[53] Id, page 470

To compare the issue of separability with competence-competence, separability is a matter of determining whether a valid arbitration agreement or clause exists separately from the underlying contract. Competence-competence is about the arbitral tribunal's power to decide about these questions of validity, even if that effectively affects the tribunal itself. These matters are related to each other, but they are still two distinct matters.

3.2 Arbitrability

Arbitrability is about which types of dispute may be brought and resolved in arbitration. Some matters belong solely to the jurisdiction of national courts and in such matters settlement by arbitration is not possible. As mentioned before, issues regarding family law and matters that have a public interest are generally not arbitrable. According Born, "typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters, domestic relations and succession, bankruptcy, trade sanctions, certain competition claims, consumer claims, labor or employment grievances and certain intellectual property matters"[54]. Arbitration may be a private proceeding, but it has public consequences for example in recognizing and enforcing arbitral awards[55]. For example, the New York Convention[56] and the UNCITRAL Model Law[57] can only be applied to disputes that can be settled by arbitration. Agreements to arbitrate on matters that are not arbitrable do not need to be given effect, while being otherwise valid. In the same way, arbitral awards concerning nonarbitrable matters do not need to be recognized.[58]

There is no single, universally accepted rule on which matters are arbitrable and which are not. Each state decides which matters that state considers arbitrable and which nonarbitrable. The results may wary between states depending on their political, social and economic policy[59]. In deciding the question of arbitrability, the legislators and courts need to balance the public interest of reserving certain matters to courts and at the same giving as much freedom as possible for private parties to arrange their legal affairs as they see fit[60]. In the end the question of arbitrability revolves much around the conflict between personal freedom and public interest.

The concept of arbitrability is not static or permanent. Perceptions may change over time[61] and matters which once were considered nonarbitrable may become arbitrable in the eyes of the court.

[54] Born, International Commercial Arbitration, 2014, page 945
[55] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 F (a) 2.126
[56] the New York Convention Articles II (1) and V (2)(a)
[57] UNCITRAL Model Law Articles 34 (2)(b)(i) and 36(1)(b)(i)
[58] Born, International Commercial Arbitration, 2014, page 944
[59] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 F (a) 2.127
[60] Id.
[61] Id, Chapter 2 F (a) 2.129

Such a change has happened in matters regarding competition law, for example. In the famous US case American Safety, the court held that:

> "A claim under the antitrust laws is not merely a private matter … Antitrust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. We do not believe Congress intended such claims to be resolved elsewhere than the Courts."[62]

After the American Safety case it was long held (in the US) that antitrust or competition law issues are not arbitrable, because of the strong public interest tied to them. I think that the view of the court in the American Safety case is quite understandable in that sense that antitrust issues generally affect much larger audience than just the parties. It is in the interest of state to prevent antitrust violations and try to ensure that any possible violations are dealt with accordingly. If it is the objective of the antitrust legislation to protect the public interest by protecting free market economy, why should it be allowed that disputes related to such matters could be resolved in private process like arbitration.

However, the US Supreme Court adopted a different approach in the Mitsubishi case in 1985[63]. In that case the Court decided that antitrust issues arising out *international contracts* were arbitrable under the Federal Arbitration Act[64]. The Court stated in its decision that:

> "We conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."[65]

The Court also addressed the issue of public interest by pointing out that national courts could still ensure at the enforcement stage of arbitral awards that necessary legitimate interests have been addressed in the award. If that were not the case, the enforcement of arbitral award could be denied based on public policy. The Court stated that:

> "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The New York

[62] American Safety Equipment Corporation v JP Maguire Co. 391 F.2d 821 (2nd Cir. 1968)
[63] Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc. 473 US 614, 105 S.Ct 3346 (1985)
[64] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 F (b)(ii) 2.136
[65] Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc. 473 US 614, 105 S.Ct 3346 (1985), at 629

> Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to a public policy of that country"."[66]

The so-called public policy exception in the New York Convention Article V (2)(b) makes it possible for state courts to refuse recognition and enforcement of an arbitral award based on violating the public policy of the country where recognition and enforcement is sought. Ultimately, it is up to each state to determine its public policy. Naturally, that also means that public policy may vary between different states. In legal literature and in arbitration community there has been a lot of discussion regarding the public policy exception and the concept of international public policy, but that topic will be addressed later in chapter 4.

One could say that the more protective spirit of (US) national courts has changed for more pro-arbitration attitude. The following quote of the US Supreme Court in the case Mitsubishi gives a good picture of the approach:

> "The utility of the (New York) Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own."[67]

The Court sees that it is more important to support and promote international commercial arbitration than to stick too eagerly on traditional views on arbitrability. If national courts cannot trust the decisions made in international arbitration, it makes it very difficult for international arbitration to work efficiently. The effectiveness of international arbitration much relies on recognition and enforcement of arbitral awards. That does not happen if national courts need to review the awards before enforcing them. That kind of procedure would frustrate the whole process and bring much uncertainty international arbitration.

Similar development regarding arbitrability of competition law issues has happened also in Europe. Rules on competition are regulated in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Their basis on the Treaty makes them part of mandatory legislation in the EU. EU treaties have the power to override any national legislation of the member states, should there be a conflict between provision of the Treaty and national law of a member state. In competition law

[66] Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc. 473 US 614, 105 S.Ct 3346 (1985), at 638
[67] Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc. 473 US 614, 105 S.Ct 3346 (1985), at 639 footnote 21

issues the European Commission is the official supervising authority, which oversees that competition rules are being followed in the EU market.

The mandatory nature of EU competition law applies also to arbitration and arbitral tribunals. It is recognized that European competition law is comparable to international public policy at least when the EU member states are in question. Therefore, arbitrators need to comply with these mandatory competition rules, when the seat of arbitration is located in the territory of one of the member states. This probably applies also in cases where the seat of arbitration is located outside the EU, but the agreement has an effect within the EU.[68]

The US Supreme Court case Mitsubishi had significant impact also on arbitration and European competition law. Finally in the case Eco Swiss v. Benetton[69] the European Court of Justice (ECJ) recognized the right of arbitrators to resolve issues regarding European competition law. The underlying contract was a licensing agreement between Eco Swiss China Time Ltd, Bulova Watch Company Inc and Benetton International NV permitting manufacture and subsequent sale of watches with the wording "Benetton by Bulova". The applicable law to the agreement was Dutch law and the agreement contained an arbitration clause under which all disputes arising from the agreement should be determined under the Rules of the Netherlands Arbitration Institute. A dispute arose between the parties and the agreement was terminated. The dispute was settled in arbitration resulting an award for monetary compensation for wrongful termination. Benetton sought annulment of the award for violating the competition rules of the TFEU (Article 101).[70] The Dutch Supreme Court requested interpretation of the EC Treaty (now TFEU) from the ECJ and as well as to answer the following question whether:

1. Arbitrators are required to apply Article 85 (now Article 101), when parties have made no reference to it?[71]
2. Can courts annul arbitral awards for violating competition law rules of Article 85 (now Article 101)?[72]

In its decision, the ECJ confirmed Article 85 (now TFEU Article 101) to be a mandatory provision and fundamental for the functioning of the internal market in the EU[73]. The ECJ ruled that

[68] Lew, Competition Laws: Limits to Arbitrators' Authority, 2009, page 245
[69] Eco Swiss China Time Ltd v. Benetton International NV (Case C-126/97) of 1 June 1999
[70] Lew, Competition Laws: Limits to Arbitrators' Authority, 2009, page 255
[71] Eco Swiss China Time Ltd v. Benetton International NV (Case C-126/97), par. 30 (1)
[72] Eco Swiss China Time Ltd v. Benetton International NV (Case C-126/97), par. 30 (2)
[73] Eco Swiss China Time Ltd v. Benetton International NV (Case C-126/97), par. 36

> "A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 of the EC Treaty (now TFEU Article 101), where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy."[74]

The ECJ decision affirmed that national courts are allowed to review and annul, if necessary, arbitral awards that violate public policy, which in this context would be mandatory provisions of the EU competition law. It should also be noted that this power does depend on in which stage of the process the allegation of competition law violation is raised. In Eco Swiss v. Benetton, it did not constitute a problem that such allegation was raised before a national court, after the arbitral award was rendered.[75]

In summary, competition law issues are considered as mandatory provisions in the EU and they need to be applied properly even if the arbitration takes place outside the EU, but the award has effect in the EU[76]. If arbitrators fail to apply these mandatory rules or they apply them incorrectly, the resulting arbitral award may be set aside or enforcement may be refused in national courts. The reason why arbitrability of competition law issues was brought up here, is that it works as a prime example how the concept of arbitrability can change over time and that issues with public interest can also be resolved in arbitration. However, enforcing courts still have the final say by controlling that awards do not violate public policy. There is a lot of similarity here with the issue of dealing with allegations of criminal conduct in arbitration. Also criminal matters have a strong connection to public interest. Similarly, arbitrability of criminal issues has also changed over time.

As a closing comment on arbitrability of commercial disputes, it can be said that arbitrability is not usually an issue. It is an important issue to be aware of, but one that rarely causes problems. According to Redfern and Hunter, "the significance of arbitrability should not be exaggerated".[77]

[74] Eco Swiss China Time Ltd v. Benetton International NV (Case C-126/97), par. 41
[75] Lew, Competition Laws: Limits to Arbitrators' Authority, 2009, page 256
[76] Lew, Competition Laws: Limits to Arbitrators' Authority, 2009, page 257
[77] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 (F) (c) 2.160

3.3 Arbitrability and claims of criminal conduct

"Arbitration is usually regarded as a domain exclusively reserved for private law. Inevitably, however, certain criminal matters and allegations might creep into arbitral proceedings[78]."

If criminal matters appear in arbitration, this immediately raises the question of their arbitrability. As Gary Born says, "disputes involving claims of corruption, bribery or similar illegality have long raised issues of arbitrability[79]." How should one approach this issue then? There are no explicit rules or legislation concerning this matter. Therefore, one must begin by examining the relevant case law. Regarding bribery and corruption in arbitration, there is a famous ICC case from 1963, where Gunnar Lagergren acting as a sole arbitrator declined jurisdiction over a claim which included allegations of bribery of government officials[80]. In the case Lagergren found the dispute to be nonarbitrable. According to him the contract was "condemned by public decency and morality", because it "contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business". Furthermore, Lagergren stated that the parties to that kind of contract had "forfeited the right to ask for assistance of the machinery of the justice".[81]

Gunnar Lagergren's view was that contracts which include performance of illegal activity are not arbitrable. Instead of relying on specific national law, Lagergren applied general principles (of law). In his decision, he stated that:

> "It cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators."[82]

Later Lagergren's analysis and view has been rejected and arbitrators' competence to resolve claims of illegality accepted[83]. This probably serves practical needs in arbitration. According to Michael Nueber, "arbitral tribunals have to deal with corruption cases on a regular basis"[84]. As corruption increases worldwide, also arbitration proceedings involve issues of corruption more often[85]. The

[78] Hiber - Pavic: Arbitration and Crime, 2008, page 461
[79] Born: International Commercial Arbitration, 2014, page 989
[80] ICC Case No 1110 (1963)
[81] case cited in Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 F (v) 2.150
[82] case cited in Born: International Commercial Arbitration, 2014, pages 989-990
[83] Born: International Commercial Arbitration, 2014, page 990
[84] Nueber: Chapter I: The Arbitration Agreement and Arbitrability, Corruption in International Commercial Arbitration – Selected Issues, 2015, page 3
[85] Id.

modern approach bases itself on the concept of separability and has been widely accepted on national and international level. It holds that "an allegation of illegality does not in itself deprive the arbitral tribunal of jurisdiction".[86] Following the principle of competence-competence, the arbitral tribunal can rule on its own jurisdiction which includes also the questions of illegality involved in the dispute at hand. According to the concept of separability, the arbitration agreement survives even if the underlying contract would be tainted by illegal conduct.

In addition to bribery and corruption, arbitrators may have to deal with allegations of fraud. It seems that these allegations can be dealt with like allegations of bribery and corruption. Thus, there is no apparent reason for the arbitral tribunal to decline jurisdiction in case where allegations of fraud are raised[87]. One exception can be mentioned, there is a Pakistani Supreme Court judgement, where it was concluded in the decision that claims of fraud cannot be arbitrated[88]. But according to Gary Born the decision contradicts the New York Convention and state practice on arbitrability[89]. It is probably somewhat questionable what kind of conclusions should be drawn from the Pakistani decision regarding arbitrability of claims of fraud, if any at all.

There is also the possibility that the alleged criminal conduct affects directly the arbitration agreement rather than the underlying contract. Due to separability doctrine, it is entirely possible that the arbitration agreement can be deemed invalid, but it does not affect the underlying contract. This issue deals with substantive validity of arbitration agreement. The New York Convention provides that arbitration agreement may be considered "null and void", "inoperative" or "incapable of being performed"[90]. Here we are interested in the category of "null and void". It is also good to notice that substantive validity of arbitration agreement is a different from the issue of arbitrability. Substantive validity of arbitration agreement concerns arbitration agreement's contractual validity in general, while arbitrability or nonarbitrability concerns only certain kind of dispute[91].

The New York Convention does not clarify what an arbitration agreement being null and void actually means. According to Gary Born, "null and void exception refers to cases in which an arbitration agreement was defective or invalid from the outset. Typical examples of defences falling within the category include fraud or fraudulent inducement, unconscionability, illegality and mistake."[92] Born also mentions that, at least in principle, any defects in formation or consent regarding the arbitration

[86] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 F (v) 2.151
[87] Blackaby - Partasides - Redfern - Hunter, Redfern and Hunter on International Arbitration, 2015, Chapter 2 F (vi) 2.154
[88] The Hub Power Co. v. Pakistan WAPDA, 16 Arb. Int'l 439 (Pakistan S.Ct. 2000)
[89] Born: International Commercial Arbitration, 2014, page 991
[90] The New York Convention Article II (3)
[91] Born, International Commercial Arbitration, 2014, page 837
[92] Id, page 841

agreement should not belong under the category of null and void. This is because there would be no (valid) arbitration agreement due to those defects. The question is if there is any agreement at all. Whereas the New York Convention Article II (3) refers to arbitration agreement being null and void. Thus there should be an arbitration agreement in the first place. However, Born still prefers the view that Article II (3)'s null and void category should be interpreted expansively and that it includes all claims that an arbitration agreement is not valid and binding. This should also include claims that there are defects in formation or consent regarding the arbitration agreement. Born thinks that this view better serves the purpose of the New York Convention and its global application. Therefore, "all challenges to the validity of an arbitration agreement should fall within Article II (3)'s "null and void" category".[93]

To summarize, it is possible that arbitration agreement is tainted for example by fraud or fraudulent inducement. Then the arbitration agreement can be considered null and void, if challenged successfully by a party. In that case the arbitration agreement ceases to exist (if technically it did not exist in the first place). However, the arbitration agreement being invalid does not automatically affect the underlying contract due to the separability doctrine. Only if the same defect causing invalidity applies to both arbitration agreement and the underlying contract, they both must be considered invalid.

Continuing with the issue of separability. It is established that the arbitral tribunal has jurisdiction to resolve issues, which include alleged criminal conduct, because those allegations do not affect the validity of the arbitral agreement. However, is it possible that alleged illegal conduct breaches the separability principle and affects also the arbitration agreement? One possible scenario, which must be discussed, is that can the criminal conduct constitute such a gross violation of public policy that it also results the nullity of the arbitration agreement?

The ICC case Westacre[94] from 1994 deals with corruption and its effect on arbitration agreement. The Panamanian company Westacre Investment Inc. (Westacre) had signed a contract with the Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia (the Directorate) and the Udruzena Beogradska Banka DD (the Bank). The Directorate appointed Westacre as a consultant in conducting sale of M-84 tanks to the Kuwait Ministry of Defence. Westacre was agreed to receive fees based on the total orders made. The contract included an arbitration agreement, which provided that any disputes arising out of the agreement (contract) shall

[93] Born, International Commercial Arbitration, 2014, pages 841-842
[94] Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd (ICC Award No. 7047/JJA) ("Westacre")

be settled in accordance with the rules provided for in the Arbitration Rules of the International Chamber of Commerce.[95]

A dispute arose between the parties and the Directorate terminated the contract. The Directorate refused to pay the fees related to the orders made by the Kuwait Ministry of Defence. The dispute was settled in ICC arbitration proceedings and in the final award (majority decision) the Directorate was ordered to pay the outstanding fees. The award was also confirmed by the Swiss Tribunal federal. Confirmation of the award was also sought in the United Kingdom, where two rulings were ultimately rendered. The first decision was given by the commercial Court of the Queens Bench Division and the second by the Court of Appeals. In both decisions the award was upheld.[96]

The Directorate and the Bank submitted new evidence during the proceedings in the commercial Court to demonstrate that the object of the original contract was bribery of Kuwaiti officials. The commercial Court wanted the following question to be resolved at the outset: does enforcement of the arbitral award violate English public policy, if the intention of the contract was exercising personal influence and bribery of Kuwaiti officials? Westacre replied that it was not seeking to enforce the contract, rather the question was really about the arbitration agreement and obligation to honour arbitral awards following from the agreement. Westacre also stated that if there was a question of the underlying contract being illegal and that question was resolved in a reasoned arbitral award in favour of not being illegal, the arbitral award would be enforced. Arbitral awards with potential public policy violations should be examined case-by-case, evaluating how arbitral tribunal has dealt with for example bribery allegations. Westacre also emphasized the arbitration agreement being separate from the underlying contract and that arbitration agreement remains valid regardless of the underlying contract, even if the main contract's legality is questioned.[97]

The Directorate and the Bank, as defendants, argued that if the underlying contract was illegal according to English law and thus contrary to public policy, it would also be contrary to English public policy to enforce an arbitral award made in respect of that contract. They also argued that while the finality of arbitral awards should be respected, there needs to be a balance between respecting said finality and seriousness of illegality in the underlying contract supported by the award.[98]

The commercial Court was not able to identify any rule, which would dictate if the principle of separability survives also in cases, where the underlying contract is considered illegal. In similar

[95] case cited in Sayed: Corruption in International Trade and Commercial Arbitration, 2004, page 48
[96] Id.
[97] case cited in Sayed: Corruption in International Trade and Commercial Arbitration, 2004, page 49
[98] case cited in Sayed: Corruption in International Trade and Commercial Arbitration, 2004, page 50

fashion, the Court did not recognize any rule commanding that if the underlying contract is illegal and void ab initio that will cause the relevant arbitration clause to be void ab initio.[99] The Court did recognize the existence of two public policies regarding the case, one respecting finality of arbitral awards and the other one combatting illegal contracts, and the tension between those public policies. The Court concluded that this kind of situation should be approached on a case-by-case basis. The issue being respecting the arbitration agreement and enforcing an arbitral award in connection to an illegal contract.[100]

Regarding the case-by-case analysis, the Court concluded that the survival of the arbitration agreement, in case of the underlying contract being illegal, would depend on the nature of the illegality involved. In other words, if the illegality of the underlying contract would be intolerable that would impeach the arbitration agreement and the arbitral award. Then again, illegality of minor significance would not impact the arbitration agreement and award.[101]

Evaluating the degree of illegality in question, the Court reasoned that corruption, while condemnable, is not so intolerable that it would breach the public policy of finality and upholding of arbitral awards. The Court made a comparison to drug-trafficking, which would, according to the Court, be an example of offensiveness of intolerable level. Such offensiveness would outweigh any countervailing consideration.[102] The Court also emphasized that its decision does not mean approval of corruption in international trade, but expression of confidence in (ICC) arbitration. If an issue of illegality, for example corruption, is referred to arbitration and considered by arbitral tribunal, it would be contrary to the New York Convention for a court to reconsider the issue again in enforcement stage. The Court of Appeals agreed by majority with most of the conclusions done by the commercial Court.[103]

To summarize what was concluded in case Westacre, according to the English Court illegality related to the underlying contract could breach the separability principle and impact the arbitration agreement. This would depend on the level of offensiveness of alleged illegality and how arbitral tribunal has addressed the issue in arbitration. It is questionable whether this method could be applied today. If the underlying agreement can be considered illegal and arbitral tribunal does not address that issue, courts may deny enforcement of the arbitral award on the basis of public policy. This does not mean that the arbitration agreement itself is considered null and void. In the end, it remains an

[99] case Westacre cited in Sayed: Corruption in International Trade and Commercial Arbitration, 2004, page 50
[100] Id.
[101] Id, page 51
[102] Id, page 53
[103] Id, page 54

open question whether the sepability principle can be breached by illegality, if the arbitration agreement itself is not illegal and thus null and void.

In the case Fiona Trust[104], the House of Lords confirmed the arbitral tribunal's power to determine its own jurisdiction, also in cases of alleged illegality. The case involved an agreement, which was allegedly induced by bribery[105]. The question was whether the arbitration clause covered also the issue of bribery and thus the matter could be resolved in arbitration or was that an issue to be determined by a court. Secondly, it was questioned if the alleged bribery related to the main contract also affected the arbitration agreement. The House of Lords concluded that all kinds of dispute arising out of the contract can be resolved in arbitration, unless it is made clear that certain questions are excluded from the arbitrator's jurisdiction[106]. Therefore, arbitrators have jurisdiction to rule on issue of validity of the contract, even on the grounds if the contract was procured by fraud, bribery, misrepresentation or anything else[107]. The arbitration agreement can be void or voidable only if it is directly affected by illegality, which may be identical ground of illegality as with the main agreement. Otherwise, invalidity or rescission of the main agreement does not cause invalidity of the arbitration agreement.[108]

In conclusion, matters of criminal character appear to be arbitrable and arbitral tribunal has the power rule on its own jurisdiction on case-by-case basis when dealing with allegations of criminal conduct. The separability presumption provides that illegality of the underlying contract does not automatically affect the arbitration agreement. Only if the illegality affects directly the arbitration agreement, then the agreement may be considered null and void.

3.4 Nonarbitrability and public policy

The issue of arbitrability was discussed above and also the concept of public policy was briefly mentioned. As these issues are easily linked together, it should be noted that (non)arbitrability and public policy are considered different concepts and distinct from each other. As Born says, the nonarbitrability doctrine is related to principles of public policy, but still distinguishable[109]. However, there are also differing views. Kaj Hober sees that "the concept of arbitrability is strictly speaking a public policy limitation on arbitration as a dispute settlement method"[110] and "issues of arbitrability

[104] Premium Nafta Products Limited (20th Defendant) and others v. Fili Shipping Company Limited (14th Claimant) and others [2007] UKHL 40 ("Fiona Trust")
[105] Fiona Trust, paragraph 1
[106] Fiona Trust, paragraph 13
[107] Fiona Trust, paragraph 15
[108] Fiona Trust, paragraph 17
[109] Born, International Commercial Arbitration, 2014, page 950
[110] Hober, International Commercial Arbitration in Sweden, 2011, page 302

in fact form part of public policy"[111]. Also Marike Paulsson seems to think that arbitrability belongs under the concept of public policy. According to her, in the connection of the New York Convention arbitrability should be perceived to narrow the scope of public policy[112], while in fact the "concept of arbitrability would fall under the umbrella of public policy"[113]. As it can be seen here, this theoretical question is not a simple one. It would seem logical that issues of arbitrability and public policy belong together. In the New York Convention they are also bundled together in Article V (2) which provides that recognition and enforcement of an arbitral award may be refused, if (a) the matter is not arbitrable or (b) enforcement would contrary to public policy. According to Paulsson, the issue of arbitrability is mentioned separately from public policy only for reasons of clarity and in order to prevent public policy exception being used too frequently[114]. When listed separately, national courts' possibility to apply the Convention's Article V (2)(b) is much more difficult, because all cases regarding nonarbitrability fall automatically outside of it. Therefore, the public policy exception could be resorted only in cases of violation of fundamental values[115].

As said, Born has a different view on this matter. The nonarbitrability doctrine, as he calls it, as well as the public policy rule can lead to invalidity of otherwise valid arbitration agreement or arbitral award[116]. Both of these categories differ from usual party autonomy in arbitration and "in both instances, the rationale rests on the premise that there are unacceptable conflicts between the award or arbitration agreement and basic public policies and legal norms of a particular state"[117].

However, arbitrability and public policy can be distinguished from each other. Public policy requires that particular substantive rules are applied, but it does not necessarily mean that the matter is not arbitrable. Let us take the antitrust issue as an example, a dispute involving antitrust issues is considered to be arbitrable, but it may be against public policy if mandatory (national) legislation is neglected. On the other hand, if a matter is nonarbitrable, it is so ab initio and de facto. It means that in nonarbitrable matters the arbitral process cannot be used to produce a binding decision[118]. The issue of arbitrability does not depend on the result of the award, while the issue of public policy does. The public policy exception can be raised only if enforcing the *award* would be contrary to public policy.

[111] Hober, International Commercial Arbitration, 2011, page 303
[112] Paulsson, The 1958 New York Convention in Action, 2016, page 219
[113] Id, page 220
[114] Id.
[115] Id, page 219
[116] Born, International Commercial Arbitration, 2014, page 950
[117] Id.
[118] Id, page 952

Why is difference between nonarbitrability and public policy violation interesting here? If issues involving criminal conduct would be considered nonarbitrable, they simply cannot be resolved or addressed in arbitration. However, if these issues are considered arbitrable, but failure to address them properly constitutes a violation of public policy, the situation becomes quite different. The scope of arbitrability and public policy both play a significant role here. In the following chapter the concept of public policy will be examined in greater detail.

4 Arbitration and public policy

As we have concluded above, some authors link arbitrability and public policy together. Others, for example Born, think that they are two separate issues. Regardless of the theoretical view adopted, the concept of public policy plays an important role in international arbitration. Public policy functions as a sort of "fail safe", since it makes possible for courts to ensure that enforcing an arbitral award does not violate any fundamental rules or values of society. In general, courts do not have a right to review arbitral awards on their merits[119]. However, as said, enforcement of an arbitral award may be refused if recognition or enforcement of the award would be contrary to public policy. The New York Convention Article V (2) provides that:

> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"

A similar provision is included also in UNCITRAL Model Law on International Commercial Arbitration Article 36 (1)(b)(ii). While states are free to interpret their public policy as they deem appropriate, public policy reservation is meant to be applied in restrictive manner as explained below. Public policy control is also something that courts need to do on their own motion and it is not dependant on allegations raised by the parties[120]. Although, as Paulsson notes, "respondents will not fail to invoke it" and they will probably try to find any argument that could possibly fit under the

[119] Lew -Mistelis - Kröll, Comparative International Commercial Arbitration, page 706
[120] Paulsson, The 1958 New York Convention in Action, 2016, page 217-218

concept of public policy[121]. Ultimately, it is in the discretion of enforcing court to consider whether enforcement should be refused due to public policy violation.

Paulsson contemplates the drafting history of public policy article in the New York Convention. According to her, there was discussion about which definition should be used in the Convention. The choice was between "public policy of the country where enforcement is sought" and "public order (ordre public)". These two terms are not understood to be synonyms, while they still are close to each other. The term ordre public is understood in narrower sense compared to public policy. Ordre public only covers the most fundamental notions of morality and justice, whereas public policy may be understood to include a broader notion. The term public policy is more open to interpretation than ordre public and it can be argued that public policy could also cover even governmental policy. According to Paulsson, public policy is more closely connected to individual domestic laws of the contracting states of the Convention. This may cause the notion of public policy to vary between different states and could result fragmented application of the Convention.[122]

In drafting the New York Convention, the term ordre public was actually considered to better illustrate the idea behind the Article V (2)(b). However, it was established that the term ordre public was not known in various countries and therefore it would not be properly understood, which could cause problems regarding its application. In the end, the term public policy was used in the Article V (2)(b) instead of ordre public. It should be emphasized that using the term public policy instead of ordre public, does not mean that this should lead to broader notion of public policy. Quite the opposite, since it was the drafters' intent that the Article V (2)(b) should be interpreted in narrow sense. This view is supported by the fact that the term ordre public is used in the French version of the text of the Convention, which is equally authoritative as the English version.[123]

We have thus established that public policy was intended to be understood in narrow sense. Paulsson argues that "in the context of international arbitration, many national courts have embraced the so-called narrow or international notion of public policy"[124]. Such was the view of the Court of Appeals also in the US in a case called Parsons & Whittemore[125]. The case was about an American corporation (Parsons & Whittemore Overseas) and an Egyptian corporation (Societe Generale de l'Industrie du Papier (RAKTA)) entering in a contract governing the construction and operation of an Egyptian

[121] Paulsson, The 1958 New York Convention in Action, 2016, page 222
[122] Id, page 223
[123] Id, page 224
[124] Id, page 231
[125] Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), Bank of America (2nd Cir. 1974)

paper mill. The contract included an arbitration clause, which ruled that any disputes related to the contract would be settled in arbitration under ICC arbitration rules. The contract also included a force majeure clause for excusing delays in performance, because of reasons beyond reasonable capacity to control.[126]

The Six Day War caused many of the American workers to leave Egypt and soon the Egyptian government also broke diplomatic ties with the US. At that point Parsons & Whittemore Overseas ceased their performance of the contract and informed RAKTA of their conduct by invoking the force majeure clause. RAKTA disagreed and took the dispute to arbitration. The arbitral tribunal decided that Parsons & Whittemore Overseas was liable to pay damages to RAKTA as compensation for the losses it had suffered for Parsons & Whittemore abandoning their project. RAKTA sought enforcement of the award in the US, which was accepted in the first instance. However, Parsons & Whittemore appealed to that decision to the Second Circuit.[127]

One of the arguments Parsons & Whittemore used in its appeal was that the enforcement of the award would violate the US public policy. The Court of Appeals dismissed that claim and confirmed the award. In its decision, the Court made a reference to the New York Convention and concluded that public policy defence should be construed narrowly. The Court continued that "enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice".[128] Furthermore, the Court concluded that

> "In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis."[129]

Therefore, the Court of Appeals concluded in Parsons & Whittemore that the public policy in the context of the New York Convention is to be understood in narrow sense. Instead of interpreting public policy in purely national context, a supranational approach should be embraced. Thus it is more reasonable to talk about international public policy than (national) public policy. But in the end,

[126] case cited in Born, International Arbitration: Cases and Materials, 2015, page 1192
[127] Id.
[128] case cited in Paulsson, The 1958 New York Convention in Action, 2016, page 227
[129] case cited in Paulsson, The 1958 New York Convention in Action, 2016, page 227

it is up to the enforcing court to decide how to interpret the concept of public policy. Some courts may favour an approach, which is closer to national public policy and some national orders do not recognize the narrow conception of public policy (international public policy) as for them there exists only one notion of public policy[130].

So, it is argued that in the context of enforcing international arbitral awards courts should apply the notion of international public policy. The natural question that follows is what is the international public policy? How is it defined and how should courts interpret it? So far, we have only concluded that international public policy covers the most fundamental notions of morality and justice, which seems a bit vague to be actually helpful in practice. Unfortunately, it has been said that the concept of public policy "is difficult, if not impossible, to define"[131]. Still, some guidance is available. In its conference in New Delhi in 2002, the International Law Association (ILA) has issued recommendations[132] regarding the use of international public policy. As recommendations they are not a binding source of law, but they may be persuasive and looked for guidance, when dealing with issues regarding public policy. In the recommendations, the international public policy (of any state) is defined to include:

(i) fundamental principles, pertaining justice or morality, that the State wishes to protect even when it is not directly concerned
(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules" and
(iii) the duty of the State to respect its obligations towards other States or international organisations.[133]

4.1 Fundamental principles

According to the recommendations, a court should evaluate an arbitral award's conformity with fundamental principles by making a reference to principles considered fundamental within its own legal system. The law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration are not relevant in this context.[134]

[130] Paulsson, The 1958 New York Convention in Action, 2016, page 231
[131] Lew - Mistelis - Kröll, Comparative International Commercial Arbitration, 2004, page 722
[132] International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards
[133] ILA Conference 2002, Committee on International Commercial Arbitration, Annex 1 (d)
[134] Id, Annex 2 (a)

When determining whether a principle (as a part of its legal system) must be considered fundamental to justify a refusal to enforce an arbitral award, a court needs to consider the international nature of the case and its connection with the legal system of the forum. Secondly, a court should take into account the possible existence of consensus within the international community regarding the principle in question. If such a consensus exists, the principle can be considered to be a part of international public policy.[135]

If a party could have brought the issue concerning a fundamental principle before the arbitral tribunal, but has failed to do so, that party should not be able to raise that same issue before a court in the enforcement stage as a ground for refusing recognition or enforcement of the arbitral award.[136]

4.2 Lois de police or public policy rules

The recommendations also state that a violation of a mandatory rule should not be a reason to prevent the recognition or enforcement of an arbitral award, when that mandatory rule does not form a part of the state's international public policy. That applies also when said rule forms a part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.[137]

Recognition and enforcement should be refused by a rule of public policy only when the situation under consideration belongs inside the intended scope of the rule and recognition or enforcement of the award would cause a manifest disruption of the essential political, social or economic interests protected by the rule.[138]

If the violation of a public policy rule alleged by a party cannot be concluded without reassessment of the facts of the case, the court is allowed to do that reassessment[139]. (This is an interesting note, because courts are not generally allowed to review arbitral awards by their substance[140].)

A public policy rule should not be used retroactively so that a rule enacted after an arbitral award has been rendered would prohibit implementation of said award. Only if the legislator has plainly intended the rule to have retroactive effect on awards rendered prior to its enactment, should a court refuse to recognize or enforce an arbitral award on the basis of said rule.[141]

[135] ILA Conference 2002, Committee on International Commercial Arbitration, Annex 2 (b)
[136] Id, Annex 2 (c)
[137] Id, Annex 3 (a)
[138] Id, Annex 3 (b)
[139] Id, Annex 3 (c)
[140] Lew -Mistelis - Kröll, Comparative International Commercial Arbitration, page 706
[141] ILA Conference 2002, Committee on International Commercial Arbitration, Annex 3 (d)

4.3 International obligations

Lastly, recognition or enforcement of an arbitral award may be refused in a court, if recognition or enforcement would constitute a manifest infringement by the forum state of its obligations towards other states or international organisations[142].

4.4 General notions

The recommendations include also a couple of other interesting observations regarding public policy. As a first point is mentioned that "finality of arbitral awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances"[143]. Then it is mentioned that violation of international public policy can constitute such exceptional circumstances[144]. It is also recommended that courts, in case of refusing recognition or enforcement of an arbitral award, would describe in detail their method of reasoning and the grounds for refusing enforcement. This work method would contribute in creating a more coherent practice and help to develop a consensus on principles and rules, which would belong inside the sphere of international public policy.[145]

The recommendations promote the idea of partial enforcement awards in a situation, where a part of an arbitral award violates international public policy. If that part can be separated from any part that does not violate international public policy, the part without violation may be recognized or enforced in court.[146] Promoting partial recognition and enforcement of arbitral awards illustrates a very strong supposition on arbitral awards being final and binding and the "pro enforcement" bias evident also in the New York Convention. Similar provisions are included in the New York Convention Article V (1)(c) and in UNCITRAL Model Law on International Commercial Arbitration Article 36 (1)(a)(iii) regarding the mandate of arbitrators. There it is provided that

> "…if the decisions on matters submitted to arbitration can be separated
>
> from those not so submitted, that part of the award which contains decisions
>
> on matters submitted to arbitration may be recognized and enforced"

If an arbitral award deals with matters not submitted to arbitration or beyond the scope what is submitted, it is a ground for a court to refuse recognition and enforcement of the award. However, if

[142] ILA Conference 2002, Committee on International Commercial Arbitration, Annex 4
[143] Id, Annex 1 (a)
[144] Id, Annex 1 (b)
[145] Id, Annex 1 (g)
[146] Id, Annex 1 (h)

the decisions dealing with matters submitted to arbitration can be separated from those decisions that deal with matters not submitted to arbitration, the award may be partially enforced. It is difficult to say how well partial enforcement of an award works in practice. Can problematic parts of the award reasonably separated from "healthy" parts? Nonetheless, courts are clearly encouraged to at least evaluate the possibility of partial enforcement should the question arise after an arbitral award has been rendered.

4.5 Public policy and criminal conduct

Why is public policy a relevant issue when it comes to arbitration and allegations of criminal conduct? As we have concluded, recognition and enforcement of an arbitral award may be refused, if enforcing court considers that the award would violate public policy. Regarding the concept of public policy, allegations of illegality or criminal acts such as corruption and fraud are mentioned as examples of violations of international public policy in legal literature[147]. As arbitrators are expected to render an enforceable award to resolve the dispute that parties have submitted to arbitration, public policy concerns are an important issue to be aware of. If allegations of criminal conduct can raise concerns of public policy violation, arbitrators need to be careful to deal with the issue correctly. Here it should be remembered that violation of national public policy does not necessarily justify refusal of recognition and enforcement of arbitral award, if such violation does not constitute also a violation of international public policy. In the end, enforcing courts need to this analysis on case-by-case basis.

5 Arbitral tribunal's mandate and capability to investigate criminal matters

5.1 Alleged criminal conduct and arbitral tribunal's mandate

In determining arbitral tribunals scope of powers in resolving a dispute, it is essential to recognize arbitral tribunal's jurisdiction. It is important to remember that arbitration and arbitral tribunal are constructions of parties' common will. An arbitral tribunal is formed only to get a final and binding decision in that particular dispute. Comparing arbitration with court litigation, courts are permanent and they also have a general duty of upholding the law and justice. In arbitration, the main goal of the arbitrators is to produce a decision, which settles the dispute submitted by the parties. In order to submit their dispute to arbitration, the parties need to make an arbitration agreement. The arbitration agreement forms the basis of the arbitrator's mandate.

[147] Lew - Mistelis - Kröll, Comparative International Commercial Arbitration, 2004, page 723

Why is it important to pay attention to the arbitrator's mandate? The answer is simple; if arbitrators operate outside their mandate, ultra petita, it is a ground for setting aside the arbitral award. For example the New York Convention Article V (1)(c) provides that recognition and enforcement of the award may be refused, if it is proved by the contesting party that

> "The award deals with a difference not contemplated by or not
>
> falling within the terms of the submission to arbitration, or it contains decisions
>
> on matters beyond the scope of the submission to arbitration…"[148]

Therefore, it is extremely important for arbitrators not to overstep their jurisdiction. This also goes hand in hand with the general principle that arbitrators have a duty to make every effort to make sure that the award is enforceable at law[149]. As excess of mandate is a ground for refusing enforcement, arbitrators must make every effort to avoid such a scenario. The question follows: How is this important regarding alleged or suspected criminal conduct?

There are two kinds of situations, when the issue of illegality may rise in arbitration. The first is that a party raises the issue during arbitration proceedings. A party may claim for example that the other party has engaged in corruption or bribery related to the performance of the contract between the parties. When such a claim is relevant to the dispute brought before the arbitrators and, it would appear reasonable that arbitrators need to address the issue of alleged illegality in order to reach a proper decision to resolve the dispute.

The second kind of situation is a more challenging one. What kind of mandate do the arbitrators have to investigate issues of illegality, when none is alleged by the parties? It must be remembered that arbitrators derive their authority from the parties. Then again, according to the principle of competence-competence arbitrators have the right to rule on their own jurisdiction. Still, that ruling may be contested in the enforcement stage of the award.

It is probably safe to say that if there is no evidence of illegal conduct and neither of the parties raise such a claim, there appears to be no reason why arbitrators should or even could start any investigation on possible illegal conduct. Then how about situations, when a claim of illegal conduct is raised by a party? We have already established that issues of illegality and criminal conduct are arbitrable. Gary Born has stated as follows:

[148] The New York Convention Article V (1)(c)
[149] see for example ICC Rules of Arbitration (from 1.1.2012) Article 41

> "It is a vital precondition to the fulfillment of this mandate that the arbitrators consider and decide claims that contractual agreements are invalid, unlawful, or otherwise contrary to applicable mandatory law and public policy. Without such consideration and decision, the tribunal cannot make an award that decides the parties' substantive legal rights in a binding manner; that is, a tribunal is incapable of deciding that Party A is legally obligated to pay €100, or to hand over specified property, to Party B without considering mandatory law and public policy objections to the existence of such a legal obligation. Inherent in the legally-binding resolution of a dispute and the making of a legally-binding award is the duty to consider and resolve public policy (and other mandatory legal) objections."[150]

Hwang and Lim point out that "Parties' claims or defences may be expressly premised upon the other party's corrupt dealings, or their joint corrupt object underlying a contract in dispute. A tribunal is clearly obliged to investigate and rule upon the existence and consequences of corruption in such case to resolve the parties' dispute."[151] It can be thus concluded that arbitrators need to address claims of criminal conduct, when they are relevant to the outcome of the arbitral proceedings. Arbitrators need to deal with these issues properly, if they want to produce a legally-binding resolution of a dispute.

If neither party alleges any illegal conduct, but during the arbitral proceedings the tribunal happens to find some evidence, which leads the tribunal to suspect that there may illegal activity linked to the case, it is less clear what kind of mandate does the tribunal have to investigate the issue. In conducting investigation on their own initiative, when no allegations are made by the parties, arbitrators risk ruling ultra petita[152]. Conversely, a failure to deal with issues of illegality may constitute a ground for refusing recognition or enforcement of arbitral award in national courts for violating public policy. For example in case of suspected corruption national courts may want to re-open the issue, if arbitrators have failed to address it in the award[153]. In other words, what can arbitrators do in such a situation? It can be argued that the arbitrators' duty to render an enforceable award prevails over the question whether arbitrators can investigate issues of illegality on their own initiative, sua sponte, or not.

If arbitrators do conduct investigation on possible illegal conduct and the resulting award is challenged on the basis that the arbitral tribunal has exceeded its mandate, it will be up to courts to

[150] Born, International Commercial Arbitration, 2014, pages 2705-2706
[151] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 14
[152] Kreindler, Aspects of Illegality in the Formation and Performance of Contracts, 2003, page 227
[153] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 15

decide, whether excess of mandate has really occurred. It can be argued that courts are cautious about finding that to be the case. Authors Michael Hwang and Kevin Lim argue that "the general proposition that emerges from a distillation of various case law and commentary is that a tribunal will not be regarded as having exceeded its authority so long as the matters determined or the evidence relied upon in its award are relevant to resolution of the dispute submitted to the tribunal."[154] In other words, arbitrators should not be that worried about exceeding their mandate, as long as the matter they are dealing with is relevant to resolving the dispute in arbitration.

Also Richard H. Kreindler supports the view that arbitral tribunal's investigation of possible illegality should not be a violation of tribunal's mandate, even when no claim of illegality is raised by the parties[155]. According to Kreindler: "Arguments or differences relating to illegality, even if initiated by the tribunal itself, should normally be deemed to fall within the terms of the submission to arbitration. While an illegality analysis may not be a difference contemplated by the terms of the submission, it has a core relevance to arbitrability and public policy. For that reason among others, it should be seen as necessarily falling within the terms of virtually any submission to arbitration."[156]

It can be concluded that if suspected illegality is not relevant to the claims or the dispute, in that case arbitrators do not have a mandate to engage the issue. Whereas when dealing with suspected illegality, which is relevant to the dispute, arbitrators need to be careful not give either party anything more that parties have sought in their claims or counterclaims. Deciding otherwise would be acting ultra petita and, as already said, arbitral tribunal needs to stay inside its jurisdiction. It may be that the arbitral tribunal is able to verify the existence of illegal conduct, which may lead to nullity of the underlying contract.

In making investigations on sua sponte, arbitrators need to pay special attention to rules of due process. The parties' right to be able to present their case must be respected. If a party's procedural rights are violated in arbitration proceedings and a party is not given a sufficient chance to present his case, that constitutes a ground for refusing recognition or enforcement of the award in court[157]. Therefore, if arbitrators choose to investigate suspected illegal conduct, they also need to inform the parties and give them a chance to comment on those suspicions and provide submissions on the matter. Arbitrators are entitled to ask the parties to produce evidence or submit arguments regarding

[154] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 16
[155] Kreindler, Aspects of Illegality in the Formation and Performance of Contracts, 2003, pages 236-237
[156] Id, page 239
[157] the New York Convention Article V (1)(b) and UNCITRAL Model Law Article 36 (1)(a)(ii)

the suspected illegal conduct. If the parties refuse to cooperate, arbitrators need to draw their conclusions from that lack of will and make their decision on that basis.[158]

Though it should be remembered that arbitrators must not become too eager to investigate all possible suspicious elements they might encounter in arbitration proceedings. Arbitral tribunal should act on its own motion only when there is some prima facie evidence of illegal conduct. Overly zealous approach can be as harmful as complete indifference. Both of these approaches can compromise the institution of international arbitration.[159] Unfortunately, it is impossible to give exact instructions of how arbitral tribunal should proceed so that these instructions would apply in all circumstances. Rather, this is a consideration that must be done on case-by-case basis. There is no clear threshold of evidence, which would allow an arbitral tribunal to conduct investigation on its own motion. In addition of being a matter of evidence, it is also about proportionality. For example, strong international condemnation of corruption should cause arbitrators to take even slight suggestions of corruption seriously. Then it would seem justified for an arbitral tribunal to ask a party to give an explanation for those suspicions. If the party is innocent, it should not be too difficult to prove it.[160]

It is argued that arbitrators need to be able to operate tactfully and discreetly in order not to disturb the flow of arbitration proceedings any more than necessary. An arbitral tribunal needs to balance the need for efficient conduct of arbitration proceedings and its responsibility to the administration of justice.[161]

5.2 Arbitral tribunals' capabilities to investigate criminal issues and using interim measures

Unlike national courts, arbitral tribunals have no "coercive powers to enforce its own jurisdiction"[162]. They cannot for example impose fines on parties for failing to carry out the tribunal's orders. In addition, "arbitrators do not have power to issue orders against third parties who are not bound by the arbitration agreement".[163] This can be considered problematic especially regarding investigation of criminal matters. If a party refuses to cooperate, when arbitrators are trying to investigate allegations of criminal conduct, what should the tribunal do? It is argued that arbitrators can draw adverse

[158] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, pages 19-20
[159] Id, page 21
[160] Id.
[161] Id, page 22
[162] Yesilirmak, Provisional Measures in International Commercial Arbitration, 2005, page 8
[163] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 648

inferences from a party's lack of cooperation, but it should be done with caution and on the basis of facts[164].

While not quite comparable to state courts, arbitral tribunals have some tools at their disposal. Arbitrators have power to order interim measures, also called provisional or conservatory measures[165]. "Broadly speaking, interim measures are orders or awards which aim to protect the rights of the parties to a dispute pending its final resolution"[166]. Traditionally, the power to order interim measures belonged only state courts, but that has been changing and a certain milestone was hit by the version of UNCITRAL Model Law on International Commercial Arbitration adopted in 2006, which includes detailed provisions on interim measures ordered by arbitrators[167]. However, it is noted that "relatively few countries have passed national legislation adopting the new provisions of the Model Law"[168].

What kind of interim measures there are available for arbitrators to consider? The UNCITRAL Model Law Article 17 (2) provides that the arbitral tribunal may order a party to:

> (a) Maintain or restore the status quo pending determination of the dispute;
>
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
>
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
>
> (d) Preserve evidence that may be relevant and material to the resolution
>
> of the dispute.

In comparison, ICC Rules of Arbitration provide that "the arbitral tribunal may order any interim or conservatory measure it deems appropriate"[169]. In investigating allegations of criminal conduct, preserving evidence and preserving assets are probably the most relevant measures available. While preservation of evidence is not the same as an order to produce evidence, it has been noted that "in many cases this distinction may not be substantive, as orders for the production of documents can preserve evidence as well as collect it. Applying the Model Law, it may be advantageous for a party

[164] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 37
[165] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 647
[166] Id.
[167] Savola, Guide to the Finnish Arbitration Rules (English), 2015, page 322
[168] Id.
[169] ICC Rules of Arbitration, Article 28 (1), in force from 1.1.2012

seeking to obtain documents from its adversary to frame its request as one for the purpose of preserving evidence."[170]

5.3 Enforcement and compliance with interim measures

It does not seem very unlikely that a party faced with allegations of criminal conduct, may want to dispose of some evidence it considers detrimental for its case. In that kind of scenario, an interim measure ordered by an arbitral tribunal may help to preserve such evidence. Naturally, it can be questioned whether a party is willing to comply with the interim measure order. It should also be noted that "in most jurisdictions, arbitrator-ordered interim measures are not enforceable through the judicial system"[171]. Lack of enforcement power definitely constitutes a major disadvantage for arbitrator-ordered interim measures. Eventually, UNCITRAL Model Law adopted in 2006 may bring a welcome change to this situation. Article 17 H and Article 17 I of the Model Law provide for recognition and enforcement of interim measures. According to Article 17 H (1) an interim measure issued by an arbitral tribunal shall be enforced irrespective of the country in which it was issued.

Even if arbitrator-ordered interim measures do lack enforceability, it does not necessarily mean that they can be considered to be without effect in practice. An arbitral tribunal is still said to have great persuasive power towards the parties[172]. Parties generally wish to convince the arbitrators of their claims and case and therefore are cautious of disobeying the orders of the tribunal. That being said, "an arbitral tribunal's informal powers of encouraging compliance"[173] should not be overstated either. According to Born: "Parties may well be willing to sacrifice some measure of their appearance as "good citizens" if noncompliance with provisional measures brings them significant benefits"[174].

Arbitrators may also draw adverse inferences from a party's failure to comply with the interim measure ordered by the tribunal. In practice however, it may be difficult for the arbitrators to decide to what kind of conclusions should drawing adverse inferences lead.[175] It seems a bit unlikely that an arbitral tribunal could establish criminal conduct being proved only by relying on adverse inferences drawn from a party's non-compliance with the tribunal's orders. Certainly, "an arbitral tribunal cannot

[170] Madsen, Interim Measures – The Frontier of International Arbitration, in Jan Kleineman – Peter Westberg – Stephan Carlsson (eds.), Festskrift till Lars Heuman (Stockholm: Jure Förlag AB 2008), page 347.
[171] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 661
[172] Id, page 662
[173] Born, International Commercial Arbitration, 2014, page 2448
[174] Id.
[175] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 662

in any event "punish" the disobedient party by making an award against it merely because of the party's failure to comply with an arbitrator-ordered interim measure"[176].

5.4 Standards for issuing interim measures

There is some dissent among legal academics on which law should provide the applicable standards for issuing interim measures in international arbitration[177]. It is naturally for an arbitral tribunal to decide whether it should order an interim measure or not, but which standard it should apply in making that decision. There appear to be three possible choices for the law governing interim measures ordered by arbitrators: 1. the law of the arbitral seat (lex arbitri); 2. the law governing the parties' underlying contract; or 3. international standards[178]. Born advocates the view that international sources are best suited to provide the appropriate standards for ordering interim measures in international arbitration[179]. Born reasons that

> "These international sources are consistent with the parties' reasonable expectations, because they ensure that (a) a single, uniform standard will be applied to requests for provisional measures in an arbitration; (b) a single, uniform standard will apply to the same sorts of requests regardless what the seat of the arbitration may be; and (c) the standard for provisional relief will be tailored to international arbitral procedures, rather than to the procedures of a national court system. This approach also reduces the importance of choice-of-law questions and encourages uniform results, both of which are important objectives of the arbitral process."[180]

In international arbitration practice there appear to be at least two substantive requirements for granting interim measures by arbitral tribunals: 1. no pre-judgment of the case; 2. the threat of irreparable or substantial harm which cannot be compensated for by damages[181]. Born also includes urgency as a separate requirement[182]and Savola "an arguable case on the merits"[183], but it should be noted that the latter requirement is not really supported by Lew, Mistelis and Kröll[184]. Born also states that "most arbitral tribunals also look to the nature of the provisional measures that are requested, and

[176] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 663
[177] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 658
[178] Born, International Commercial Arbitration, 2014, page 2463
[179] Id, page 2465
[180] Id.
[181] Lew – Mistelis – Kröll, Comparative International Commercial Arbitration, 2003, page 604
[182] Born, International Commercial Arbitration, 2014, page 2468
[183] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 658
[184] Lew – Mistelis – Kröll, Comparative International Commercial Arbitration, 2003, page 604

the relative injury to be suffered by each party, in deciding whether to grant such measures"[185]. In other words, the applicable criteria depend on the requested measure. For example maintaining or restoring the status quo will generally demand more serious grounds than preservation of evidence[186]. Similar provision[187] is included in UNCITRAL Model Law, which also seeks to achieve some harmonization of requirements for granting interim relief with its Article 17 A.

5.5 Court assistance in international arbitration

Arbitral tribunals or parties to arbitration may require assistance from state courts in arbitral proceedings. Such assistance may apply to both interim measures and taking evidence. Regarding interim measures, in many countries judicial authorities and arbitral tribunals have concurrent jurisdiction to issue them[188]. While this may lead to some conflicting situations, if a party decides to approach both arbitrators and state courts in order to obtain interim relief, there are also advantages in this arrangement. As Savola says, "arbitrators have no power to issue orders against third parties who are not bound by the arbitration agreement; an arbitral tribunal usually lacks the coercive power to impose fines for failure to carry out its orders; arbitrators generally cannot issue interim measures ex parte[189]; and before the tribunal is constituted, it is unable to entertain requests for interim measures of protection"[190]. In addition, interim measures ordered by state courts are generally more effective than arbitrator-ordered, since "most national legal systems lack a proper enforcement regime for arbitrator-ordered provisional measures"[191]. Therefore, concurrent jurisdiction to grant interim measures works to patch up some shortcomings in international arbitration and involving state courts provides more effective dispute resolution mechanism[192].

It has already been said that arbitral tribunals lack coercive powers. This may also affect taking evidence in arbitration, since tribunals generally "cannot force witnesses to appear at a hearing or answer questions, or order third parties to produce documents"[193]. If the need for such measures

[185] Born, International Commercial Arbitration, 2014, page 2468
[186] Id.
[187] UNCITRAL Model Law on International Commercial Arbitration, adopted in 2006, Article 17 A (2): "With regard to a request for an interim measure under article 17(2)(d) (preserving evidence), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate."
[188] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 648
[189] with the exception of preliminary orders in Article 17 B of the UNCITRAL Model Law
[190] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 648
[191] Id.
[192] Yesilirmak, Provisional Measures in International Commercial Arbitration, 2005, page 67
[193] Lew – Mistelis – Kröll, Comparative International Commercial Arbitration, 2003, page 369

arises, arbitral tribunals will then have to rely on support of state courts. Fortunately, courts are usually willing to assist arbitral proceedings by using powers vested in them[194].

UNCITRAL Model Law on International Commercial Arbitration Article 27 provides for arbitral tribunals' power to request assistance from state court in taking evidence. The article provides that

> "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."[195]

Similar provision is included for example in the Finnish Arbitration Act[196] and in the Swedish Arbitration Act[197]. Also the US Federal Arbitration Act (FAA) provides that the arbitrators "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case"[198].

Arbitration involving allegations of criminal conduct, court assistance may prove to be especially important. If a party to arbitration has indeed committed a criminal act, there is a real risk that that party is unwilling to present documents which would be relevant to the arbitral proceedings. In corruption cases there is often some third party involved, who acting as an intermediary has been using his personal influence to affect decision-making process in parties' favour. Assistance from state courts is probably required to make such a third party to appear as witness in arbitral proceedings or to make a party present documents it is unwilling to present.

6 Criminal offences and arbitration

What kind of criminal offences are such that they can be relevant to arbitration proceedings? It should be remembered that arbitration is not meant for criminal procedure and arbitrators cannot impose criminal sentences. An arbitral tribunal can only address such issues of illegality, which are relevant to the resolution of the dispute submitted to arbitration.

The choice-of-law question is very important, when dealing with allegations of criminal conduct in arbitration. Criminal law is still at the core of states national jurisdiction and not so harmonized on

[194] Lew – Mistelis – Kröll, Comparative International Commercial Arbitration, 2003, page 370
[195] UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, Article 27
[196] the Finnish Arbitration Act (967/1992) 29 §
[197] the Swedish Arbitration Act (SFS 1999:116) Section 26
[198] the Federal Arbitration Act (USA), Section 7

international level as commercial law. Therefore, whenever criminal law issues arise in arbitration proceedings, arbitrators need to decide which national criminal law should be applied. Unfortunately, this question may be more difficult to answer than it would appear at first glance. Florian Kremslehner and Julia Mair summarize the complexity of the question in the following way:

> "The applicable criminal law system will not necessarily be determined by the choice of law agreed between the parties or by the conflict rules otherwise applied by the tribunal. Even if the same conflict rules should be applied, the application of these rules to the legal consequences of criminal offences may lead to the result that different national laws have to be applied to contractual and tort claims."[199]

It appears that the choice-of-law question should not dealt lightly. The issue will be addressed in greater detail in Chapter 8. However, in the following some offences, which in legal literature are mentioned to concern arbitration[200], are examined.

6.1 Money laundering

It is possible that parties try to conduct money laundering by bringing a fictitious dispute into arbitration. There may be different kind of scenarios, but a common factor is that there is no real dispute. The whole arbitration proceedings are a scheme to obtain an award in order to legitimize a payment (ordered in the award) and maybe even enforce it in court. This may happen via one party submitting a fictitious claim, which the other party may or may not contest, or it may happen that the other party is completely passive in the arbitration proceedings. In conducting the arbitration proceedings, the arbitral tribunal relies heavily on the arguments and facts presented by the parties. The arbitral tribunal is under a duty to render a reasoned award, which in this context may be used to justify otherwise suspicious payments.[201]

Another possible scenario is that parties initiate arbitration proceedings, but quickly request the arbitrators to confirm the consent they have reached by recording the settlement in the form of an arbitral award. In the case of settlement, it may be difficult for arbitrators to detect the true nature of the matter.[202]

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[199] Kremslehner – Mair, Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels, 2012, page 290
[200] Kurkela, Criminal laws in International Arbitration – the May, the Must, the Should and the Should Not, 2008, page 285
[201] Kremslehner – Mair, Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels, 2012, page 291
[202] Id.

How can arbitrators protect the arbitral process against these kinds of false intentions? There may be hints to lead the arbitrators to conclude that the dispute at hand is a fictitious one. Conspiring parties will not behave similarly to independent parties. Such indicators may be that there is (unusually) close cooperation between the parties in the arbitration proceedings, or that the respondent does not present material defence arguments, or that the opposing party does not object doubtful evidence presented against it. However, arbitrators should not be too eager to draw conclusions if aforementioned indicators emerge in arbitration proceedings, because there may be also other reasons behind those indicators. Such reasons include that the respondent may have a weak case or the respondent may be represented by a poor counsel. In those situations it would not be appropriate for an arbitrator to discuss the issue of a party's position and behaviour with the parties.[203] Doing so could endanger the impartiality of the arbitrator in the eyes of the parties.

It is probably a relief to arbitrators that money laundering via arbitration proceedings is not very quick or simple and from economic perspective it is not the most appealing method to launder money. It is said that fulfilling fictitious commercial transactions with the help of offshore companies provides a much more efficient method to conduct money laundering. It can be argued that using arbitration for money laundering suits better for purposes of restructuring already laundered assets.[204]

6.2 Fraud

Fraud in the context of arbitration is a general and broad concept. It is said that "allegations of fraud usually arise in arbitration proceedings in relation to the subject matter of the dispute"[205]. A distinction can be made between fraud in the factum and fraud in the inducement. Fraud in the inducement may result an originally valid contract to become illegal (ex post). Whereas fraud in the factum may result a contract to be illegal from the beginning (ab initio).[206] Fraud in the factum includes situations of forged signatures or other falsified documents, which may reach to the root of consent to the contract[207]. The question is then has there even been a valid contract to begin with.

6.3 Willful deception

Wilful deception is closely related to the offence of fraud. In willful deception "the victim must have been intentionally induced by way of deceit to an act or omission by which the victim suffers a

[203] Kremslehner – Mair, Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels, 2012, pages 291-292
[204] Id, page 292
[205] Id, page 305
[206] Kreindler, Aspects of Illegality in the Formation and Performance of Contracts, 2003, page 215
[207] Id, page 225

disadvantage in his or her rights"[208]. In comparison to fraud, no actual loss is required as "any disadvantage in exercising any right is sufficient to commit the offence. It is neither necessary that the perpetrator acts with the intent to profit from the victim's acts or omissions."[209]

For example, according to Austrian law willful deception is prosecuted only by consent of the injured party, which is also a difference compared to fraud. However, willful deception may become relevant in arbitration, if an arbitration clause is claimed to be invalid because of fraud. If the concept of fraud can only be applied in cases, where some economic loss has occurred, the concept of fraud cannot be applied in connection to an arbitration clause, since it is unlikely that the arbitration clause itself has any economic value.[210] Therefore, the offence of willful deception needs to be applied instead of fraud. Also in Finnish legislation, the concept of fraud includes economic loss[211].

6.4 False testimony and perjury

The issue of false testimony and perjury of witnesses is not a new topic in international arbitration. It is a common practice in arbitration that an arbitral tribunal will examine the testimony of witnesses and evaluates the credibility of the witness. However, performing the evaluation may not be an easy task even for experienced arbitrators.[212] The most usual and also efficient method to verify the quality of witness testimony is to make a comparison between (oral) testimony and written documentation. The situation becomes challenging, when no written documents are available regarding the subjects of the testimony. Things become even more complicated, when arbitrators are encountered with conflicting and opposing testimonies of multiple witnesses during the arbitration proceedings, which is probably not uncommon in international arbitration.[213]

It may happen that falseness of a testimony is discovered after the arbitration proceedings and rendering an award. Then the question is how the issue of false testimony and perjury affect an arbitral award. The answer depends how decisive for the outcome of the arbitral award false testimony and perjury have been. Depending on the procedural legislation applied to arbitral proceedings, false testimony may function as a ground for reopening the proceedings, which is possible for example under Austrian civil procedural law[214]. An arbitral award may be set aside, because of false testimony,

[208] Kremslehner – Mair, Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels, 2012, page 307
[209] Id.
[210] Id.
[211] the Finnish Penal Code 36:1 §
[212] Kremslehner – Mair, Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels, 2012, page 308
[213] Id.
[214] Id, page 310

but the requirement is that the award was based on that false testimony[215]. However, for example under Austrian law it is also required that the false testimony must have been given before a judge, requested by an arbitral tribunal, which would make the testimony punishable under Austrian Criminal Code § 288[216]. In practice, that is probably unlikely to happen in international arbitration.

If the testimony has not affected the outcome of the award, there is no reason to reopen the proceedings or question the validity of the award. It can be argued that this holds true also when false testimony has only had minor influence on the arbitral award.

6.5 Forged of falsified documents

It is possible that arbitrators need to deal with the issue of forged or falsified documents in arbitration proceedings. Presentation of forged or falsified documents constitutes a criminal law issue that arbitrators need to address. If an arbitral award is based on forged or falsified documents, it can constitute a ground for setting aside the award[217]. Also concealment or suppression of documents raise questions of possible criminal liability[218]. Regarding concealment and suppression, an arbitral tribunal cannot really force a party to present documents, which the party is not willing to present. In that case, the arbitral tribunal will need to draw adverse inferences to the disadvantage of the party[219].

6.6 Corruption

Corruption in international trade can be described to mean "actions of transfer of money or anything of value to foreign public officials, either directly or indirectly, to obtain favourable public decisions in the course of international trade"[220]. Corruption is generally considered to be "contra bonos more" and against international public policy as stated in the ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards[221]. Corruption may also be prohibited in national legislation, which can make it a mandatory law (lois de police) to be applied in arbitration[222]. Therefore, corruption would constitute a ground for refusing recognition or enforcement of an arbitral award, if the issue of corruption is raised in arbitral proceedings and arbitrators fail to address it properly. Another question is how to present sufficient proof that corruption has actually occurred.

[215] Kremslehner – Mair, Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels, 2012, page 310
[216] Id, page 333
[217] Id, page 323
[218] Id, page 311
[219] Id.
[220] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page XXIII
[221] International Law Association New Delhi Conference (2002) Committee on International Commercial Arbitration: Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, paragraph 32
[222] Id.

In the following chapter, I will address the issues of burden and standard of proof regarding criminal allegations in arbitration.

7 Criminal allegations and standard of proof

In international arbitration it is up to each party to prove the facts that the party relies on in supporting its claims. So, the burden of proof is on the one making a claim. According to UNCITRAL Arbitration Rules: "Each party shall have the burden of proving the facts relied on to support its claim or defence[223]." The standard of proof instead, appears to be a balance of probabilities or standard of "more likely than not"[224]. Although, it is argued that "there is little discussion of the issue"[225]. However, arbitrators usually embrace a pragmatic approach to burden of proof issues and attempt to avoid unnecessary formalism[226], since arbitrators are allowed to operate more freely compared to national courts.

The following question is that should an arbitral tribunal adopt a different burden and standard of proof, when dealing with issues of criminal character? One should also consider that standard of proof is usually different in civil and criminal procedure. Whereas in civil procedure standard of proof is aforementioned balance of probabilities, in criminal procedure a higher standard is normally applied. It should be remembered that an arbitral tribunal cannot impose a criminal sentence and cannot apply criminal procedure in similar fashion to national courts. Arbitration is meant for dispute resolution only. It seems that there is no universal consensus on standard of proof regarding criminal allegations in arbitration[227].

In cases involving claims of corruption, some authors (for example Karen Mills) have argued that shift of burden of proof could be applied, when there indeed is a reasonable indication of corruption[228]. Therefore, it would be up to "the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met"[229]. This view is advocated, because an arbitral tribunal does not have similar subpoena and enforcement powers to national courts in order to compel production of evidence from a reluctant party[230]. Mills also states that "acts of corruption and

[223] UNCITRAL Arbitration Rules (as revised in 2010) Article 27 (1)
[224] Born, International Commercial Arbitration, 2014, page 2314
[225] Id.
[226] Id, pages 2313-2314
[227] in corruption matters see Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 102
[228] Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, 2003, page 295
[229] Id.
[230] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 23

collusion are specifically designed not to be able to be identified or detected"[231]. While reversed burden of proof would seem like a reasonable solution in certain situations, this view has not been universally accepted. Some commentators have stated that "a reversal of the burden of proof in corruption cases without a basis in the applicable substantive or procedural rules would seem to be contrary to the general principle of law that each party has the burden of proving the facts on which it relies"[232]. Therefore, it seems that burden of proof can be reversed only if that is supported by the applicable substantive or procedural rules and thus arbitrators would have only limited freedom to make such a decision.

Another problem with Mills' view of applying reversed burden of proof is that how would it be defined, when there would be (sufficient) prima facie evidence of corruption to justify changing the burden of proof. Such a change would affect parties' procedural rights significantly and thus it should be used with great caution.

7.1 High standard of proof

In arbitral case law involving corruption and bribery, there are cases where a high standard of proof is applied and in some cases a lower standard instead[233]. First the Westinghouse[234] case will be examined as an example of applying high standard of proof. In the Westinghouse case an US based company made a contract with the Philippine National Power Corporation for consultancy and construction of a power plant. The Republic of the Philippines and the National Power Corporation raised a claim against Westinghouse for obtaining the contract not by submitting a superior proposal, but rather by bribery and deceit. It was claimed that the bribes were paid to the Philippine President Marcos through intermediation of a certain Mr. Disini, who was closely connected to the President.[235]

One of the first questions to be decided by the arbitral tribunal was to identify which source (of law) would determine the applicable standard of proof. At first, the tribunal argued that the standard of proof would be determined by the governing law (of the contract), because that would have the closest connection to the dispute. However, the tribunal noted that since the parties were of US and Philippine nationalities, it would be reasonable to apply the standards of proof applicable both in the Philippines

[231] Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, 2003, page 295
[232] Haugeneder – Liebscher, Chapter V: Investment Arbitration -Corruption and Investment Arbitration: Substantive Standards and Poof, 2009, page 547
[233] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 24
[234] ICC Case No 6401 (1991) (Westinghouse and Burns and Roe v Nat'l Power & Co and the Republic of Philippines)
[235] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 103

and in the US. After conducting a comparative analysis of both standards of proof, the tribunal concluded the standard of proof to be essentially the same in both jurisdictions.[236]

Regarding the standard of proof, the tribunal first stated the general rule that the party having the burden of proof must be able to prove the presented facts by superior weight of evidence and thus establish that those facts are more likely true than not true. However, in case of alleged bribery, which the tribunal noted to be a form of fraud in civil cases, a higher standard of proof is required both in the US and the Philippine jurisdictions. The tribunal stated that bribery is a form of fraud and fraud must not be lightly presumed. The tribunal continued that fraud in civil cases must be proved by *clear and convincing evidence* that amounts to more than preponderance and such higher standard of proof is applied both in the US and in the Philippines. Therefore, the tribunal concluded that the standard of clear and convincing evidence will be applied to the claims of bribery.[237] The tribunal was concerned to ensure that the parties would be properly informed in advance which standard of proof would be applied in the case[238].

In an ad hoc arbitration case[239] mentioned by Sayed, the standard of proof applied for the establishment of corruption was "further and direct evidence". Therefore, it seems that to prove corruption, a high standard of proof must be met. In addition, it appears that circumstantial evidence may not suffice and only direct evidence can be enough to prove allegations of corruption.[240]

7.2 Normal or low standard of proof

Next, a lower standard of proof or normal weighing of probabilities will be examined. The ICC case No. 6497 can be used as an example to illustrate this opposite trend of reasoning. This practice seems to suggest that there is no reason to deviate from the normal weighing of probabilities even when matters of illegality are involved. In the case, the parties (a German contractor as Respondent and a Liechtenstein consultant as Claimant) had entered into a number of consultancy agreements ("basic agreements") over a period of several years[241]. The main object of the agreements "was to provide the services of claimant for respondent to obtain construction contracts in a number of countries including a certain Middle Eastern country (country X)". During the period, respondent obtained a number of contracts in country X and according to the basic agreements, the claimant was supposed to receive a certain percentage of the amounts received by the respondent. In addition, the parties had

[236] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 103
[237] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 104
[238] Id.
[239] ad hoc arbitration award 28/7/1995 rendered by Professor Claude Raymond
[240] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 104
[241] ICC Case No. 6497, published in Yearbook of Commercial Arbitration, 1999, Volume XXIV, page 71

also entered into a number of "product agreements", which provided additional remuneration and in some cases new obligations. All the agreements included a termination date.[242]

A dispute arose between the parties regarding the payments related to certain contracts. Since the contracts contained an ICC arbitration clause, arbitration proceedings were commenced in Geneva. Swiss law was agreed to be the substantive law applicable in the case. Respondent alleged that "the real object of all agreements between the parties was to organize the bribing of officials of country X, through claimant. Respondent has no direct written evidence about the bribery nature of the agreements and about the bribes in particular."[243] The tribunal stated that the alleging party has the burden of proof and if the tribunal is not convinced, it shall reject the argument of the alleging party[244]. However, the tribunal also added that

> "The alleging party may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counter-evidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven. However, such change in the burden of the proof is only to be made in special circumstances and for very good reasons."[245]

This is an interesting note, especially regarding allegations of criminal conduct. Corruption and bribery are often difficult to prove and it is very challenging for the alleging party to provide conclusive evidence of such acts. The tribunal also noted that "a civil court, and in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth."[246] An arbitral tribunal cannot take inquisitorial role. In that respect, it is a clear exception from the main rule to require a party to present counter-evidence against allegations of criminal conduct.

Regarding the standard of proof applicable to allegations of criminal conduct, the arbitral award does not seem to indicate that any higher standard should be applied. Compared to the Westinghouse case, where "clear and convincing evidence" was specifically required, in ICC Case No. 6497 the arbitral

[242] ICC Case No. 6497, published in Yearbook of Commercial Arbitration, 1999, Volume XXIV, page 71
[243] Id, page 72
[244] Id, page 73
[245] Id.
[246] Id.

tribunal makes no mention of specific standard of proof to be applied. Therefore, it can be concluded that the normal preponderance of evidence should be applied.

It has been also argued that even when preponderance of probability is applied as standard of proof, there may be different degrees of probability within that standard. Denning LJ said in the case Bater v Bater:

> "In civil cases the case must be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."[247]

I am compelled to agree with the view that in arbitration the case must be proved by a preponderance of probability. This should apply also to allegations of criminal conduct. After all, procedure in arbitration does not change depending on the nature of the dispute. There is no different procedure for competition law issues in arbitration, so neither should there be for issues of criminal conduct. It is argued that the balance of probabilities standard should be "the compass" to follow, but there should room for flexibility and attention paid to the specific circumstances of each individual case[248]. When dealing with allegations of criminal conduct, arbitral tribunals have some special tools at its disposal. Where for example corruption is alleged, an arbitral tribunal may draw adverse inferences, if a party fails to present counter evidence, when there already is prima facies evidence of corruption[249]. However, drawing inferences should be done with caution and "on the facts". If there is circumstantial evidence, it must carry "sufficient weight to be probative of corruption".[250]

In the words of Michael Hwang and Kevin Lim:

> "The fight against corruption must be balanced with the rights of the parties and the integrity of the fact finding process in international arbitration."[251]

[247] Bater v Bater [1950] 2 All ER 458, cited in Haugeneder – Liebscher, Chapter V: Investment Arbitration -Corruption and Investment Arbitration: Substantive Standards and Poof, 2009, page 548
[248] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 36
[249] Id, page 35
[250] Id, page 37
[251] Id.

8 Criminal conduct and conflict of laws issues

In arbitration parties are free to choose the substantive law applicable to their dispute. In the arbitration agreement parties usually determine the law to govern their contract. That law will then be the first source the arbitral tribunal will look to resolve the parties' dispute. Arbitration is based on strong party autonomy and thus parties have a wide discretion to determine such an applicable substantive law that best serves their interests. In both ICC Arbitration Rules[252] and UNCITRAL Arbitration Rules[253] it is stated that parties are free to determine the rules of law to be applied to the substance of the dispute.

In practice, everything may not be so simple. Mandatory laws or public policies of the place of performance or of the arbitral seat can complicate things. This is especially true if issues of criminal character are involved, since criminal law is part of mandatory national law.

If there exists a difference between the chosen applicable law and mandatory laws, conflict of laws analysis needs to be conducted to determine the governing law. Regarding criminal issues, a distinction can be made between "false conflicts" and "true conflicts" of law[254]. In case of false conflict, a criminal conduct, for example bribery, is so evident that the result is the same regardless of the substantive law applied. A corrupt act is deemed to have been committed under the contract and any claims of the corrupt party will be dismissed. This kind of false conflict situation does not require the arbitral tribunal to address any potential conflict of laws issues.[255]

8.1 Law of the Place of the Performance

A situation of true conflict can arise, when the legality of the underlying contract is viewed differently by the law chosen by the parties and the law of the place of performance or the law of the arbitral seat. Such a situation happened in the case Hilmarton[256], where an intermediary agreement was established between a French corporation (Omnium de Traitement et de Valorisation, "OTV") and an English intermediary (Hilmarton). The purpose of the contract was for the intermediary to negotiate a contract for the construction of a drainage system in the city of Algiers[257]. OTV agreed to pay Hilmarton a fee on the basis of a certain percentage of the total amount of the construction

[252] ICC Rules of Arbitration (in force from 1.1.2012) Article 21 (1)
[253] UNCITRAL Arbitration Rules (as revised in 2010) Article 35 (1)
[254] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 38
[255] Id.
[256] Omnium de Traitement et de Valorisaion SA v Hilmarton Ltd
[257] Omnium de Traitement et de Valorisation -OTV v. Hilmarton, Tribunal Fédéral (the Supreme Court of Switzerland), 17 April 1990, published in Yearbook Commercial Arbitration 1994 Volume XIX, page 214

contract[258]. The parties agreed that the law applicable to the contract would be Swiss law[259]. A dispute arose between the parties for non-payment of the agreed amount of fees to Hilmarton. The conflict of laws issue in the case was that Algerian law (the place of performance) prohibited intermediation contracts in government procurement, whereas Swiss law (substantive law chosen by the parties and law of the seat) provided no such prohibition[260].

The Hilmarton case started as a case bribery, for obtaining a construction contract illegally through intermediation. However, it developed into a conflict between two different arbitral awards with different conclusions on the same set of facts. The first arbitral award was rendered by an ICC arbitral tribunal in 1988[261]. That award denied Hilmarton's claims for the full payment of the commission fee on the basis that the (intermediation) contract violated Algerian law prohibiting intermediation in government procurement and these provisions were in line with the Swiss concept of good morals[262]. The award was then reversed by the Geneva Court of Justice in 1989 and the Swiss Tribunal federal in 1990 (the Swiss Supreme Court) on the findings that the conclusions made by the arbitral tribunal were arbitrary. Consequently the case was tried again before a new arbitrator, who adopted the view of the Swiss Tribunal federal and accepted Hilmarton's claims.[263]

During the first arbitral proceedings, OTV argued that despite Swiss law was chosen as the applicable substantive law, Algerian mandatory law prohibiting intermediation activity should be taken into consideration by the arbitral tribunal[264]. There was a conflict of laws, which demanded the arbitral tribunal to determine which law would be applied to evaluate the validity of the main contract. Swiss law was the applicable legal system as chosen by the parties, so Algerian law was basically foreign law with mandatory provisions[265]. If the intermediation contract would be concluded to violate Algerian law, would that also affect its validity under Swiss law? Evaluating the possible violation of Algerian law, the arbitral tribunal concluded that any bribery was not proved beyond doubt, since direct evidence has not been given and indirect evidence was not sufficiently relevant[266]. However, the arbitral tribunal continued that the submitted evidence was sufficient to conclude that Hilmarton "gathered confidential information, surveyed, observed and also used its influence on the Algerian

[258] Omnium de Traitement et de Valorisation -OTV v. Hilmarton, Tribunal Fédéral (the Supreme Court of Switzerland), 17 April 1990, published in Yearbook Commercial Arbitration 1994 Volume XIX, page 215
[259] Id.
[260] case cited in Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 39
[261] ICC Case No. 5622
[262] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 235
[263] Id.
[264] Id, pages 236-237
[265] Id, page 237
[266] ICC Case No. 5622, Hilmarton Ltd. v Omnium de Traitement et de Valorisation, Yearbook of Commercial Arbitration 1994 Volume XIX, page 112 par. 23

authorities". Therefore, the arbitral tribunal held that Algerian law prohibiting intermediation in government procurement was violated.[267]

Next step was to evaluate, if the breach of Algerian law would also lead to the contract being against Swiss law. The arbitral tribunal found that violation of foreign law violates also Swiss law (article 20(1) of the Swiss Code des obligations) only when such a violation also violates Swiss morality[268]. To establish such a violation "the foreign provision concerned must protect individual and community interests generally acknowledged to be fundamental, or else juridical interests which are, from an ethical point of view, more important than contractual freedom"[269] In other words, if violation of foreign law is also a violation of public policy under applicable law, the foreign law can be applied. The arbitral tribunal concluded that the contract between Hilmarton and OTV was "null and void in its entirety"[270].

After that the award was annulled at Geneva Court of Justice, because the Swiss law (Concordat) applicable to arbitration "did not contain provisions allowing for the application of foreign mandatory rules"[271]. The Swiss Tribunal Federal maintained the decision of Geneva Court of Justice. While both courts agreed that the contract was against Algerian law, they did not see any affront to morality according to Swiss law[272]. The Swiss Tribunal Federal held that the Algerian law was too broad and protectionist to be comparable to Swiss morals and public policy:

> "The Algerian provision at issue prohibits all intervention of intermediaries in the conclusion of a contract, even in the absence of bribes, traffic in influence or doubtful activities; the prohibition is, therefore, too broad and protectionist, aimed at guaranteeing a State monopoly on foreign trade. With respect to Swiss law, such a provision is a serious attack on the parties' contractual freedom and cannot prevail, on the ethical level, over the general and fundamental principles of contractual freedom, in

[267] ICC Case 5622, Hilmarton Ltd. v Omnium de Traitement et de Valorisation, Yearbook of Commercial Arbitration 1994 Volume XIX, page 112 par. 25
[268] ICC Case 5622, Hilmarton Ltd. v Omnium de Traitement et de Valorisation, Yearbook of Commercial Arbitration 1994 Volume XIX, page 113 par. 28
[269] Id, par. 29
[270] ICC Case 5622, Hilmarton Ltd. v Omnium de Traitement et de Valorisation, Yearbook of Commercial Arbitration 1994 Volume XIX, page 115 par. 35
[271] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 239
[272] Omnium de Traitement et de Valorisation -OTV v. Hilmarton, Tribunal Fédéral (the Supreme Court of Switzerland), 17 April 1990, published in Yearbook Commercial Arbitration 1994 Volume XIX, page 222 par. 26

> the absence of activities which would also be considered as doubtful under Swiss law."[273]

Second round of arbitration proceedings followed with a new arbitrator. That award has not been published, but Sayed mentions that the findings and decision were summarized in connection with enforcement of the award[274]. In the second award it was concluded that the contract between Hilmarton and OTV was valid and enforceable in Switzerland and OTV was ordered to pay the remaining fees to Hilmarton[275].

8.1.1 Rome I Regulation and fraude a la loi

Rome I Regulation[276] provides an example of a choice of law rule for application of mandatory laws of the place of performance. Article 9 (3) provides that

> "Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

Mandatory provisions are defined in Article 9 (1) as follows:

> "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

Therefore, mandatory provisions of the place of performance may be given overriding effect in relation to the law chosen by the parties. By the description in Article 9 (1) mandatory provisions in this context seem to be quite similar to the concept of public policy, as understood in the sense of the New York Convention.

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[273] Omnium de Traitement et de Valorisation -OTV v. Hilmarton, Tribunal Fédéral (the Supreme Court of Switzerland), 17 April 1990, published in Yearbook Commercial Arbitration 1994 Volume XIX, page 222 par. 25
[274] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 242
[275] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 243
[276] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

In legal literature it has also been suggested that foreign mandatory law should be applied only in situations where parties have chosen the applicable law in the purpose of avoiding that foreign law to be applied, which would otherwise be applicable[277]. In other words, if parties consciously try to avoid application of foreign mandatory law that would constitute a ground for applying that mandatory law in arbitration despite the parties' choice of law. Aforementioned principle of conflict of laws is also called "fraus legis" or "fraude a la loi"[278].

In English common law conflicts rules, according to which the law chosen by the parties generally prevails over mandatory laws of the place of performance, there are some exceptions to this main rule. Such an exception was established in case Foster v Driscoll[279], where the parties entered into an agreement to import whisky into the US, contrary to the prohibition laws in force in the US at the time[280]. The parties' contract, governed by English law, was deemed unenforceable due to the fact that "the common intention of the parties in entering into the contract was to perform, in a foreign and friendly country, an act which is illegal under the law of that country"[281]. Therefore, the mandatory law of the place of performance was able to override the law chosen by the parties.

Under common law, there is also a similar rule to the aforementioned fraude a la loi. In certain cases it may lead to displacement of the parties' chosen law by the law of the place of performance, if that law is the most closely connected to the dispute. The requirement is that the choice of law is not bona fide or legal, or is contrary to public policy and by choosing the applicable law parties have intended to evade the proper law most closely connected to the dispute.[282]

8.2 Law of the Arbitral Seat

An arbitral tribunal also needs to take into account the laws and public policy of the arbitral seat and determine whether they may override the law chosen by the parties. Article 9 (2) of the Rome I Regulation provides that "nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.". Similarly also notions of public policy must be taken into account, as the parties' chosen law may be overruled by the forum's public policy rules, if there is a conflict between the chosen law and the public policy. That is provided also in Article 21 of the Rome I Regulation. However, Article 21 speaks of manifest incompatibility between the chosen law and public policy of the forum. It seems, that minor conflicts between the chosen law and public

[277] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 51
[278] Id.
[279] Foster v Driscoll (1929) 1 KB 470, the English Court of Appeal
[280] case cited in Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, pages 52
[281] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, pages 51-52
[282] Id, page 56

policy do not warrant overriding the law chosen by the parties. In arbitration party autonomy is an essential feature and that can be neglected only in special circumstances and for very good reasons. It is argued that in conflict of laws situation, public policy of the forum does not typically override the parties' chosen law, unless there is "a close connection between the dispute and the forum" or "the public policy is of fundamental moral nature"[283].

Paying attention to public policy rules of the arbitral forum also relates to arbitrators' duty to render an enforceable award. Public policy is connected to two different articles of the New York Convention, Article V (1)(e) and Article V (2)(b). The former article contemplates a situation, where a competent authority of a country (court) may set aside an arbitral award, which was rendered in the same country (or under the law of that country) and then setting aside the award functions also as a ground for refusing recognition and enforcement of the award. This is linked to public policy of the arbitral forum (arbitral seat), because courts in that country apply the same notion of the public policy[284]. If public policy is neglected in a conflict situation between the chosen law and the public policy (of the seat), it is possible that courts at the seat may set aside the arbitral award due to public policy violation. If the award is set aside at the seat, recognition and enforcement may be refused also elsewhere.

Article V (2)(b) of the New York Convention deals with recognition and enforcement of (foreign) arbitral awards. It is not as relevant regarding public policy of the arbitral forum, unless enforcement is sought in the same country where the arbitral seat was located.

8.2.1 Case Lemenda

The case Lemenda[285] illustrates some reasoning how under common law public policy of the forum may affect the outcome of a dispute. The case was about an agreement to procure renewal of an oil supply contract from the state owned national oil corporation of Qatar. The agreement was an intermediation agreement governed by English law, under which a party was to influence Qatari officials in order to procure renewal of the contract for a commission fee as remuneration.[286]

The law of the place of performance, Qatari law, considered intermediary agreements to influence public officials to be contrary to public policy. In its evaluation, the English court made a difference between (domestic) public policy and international public policy. The court found that using personal influence to obtain benefits for another for a fee was also against English public policy, but since that

[283] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 57
[284] Id, pages 57-58
[285] Lemenda Trading Co Ltd v. African Middle East Petroleum Co Ltd (1998) 1 QB 448
[286] case cited in Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 58

public policy was purely domestic it would not be enough to refuse enforcement of a contract performed outside England. However, the court noted that both the public policy of the seat and the place of performance were violated by the intermediary agreement which led the court to conclude that enforcement of the agreement could be refused.[287]

Case Lemenda is probably not a perfect example how law of the forum may affect the outcome of a dispute. The court reasoned that violation of international public policy (of the forum) would prevent enforcement of an agreement without question. Instead, violation of domestic public policy of the forum would not as such be sufficient to refuse enforcement of a contract performed elsewhere. However, under certain circumstances enforcement can still be refused, as was concluded in the case.

8.3 Conflict of laws issues and international public policy

Interestingly, there seems to be some dissent among legal professionals regarding these conflict of laws issues. As explained above, some authors see any potential conflicts between the governing substantive law and law of the place of performance or law of the forum as a conflict of laws issue, where also applicable conflict of law rules must be considered. Usually the applicable conflict of law rules are those of the arbitral forum and such an approach is also favoured by several authors[288].

However, there are views according to which contemplating conflict of laws issues in international arbitration becomes an issue only when we are dealing with issues violating international public policy or mandatory norms of the arbitral seat[289]. According to Richard Kreindler:

> "The fact that the law of X (place of performance) is, factually, closely connected to the contract – and that the laws of Germany (substantive law) and Switzerland (arbitral seat) respectively are not at all except for the contract terms – is, by itself, of no consequence. Even where such issues of connectivity might play a role in the national courts, such consideration has no binding effect in the arbitral sphere. Conflict of law rules which might bind the national courts will not bind the arbitral tribunal, for example, at our Swiss seat."[290]

Regarding violation of public policy as a ground for superseding the agreed substantive law, Kreindler states that

[287] case cited by Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 59
[288] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 45; also Born, International Commercial Arbitration, 2014, page 2659
[289] Kreindler, Aspects of Illegality in the Formation and Performance of Contracts, 2003, pages 249-252
[290] Id, page 250

> "Unless the illegality under X's (place of performance) law rises to the level of a violation of notions of international public policy which likewise offend notions of international public policy in German (substantive law) and/or Swiss law (law of the seat), the illegality at X need not concern the tribunal, and cannot bind it."[291] Furthermore, "the illegality at X (the place of performance) does not mandatorily result in the illegality of the contract under the stipulated governing law or under the curial law unless it fits into an egregious violation of public policy"[292].

From practical point of view, considering the influence of law of the place of performance and law of the seat to the agreed substantive law, it seems that in most cases only violations of international public policy can result overriding the provisions of the substantive law. As mentioned above, there may be some exceptions to this rule and naturally arbitrators need to treat each case individually, so case-by-case analysis is necessary. Arbitrators have a duty to render an enforceable award and therefore law of the place of performance and law of the seat should be considered. It should be remembered though that an arbitrator is not under a duty to render an universally enforceable award, which means that party autonomy over applicable substantive law must be respected in the first instance. "Where the provisions of foreign law are not considered to rise to the level of a transnational loi de police, then there should be no obligation by the arbitrator to apply them in lieu of the agreed substantive law[293]."

9 Legal consequences of establishing existence of criminal conduct

What happens if arbitrators are able to establish that criminal conduct has occurred in relation to the dispute at hand? The legal consequences depend on the nature of criminal conduct in question. If a contract cannot be considered "overtly illegal", illegality does not necessarily mean that such a contract is null and void ab initio[294]. Drug trafficking, terrorism and slavery can be mentioned as examples of offences of overtly illegal nature[295]. The offences arbitrators usually need to deal with, do not seem to belong to that category and therefore the relevant legal consequences are examined in the following.

As we have already established with cases of money laundering, arbitrators can conclude that there is no real dispute and dismiss the case. If the underlying contract is tainted by fraud, it is possible that

[291] Kreindler, Aspects of Illegality in the Formation and Performance of Contracts, 2003, page 250
[292] Id, page 251
[293] Id, page 252
[294] Id, page 212
[295] Id.

there has not been a valid contract to begin with, if fraud extends to the root of the parties' agreement. Another possible scenario is that there has been an originally valid contract, which later has been tainted by fraud committed by one of the parties. In this kind of scenario the innocent party may raise claims against fraudulent party in similar fashion to corruption cases examined in the following.

In case of corruption, it is generally considered that a contract involving corruption is null and void[296]. According to Sayed nullity of corrupt relations may be derived from three legal grounds, which are illegality due to national mandatory laws, being contrary to public policy and being immoral (or contra bonos mores)[297]. Nullity of a contract which involves corruption may be invoked by a party to the contract or by arbitral tribunal by its own motion[298]. Corruption can be invoked by a party who has committed a corrupt act or by an innocent party. While it shows bad faith towards the parties' contract that the party responsible for corruption tries to invoke nullity of the contract, such invocation needs to be considered admissible, since "it encourages party defection from a reprehensible scheme"[299].

The effect of nullity resulting from corruption may also result problems. In this regard, Sayed makes a distinction between non-performed contracts and partially performed contracts[300]. When no action has been taken to perform what has been agreed in the parties' contract and the contract is pronounced null and void, the result is like the contract did not exist in the first place[301]. Then neither party should stay committed to the contract and there are no obligations between the parties resulting from the contract. The situation is more complicated when it comes to partially performed contracts. As Sayed says: "It is commonly held that in case of nullity, the parties are to be reinstated to their respective initial positions before the conclusion of the contract. In a contract where some of the parties have performed all or part their obligations, it is to be expected that both will have title to recover the thing transferred, the payment made, or the value of the service performed."[302]

However, the afore-mentioned right to recovery is not generally considered applicable to immoral and illegal contract, which would also be the case in matters of corruption[303]. Yet, choosing this approach of denying right to recovery may cause a party to benefit from criminal conduct. This can be demonstrated by following examples: A party performs its services to assist the other party in

[296] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 357
[297] Id, page 355
[298] Id, pages 357 and 361
[299] Id, page 357
[300] Id, page 366
[301] Id.
[302] Id.
[303] Id, page 367

conducting a sales contract through corruption, but not all agreed remuneration is received. Or the other way around, remuneration for agreed services is paid, but not all services are performed. If no recovery is allowed, the other party has benefited from nullity caused by corruption.

It is also argued that a distinction can be made between "contracts that are procured by corruption and contracts that provide for corruption"[304]. Nullity of contracts procured by corruption can be invoked only by the innocent party[305], as corruption has occurred without the knowledge of that party. Therefore, that kind of contract is basically valid until the innocent party takes action to set it aside. While instead, contracts which provide for corruption belong to the category mentioned by Sayed, where such contracts are null and void from the outset, as both parties are aware of the corrupt intent.[306] It follows from there that "the parties are precluded from maintaining any claims founded upon the contract whether contractual or restitutionary in nature"[307].

Where the contract between the parties is legal as such, but the other party intends to perform it by using corruption, the innocent party can bring claims based on the contract against the other party. The corrupt intent of one party does not make the contract itself illegal. Therefore, recovery of payments or other contractual claims can be made.[308]

10 International arbitration and parallel criminal proceedings

What happens to arbitral proceedings which involve allegations of criminal conduct, if parallel criminal proceedings are commenced on a state court? Should arbitrators just stick to their duty and focus on rendering an award within a reasonable length of time and ignore parallel criminal proceedings, which can last for years? Or should they freeze the proceedings and wait for the results of criminal investigation and proceedings, when they are closely related to the dispute in arbitration?

While many of the following considerations have in fact been made in the context international arbitration and competition law violations in Europe, I think it is reasonable to assume that the same principles can be followed at least as guidelines also in cases of corruption or other relevant crimes in arbitration.

The first question arbitrators need to consider, is what kind of potential impact can the parallel proceedings have on the final decision of the arbitrators. When parties bring their dispute to be

[304] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 64
[305] Id.
[306] Id, pages 64-65
[307] Id, page 67
[308] Id, page 68

resolved in arbitration, they also have a legitimate expectation of obtaining an award within a reasonable period of time. For example ICC Arbitration Rules Article 22 (1) provides that "the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute". Therefore, arbitrators need to balance the duty to conduct arbitration in an expeditious manner with "the link between the criminal and the arbitral proceedings", as well as "the state of the criminal proceedings".[309]

Due to the different standards of proof applicable in criminal proceedings and in arbitration, the impact of criminal proceedings may not be as straightforward as one could imagine. Since criminal conviction requires higher level of proof than the usual balance of probabilities applied in arbitration, the impact of criminal proceedings on arbitral proceedings is not self-evident. Thus, even if criminal proceedings do not result a criminal conviction, it does not necessarily mean that any civil liability cannot be found in arbitral proceedings, because the applicable standard of proof is different. However, a criminal conviction may have effect on the arbitral tribunal's findings on civil liability. While it seems unlikely that a decision of a criminal court would actually be binding on an arbitral tribunal and its decision making, criminal procedure can still affect the outcome of the arbitral proceedings.[310] It should also be noted that according to Heitzmann: "Most (if not all) European jurisdictions do not consider that an arbitral tribunal has an obligation to stay international arbitration proceedings pending the outcome of the criminal proceedings, which might be relevant for the arbitration."[311] Therefore, it is up to arbitrators to decide whether to stay the proceedings or not.

On practical level, it appears that arbitrators are reluctant to stay proceedings in international arbitration for reasons of parallel criminal proceedings. One reason for their reluctance may also be that in some countries private parties are capable of commencing criminal proceedings by filing a criminal complaint and thus try to use the criminal proceedings as "a dilatory tactic". Still, in some cases and depending on case-by-case analysis, arbitrators may conclude that arbitral proceedings should be stayed. Such a conclusion may be drawn, if the result of criminal proceedings is to be expected shortly and the result appears relevant to the issue in arbitration.[312]

[309] Heitzmann, Chapter 31: Arbitration and Criminal Liability for Competition Law Violations in Europe, 2011, pages 1269-1270
[310] Id, page 1270
[311] Id, pages 1270-1271
[312] Id, page 1272

11 Duty to disclose criminal activities?

Confidentiality is often mentioned as one of the essential features in arbitration. While there are views that arbitration nowadays is private, but not confidential unless parties so agree, arbitration is not public like litigation.[313] However, as already mentioned, arbitration is a private process, but with public consequences. Arbitration does not just exist inside its own private sphere. This setting raises the following question: Do arbitrators have a duty to report to public authorities of criminal activities they have encountered in arbitral proceedings? In comparison, state officials are usually required to report on criminal acts they have learned while performing their public duties[314]. How should arbitrators act in this kind of situation? Does confidentiality of arbitration prevent any duty to report?

While the exact scope of confidentiality in arbitration is up to discussion, it is argued that confidentiality (or privacy) is stronger regarding arbitral proceedings than maybe on part of arbitral award or the existence of arbitration. Also the source of the duty of confidentiality is not exactly consistent between different jurisdictions and national laws may be completely silent on the issue.[315] Institutional arbitration rules deal with the issue a little better and for example ICC Arbitration Rules provide that

> "Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information."[316]

How does the assumed duty of confidentiality react when faced with suspicions of criminal conduct? According to Hiber and Pavic: "In some countries, every citizen is expected to report planned or committed criminal offences which are prosecuted ex officio"[317]. What is the status of arbitrators in this context? There are somewhat different views about this issue in legal literature. Hiber and Pavic for example consider that "it seems unlikely that the duty of confidentiality (even expressly provided for in the statute of arbitration rules) trumps the obligation to report the preparation or perpetration of a crime which might be imposed by the legal system where arbitration is located". Then again, Cremades Román and Cairns argue that

[313] Hober, International Commercial Arbitration in Sweden, 2011, page 137
[314] Hiber – Pavic, Arbitration and Crime, 2008, page 464
[315] Id, page 465
[316] ICC Rules of Arbitration Article 22 (3), in force from 1.1.2012
[317] Hiber – Pavic, Arbitration and Crime, 2008, page 465

> "Such duty (of dislosure) could only arise from express legislation in a jurisdiction to which the arbitral tribunal, or some of its members, were subject. The writers are not aware of any such legislation, and there would appear to be strong public policy objections to it. The imposition of an obligation on arbitrators to disclose possible bribery, money laundering or fraud that comes to their notice in the course of an arbitration might compromise the right to a fair and independent determination of civil rights guaranteed by Article 6 of the European Convention On Human Rights."[318]

Therefore, it would seem that arbitrators have no obligation of disclosure, unless such a duty is specifically expressed in legislation. However, while there may not be such an obligation for an arbitrator, it has been argued that "disclosure of his or her own accord to the relevant authorities may fall under the public interest or interests of justice exceptions to confidentiality"[319]. Thus, it would be on arbitrators' own discretion to decide whether to report about criminal acts or not.

Another relevant issue regarding this topic is interference in arbitral proceedings by state courts or national investigation agencies. If parallel criminal proceedings are commenced, there are several measures public authorities may take, which can also affect arbitral proceedings. According to Kurkela:

> "Authorities may resort to various investigative, confiscatory or other measures having effects on arbitral proceedings on the basis of statutory authority breaching perhaps thereby the confidential and private nature of the arbitral proceedings and compelling the arbitrators or the parties to produce, disclose or surrender documents or information they would otherwise refuse to produce or disclose."[320]

These kinds of actions obviously have an impact on arbitral proceedings and breach the confidentiality normally applied to them. A noteworthy case in this context is The English Court of Appeal decision in Bowman v. Fels[321], where the Court examined under what circumstances a dispute resolver is under a risk of prosecution for a criminal offence, if criminal acts noted during the proceedings are not disclosed to public authorities. It may be questioned how the findings of the Court apply outside the United Kingdom and outside the jurisdiction of the English Proceeds of Crime Act (POCA) 2002 which was applied in Bowman v. Fels. According to POCA Section 328 (1)

[318] Cremades Román – Cairns, Trans-national Public Policy in International Arbitral Decisionmaking: The Cases of Bribery, Money Laundering and Fraud, 2003, page 85
[319] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 72
[320] Kurkela, Criminal laws in International Arbitration – the May, the Must, the Should and the Should Not, 2008, page 285
[321] Bowman v. Fels 2005 EWCA Civ 226

(Arrangements) "a person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

In its decision the Court concluded that Section 328 of POCA is "not intended to cover of affect the ordinary conduct of litigation by legal professionals"[322]. However, arbitrators do not conduct litigation and it is unclear if they can be considered as legal professionals in the context of this decision. Does this then imply that arbitrators caught up in an "arrangement" in the arbitral proceedings would be under a risk of prosecution, if no disclosure is made? According to the Guidelines published by Chartered Institute of Arbitrators:

> "The only situation in which an arbitrator may be at risk of becoming concerned in an arrangement prohibited by Section 328 is if, at the request of the parties, he issues an agreed award following a settlement. It is not unknown for parties to an illegal operation to use an agreed arbitration award as a way of "laundering" the proceeds of crime. If an arbitrator knows or suspects that a request for an agreed award is, or may be, a prelude to an arrangement by which criminal property is to be acquired, retained, used or controlled he should of course refuse to issue such an award." It is also noted that in such circumstances no disclosure is required.[323] It should be remembered that these are only guidelines and not binding in practice.

In conclusion, it seems that arbitrators are not generally under a duty to disclose information regarding suspected criminal acts faced during arbitral proceedings. However, such a duty may derive from national legislation applicable to arbitrators, parties or arbitral proceedings. Also in case of parallel criminal proceedings, arbitrators may be obliged to disclose information to public authorities by court order.

12 Challenging an arbitral award and judicial review of awards

After rendering an arbitral award arbitrators have fulfilled their duty. In an ideal situation, both parties voluntarily comply with the award and no enforcement procedure is necessary. The reality may be different though and rendering an award can be just a beginning to court proceedings, where the award can be challenged and also enforced. In some cases court proceedings after arbitration may stretch to multiple countries.

[322] Bowman v. Fels (2005) EWCA Civ 226, par. 83
[323] CIArb Guideline 12: The Proceeds of Crime Act 2002: Guidance for arbitrators and mediators, par. 4.3.

Evaluating alleged criminal conduct, arbitrators need to be careful to respect parties' due process rights. If a party is not given a proper chance to present his or her case, it could constitute a ground for refusing recognition and enforcement of the arbitral award[324]. This due process defence is meant to ensure that "certain standards of fairness are observed by the arbitral tribunal"[325]. This issue is closely linked also to burden of proof, especially if arbitral tribunal decides to use reverse burden of proof regarding allegations of criminal conduct. This issue has been discussed already above.

However, if allegations of criminal conduct are related to the arbitral proceedings, it is probably more likely that the resulting arbitral award is challenged on the grounds of public policy. On general level, arbitration is one-instance legal procedure resulting a binding and final decision. There is no possibility to appeal. Again, reality is somewhat different as national courts have varying power to review arbitral awards. It is said that "at one end of the spectrum, there are countries where national courts can effectively act as a court of appeal to arbitration, reconsidering the case on the merits. At the other end, there are states which allow no recourse whatsoever against an award"[326].

Judicial review of arbitral awards is a complicated issue, because it involves two conflicting topics: finality of arbitral awards and courts' duty as guardians of public policy. On one hand, finality of arbitral awards should be respected and "all grounds for refusal of enforcement must be construed narrowly"[327]. On the other hand, states have a right to ensure that fundamental policies and values are upheld and respected in international arbitral awards. As said, the New York Convention grants courts the possibility to refuse recognition and enforcement of foreign arbitral awards, if an award violates public policy. Therefore, courts are allowed to review arbitral awards to ensure that no violation has occurred. However, "the degree of judicial review ranges from minimal to maximal judicial of the merits of the award, regardless of the nature of the violation of the public policy invoked"[328].

The different approaches to judicial review can be separated into three categories, which are minimal review, maximal review and contextual review of arbitral awards. Next each of these categories will be examined separately.

[324] the New York Convention Article V (1)(b) and UNCITRAL Model Law Article 34 (2)(a)(ii)
[325] Lew – Mistelis – Kröll, Comparative International Commercial Arbitration, 2003, page 711
[326] Khodykin, Chapter 16: National Court Review of Arbitration Awards: Where Do We Go From Here?, 2016, page 269
[327] Lew – Mistelis – Kröll, Comparative International Commercial Arbitration, 2003, page 706
[328] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 392

12.1 Minimal review

Minimal review appears to be characteristic to courts both in Switzerland and in the US[329]. An often-mentioned example of Swiss minimal review is case Frontier AG v. Thomson[330]. There was an agreement between Frontier AG and Thomson, governed by French law, under which Frontier AG was to act as intermediary and assist Thomson to complete a sale of French warships to Taiwan. A deal that China objected. Ultimately, the sale contract was signed, but a dispute arose between Frontier AG and Thomson for unpaid commission fees under the intermediary agreement. Thomson then argued that the purpose of the agreement was corrupt influence peddling in order to make the sale happen. The arbitral tribunal found that there was not sufficient evidence to establish corruption and ordered Thomson to pay the fees.[331]

The award was challenged by Thomson, who requested setting aside of the award on various grounds, for example public policy. As one ground, Thomson argued that the arbitral tribunal had applied badly an article of French penal code, which sanctioned influence peddling. However, the Swiss Supreme Court was unwilling to review the arbitral tribunal's application of law in the award.[332] The Court concluded that bad application of law of the substance "would not justify the setting aside of the award"[333]. According to Sayed the Court's findings can be summarized as follows:

> "Only a bad interpretation of a fundamental principle of public policy which would lead to a result violating it, is susceptible to lead the federal Court to set aside the award. Mere error in the application of the law does not offend public policy. However, bad interpretation of a rule which is regarded to be of public policy is offensive."[334]

Another example is the US Ninth Circuit Court of Appeals decision in Northrop v Triad[335]. Northrop and Triad entered into an agreement (the law of the State of California as governing law), under which Triad was to assist Northrop in selling military equipment and services to Saudi Arabia. Triad was to act as an intermediary in exchange for a commission fee based on resulting sales.[336] Also here a dispute arose over payment of the commission fees and arbitration proceedings were commenced. The arbitral tribunal held that even if Saudi Arabian Decree prohibited the use of intermediaries with

[329] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, pages 394 and 396
[330] arising out of ICC Case No. 7664 Frontier AG & Brunner Sociedale v. Thomson CSF, 1996
[331] case cited in Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, pages 76-77
[332] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 400
[333] translated from French and cited by Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 400
[334] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 401
[335] Northrop Corp v Triad Financial Establishment 593 F. Supp. 928 (1984) ('Northrop v Triad')
[336] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 247

respect to arms sales to the Saudi government, it did not prevent the performance of the agreement completely[337]. Northrop challenged the arbitral award in the US and claimed the award to violate public policy. The District Court considered the issue of judicial review and its applicable scope on the case. The District Court found that new examination of the arbitral award was necessary, because of the public policy implications related to the award[338]. The Court vacated the award on those parts, which it considered to violate the Saudi Decree.

The Court of Appeals came to opposite conclusion and reversed the District Court decision on those parts vacating the arbitral award[339]. The Court of Appeals did not accept the new examination of legal and factual conclusions of the arbitral award. The Court stated that

> "The arbitrators' conclusions on legal issues are entitled to deference here. The legal issues were fully briefed and argued to the arbitrators; the arbitrators carefully considered and decided them in a lengthy written opinion. To now subject these decisions to de novo review would destroy the finality for which the parties contracted and render the exhaustive arbitration process merely a prelude to the judicial litigation which the parties sought to avoid."[340]

The Court also referred to the Supreme Court's ruling in another decision: "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[341] The Court of Appeals concluded that "mere error in interpretation of California law (governing substantive law) would not enough to justify refusal to enforce the arbitrators' decision. It is far from evident that the arbitrators misread California law at all."[342] This refers to the arbitrators' conclusion that the Saudi Decree did not prevent the performance of the agreement from the point of California law.

In the light of afore-mentioned examples, it appears that courts favouring the minimal review of arbitral awards are reluctant to re-examine the factual and legal conclusions of arbitral awards. Only in cases, when it appears that an award shows manifest disregard of law or violates a fundamental principle of (international) public policy, courts may review the findings of the award in order to decide possible setting aside or refusal of enforcement of the award.

[337] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, pages 248-249
[338] Northrop v. Triad 593 F. Supp. 928, at 936.
[339] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 250
[340] Northrop v. Triad 811 F. 2d 1265, par. 17
[341] Id., par. 18
[342] Id., par. 19

In legal literature minimal review has been criticised for its "laissez-faire" approach to reviewing arbitral awards[343]. As enforcing courts are conducting only surface review of arbitral awards, there is a risk that an award will be accepted even when findings of an arbitral tribunal can be considered unreliable[344]. It appears that the threshold for re-examination of factual and legal conclusions made by the arbitral tribunal is seen to be too high, which creates concern for possible violations of public policy. Especially in cases when corruption is involved, for example in a form of corrupt contract or corrupt method of its performance, fraud and perjury can also be committed to mislead the arbitral tribunal[345]. It is doubtful whether minimal review can effectively discover such defects in arbitral awards.

12.2 Maximal review

Maximal review has been described to refer to "a certain degree of court scrutiny which, while being predominantly jealous in preserving certain national values and policies, is nevertheless not conducted in such an intrusive way as to upset the finality of arbitral awards"[346]. French courts have traditionally applied maximal review of arbitral awards, but recently some change has been noticed in that trend[347].

Under the doctrine of maximal review practiced by French courts, Sayed notes that French judges are entitled to do the following actions in reviewing an arbitral award:

1. "Review the facts of the case"
2. "Appreciate the manner in which evidence is weighed"
3. "Propose independent reading of the available evidence"
4. "Admit new evidence as well, so long as the arguments of public policy are raised even for the first time during the annulment proceedings"
5. "Suspend consideration of the facts, until final determination by penal jurisdictions, provided that (a) the criminal investigation pertains to facts that are material to the challenge against the award and that (b) the request to suspend the challenge proceedings are presented in good faith."[348]

[343] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 107
[344] Id.
[345] Id.
[346] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 393
[347] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 88; see also Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 404
[348] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 407

As an example of French maximal review of an arbitral award involving criminal allegations, is often mentioned case Westman[349] and the judgement of Paris Court of Appeal. In Westman, a French company Alsthom Turbines a Gaz SA (Alsthom later became European Gas Turbines) entered into an intermediary agreement, governed by French law, with Westman International Ltd (Westman). Under the agreement Westman was to promote Alsthom's gas turbines for a petrochemical project in Iran and help to secure a sales contract with the Iranian officials. As remuneration Westman was to receive a commission fee based on the value of the sales contract. After obtaining the planned contract Alsthom refused to pay the agreed commission to Westman. The agreement included an ICC arbitration clause, so Westman commenced arbitration proceedings claiming the complete payment of the commission fee.[350]

Alsthom argued that the objective of the agreement was to use corrupt personal influence and bribe foreign government officials and as such the agreement was of illegal purpose. However, the arbitral tribunal found the presented evidence to be insufficient to prove that the alleged corrupt activities had occurred. Therefore, the arbitral tribunal ordered Alsthom to pay the commission to Westman according to the calculations based on Westman's evidence.[351]

Alsthom sook annulment of the award in France on the basis that Westman had committed perjury regarding the incurred expenses it had presented in the arbitration, Alsthom argued that the expenses were untrue, and that way Westman had concealed the corruption related to the intermediary agreement. To support its claims, Alsthom presented new evidence showing that no records of the expenses presented by Westman existed. It is noteworthy, that this evidence presented by Alsthom was new, since it was not presented during the arbitration proceedings, but it was not fresh evidence because Alsthom could have obtained it already during the arbitration.[352]

Regarding the scope of judicial review of arbitral awards, the Paris Court of Appeal stated:

> "Whereas there is a recognized power of the arbitrator, in international arbitration, to appreciate the legality of the contract according to the relevant rules of international public policy, and to sanction illegality by pronouncing in particular the nullity of the contract; whereas such power requires, *in the framework of a challenge of annulment on the basis of violation of the recognition and enforcement of the arbitral award of international public policy to scrutinize the award by the judge of annulment, both as a*

[349] Paris Court of Appeal Judgement of 30.9.1993 XX YB Comm Arb 198 ("Westman")
[350] case cited in Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 85
[351] Id, pages 85-86
[352] Id, page 86

> *matter of law and fact on all elements specifically justifying the application or non-application of the international public policy rule*; to appreciate the legality of the contract, under said rule (of international public policy)."[353]

The Court investigated all available evidence and facts in detail and in independent manner. The Court also did weigh the available evidence without referring to the arbitral award. The Court concluded that corruption was not proved to be involved, but based on the new evidence provided by Alsthom the Court found that Westman had committed a fraud by making false declarations about its expenses, which led the arbitral award to be vacated.[354]

A second case, which can be mentioned as an example of maximal review of French courts, is continuation to Frontier AG v. Thomson CSF case series. After the Swiss Supreme Court had declined to set aside the original arbitral award, enforcement of the award was sought in France. Thomson CSF also filed a criminal complaint alleging that there was a scheme of corruption involved and that fraud was committed in the presentation of evidence. Thomson CSF alleged that public policy was violated by the Frontier's fraudulent presentation in the arbitration proceedings and by the arbitral award approving a contract of influence peddling. Thomson requested that some relevant documents in the criminal investigation file would be allowed to be transmitted to the Paris Court of Appeal to help the Court in its determination. Another request regarded suspending the court proceedings until the criminal investigation had been completed and a final decision on the criminal charges issued. The Paris Court of Appeal decided to grant both Thomson's requests.[355]

In its decision, the Court considered the necessary total control in dealing with public policy challenges:

> "The power recognized to the arbitrator in international arbitration to appreciate the legality of a contract under rules of international public policy and to sanction illegality by pronouncing nullity, requires, in the framework of the control exercised by the annulment or the exequatur judge, on the ground of public policy violation of the recognition and enforcement of the arbitral award, the ability to *appreciate all elements of facts and law* allowing notably to justify the application of the rule of international

[353] translated from French and cited by Sayed, Corruption in International Trade and Commercial Arbitration, 2004, pages 408-409
[354] case cited by Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 409
[355] Id, page 410

public policy, and, in the affirmative, to measure the legality of the contract, based on this rule."[356]

As it is illustrated the two cases above, maximal review applied by French courts favours total control over arbitral awards which involve potential violation of international public policy. Therefore, courts may conduct a complete review of the merits of an arbitral award, both matters of fact and law. Courts may also stay enforcement or challenge proceedings in case of parallel criminal proceedings and wait for the outcome of criminal investigation, before continuing proceedings with the arbitral award. It is probably not surprising that maximal review has been criticised for departing too much from the finality of arbitral awards[357].

12.3 Contextual review

The approach applied by courts in the United Kingdom is mentioned in legal literature as an example of contextual review of arbitral awards. Characteristic to contextual review is that the extent of judicial review depends on the nature and seriousness of the public policy violation in question.[358]

A famous case Soleimany v. Soleimany[359] is often mentioned[360] as an example of contextual review. The case was about a contract between two Iranian Jewish merchants, a father and a son, who smuggled Persian carpets out of Iran. Smuggling was conducted through bribery of diplomats, who in turn would transport the carpets through customs and out of Iran. A dispute arose between the parties and it was resolved in Beth Din, a Jewish religious arbitration panel. The award rendered by the Beth Din recognized the contract between the parties to be illegal under Iranian law, but that illegality was considered irrelevant under the applicable Jewish law.[361]

The award was sought to be enforced in the UK. However, the enforcement was refused on the basis that the illegality of the underlying contract made enforcing the award contrary to English public policy. The Court of Appeal also considered the issue and extent of judicial review. One of the main questions was whether under what conditions an enforcement court is allowed to re-examine matters of fact of a case involving issues of illegality.[362] In its consideration[363] the Court set out a two-stage

[356] Judgement of the Paris Court of Appeal, 10.9.1998, translated and cited by Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 410
[357] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 107
[358] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 412
[359] Soleimany v. Soleimany [1998] 3 WLR 811, [1999] QB 785 (CA)
[360] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 414 and Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 94
[361] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, pages 414-415
[362] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 415
[363] "In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator

test for reviewing arbitral awards. According to this two-stage approach, when there is "prima facie evidence" of illegality, the enforcement court should opt for a preliminary inquiry of the award to ensure that the award can be given "full faith and credit" and thus upheld in court. This would constitute Stage 1. If that is not the case, the court needs to conduct a full-scale inquiry of the award, involving also factual investigation, to determine the issue of illegality (Stage 2).[364]

The Court proposed a list of matters or circumstances to be considered in Stage 1 before making the decision whether Stage 2 inquiry should be conducted. The list has been restated by Sayed as follows:

(1) "Available evidence of legality and illegality;

(2) The way the Arbitrator reached his or her conclusion of illegality;

(3) The degree of competency of the Arbitrator;

(4) The way arbitration was conducted. Care must be taken to verify whether the award was procured by fraud, collusion or bad faith."[365]

12.3.1 Case Westacre

Along with case Westacre in the Court Appeal, nature of illegality was also introduced as a factor to be considered by courts[366]. The case itself is already discussed above. In its decision the Court conducted a balancing exercise between the finality and upholding arbitral awards and nature of illegality violating public policy. If the nature of illegality would be considered high on a scale opprobrium, it could constitute a ground for discarding the finality of arbitral awards and justify judicial review by courts[367]. As already discussed above, the Court of Appeal agreed by majority with the lower court's ruling which concluded that commercial corruption was not so intolerable on a scale of opprobrium that it would warrant discarding finality of arbitral awards[368]. However, one judge did

expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decided at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality." Soleimany v. Soleimany, Court of Appeal, 1998, in Yearbook Commercial Arbitration 1999 Volume 24, page 339 par. 25

[364] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 95

[365] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 415

[366] Westacre Investments Inc. v. Jugoimport-Sdpr Holding Co. Ltd. and Others (1999); case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 417

[367] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 417

[368] see page 21

not agree as he considered corruption so offensive on a scale of opprobrium that the finality of arbitral awards should not be upheld[369].

There has also been some dissent among Court of Appeal judges, whether evaluation of nature of illegality belongs to Stage 1 (preliminary inquiry) review of awards or to Stage 2 (full-stage inquiry)[370]. Some reservations have also been expressed about using the two-stage test, regarding both its concept and application in practice[371].

Regardless of the difference of opinions, contextual review of arbitral awards has power in its flexible approach. Enforcement courts faced with allegations of public policy violation probably need to conduct a case-by-case analysis anyway, since the finality of arbitral awards can be discarded only in exceptional circumstances. Contextual review may strike the best balance between the finality of arbitral awards and protection of public policy, when compared to minimal and maximal review. The biggest problem with contextual review probably relates to evaluation of nature of illegality. It has been argued that "there does not seem to be an objective scale along which illegalities are classified. Appreciating the nature of illegality and the degree of opprobrium it generates seems rather to be a matter of subjective evaluation"[372]. This was also evident in case Westacre.

13 Conclusions

The objective of this paper was to look into the issue how allegations of criminal conduct can appear in international commercial arbitration and how should arbitrators deal with them. We have thus established that basically any issues arising out of the underlying (commercial) contract between the parties and covered by a valid arbitration agreement can be resolved in arbitration. Matters involving alleged criminal conduct make no exception to this rule. The arbitrability of such matters is not questioned anymore and a lot has happened since Judge Lagergren gave his decision in ICC case No. 1110 in 1963, where he denied arbitrability on the basis of corruption and bribery.

It has also been established that arbitrators have a mandate to investigate allegations of criminal conduct, when such claims are raised by a party to arbitration. The situation is more difficult, when no such allegations are made, but arbitral tribunal happens to detect some evidence of criminal conduct. It seems that arbitrators are not stepping outside their jurisdiction even if they decide to

[369] case cited in Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 417
[370] see Sayed, Corruption in International Trade and Commercial Arbitration, 2004, pages 416-421; Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, pages 96-97
[371] see Westacre Investments Inc. v. Jugoimport-Sdpr Holding Co. Ltd. and Others (1999), Court of Appeal, at 71.; R v. V [2008] EWHC 1531 (Comm)., High Court of Justice Queen's Bench Division, at 30.
[372] Sayed, Corruption in International Trade and Commercial Arbitration, 2004, page 417

investigate possible criminal conduct on their own initiative[373], when addressing the matter can be considered relevant in resolving the dispute submitted to arbitration. Still, arbitrators need to remember that they derive their power from the parties and there needs to be some prima facie evidence of criminal conduct (for example corruption), before arbitrators can conduct any investigation on their own[374].

The problem with investigating suspected or alleged criminal conduct is that arbitrators lack coercive powers similar to state courts[375]. Arbitrators cannot force a party to present evidence or cannot issue orders against third parties who are not party to the arbitration agreement[376]. Applying interim measures can bring some help to these problems as well as requesting assistance from state courts. In some cases arbitrators can also draw adverse inferences from non-cooperation of a party. However, it is disputable what kind of conclusions can be reached just from drawing adverse inferences.

The issue of applicable burden and standard of proof was discussed in chapter 7. There appears to be no universal consensus on the issue. Both high standard of proof (of clear and convincing evidence) and normal balance of probabilities has been applied in the context of criminal allegations. The burden of proof is generally on the party making a claim, but there are situations when arbitral tribunal has considered asking the other party to bring some counter-evidence. Also reversed burden of proof has been suggested in legal literature, when arbitral tribunal is dealing with corruption matters[377]. Regarding the standard proof, the most reasonable approach appears to be the balance of probabilities, but with attention paid to individual circumstances of each case.

Dealing with allegations of criminal conduct appropriately has great significance for the outcome of arbitration. If arbitrators are able to establish corruption, it can lead to nullity of the main contract between the parties. Illegal intent can also affect the right to recovery and parties' rights to bring claims based on the contract.

If arbitrators fail to address the issue of suspected or alleged criminal conduct, there is a risk of rendering an award violating public policy. Public policy issues should always be taken into account by arbitral tribunals, since violation of public policy can lead to refusal of recognition and enforcement in state courts. While the concept of public policy is difficult to define, there are some

[373] Kreindler, Aspects of Illegality in the Formation and Performance of Contracts, 2003, pages 236-237
[374] Hwang – Lim, Corruption in Arbitration – Law and Reality, 2012, page 21
[375] Yesilirmak, Provisional Measures in International Commercial Arbitration, 2005, page 8
[376] Savola, Arbitrator-Ordered Interim Measures of Protection in International Arbitration, 2011, page 648
[377] Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto, 2003, page 295

universal principles and guidelines to follow. It is argued that enforcing courts should apply narrow or international concept of public policy, instead of domestic notion of public policy.

Finally, there are different approaches how courts may conduct judicial review of arbitral awards to ensure that public policy is not being violated. Finality of arbitral awards should be respected and it can be neglected only in exceptional circumstances, as it is intended in the New York Convention. Between different approaches, contextual review may strike the best balance between finality of arbitral and defending public policy.

Some questions still remain. It can be discussed how well arbitrators are in practice equipped to investigate issues of criminal nature compared to state courts. If arbitrators address the issue of alleged criminal conduct, but do not (or cannot) investigate the issue deeply enough to be able to establish with sufficient certainty that criminal activity has actually occurred, it is questionable whether courts are still willing to re-open the issue at the enforcement stage after the award has been rendered. If claims of criminal conduct have been addressed and taken into account in the decision of the arbitral tribunal, courts performing only surface review of arbitral award may not notice even if some defects existed in the tribunals reasoning or conclusions. It is possible that a misdeed may slip through these loopholes. In order to prevent that both arbitrators and courts need to stay vigilant, when dealing with allegations of criminal conduct in international commercial arbitration.