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Analysis of Civil Law Consequences of Corruption Under the Czech Law in the Light of International Commercial Arbitration

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Abstract

This paper analyzes the civil law consequences of corruption of the contractual parties assessed in international commercial arbitration under the Czech law applicable to the merits of the dispute. The act of corruption is under most jurisdictions considered as a criminal offence. However, it can have a great legal impact on the contracts tainted by corruption, especially with the regard to its validity. There are two categorize of such contracts, one providing for corruption, and one procured by corruption. As stipulated in this paper, such activities are common in international trade nowadays. Therefore, it is important to clarify whether a particular national legislation draws adequate private law consequences to deter and punish potential perpetrators of corruption.

Keywords

Bribery; Corruption; International Commercial Arbitration; Invalidity of the Contract.

1 Introduction

The international commercial arbitration is a generally accepted method of resolving disputes arising in connection with international commercial transactions that exists alongside court proceedings and alternative dispute resolution methods. A fundamental feature of arbitration is that the jurisdiction of arbitrators is dependent, *inter alia*, on the manifested autonomy of the will of the parties to submit the arising conflict to arbitration. The nature of this method of dispute resolution is, above all, private and based on confidentiality.

At the same time it gives the parties a wide margin of discretion as to the rules to be followed in the proceedings or applicable on the merits of the dispute which is consistent with the principle of the autonomy of the will which is strongly manifested in such proceedings. The primary, but not the only source of the arbitrator's power is the will of the parties as reflected in the arbitration agreement. It is however limited by applicable laws which play an important role especially in disputes tainted by corruption.

On the other hand, the autonomy of the will of the parties is directly related to the freedom of conduct which may not always be legal. Unfortunately, today, despite international efforts, we are experiencing an increase in illegal economic activities, the aim of which may be to abuse the powers entrusted to them in order to achieve their own private gain.[1] If this behaviour exceeds the limits of legality which, however, may not be immediately apparent in today's globalized era, it could be categorized as corrupt.

Corruption, as well as its various forms, is generally considered a criminal offence. Despite of that there is no uniform definition of this behaviour and therefore its punishment is not easy. Moreover, different states take different approaches when regulating different forms of corruption.[2] In general, we can agree that corruption undermines the integrity of international trade, creates a dangerous link between business and organized crime, distorts competition and helps to perpetuate corrupt regimes in third world countries. The fight against corruption is an established part of public order and it must be respected even in an area that is not based on the principles of public law and the state apparatus. That is in the resolution of disputes before arbitrators.

In the area of commercial transactions and in the private sphere, such efforts are increasingly common. This is not to say that the new millennium brought corrupt behaviour that did not exist before. On the contrary. It did exist but it was not so widespread, or, in many cases, it was not even known. Therefore, the field of arbitration has also had to respond to these rising

1 Corruption Perceptions Index. *Transparency International* [online]. 2018 [cit. 1. 5. 2020]. Available at: https://www.transparency.org/files/content/pages/2018_CPI_Executive_Summary.pdf

2 BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, p. 7.

trends. Indeed, exclusion from the jurisdiction of the courts can very easily be abused by parties to cover up their behaviour. The reason why parties might do this is the privacy and generally broad-based confidentiality. Parties see arbitration as a safe harbor for illegal activity or for resolving disputes arising out of or in connection with contracts affected by such activity. This makes the fear of arbitration abuse all the more pertinent.

The aim of this paper is to analyze the civil law consequences of corruption that the arbitral tribunal may draw in relation to disputed arising out of contracts tainted by corruption. The subject matter of the dispute itself is not the act of corruption, but rather a breach of obligations specified in the contract. The claim that is brought before the arbitrator must always relate to the contract to which the arbitration clause or arbitration agreement is tied. The claim must be arbitrable under the applicable law and the arbitrator may only decide on the civil law consequences.[3]

Corrupt conduct thus arises independent of the contract. However, its act has legal consequences for contracts that are concluded as a result of it but also for contracts that are concluded for the purpose of providing, for example, a bribe. These legal consequences must be drawn by the arbitral tribunal based on the law applicable to the merits of the dispute. This paper will analyze the legal consequences of corruption that apply to contracts afftected by it under the Czech law.

Against this background, this paper is divided into 5 chapters starting with the characterization of the corrupt practices that occur in front of the arbitral tribunal. We see strong support in fight against corruption on international level, therefore we will examine the corrupt legal framework. From the international perspective we will move to the Czech national legislation and analyze the national concept of corruption from the perspective of criminal and civil law. Last but not least, we will proceed to analyze civil law consequences that an arbitrator may apply in the event of a finding of corrupt behaviour in a dispute.

3 VALDHANS, J. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, pp. 111–112.

2 Characteristics of Corrupt Practices in International Trade

Corruption cannot be seen as a phenomenon that affects only a particular state. On the contrary, corrupt practices are transnational phenomenon that affect societies around the world, and international cooperation is therefore essential to prevent and punish them. Corrupt behaviour has been encountered in perhaps every country in the world to date, even on a daily basis. The 187 States Parties[4] to the United Nations Convention against Corruption ("UNCAC") recognize that corruption poses serious problems and threats to the stability and security of societies.[5] According to International Transparency's annual Corruption Perceptions Index, more than 120 countries, about 2/3 of the world's countries, struggle with high levels of corruption (0 – most corrupt, 100 – least corrupt). The Czech Republic, for example, is not among them. It scored 54 points for 2020, according to the index. For comparison, the Czech Republic had 56 points for 2019, and 48 for 2013. The consequences of corruption in the public sector are very serious. They affect not only the economic status and economic development of the countries concerned but also human rights, national security, health care and other areas.[6] Therefore, legislative efforts to prevent and combat corruption in the public sector are quite substantial.[7] Similarly, corruption has an impact on the private sector. The latter, however, does not attract as much attention from states and international organizations. This in turn has an impact on the increasing number of cases of corrupt practices that national courts and arbitral tribunals are confronted with.[8]

Despite extensive international, regional, and national efforts to combat corruption, it remains a pervasive problem. This fact should lead to a search for more effective ways of protecting society from its serious consequences.

4 As of 15 June 2021.

5 Preamble UNCAC.

6 SARTOR, M.A. and p.W. BEAMISH. Private Sector Corruption, Public Sector Corruption and the Organizational Structure of Foreign Subsidiaries. *Journal of Business Ethics*, 2020, Vol. 167, pp. 725–726.

7 PAVIĆ, V. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review*, 2012, Vol. 43, p. 664.

8 ARGANDOÑA, A. Private-to-private Corruption. *Journal of Business Ethics*, 2003, Vol. 47, no. 3, p. 253.

The question is therefore, whether the national approach to combating corruption which is primarily based on criminal law is still able to respond adequately to corrupt behaviour that occurs beyond territorial borders. This is partly due to the jurisdictional concepts that national legislators often apply within the framework of criminal law. It is up to national legislators to decide which principle or principles to adopt. This inconsistency and rigid legislation are also behind efforts to find more effective ways to minimize the incidence of corrupt behaviour.

Corrupt behaviour is often hidden behind, at first sight, inconspicuous contractual obligations of the parties. This is primarily because it is the private sector, and primarily civil and contract law which gives parties contractual freedom and thus creates a quasi-safe bubble for illegal transactions. However, civil law can be used as a tool in the fight against corruption. It can respond more effectively to cross-border transactions thanks to private international law standards but also by being able to sanction the assets of actors, including abroad, thanks to the enforceability of decisions of national courts and arbitral tribunals.[9] It is therefore not only criminal law that carries serious legal consequences for wrongdoers.

In the light of international commercial arbitration corrupt conduct may be committed not only by the contractual parties but also by arbitrators or third parties such as witnesses, experts, or interpreters. It is also true that a person may commit it both in the pre-trial stage and during the trial. In the course of the proceedings, the most frequent act of corruption will be on the side of arbitrators or third parties such as witnesses or experts. The first possibility how corruption on the side of the parties may occur and which appears to be more common is that the person committed the offence prior to the commencement of the arbitration proceedings and that the offence only came to light after the dispute resolution process had commenced.[10]

The paper will be focused solely on corrupt conduct that was committed by both or only one of the parties prior to the commencement

9 MAKINWA, A. *Private remedies for corruption: towards an international framework*. The Hague: Eleven International Publishing, 2013, p. 9.

10 PAVIĆ, V. Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy. *Victoria University of Wellington Law Review*, 2012, Vol. 43, p. 667.

of the arbitration but which only came to light during the arbitration. At the outset, it should be noted that the subject matter of the dispute will never be the corrupt conduct itself. This is because the arbitrators' jurisdiction is based on an arbitration clause that is tied to a particular commercial transaction and only disputes that are arbitrable under the applicable law can be decided. The scope of this clause, i.e., the definition of what disputes will be arbitrated then limits the claims that the parties can pursue in the arbitration. This paper will therefore be focused only on bilateral legal dealings – contracts, that are in some way affected by corruption.

There are two categories of these contracts. The first category is contracts which, by their object of performance, conceal the commission of corruption.[11] In this case, the corrupt practice is hidden behind an otherwise legal act with both parties to the contract being aware that the real purpose is to provide a bribe in order to obtain an advantage. Most often these contracts will have a form of service contracts or contracts of a command type[12], such as agency, commercial representation or commission.

The second category consists of contracts that were concluded as a result of corruption, most often bribery. These commitments are legitimate business transactions. However, their conclusion is preceded by the payment of a bribe which results in an advantage in the form of the conclusion of this specific contract.[13] These will most often be public procurement contracts or other types of contracts which are also concluded with non-state

11 ARMESTO, F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, D. and R. KREINDLER (eds.). *Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption in Commercial and Investment Arbitration.* Paris: ICC Publishing s.a., 2015, p. 167.

12 For example, the Case No QBCMI 1998/0485/3 of Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd decided by the Court of Appeal of England and Wales on 12 May 1995; the case No. 1998 Folio No 1003 of Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd decided by the Supreme Court of England and Wales on 24 May 1995, Swiss Arbitration Decision under Case No. 4A_596/2008 dated 6 October 2009, under Case No. 4A_532/2014 and 4A_534/2014 dated on 29 January 2015, or ICC Case No. 13914 and No. 16090.

13 ARMESTO, F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, D. and R. KREINDLER (eds.). *Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption in Commercial and Investment Arbitration.* Paris: ICC Publishing s.a., 2015, p. 167.

actors and where strong competition between those interested in obtaining the business transaction is expected.

2.1 Structure of Contracts Tainted or Linked to Corruption

In this subsection, we outline the basic contractual constructs that we briefly introduced in the introduction to this chapter: Company A, a development company, is interested in entering into a service contract with Company B which offers a long-term cooperation on various projects. We assume that both companies are based in different countries. Company A enters into a separate contract with an agent who has the necessary knowledge of the market that Company A is trying to enter. The purpose of the contract is to facilitate the conclusion of the contract between Company B and Company A. In consideration, Company A pays the agent a commission, the amount of which depends on whether the service contract with Company B is concluded and on what Company A's net profits are from the transaction. The agent will offer a bribe to the company B's advisor which will result in the conclusion of the service contract between company A and B. An arbitration clause is an integral part of both contracts which obliges the parties to submit any claim arising out of the contract to an arbitral tribunal (which is specified).

Corrupt conduct will always stand outside the contractual relationships, the disputes from which will be resolved before arbitrators. However, corrupt conduct carries with it legal consequences that also affect contracts tainted by this behavior. These legal consequences on the related legal relationships will depend on the applicable law for the resolution of the merits of the dispute. Procedural issues, in particular the powers and duties of arbitrators, will in turn depend on the law applicable to the arbitration. However, this topic is outside the scope of this paper.

2.2 Definition of Corruption

Despite universal agreement on the seriousness of corrupt behaviour and not only in the field of international trade there is no single definition that defines what constitutes corrupt practice. Despite the global convergence of legal rules, efforts and views condemning corruption, international

society has not come to a sufficient and coherent approach in defining this behaviour. Even in the preparation of international conventions, states and their representatives have not arrived at a single definition. The line between what can be considered legal practice in the sector and what already crosses the boundaries of legality and morality and can be categorized as corrupt behaviour is thus blurred.[14] The main problem is that corruption is an umbrella term for a wide range of practices that include bribes and enrichment at the expense of others in different sectors but also at different levels favoritism, blackmailing or influence peddling. Individual practices do not occur in isolation and in most cases are hidden behind otherwise legal conduct.[15]

In defining corruption, we return to *International Transparency* which defines corruption *as the abuse of entrusted power for private gain*. This definition can apply to both private and public corruption. However, in analyzing and grasping corruption in the public sector, we take the liberty of referring to the definition used by *Sayed*, namely that it is the transfer of money or other values to foreign public officials, either directly or indirectly, for the purpose of obtaining a favorable decision from the public actor in the course of international trade.[16] In the private sector, as mentioned above, the concept of corruption is seen as the abuse of certain powers conferred on an employee by his superior in order to influence a particular corporate decision. The nature and consequences of corruption in both the public and private spheres are the same and constitute an obstacle to the proper functioning of international trade.[17] If we add to this the fact that corrupt behaviour does not have clearly defined definitional features, the treatment of this area in the various legal systems is diversified. Consequently, these regulate some forms as legal or do not recognize some

14 DAVID, V. and A. NETT. *Korupce v právu mezinárodním, evropském a českém*. Praha: C. H. Beck, 2007, p. 15.

15 JENKINS, A. Money laundering, corruption and fraud: The approach of an international law firm. In: KARSTEN, K. and A. BERKELEY (eds.). *Arbitration – Money Laundering, Corruption and Fraud*. Paris: ICC Publishing s.a., 2003, p. 31.

16 SAYED, A. *Corruption in international trade and commercial arbitration*. The Hague: Kluwer Law International, 2004, p. xxvi.

17 ARGANDOÑA, A. Private-to-private Corruption. *Journal of business ethic,* 2005, Vol. 47, no. 3, p. 255.

forms at all.[18] Conduct that is criminal in one country may not be criminal beyond its borders, making international efforts to combat it all the more difficult.[19] It could be said that we can get into a legal vacuum when using this concept and the only clues are the legal definitions of the various forms of corruption that are criminalized in that particular state.

3 The Current Legal Framework Against Corruption – From International to National

Although corruption has always been a major problem affecting development, competition and all trust in institutions, it was only after 1990 that it began to be seriously addressed at the international level.[20] Until then, efforts to combat corruption were more at the national level. The global community began to warn international business that corruption was unacceptable and thus globally prohibited.[21] The international community has managed to reach an admirable consensus in the fight against transnational bribery, a form of corruption. The first significant step has been taken by the Organisation for Economic Co-operation and Development ("OECD"). In 1997, the OECD adopted Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which covers public bribery by individuals and companies.[22] However, it addresses only one side of bribery, namely active bribery. By active we mean the promise, offer or provision of a bribe. It provides for penalties, both criminal and civil where the specific conduct is not criminal in the jurisdiction.[23] The Convention also resolves the conflict of multiple jurisdictions under which these acts could

18 Ibid., p. 256.

19 DAVID, V. and A. NETT. *Korupce v právu mezinárodním, evropském a českém*. Praha: C. H. Beck, 2007, p. 15.

20 PIETH, M. Contractual Freedom vs. Public Policy Considerations in Arbitration. In: BÜCHLER, A. and M. MÜLLER-CHEN (eds.). *Private Law: national – global – comparative, Festschrift fur Ingeborg Schwenzer zum 60. Geburstag*. Bern: Stampfli Velag AG Bern, 2011, p. 1379.

21 FOX, W. Adjudicating Bribery and Corruption Issues in International Commercial Arbitration. *Journal of Energy & Natural Resources Law*. 2009, Vol. 27, no. 3, p. 493.

22 BETZ, K. Economic Crime in International Arbitration. *ASA Bulletin*, 2017, Vol. 35, no. 2, p. 284; see also Art. 1 para. 1 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

23 See also Art. 3 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

be punished.[24] Although the OECD covers only one form of corruption, namely active bribery, it marked a first step to stimulate debate on the scope of punishing corrupt behaviour.

Probably the most remarkable development in the international community was made by the United Nations ("UN") in 2003. The way in which the UN approached the problem of transnational corruption in the UNCAC was somewhat more sophisticated than that of the OECD, and moreover, it was ratified by 187 countries worldwide. The UNCAC can be said to be a kind of superstructure of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted in the OECD. Where the OECD merely recommends to its member states that they prohibit certain bribery-related activities, the UNCAC prohibits those activities directly to the contracting states. This Convention is innovative not only in terms of the acts it criminalizes but also because of its strong focus on prevention, investigation, as well as its emphasis on international assistance and the recovery of the profits derived from these crimes.[25] In addition, the UNCAC creates a relatively strong framework for states parties to adapt their civil law regulations to provide redress for victims of corruption and to draw other civil law consequences, such as the nullity of a contract or the right to rescind a contract.[26]

UNCAC recognized not only the active side of bribery - the individual offering or paying bribes, but also the passive side - the public official accepting or demanding the bribe.[27] Above and beyond this it also explicitly defines embezzlement or other misuse of property by a public figure, trading in influence, abuse of office or position, illicit enrichment, laundering the proceeds of crime, or concealing the commission of the aforementioned acts and, in this context, obstruction of justice.[28] It affects both national and

24 See also Art. 4 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

25 WOUTERS, J., C. RYNGAERT and A. S. CLOOTS. *The Fight Against Corruption in International Law*. Den Haag: T. M. C. Asser Press, 2012, p. 16.

26 Art. 26, 34 and 35 UNCAC.

27 FORTIER, L. Y. Arbitrators, corruption, and the poetic experience: 'When power corrupts, poetry cleanses'. *Arbitration International*, 2015, Vol. 31, no. 3, p. 370; see also Art. 15 UNCAC.

28 See Art. 15–25 UNCAC.

foreign public officials. The UNCAC takes a similar approach to corrupt conduct in the private sector. Thus, both active and passive aspects are equally affected in relation to any person who manages or works in any capacity for a private sector entity or any other person.[29]

Progress in the fight against transnational corruption can also be observed at the regional level. The main actors in these areas have been the Council of Europe, the EU, the Organization of American States[30] and the African Union[31]. For the purposes of this paper, we discuss the European approaches in more details. The Council of Europe has adopted two major conventions on its soil - the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption. They impose obligations on countries that have ratified them to adopt legislative or other measures that penalize active and passive corruption in relation to domestic and foreign public officials, judges, officials in international organizations, as well as in the private sector.[32] The Civil Law Convention on Corruption sets out rules on combating corruption with private law instruments and on the legal consequences. States parties have an obligation to establish a legal framework that would allow persons aggrieved by corrupt conduct to initiate legal proceedings to obtain full compensation for damages. In connection with the above-mentioned documents, the Council of Europe has established a special system for monitoring compliance with all the standards established in the fight against corruption, the Group of States against Corruption that serves as a platform for the exchange of best practices in the fight.

Beyond legally binding instruments, there are also several soft-law instruments that have been developed from private initiatives. One of these is Transparency International and its Corruption Perceptions Index tool, mentioned earlier in this paper which ranks countries according to perceived levels of corruption based on public opinion polls.[33]

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29 See Art. 21 letter a) and b) UNCAC.

30 The Organization of American States adopted in 1996 the Inter-American Convention against Corruption.

31 The African Union adopted in 2003 the African Union Convention on Preventing and Combating Corruption.

32 See Chapter 2 Criminal Convention on Corruption.

33 WOUTERS, J., C. RYNGAERT and A.S. CLOOTS. *The Fight Against Corruption in International Law*. Den Haag: T.M.C. Asser Press, 2012, p. 32.

However, the question is to what extent members of the international community respect anti-corruption rules and what international enforcement mechanism they have already adopted. The core of the argument is that almost all anti-corruption treaties lack an international enforcement mechanism which is left to national laws and courts.[34] All of the above treaties are not self-executing, leading to the need for the reception of the conventions' provisions into domestic law by each state. An example is UNCAC, an international convention that combats corruption and obliges states to adopt the necessary rules and instruments for certain forms of corruption. However, the diversification of state approaches has caused those certain forms of corrupt behaviour may not be criminalized but states are 'merely' required to consider adopting rules to combat them. How the rules from the aforementioned conventions have been reciprocated into Czech legislation will be discussed in the following subsection.

However, leaving this important part of the fight against corruption to each state leads to uneven application of anti-corruption rules between countries, making the whole idea of tackling transnational corruption inadequate. Nevertheless, the existence of a set of anti-corruption rules represents a strong voice from the international community that corruption and its forms are no longer tolerated in international business transactions and that individuals will be punished.

Corrupt behaviour in the private sector is perceived as illegal by most countries, as evidenced not only by national legislation but also by the aforementioned trends at international level. International treaties provide the countries concerned with a basic legal framework that contains the minimum requirements for national legislation. They thus lay down rules on how to approach corrupt behaviour. Each country thus creates a legal framework of regulation that may as a result differ significantly from those of other states, not only in the categorization of offences but also in the regulation of corrupt behaviour across different legal sectors.

Most often arbitral tribunals deal with disputes arising from contracts providing for corruption. Based on the findings below the selected arbitral decisions show that arbitrators have taken a clear position on the legal implications of corrupt

34 FORTIER, L. Y. Arbitrators, corruption, and the poetic experience: 'When power corrupts, poetry cleanses'. *Arbitration International*, 2015, Vol. 31, no. 3, p. 370.

conduct on this type of contract – dismissal of the claims of both parties where the agreement is found to be null and void due to corrupt activities.

In International Chamber of Commerce ("ICC") case 3913, the arbitral tribunal has concluded that the agreement concluded between two companies providing for services consisting of obtaining certain contracts for a fee in the amount of the contracts awarded was actually an agreement providing for "kickbacks". Such agreement was declared by the tribunal as null and void not only under the applicable French law, but under the international public policy as well.[35] The same conclusion was rendered by the arbitral tribunal in ICC case 8891. However, in this case the arbitral tribunal became aware of the bribery based on a witness statement.[36] In case 13914 the arbitral tribunal itself found out indicators of act of corruption regarding the consulting agreements. Therefore, the arbitral tribunal concluded that the purpose of the consulting (and other related) agreement was to provide bribes and such agreement must be therefore declared null and void. Neither party may require performance of the contract nor seek restitution under it.[37] Another case with the same conclusion was brought under French applicable law. The claim was brought by one of the contractual parties for the payment of sum of money based on separate agreements signed, beside other parties, by government of African state. However, the government was subsequently overthrown in civil war. The following government rejected to pay the sum of money arguing that the agreement was void as it had been made in abnormal circumstances to enrich corrupt government leaders. The respondent provided the arbitral tribunal with information and indicators that established a presumption of illegality which the claimant did not rebut. Based on that the arbitral tribunal held that the agreement was null and void and dismissed the claim.[38]

35 CRIVELLARO, A. Arbitration case law on bribery: Issues of arbitrability, contract validity, merits and evidence. In: KARSTEN, K. and A. BERKELEY (eds.). *Arbitration: Money Laundering, Corruption and Fraud.* Paris: ICC Publishing s.a., 2003, p. 120.

36 JOLIVET, E. and C. ALBANESI. Dealing with Corruption in Arbitration: A Review of ICC Experience. *Special Supplement 2013: Tackling Corruption in Arbitration.* 2013, p. 9.

37 Final Award (Extract) of the International Chamber of Commerce of 2013, Case 13914. In: *Special Supplement 2013: Tackling Corruption in Arbitration.*

38 Final Award (Extract) of the International Chamber of Commerce of 2013, Case 12990. In: *Special Supplement 2013: Tackling Corruption in Arbitration.*

3.1 National Anti-corruption Legislation

As at the international level, neither national legislation, in most cases, contain a definition of corruption. Even from a national perspective, it is a generic term that encompasses several unlawful acts. Their common denominator is the abuse of power for undue advantage.[39] National legislation also treats the various forms of corruption primarily as criminal offences.[40] Nevertheless, as stated by *Bonell and Meyer*, corruption in international trade is not only the domain of criminal law but the involvement of other branches of law is also necessary.[41] The UNCAC itself reflects this approach. It obliges States Parties to ensure effective, proportionate and dissuasive civil, administrative and criminal penalties for breaches of measures taken under the UNCAC to combat corruption.[42]

States primarily use criminal law instruments to combat corrupt practices and regulation of corrupt practices through private law instruments is lacking in most countries. An exception is the unfair competition rules which in some jurisdictions also regulate corrupt conduct.[43]

The Czech Republic is a party to all the above-mentioned conventions[44] which it has transposed into national law. In the Czech legal system,

39 See, for example, the legal concept of corruption in the Czech Criminal Code, the Slovak Criminal Code, the Danish Criminal Code or the German Criminal Code. Discussed in more detail: BONELL, M. J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, pp. 100, 120, 173.

40 KREINDLER, R. Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements. In: *Recueil des cours 2012*. Leiden: Brill – Nijhoff Publishers, 2013, Vol. 361, p. 79.

41 BONELL, M. J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, p. 1.

42 Art. 12 para. 1 and Art. 26 para. 2 UNCAC.

43 BONELL, M. J. and O. MEYER. The Impact of Corruption on International Commercial Contracts – General Report. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, p. 4. As *Bonell* and *Meyer* point out, these jurisdictions include the Czech Republic, Poland and Switzerland. We can also add Slovakia, which, like the Czech Republic, regulates bribery as a specific act of unfair competition.

44 These are the UNCAC, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.

anti-corruption measures can be divided into two groups. The first is, of course, the norms of criminal law and the second the area of civil offenses. Civil offenses related to corrupt behavior are regulated in the Act No. 89/2012 Coll, the Civil Code ("Czech Civil Code"). It captures one of the forms of corruption, namely bribery as a private offense and one of the special facts of unfair competition.[45] The Czech Civil Code regulates two forms of this behavior, namely active and passive. The factual nature of the active form of bribery consists in the direct or indirect granting of an advantage in order to obtain a certain undue advantage or competitive advantage.[46] Passive, on the other hand, in direct or indirect demand, promise or acceptance of a benefit for the same purpose. Both forms of corrupt behavior can be committed exclusively by a competitor which can be a natural person but more often a legal entity. It will, of course, commit bribery through natural persons who are authorized to represent it, or whose legal acts are attributable to a legal person as a competitor.[47] However, only a natural person can be a person bribed, namely either a member of the statutory or other body of another competitor or his employee. In practice, however, it happens that a legal person is also bribed. In such case, although the factual nature of bribery according to Section 2983 of the Czech Civil Code is not fulfilled, such an act can be assessed according to the general clause.[48]

The specificity of unfair competition according to the Czech Civil Code is that it is based on a combination of the general clause regulated in Section 2976 para. 1 and (demonstrative calculation) of special legal facts according to Section 2976 para. 2 et seq. In order for a conduct to be classified as unfair, it is primarily necessary to fulfill the characteristics of a general clause. Whether it also fulfills the characteristics of any of the particular facts will no longer affect the conclusion that the conduct is unfair.[49] However, bribery as a special factual basis of unfair competition is rarely

45 Section 2976 para. 2 letter e) and Section 2983 Czech Civil Code.
46 ONDREJOVÁ, D. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014).* Praha: C. H. Beck, 2014, p. 190.
47 BEJČEK, J. et al. *Obchodní právo. Obecná část. Soutěžní právo.* Praha: C. H. Beck, 2014, p. 231.
48 Ibid., p. 231.
49 ONDREJOVÁ, D. § 2976. In: HULMÁK. M. et al. *Občanský zákoník VI. Závazkové právo. Zvláštní část (§ 2055–3014).* Praha: C. H. Beck, 2014, pp. 1769–1789.

sued in court. The reason is precisely that the features of the general clause must be met. Without the fulfillment of the characteristics of the general clause, this is not an unfair competition behavior, even if the conduct fulfills the characteristics of the factual nature of bribery.[50]

The basis of public law affecting corrupt practices is the Act No. 40/2009 Coll., the Criminal Code ("Czech Criminal Code") and the related Czech law on criminal liability of legal persons. As mentioned above, sanctions through criminal law must be understood as the *ultima ratio*, i.e., as the last resort for the protection of society. Related to this is the principle of criminal repression. The essence of this principle is that the criminal liability of the offender and the criminal consequences associated with it can be applied only in cases of socially harmful, where the application of liability under other legislation is not sufficient.[51]

In the special section, the Czech Criminal Code distinguishes between three groups of crimes related to corrupt practices. The first group is the offenses of bribery under Part 3 of Title X which we consider to be corruption in the strict sense. The second group is, according to Part 2 of Title X, the offenses of officials which includes the crime of abuse of power. And the last third group consists of crimes against serious rules of the market economy, where according to Part 3 of Title VI of the Czech Criminal Code we classify violations of competition rules, abuse of position in trade, obtaining an advantage in awarding public contracts, public tenders and public auctions and gossip offenses. Given the stated purpose of this work we will continue to deal only with the legal regulation of bribery offenses, i.e., according to Part 3 of Title X of the Czech Criminal Code, and we will leave offenses related to bribery outside the scope of this paper.

The Czech Criminal Code regulates the criminal offenses of bribery covering the acceptance of a bribe, bribery (i.e., the passive side of a bribe) and indirect

50 Specifically in the case of bribery, this conclusion follows from the decision of the Supreme Court of the Czech Republic of 29 April 2008, Case No. 32 Cdo 139/2008. This decision was subsequently annulled by the Constitutional Court of the Czech Republic in its Constitutional Award of 11 September 2009, Case No. IV. ÚS 27/09. The reason for the annulment was the incorrect legal assessment of the case by the municipal courts, not the refutation of the conclusion that, without the fulfilment of the features of the general clause, there is no unfair competitive conduct.

51 Section 12 para. 2 Czech Criminal Code.

bribery through a third party. In this case, the Czech Criminal Code also regulates bribery in the private sector, on the basis of Council Framework Decision 2002/568/JHA of 22 July 2003 on combating corruption in the private sector. Bribe is defined in Section 334 of the Czech Criminal Code and as an unjustified advantage to which there is no legal claim for a certain person who may be directly bribed or another third party to whom the benefit is given with consent of another person.[52] An unjustified advantage may take the form not only of property enrichment but also of non-property advantage to which the bribed person or another person with the consent of the bribed person has no right. What will be categorized as a bribe depends on the facts of the case. The Supreme Court of the Czech Republic has issued several decisions in this regard, according to which it is true that a sponsorship gift can also be a bribe if the perpetrator's behavior meets the remaining defining features of the bribe.[53]

The criminal offense of accepting, promising or demanding a bribe, i.e., a passive form of corruption, is regulated in Section 331 of the Czech Criminal Code. The object of the crime is, according to para. 1, an interest in the proper and lawful procurement of things of general interest and an interest in the proper performance of business activities. The very promise of accepting a bribe which is so serious and socially dangerous that it is necessary to punish it even without the subsequent acceptance of a bribe actually taking place is also criminal. Stricter rules under para. 2 shall apply to the offender who requests the bribe.

Bribery, on the other hand, is an active form of corruption and is punishable under Section 332 of the Czech Criminal Code. The offence is reversed and the perpetrator is thus a person who himself or through another provides, offers or promises a bribe in connection with the procurement of a matter of general interest or business.

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52 Some authors mention 3 defining features, the third being material enrichment or other non-material advantage. In this case, however, we agree with Bruna's view. The enrichment or advantage is itself an advantage, i.e., the first defining characteristic of a bribe. See BRUNA, E. Problematické aspekty úplatkářských trestných činů (1. část) – úplatek. *Bulletin advokacie*, 2018, Vol. 10, p. 42.

53 Resolution of the Supreme Court of the Czech Republic of 23 February 2011, Case No. 8 Tdo 81/2011.

The last of the bribery offences is so-called indirect bribery under Section 333 of the Czech Criminal Code. This offence relates exclusively to the action of an official person. The very name of the offence suggests that corruption will not be committed directly, i.e., the perpetrator (active or passive) is not directly the official person but another person who can directly or indirectly influence the official person. This brings with it the problem of confusing the offence of indirect bribery (influence peddling) with the lawful activity of lobbying. We speak of the unprohibited activity of lobbying because in the Czech Republic there is no regulation of it yet, and thus no prohibition or authorization of this activity. Applying the principle of everything is permitted that is not prohibited by law, it is thus a permitted activity. There is no legal definition of lobbying yet. This leads to easy confusion with the offence of indirect bribery. The Czech Republic is on its way to regulating this through the government's draft law on lobbying[54] which should set a clear boundary between what is lobbying and what is already a criminal activity.

4 Negative Legal Consequences of Judicial Act

The private law regime is based on the Czech Civil Code which is based on fundamental principles that are relevant in the context of corruption. These are the principle of autonomy of the will and the principle of anything is permissible that is not expressly prohibited. These principles of civil and contractual law give the parties a certain degree of freedom in deciding what the content of their legal relationship will be. Restrictions on the parties' autonomy of will should only be made where there is a legitimate reason.[55] These principles that give freedom of decision encourage the rise of corrupt practices. Therefore, even their application cannot be absolute. The Czech Civil Code thus further establishes the limits of these behaviors, the breach of which is sanctioned by invalidity of the legal act.[56]

54 As of 21 June 2021, the government bill was in its second reading in the Chamber of Deputies of the Parliament of the Czech Republic.

55 LAVICKÝ, P. § 1. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 1–38.

56 VALDHANS, J. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Cham: Springer International Publishing AG, 2015, pp. 111–112.

4.1 Contradiction of Legal Act With Statute and Disruption of Public Order

The basic corrective guiding legal conduct is the law and the prohibitions contained in its norms. Corrupt conduct that fulfils the special offence of bribery under the Czech Civil Code or the criminal offence under the Czech Criminal Code violates the law. It is true that any conduct that violates the prohibition set out in a mandatory norm is contrary to the law.[57] The legal norms that we have analyzed in more detail in chapter 2.1 are (absolutely) mandatory[58], therefore they cannot be deviated from.

The contradiction with the law may be substantive or purposeful.[59] As *Lavický* states, the purpose of a legal act is what the act is done for and what the intent of the parties is to achieve. The purpose is legally significant not only if it is part of the expressed intention but also if the parties to the contract knew about it.[60]

What consequences will be associated with a legal action may be primarily regulated by the norm itself which has been violated by the action. This norm may stipulate that the conduct in question is null and void, or it may stipulate a different legal consequence. The relationship between the general clause contained in Section 580 of the Czech Civil Code and the specific civil law consequence flowing from the legal norm is subsidiary.[61] First, it is necessary to examine whether the consequence of the contradiction is not provided for directly by the norm whose legal conduct is contradicted. If the corresponding norm does not contain a consequence, the general rule in Section 580 of the Czech Civil Code applies.[62]

57 LAVICKÝ, P. § 1. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 1–38.

58 According to established court practice, *"… any deviation from a certain legal norm considered (per se) as violating good morals, public order or the law regulating the status of persons, such a legal norm can be qualified as (absolutely) mandatory."* See Resolution of the Supreme Court of the Czech Republic of 31 October 2017, Case No. 29 Cdo 387/2016.

59 TELEC, I. Není rozpor se zákonem jako rozpor se zákonem. *Právní rozhledy,* 2004, no. 5, p. 161.

60 HANDLAR, J. § 580. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 2077–2092.

61 Ibid.

62 Ibid.

The legal consequence under the general regulation is the invalidity of the legal act. However, a contradiction with the law does not in itself automatically render a legal act void. This must be required by the meaning and purpose of the law or legal norm that is violated by the legal act. This approach reflects the principle of the autonomy of the will of the parties. It is necessary first to examine what the meaning and purpose of the law is and only then to decide whether the legal act is void. If there is any doubt as to validity then, in accordance with the rule contained in Section 574 of the Czech Civil Code, the legal act must be viewed as valid rather than void. If the decision maker concludes that the meaning and purpose of the statute is to establish invalidity, it must be determined whether it will be relative or absolute.

The Czech Civil Code distinguishes between absolute and relative nullity. The essence of this division is the interest of protection, i.e., either the interest of a particular person or the public interest. Absolute nullity as a legal consequence occurs according to Section 588 of the Czech Civil Code when a legal act is contrary to the law and manifestly violates public policy or is manifestly contrary to good morals. The law no longer provides for an examination of the purpose and meaning of the law. However, this condition is inferred from the case law of the Supreme Court of the Czech Republic. It is true that if it is necessary to assess the meaning and purpose of a legal norm regulating legal conduct in order for its non-observance to be invalid, it is equally necessary to take that purpose and meaning into account when assessing whether it is a relative or absolute nullity.[63]

The absolute nullity in the event of a breach of the law is also conditional on a manifest disturbance of public order. Thus, only an act that both violates the law and manifestly violates public order will be absolutely void.[64] The concept of public order is a vague concept whose content and meaning is variable over time. The Supreme Court of the Czech Republic has already commented on this concept in more detail several times. He stresses that *"it is a set of rules to be insisted upon without reservation, but unlike good morals, they*

63 Judgment of the Grand Chamber of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 10 June 2020, Case No. 31 ICdo 36/2020.

64 HANDLAR, J. § 580. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 2077–2092.

have their origin in the legal order itself and not in ethics. They are the fundamental principles of value and governance without which a democratic society cannot function and which are the basis for building the rule of law. The draft does not attempt to define public policy - as a criterion limiting the autonomy of the will – in any detail, since this is not possible in a legal norm, just as it is not possible to define good morals in a legal norm. As a rough guide, public order permeates the whole of the law and includes the rules on which the legal foundations of the social order of the local society rest."[65] The Supreme Court understands this term to mean specifically, for example, the interest in the stability of the state or the interest in combating crime. The protection of public order is not left to individuals but is instead an expression of the will of the legislator.[66] A manifest violation of public order is its unambiguity, unmistakability or obviousness of the disturbance of public order by the legal act in question. If that is the case with the legal act under consideration, absolute nullity applies as a legal consequence.[67] On the contrary, relative nullity only arises if the person whose interest is protected raises an objection to the nullity. Until such objection is raised, the legal act is valid. Conversely, if the objection is raised in time, the legal transaction is void *ab initio*.[68]

Undoubtedly, we can also include legal rules in the field of combating corrupt practices as part of public policy. Public policy serves as a check on the observance of values that are fundamental to the state and whose violation cannot be tolerated. The act of a crime which is, moreover, expressly prohibited at international level, thus disturbs public policy.

4.2 Manifest Breach of Good Manners

Absolute nullity also affects legal conduct that manifestly violates good morals. As in the case of public policy, it is a vague concept that has no definition in the legal order even though legislation often works with it.

65 Resolution of the Supreme Court of the Czech Republic of 16 August 2018, Case No. 21 Cdo 1012/2016.

66 TÉGL, P. and F. MELZER. Glosa: K rozhodnutí velkého senátu NS ohledně předpokladu "zjevnosti" porušení dobrých mravů a veřejného pořádku ve smyslu § 588 o. z. *Bulletin advokacie*, 2020, no. 9, p. 63.

67 Judgment of the Grand Chamber of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 10 June 2020, Case No. 31 ICdo 36/2020.

68 ZUKLÍNOVÁ, M. Neplatnost na ochranu zájmu určité osoby (tzv. relativní neplatnost). In: DAVID, O., L. DEVEROVÁ et al. *Občanský zákoník: Komentář, Svazek I (§ 1–654)*. Available at: https://www.aspi.cz/products/lawText/13/11656/1/2?rem=586 [cit. 25. 5. 2021].

The legislator has thus left the content of this concept to judicial practice. From the case law[69] it is possible to deduce the basic grasp of good morals as a value that has its origin in normative orders other than law, especially moral, social and cultural norms of a democratic society. This defines the content of behaviors that are generally accepted by society and considered decent and honest.[70] Legal conduct that violates these values cannot be afforded legal protection. The essence of good morals is that they change over time so that they can always fulfil their purpose, and therefore the time and place of the legal conduct must also be taken into account when assessing whether there has been a manifest breach of them.[71] In addition, the law places emphasis on a clear breach of good morals (similar to the requirement of a clear breach of public order). The same conclusion as to what is to be understood by 'manifest' can also be applied in this case. The breach must be clear, unmistakable and obvious.[72]

Care should be taken with "special" categories of good manners, such as good manners of competition. Breach of the morality of competition is one of the features of the general clause. As *Bejček* points out, the good manners of competition cannot be understood as a subset of good manners in general, i.e., within the meaning of Section 1 para. 2 or Section 588 of the Czech Civil Code. On the contrary, it is a category of good morals which is linked to the principles of fair economic and commercial dealings.[73] Not all conduct which will violate the good manners of competition will also violate good manners as a civil law institute.[74]

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69 See, for example, Resolution of the Constitutional Court of Czech Republic of 16 February 2006, Case No. II. ÚS 649/05 or Constitutional Award of 5 June 2012, Case No. IV. ÚS 3653/11.

70 Judgment of the Supreme Court of the Czech Republic of 10 April 2001, Case No. 29 Cdo 1583/2000.

71 Resolution of the Constitutional Court of the Czech Republic of 26 February 1998, Case No. II. ÚS 249/97. Furthermore, see BEJČEK, J. et al. *Obchodní právo. Obecná část. Soutěžní právo.* Praha: C. H. Beck, 2014, p. 219.

72 Judgment of the Grand Chamber of the Civil and Commercial Chamber of the Supreme Court of the Czech Republic of 10 June 2020, Case No. 31 ICdo 36/2020.

73 Judgment of the Supreme Court of the Czech Republic of 10 January 2011, Case No. 23 Cdo 5184/2009.

74 BEJČEK, J. et al. *Obchodní právo. Obecná část. Soutěžní právo.* Praha: C. H. Beck, 2014, p. 217; BĚLOHLÁVEK, A. Neplatnost právního úkonu při porušení dobrých mravů. *Právní rádce*. 2006, no. 1, pp. 21–25.

The universal and general corrective of good morals, however, is secondary in determining the validity of legal conduct. Only if the legal act does not contravene the law can it be assessed from the point of view of breach of good morals. An act may also be invalid on the ground that it violates good morals but does not contravene the law.[75]

4.3 Error Caused by a Third Party That Lead to a Conclusion of the Agreement

Different approach regarding the legal consequences, especially the validity of the agreement procured by corruption, applies under Czech Civil Code in relation to an error that was intentionally caused by other contractual party under Section 583 or Section 584 of the Czech Civil Code or by a third party under Section 585 of the Czech Civil Code.

Generally, an error is based on misconception of a certain fact concerning legal conduct. However, the fact that one of the parties is mistaken cannot in itself be a reason to question the validity of such legal transaction, as this would undermine legal certainty in civil and commercial law. An error renders a legal transaction void only where it would be unreasonable or unfair to insist that the legal transaction be binding on the party who acted in error.[76]

In case the error is caused by other contractual party in a balanced bilateral legal relationship, the arbitral tribunal must consider whether the error was material or immaterial. The material error is an error as to any fact which is decisive for the performance of a legal act.[77] The party that was misled by the other contractual party would take a different decision regarding the conclusion legal act based on the knowledge of the true state of affairs. A material error renders a legal transaction null and void. However, in the case of error, only the interest of the party misled by the other party is protected by the nullity. Therefore, in accordance with Section 586 of the Czech Civil

75 Judgment of the Supreme Court of the Czech Republic of 3 June 2009, Case No. 28 Cdo 3514/2008; As well as VALDHANS, J. Consequences of Corrupt Practices in Business Transactions (Including International) in Terms of Czech Law. In: BONELL, M. J. and O. MEYER (eds.). *The Impact of Corruption on International Commercial Contracts*. Swizerland: Springer International Publishing AG, 2015, p. 113.

76 HANDLAR, J. § 583. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář*. Praha: C. H. Beck, 2014, pp. 2101–2111.

77 Ibid.

Code, it will be a relative nullity which must be duly and timely invoked before the decision-making body.

On the other hand, in case the error is caused by a third party which is not a party to a relationship that was concluded as a consequence of the error, this relationship is valid. Such action may give rise to liability consequences in the relationship between the third party and the person who has been misled but the validity of the relationship concluded in such error is not affected.[78] However, the law provides an exception. In case the other party with whom the misled party has concluded an agreement was involved in the act of the third person or knew or at least must have known thereof, such person is also considered the originator of the error. Consequently, if the error is material then the legal transaction is invalid under Section 586 of the Czech Civil Code and the misled party has a right to invoke the invalidity of the agreement.

In accordance with Section 579 para. 2 of the Czech Civil Code a party whose conduct has rendered a contract concluded as a result of misleading the other party invalid shall be liable to compensate the other party for the damage suffered by the other party if the other party was unaware of the nullity. The purpose of this regulation is to ensure that only the party who did not participate in causing the nullity, because he did not know about it, has the right to a compensation. If a party knows of such defect in a legal act which causes it to be invalid and nevertheless performs the legal act, it is appropriate that he should also bear the consequences of that act.[79]

5 An Assessment of the Impact of Corruption on the Contracts Tainted by This Action

In Chapter 1, we outlined a situation that is quite common[80] in the context of dispute resolution in international arbitration. The difference was made between the contracts providing for corruption and contracts procured

78 HANDLAR, J. § 585. In: LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář.* Praha: C. H. Beck, 2014, pp. 2116–2119.

79 Ibid., pp. 2071–2077.

80 ARMESTO, F. The Effects of a Positive Finding of Corruption. In: BAIZEAU, D. and R. KREINDLER (eds.). *Dossier of the ICC Institute of World Business Law: Addressing Issues of Corruption In Commercial and Investment Arbitration.* Paris: ICC Publishing s.a., 2015, p. 2.

by corruption. Both situations are different and so are the legal consequences that the arbitral tribunal may draw under Czech law.

How can an arbitrator become aware of corrupt behaviour? In the context of disputes arising out of an agent's contract or the service contract, the arbitral tribunal becomes aware of the act of bribe either based on a claim of one of the parties – usually as form of procedural defense, based on a witness statement who witnessed such illegal behaviour, or based on the final decision of a criminal court that the agent (or the advisor) has committed corruption based on the agent's contract. Outside the scope of this paper is gaining knowledge about corruption completely outside of arbitration proceedings.

What legal consequences can the arbitral tribunal draw for the concluded contracts tainted by corruption? In this chapter, we will apply the above conclusions that render legal actions invalid.

5.1 Contracts Providing for Corruption

These are usually the intermediary contracts, the purpose of which is to bribe a third party, allowing the main contract to be concluded. The content of this contract are the usual rights and obligations consisting in the provision of services. However, the purpose of these contracts is to provide an advantage in a form of bribe to a third party, i.e., to commit a criminal offence. These contracts are contrary to the law by their purpose. Moreover, it is conduct which is manifestly disruptive of good morals as well.

The act of bribery can be assessed as a civil offence that fulfils the facts of the general clause of unfair competition as well as the special facts of bribery under the Czech Civil Code or in accordance with the Czech Criminal Code a criminal offence.

Both parties to the contracts pursue a prohibited purpose, namely the provision of a bribe. In such case, Section 588 of the Czech Civil Code would be applicable. The legal transaction, in our case, the agency contract, will be absolutely null and void. In accordance with the principle *nemo turpitudinem suam allegare potest* expressed in Section 579 of the Czech

Civil Code, the person who has caused the nullity cannot claim an advantage from it. The contract will therefore be absolutely void and neither party will be entitled to performance or damages.

5.2 Contracts Procured by Corruption

A somewhat more complex assessment is the impact of corruption on a contract that has been entered into as a result of the act of corruption. In no way does this contract conceal illegal activities. The contract itself is not contrary to law nor good morals in its content or purpose. The question is whether the unlawful conduct of one of the parties which led to the conclusion of the main contract may have an impact on the validity of this contract.

The arbitral tribunal must consider whether Company B knew of the bribe that was provided between the agent and the advisor when it entered into the service contract. If Company B was unaware of the bribe and made its decision to enter into the contract with Company A on the basis of an assessment of whether the required conditions had been met by it, it was misled. That error can be regarded as a material error since it resulted in the selection of a particular service provider who would probably not otherwise have been selected. The originator of the error in this case is Company A which indirectly, through an agent, paid a bribe to the advisor of Company B. Accordingly, the contract is valid. Company B has the right to challenge the invalidity on the ground of material error before the arbitral tribunal. If it does so in due and timely fashion, the contract will be void *ab initio*. In addition, Company B shall be entitled to compensation for any damages incurred in this connection.

6 Conclusion

There are two basic types of contracts that may be concluded and lately disputed in arbitral proceedings – contracts providing for corruption and contracts procured by corruption. The arbitral tribunal may decide only disputes brought by the contractual parties. The tribunal must not only assess its jurisdiction or admissibility of claims but it must in case it becomes aware

of illicit behavior draw legal consequences. Since we are not in the sphere of public law, the arbitral tribunal may draw only civil law consequences under applicable law.

Contracts providing for corruption are considered absolutely invalid therefore all claims arising out of it are dismissed. The real intent of the parties is to bribe in order to achieve an advantage and no protection can be afforded to conduct which merely masks a genuine, unlawful intention, therefore neither party shall be granted with any damages. Since the purpose of such legal act contradicts law and definitely violates the public policy, it must be declared invalid. The outcome of the arbitration in which one of the parties demands performance by the other party based on the contract in question or compensation for damages, will probably by the dismissal of such claims.

On the other hand, the assessment of contracts procured by corruption seems more complex. The contract itself does not cover any illicit behavior. The content and the purpose of the contract is therefore legal and the contract is valid. However, the commission of corruption that preceded the conclusion of such contract may have a great legal impact on its validity. It is necessary to consider whether one of the parties was misled about a matter which led to the contract being concluded. If it is a material error, the contract will be invalid. However, the invalidity must be contested by a party, that was not aware of such behavior. Otherwise, the contract will be valid and the parties will have to perform their obligations. Moreover, the party that caused the invalidity of the contract will not have a right to claim any damages, but on the other hand, it will be liable to compensate the other party for the damage suffered. The purpose of this rule is to ensure that only the party who did not participate in causing the nullity, has the right to a compensation.

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