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A Story of Corruption

A Case Study of How Bribery Affects the Validity of Performed Commercial Contracts

Introduction

I have had many fascinating and exciting arbitrations together with Kaj, with him as lead counsel, generously mentoring me first as his associate and later as the junior partner on the team. Most of these arbitrations have shared some common themes:

The underlying transactions have all concerned large amounts of money. The object of the transaction has often been the sale of or exploration for natural resources, or other projects of political importance. The underlying transaction has more often than not required a licence or approval from a governmental authority. And last, but not least important, there has often been an East-West element, with at least one of the parties domiciled in a jurisdiction that scores poorly in transparency rankings.

In other words, many of the usual ingredients that one would expect to find in a recipe for corruption have been at hand in the transactions that we have litigated. Despite this, however, only rarely have allegations of corruption surfaced in the dispute.

In some of the cases with these ingredients, we have found aspects of the factual pattern to be obscure, or the acts of individuals in the *dramatis personae* to appear opaque. This has been possible to use, by ourselves or by opposing counsel, when developing the background narrative; to cast

doubts around the case. But it has not been possible to articulate concrete allegations of corruption on the facts uncovered. The reason for this is, of course, that those involved in corruption are careful to hide their acts and so are often the companies within which the corruption has taken place.

This appears to be changing. In tune with a more stringent international stance in the fight against corruption,[1] states and companies alike adopt rules, policies and codes of conduct that bring corrupt practices into light, in ways that were not done only some ten years ago.[2] One result of this is that companies that learn about corruption within their organisations, increasingly self-report and carry out careful investigations into their own business practices.[3]

What used to be only vague suspicions of improper acts surrounding a transaction, now become uncontentious facts at the heart of the dispute. Thus, rather than addressing whether a transaction is tainted by corruption,

[1] The past two decades have seen a wealth of international instruments in this area, including the United Nations Convention against Corruption (UNCAC) of 2003, The Rules of Conduct and Recommendations to Combat Extortion and Bribery of the International Chamber of Commerce (ICC) of 2005, and the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997. This development has led scholars and practitioners to argue that a *transnational public policy* against corruption has emerged, see e g Michael Hwang and Kevin Lim, 'Corruption in Arbitration – Law and Reality' (2012) 8 Issue 1 AIAJ 1, 3; and Günther J Horvath and Katherine Khan, 'Addressing Corruption in Commercial Arbitration: How Do Arbitral Tribunals Evaluate and Adjudicate Contractual Relationships Tainted by Corruption?' (2017) 15 Issue 3 GAJ 127, 135.

[2] During the past decade, national legislation for whistle-blower protection has been adopted, including in Sweden (Act 2016:749 on special protection for workers against reprisals for whistleblowing concerning serious irregularities), the Netherlands (House for Whistleblowers Act 2016), France (Sapin II Act No 2016-1691), Italy (Law No 179/2017 on the Provisions for the protection of whistleblowers), and Australia (proposed Treasury Laws Amendment (Whistleblowers) Bill 2017). These acts, in turn, require companies to enact compliant policies and protected reporting frameworks.

[3] According to Transparency International's 'Progress report 2018: assessing enforcement of the OECD Anti-Bribery Convention' there is an increasing global trend towards companies settling corruption/bribery allegations with the authorities out-of-court. Recent years have seen large corporations such as Siemens (2008), Rolls-Royce (2017), and Telia (2017) enter into settlements on charges of corruption. While this development, with increased self-reporting, may also be caused by contemporary concepts of corporate morality and responsibility, any increased compliance awareness may also be attributable to the legislative trend to expand liability for companies engaging in corrupt activities, with self-policing, cooperation and self-reporting as circumstances deemed to mitigate liability. The global trend to introduce deferred prosecution agreements, whereby prosecution may be suspended provided enhanced compliance undertakings and cooperation, has likely also contributed to the increased self-reporting; see e g the French Sapin II Act 2016 and the Australian Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017.

the arbitration will be about the legal effects that the already established corruption should have on the contract concerned.

The case study

The facts leading up to the arbitration

I was counsel for the respondent in one such case,[4] where it was an uncontentious fact that bribes had been paid in connection with the conclusion of the contract in dispute. As in many of the cases alluded to above, also this contract concerned the sale and purchase of a natural resource, from an eastern buyer to a western seller. The contract was for a three-year term, with continuous deliveries at a fixed price throughout the term.

Some years after the contract had ended, the buyer commenced a review of its global operations from the perspective of compliance and corruption. The investigations uncovered that an agent who had represented the buyer in some of its trading had made a number of disconcerting payments to, amongst others, two board members and executives of the seller of the natural resource. Some of the payments had been made around the time of the negotiations for the three-year contract.

The buyer immediately reported the irregularities uncovered in its investigations to the authorities in its home jurisdiction, and subsequently accepted corporate criminal liability and paid disgorgement and fines for the acts committed by its trading agent. The buyer continuously notified the market of the findings made in the investigations.

The buyer also shared information with the seller to allow the company to carry out investigations into the conduct of its own representatives. The seller, however, took this information to bring a claim against the buyer.

With reference to the fact that bribes had been paid in connection with the conclusion of the contract, the seller claimed that the contract was invalid and demanded that the parties return everything received under the contract (restitution). However, the contract was since long fully performed. Everything that the buyer had received under the contract was consumed and could not be returned.

According to the seller, the buyer therefore had to return the economic value of what it had received, at the current market price at the time of the claim. In return, the buyer would receive the money it had paid under the

[4] As counsel, I was of course part of a team with other lawyers in my law firm. The legal analysis outlined in this essay borrows from the work and analysis of that team. I am also in debt to Søren Henriksen and Karolina Mangs for assistance with additional research for the essay.

contract, with interest. The catch here was that, whilst the interest calculable on the paid purchase price was low, the market price of the natural resource had increased dramatically since the time of delivery. The resulting claim was thus considerable.

Arguments in the arbitration

The argued legal basis in the arbitration was a provision of Swedish substantive law. However, the underlying basis and the foundation for much of the debate in the case was the Council of Europe's Civil Law Convention on Corruption (CETS No 174) of 1999 (the 'Convention'). The issues of the case could therefore be of a wider interest than solely to Swedish law matters.

In the arbitration, the seller sought an award declaring the contract invalid and an order with respect to the consequences of its invalidation, namely restitution. To this effect, the seller relied on section 33 of the Swedish Contracts Act (1915:218). Section 33 provides for avoidance of contracts in situations where, having knowledge of the circumstances surrounding a legal act, it would be 'contrary to good faith and honour to enforce the legal act'.[5]

According to the seller, section 33 is in line with and should be interpreted as the Convention's Article 8.2, pursuant to which '[e]ach Party [to the Convention] shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void notwithstanding their right to claim for damages'.

Sweden adopted the Convention in 2004. The seller referred to the governmental bill implementing the Convention, where the Swedish legislator considered whether it needed to amend its laws in order to comply with the Convention. With respect to Article 8.2, the legislator noted that no new legislation was required in this respect, because a contract procured by the payment of bribes could be invalidated under section 33 of the Contracts Act.[6]

[5] 'Good faith and honour' is an attempt here to translate the Swedish term 'tro och heder', which stems from the German concept of 'Treu und Glauben', often simply translated to 'good faith'. However, and arguably, there is more of a moral element to 'tro och heder' than to 'good faith'.

[6] Government Bill 2003/04:70 p 46.

In summary,[7] the seller interpreted this to mean (i) that any contract tainted by corruption may be invalidated and (ii) that the consequence of invalidity should be restitution of the parties' respective performances.

The buyer took issue with these legal propositions.

With respect to the first proposition, the buyer argued that one must look at the facts of the particular case in order to determine whether invalidity is an appropriate remedy. In this respect, the buyer pointed to evidence to the effect that the terms of the contract had been negotiated and largely agreed by other representatives of the two companies – who were not under any suspicions of corruption – before the agent and the takers of the bribes took part in the negotiations. Thus, the buyer argued, the contract would have been concluded on the same or similar terms, even if the corruptive trade agent and the grafters had not entered the scene.

The buyer also pointed to evidence of the market price for the natural resource, at the time of the conclusion of the contract as well as for the duration of the three-year term. This showed that the seller had not made any loss under the three-year contract, compared to a hypothetical scenario under which the seller had sold the natural resource on the traded market during the same period of time.[8] This boiled down to two questions of law: is invalidity an available remedy even if the corruption has not affected the

[7] The summaries of the arguments, and of the facts, are simplified for the purpose of this contribution. For example, discussions concerning the extent to which the bribe-takers' actions are to be attributed to their company, considering that they were not merely employees but board members, are left out from this contribution. Also all the interesting issues surrounding the proper valuation dates for restitution – should that be an available remedy – have been left out, together with potential theories concerning unjust enrichment.

[8] The reason why the claim, despite these facts, was substantial, was that the drastic increase in the market price occurred in the period from the time when the contract was performed up to the time of the claim. The choice of valuation date for when to set a price on the returned performances, which cannot be returned in kind, determines the claim. The choice of the claim date as the valuation date has some support in other areas of Swedish law. In the case now studied, it was also by far the most economically beneficial date for the seller to choose. If translated into a theory of actual loss, the chosen valuation date would assume that the natural resource, had it not been sold to the buyer during the term of the contract, would have remained with the seller for a long period of time, until the market price had increased. If the seller instead had filed a claim for damages, this would not have been possible. In a damages claim, the economic outcome of two scenarios are compared: the actual scenario and a hypothetical scenario outlining what would likely have happened, had the contract tainted by corruption not been entered into. In that hypothetical scenario, it is quite likely that the seller would have sold the natural resource elsewhere, or even to the buyer but on spot price terms, at or around the time when the natural resource was now sold under the contract. Since the natural resource then would have been sold in the same market conditions – before the substantial price increase that occurred a few years later – it would not have been possible to establish any loss at all. This appears to explain why there was a claim for invalidity instead of damages.

willingness to enter the contract and/or if the contract has not resulted in any damage to the claimant?

With respect to the second proposition, that invalidity should result in restitution of the parties' performances under the contract, the buyer questioned whether the invalidity that the seller was seeking really was invalidity *ab initio* (nullity, or 'original invalidity'). If, instead, the correct remedy is avoidance, the buyer argued that the result would be that a contract cannot be declared invalid if already fully performed.

Put differently, could invalidity in this situation be used as a *sword*, to obtain money through restitution from a contract that has already been performed and therefore no longer was in effect, or is the remedy that of a *shield*, which can be used to avoid the performance of a contract affected by corruption which is still in force?

Legal analysis

Section 33 of the Swedish Contracts Act

In translation, section 33 of the Contracts Act reads in full:

> A legal act which would otherwise be deemed valid may not be relied upon where the circumstances in which it arose were such that, having knowledge of such circumstances, it would be contrary to good faith and honour to enforce the legal act, and where the party in respect of whom such legal act was performed must be presumed to have possessed such knowledge.[9]

The statute thus applies to situations where it, having knowledge of the circumstances surrounding a legal act, would be 'contrary to good faith and honour to enforce' it. The effect of such circumstances being found, is that the legal act 'may not be relied upon'. According to this wording, section 33 does not provide for invalidity *ab initio*, but for the non-enforceability of certain contracts.[10]

[9] Translated from Swedish by the present author.

[10] Nordic jurisprudence (the Nordic countries share a common contracts act) has traditionally not made any strict distinction between nullity (or the German *Nichtigkeit*) and voidability (*Anfechtbarkeit*); see Adlercreutz, Gorton and Lindell-Frantz (n 11) [258]. Nevertheless, the meaning and value of the distinction has at times been discussed in the legal literature, see Hjalmar Karlgren, 'Ett gammalt tvisteämne: nullitet och angriplighet' in *Festskrift till Henry Ussing* (1951) 247–266, and Torbjörn Ingvarsson, *Ogiltighet och rättsföljd* (Norstedts Juridik 2012) 31–38. Apart from such specific discussions, all kinds of invalidity are simply referred to as *ogiltighet* in the jurisprudence. Notwithstanding this lack of legal nuance, the invalidity rules in the Contracts Act are phrased differently, indicating a distinction more or less in accordance with other European legal systems. For example, the invalidity rules for coercion and fraud,

Section 33 has seldom and narrowly been applied by Swedish courts.[11] As far as the author is aware, there are no examples of the provision having been applied to acts of corruption and the legislator gives no further guidance as to the application of this remedy to instances of corruption.[12]

The scope of the provision is vague, in that it refers to 'good faith and honour', and guidance as to its application on cases of corruption is therefore better found in the treaty text that, according to the legislator, corresponds to the statute. An interpretation in conformity with the treaty text would give effect to Sweden's implementation of the Convention in its national legislation. In this case, this means that the criteria of section 33 of the Contracts Act could be interpreted in light of the criteria set out in the underlying instrument of international law, Article 8.2 of the Convention.

The Civil Law Convention on Corruption

The Convention provides the following with respect to validity of contracts that concern or are affected by corruption:

> **Article 8**
> *Validity of contracts*
> 1. Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.
> 2. Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.

Article 8 thus deals with the remedies to be applied to contracts of two different kinds:

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sections 29 and 30 of the Contracts Act, respectively, provide that the legal act 'is not valid' (*'vare ... ej gällande'* and *'vare icke gällande'*, respectively), whilst the invalidity rule for acts against good faith and honour, section 33 of the Contracts Act, rather provides that the legal act 'may not be relied upon' or 'may not be enforced' (*'må ej göras gällande'*). The deeper implications of this lack of distinction must be left outside the scope of this contribution. It appears, however, that Swedish law would benefit from greater clarity in this regard, in particular considering the many implementations into Swedish law of international conventions and European Union legislation, where these distinctions are present.

[11] See Axel Adlercreutz, Lars Gorton and Eva Lindell-Frantz, *Avtalsrätt I* (14th edn, Juristförlaget i Lund 2016) 304.

[12] There is in fact hardly no case law at all. As far as the author has been able to ascertain, the Swedish Supreme Court last applied section 33 of the Contracts Act to declare a legal act invalid in 1971; Supreme Court case NJA 1971 s 181.

- Article 8.1 concerns contracts providing for the corruptive act itself, for example bribe agreements.
- Article 8.2 concerns contracts affected by corruption – where the consent to enter into the contracts has been undermined by an act of corruption.

The available remedies differ between these two types of agreements. The former agreements should be 'null and void'. The latter agreements should be possible to have 'declared void', in addition to claiming for damages.

Article 8.1 – the bribe agreement

In the example discussed in this contribution, the bribe agreement (which falls under Article 8.1) would be the assumed contract between the buyer's trading agent, who paid bribes, and the board members and executives of the seller, who took bribes. Article 8.1 thus concerns the validity of the contract actually providing for the bribes.

Presumably, bribe agreements of this kind are rarely made in writing. Rather, the terms applicable to the illicit payment, or to the rendering of an undue benefit, are implied. The promises are exchanged in the shadows. It is understood between the perpetrators that a benefit here will result in a favour there. However, there may be situations where a contract of this kind is explicit, but then often styled as something else, such as a service agreement or consultancy agreement. And even then would it be surprising to see the full transaction spelled out in the text.

If the agreement, in fact and irrespective of its form and designation, provides for corruption, Article 8.1 requires national law to provide for it to be 'null and void'. This requirement may be seen to be a principle of transnational commercial law.[13]

As opposed to the remedy in Article 8.2, Article 8.1 requires no intervention by a court in order for the bribe agreement to become null and void. Accordingly, the agreement is *void ab initio* (although a court of course may be required to confirm this status). This effect of the illegality of the bribe agreement seems to be generally accepted, although there are different

[13] See the Trans-Lex Principles <http://www.trans-lex.org>, a scientific project administered by the University of Cologne, Principle No IV.7.2(a): 'Contracts based on or involving the payment or transfer of bribes ("corruption money", "secret commissions", "pots-de-vin", "kickbacks") are void.' See also Michael J Bonell and Olaf Meyer, *The Impact of Corruption on International Commercial Contracts* (11th vol, Springer 2015) 10.

approaches in national laws as to how to achieve it,[14] and also as to how to deal with the issue of restitution and recovery of a bribe if discovered.[15]

In an essay in honour of Kaj Hobér – the 'Great Swede' in his generation of international arbitration lawyers – and on this topic, one cannot overlook to mention the famous ruling on corruption by the first 'Great Swede' in international arbitration, Judge Gunnar Lagergren.

In 1963, at a time when corruption was still largely accepted as an unavoidable aspect of business life in large parts of the world, Judge Lagergren was faced with an arbitration in which the claimant sought to enforce its purported rights to commission payments.[16] The payments were intended to be used to bribe Argentinian officials.

Rather than finding the contract null and void, Judge Lagergren refused jurisdiction. He held that 'corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations'. He went on to find that 'a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal'. Judge Lagergren's reasoning aligns with theories of *pactum turpe*. Some contracts simply do not merit the attention of the judiciary.

Judge Lagergren's decision to refuse jurisdiction has been criticised, mainly with reference to the principle of separability, although much criticism may have been somewhat misconceived.[17] Be that as it may, whilst there is now general consensus that arbitrators may take jurisdiction over matters concerning corruption, Judge Lagergren sparked the development to fight and condemn corruption in civil fora and the discussion as to *how* to address contracts catering for corruption, if proved.[18] The Convention may be said to be one result of that development.

[14] Bonell and Meyer (n 13) 9–10 with references.

[15] Ibid 14–19.

[16] ICC Award No 1110 of 1963 by Gunnar Lagergren, YCA 1996, 47 et seq (published in full in: Arb Int'l 1994, 282 et seq).

[17] Judge Lagergren's ruling has been defended by another 'Great Swede' of international arbitration (who worked extensively with both the older Lagergren and the younger Hobér), Gillis Wetter; see J Gillis Wetter, *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's. 1963 Award in ICC Case No 1110* (1994) 10 No
3 Arb Int'l 277, 281.

[18] See also Claus von Wobeser, *The Corruption Defense and Preserving the Rule of Law*, in Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series (2017) Vol 19 Kluwer Law International 203, 204.

Article 8.2 – the main contract

Introduction

The disputed contract in the case study of this essay, however, concerns the latter category of contracts identified in Article 8.2 of the Convention. That is in our case the contract for supply of a natural resource that was entered into in connection with the corruption that has already been established.

Unlike the bribe agreement, the invalidity of which amounts to a transnational legal principle, comparative law identifies three different solutions for the main contract:

> Firstly, the contract could, just like the bribe agreement, always and under all circumstances be void. Secondly, it would also be possible to lay the decision in the injured principal's hands and allow him to choose between the invalidity of the contract or continuing with its performance despite the corruption. Finally, the third approach would consist of treating the contract as binding, thereby effectively limiting the rights of the principal to other remedies such as damages or price reduction.
>
> Each of these three solutions can actually be observed in practice. All in all, however, there seem to be relatively few court decisions in this area. One may speculate that, in light of the commercial value at stake, the parties to these contracts would rather avoid judicial clarification and instead seek an amicable solution.[19]

However, when researched by the 19th International Congress of Comparative Law, the vast majority of jurisdictions reporting on the subject appear to give effect to a principle of laying the unenforceability in the hands of the injured party, in line with the second option.[20] Even in jurisdictions where there appears to be an understanding that main contracts affected by corruption should be void,[21] there seem to be additional requirements to be met than the mere finding of corruption.[22] Importantly, in these instances,[23] the invalidity primarily appears to be on public procurement grounds, which is

[19] Bonell and Meyer (n 13) 20. After the second sentence of the quote above, there is a footnote of interest here: 'When Lord Mustill included in his famous listing of principles of lex mercatoria that a "contract obtained by bribes or other means is void, or at least unenforceable", he indeed avoided a decision in favour of one of the two models, see M Mustill, 'The New Lex Mercatoria: The First Twenty-five Years' (1988) 4 Arb Int'l 86, 111 f.

[20] Ibid 22–24.

[21] These jurisdictions are not easily identified, although there seem to be indications to this effect in Portugal, Italy and Russia; see Bonell and Meyer (n 13) 22.

[22] Ibid 21–22.

[23] Ibid.

quite a different thing than to declare a commercial contract invalid based on civil law principles.

If looking at the Convention, Article 8.2 provides that it should be possible for a party to a contract to bring an invalidity claim in certain circumstances. However, the Convention gives the contracting states the right to decide upon the specific conditions for such a claim to be successful. The official commentary to Article 8.2 of the Convention provides as follows:

> Paragraph 2 of this article strengthens the civil law application to the fight against corruption by providing for an additional remedy to be available to those who have suffered damage as a result of an act of corruption. Notwithstanding the right to sue for compensation for damage, any party whose consent to enter into a contract has been undermined by an act of corruption, shall have the right to apply to Court for the contract to be declared void. It remains open to the parties concerned to continue with the contract if they so decide. The drafting clearly provides that the applicant for such a declaration must be one of the parties to the contract. It remains for the court to decide on the status of the contract, having regard to the circumstances of the case.[24]

The Convention thus sets the minimum standards for the states to implement in their national legislation, with discretion as to the exact scope and form.[25] In the following, we shall look at whether Article 8.2 of the Convention provides answers to the questions identified in the arbitration studied in this essay.[26]

Does the invalidity sanction in Article 8.2 of the Convention require damage to have resulted from the corruption?

Article 1 sets out that the purpose of the Convention is to provide remedies to those suffering damage from corruption:[27]

> Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage.

[24] Explanatory Report to the Civil Law Convention on Corruption, 4 November 1999 (ETS no 174) 9.

[25] As mentioned above, this discretion with respect to the implementation is specifically addressed also by the Swedish legislator, who simply stated that section 33 of the Swedish Contracts Act is sufficient for Sweden to comply with Article 8.2 of the Convention; see Swedish Government Bill 2003/04:70 p 46.

[26] See the section *Arguments in the arbitration* above.

[27] See also Explanatory Report (n 24) 5. The main remedy of compensation for damages to be provided by the contracting states is governed by Articles 3–4 of the Convention.

This overall purpose is reflected in all provisions of the Convention, including the invalidity sanction set out in Article 8.2. Articles 3 and 4 of the Convention set forth the requirements for a party to be compensated for damage, for example that damage must be suffered and that there must be a causal link between the act of corruption and the damage. The invalidity sanction in Article 8.2 of the Convention relates to the same situations and accordingly requires that the corruption has had an effect on the contract concerned.

A restriction on any party's entitlement to damages as a result of corruption is set out in Article 6 of the Convention. This provides that a claim for damages should be reduced in part or in full in cases of contributory negligence on the part of the claimant. Contributory negligence could be where an employer has not exercised proper control of its organisation, for example by failing to combat and follow-up previous instances of corruption.[28]

In sum, damage suffered is a prerequisite for the invalidity sanction under the Convention. This appears to go well with the criterion of section 33 of the Swedish Contracts Act, namely that the circumstances invoked as grounds for invalidity must have *affected* the legal act in such a way that it would be incompatible with good faith and honour to uphold it. If the corruption in question had no effect on the legal act, the party cannot have suffered any loss as a result of the corruption. Applying the same reasoning, and in accordance with Article 6 of the Convention, it cannot be deemed contrary to good faith and honour to uphold the legal act if the other party was aware, or even contributed to, the alleged corruption.

Does the invalidity sanction in Article 8.2 of the Convention apply to already performed contracts?

With respect to how to view the effects of invalidity, as noted above, Article 8 makes a distinction between the rules applicable to the so-called bribe agreement (8.1) and the remedies to be made available against contracts undermined by corruption (8.2). For the bribe agreement, the Convention thus requires it to be 'null and void'. This suggests invalidity *ex tunc* (from the outset). For the main agreement, the Convention requires a possibility for a party to apply that it be 'declared void'. It thus provides for *voidability*. This suggests the possibility to 'get out of' a contract still in force.

The commentary from the Explanatory Report to the Convention notes in relation to Article 8.2 that it 'remains open to the parties concerned to con-

[28] Explanatory Report (n 24) 8.

tinue with the contract if they so decide'.[29] There is thus a choice between continuing or avoiding performance. This implies that there still is a contract to continue to perform.

The meaning of voidability in this context is particularly clear in the German version of Article 8.2 of the Convention, where it is stated that contracts undermined by corruption could result in *Unwirksamkeit* (*i e* ineffectiveness) as opposed to the word *nichtig* (*i e* void) used in Article 8.1.[30] In French, which together with English is an official language of the Convention, the words used are *nullité* in 8.1 and *annulation* in 8.2. Without going into the legal definition of these words in their respective jurisdictions (which is outside the scope of the research for this contribution),[31] it would serve no apparent purpose to declare ineffective or *Unwirksam*, or apply for *annulation* of, a contract that is no longer in force nor effective.

In conclusion, in contrast to Article 8.1, Article 8.2 does not appear to be intended to provide for remedies with respect to fully performed contracts. A fully performed contract has by definition already been effected and is no longer effective. It would therefore fulfil no purpose in terms of avoidance, if it were possible to have it declared ineffective.

If the interpretation above were to be accepted, it also follows that restitution of the performances should not be available with respect to a fully performed contract (since there is nothing left to invalidate). There are also good practical reasons for this conclusion. It safeguards legal certainty and avoids the sunk costs elements that almost always follow from the unwinding of contracts. It also takes away the possibility to speculate, in changed market prices and other developments, that comes with restitution.[32] However and importantly, this is by no means to say that acts of corruption should and will go unsanctioned, if discovered late when the contract is no longer effective.

The remedies of damages, as between the parties as well as from affected third parties, and disgorgement, as between the perpetrator and the state, are still available. And so are criminal and administrative sanctions. These remedies serve both the interest of compensating the aggrieved party for

[29] Explanatory Report (n 24) 9.

[30] The German translation of the Civil Law Convention on Corruption, 1999 (ETS no 174).

[31] Amusingly, but also sadly, the words used in the official Swedish translation of the Convention are *ogiltighet* in 8.1 and *ogiltighet* in 8.2 (yes – the exact same word); SÖ 2004:14 (official collection of Sweden's international agreements). That is not a correct translation linguistically, but it nevertheless goes to show how difficult it may be to properly distinguish legally between 'null and void' and 'declared void', in particular in Nordic legal systems; see footnote 10 above.

[32] See footnote 8 for an example.

its actual economic loss and to penalise the wrongdoer, without unjustly enriching the other party.

If a partly performed contract is declared void, or if the relevant law allows rescission of a fully performed contract in situations such as this,[33] large and complex questions relating to the unwinding of the contract need to be addressed. This includes questions as to how to treat the obligations already performed.

That is, however, a subject for another article.[34] A good starting point for such an analysis may be to look at the UNIDROIT Principles' Article 3.3.2 (*Restitution*), under Section 3: Illegality.[35] The rule takes a pragmatic approach, allowing restitution where it is reasonable in the circumstances of the case. Even if there are grounds to invalidate the contract, the remedy of restitution must thus not necessarily be automatic, in the way the seller argued in the case studied in this contribution.

Does the invalidity sanction in Article 8.2 of the Convention only apply to parties whose consent has been undermined by an act of corruption?

Article 8.2 of the Convention expressly states that the invalidity remedy should be made available to parties 'whose consent has been undermined by an act of corruption'.

This criterion targets the effect of the corruption on the legal act in a similar way as the good faith criterion of section 33 of the Swedish Contracts Act: invalidity requires causation between the corruption and the legal act. Accordingly, if it is established that the party would have entered into the legal act irrespective of the act of corruption in question, the invalidity sanction contemplated in Article 8.2 is not available.

In practice, it will likely be difficult in many instances to prove exactly what factors made a party consent to a contract. The decision to conclude a transaction, in particular a large transaction, is often collectively taken by

[33] There are examples in case law where courts, applying their local law, have come to this conclusion. For example, in the New York case *S T Grand, Inc v City of New York*, 298 NE2d 105, 107 (NY 1973), referenced in Bonell and Meyer (n 13) at footnote 103, a fully performed contract for cleaning services to the City was rescinded by the City after bribes were uncovered. The cleaner had to repay all sums received, with no compensation at all for the services rendered. This harsh approach appears to have been explained by the public tender nature of the transaction. As noted at n 22 above, public procurement concerns appear to constitute a ground for varying outcomes in these regards.

[34] For an effective summary of the solutions found in several jurisdictions, see Bonell and Meyer (n 13) 25–30.

[35] Art 3.3.2 UNIDROIT Principles 2016.

several individuals. The decision involves not only the negotiators but also the management of the company and in some instances the board. It would likely not be a reasonable interpretation of Article 8.2 to require the consent of all these individuals to have been undermined by the corruption, at least not directly.

It ought to be sufficient to show that corruption can be attributed to one or some of the individuals who have had at least an indirect influence on the decision-making of the company, formally or informally, for example by preparing or presenting the materials for others to decide upon and that such influence affected the decision-making in favour of the contract. Ultimately, there ought to be a presumption that corruption had an effect. It will thus be a question of the burden and standard of proof – if corruption is established, what burden of proof must be discharged by the respondent to establish that the corruption did not undermine the consent of those involved in the transaction?

Conclusions

Based on the above case study, some principles can be identified to apply in order to invalidate a contract affected by corruption (and these principles appear to be the same or very similar under Article 8.2 of the Convention and section 33 of the Swedish Contracts Act):

- the act of corruption must have (a) affected the terms of the contract; *and* (b) thereby caused damage to that party;
- the party seeking to invalidate the contract must have been in good faith regarding, and may not have contributed to, the act of corruption invoked as a ground for invalidity;
- the contract must – at least in an action under section 33 of the Swedish Contracts Act and, arguably, also under the Convention – still be effective (and thus not have been fully performed); and
- the corruption must have undermined the aggrieved party's consent to enter into the contract.

So, on the facts of this case study, did the arbitral tribunal accept the legal conclusions reached above? We will never know. The case settled after the Statement of Defence.