PEOPLE: International Journal of Social Sciences
ISSN 2454-5899

Michaela Garajová, 2018

Volume 4 Issue 2, pp.01-16

Date of Publication: 14th July, 2018

DOI-https://dx.doi.org/10.20319/pijss.2018.42.0116

This paper can be cited as: Garajová, M. (2018). The Issue of Corruption in the International Trade – Questioning the Arbitrators' Jurisdiction? PEOPLE: International Journal of Social Sciences, 4(2), 01-16.

THE ISSUE OF CORRUPTION IN THE INTERNATIONAL TRADE-QUESTIONING THE ARBITRATORS' JURISDICTION?

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Abstract

Corruption and a private dispute resolution - two disciplines that have nothing in common? Contrarily. The area of international trade is, as a consequence of liberalization and globalization, free of many economical, legal and physical barriers between countries today. The international cooperation between subjects of different states and the exchange of goods and services is going hand in hand with a risky growth of international criminal activities. The jurisdiction of national judges has been limited in this field since the existence of an alternative dispute resolution that is more suitable to the global and commercial needs and claims. The aim of this paper is to analyze whether it is appropriate, in the context of the international arbitration proceedings, to raise an issue of corruption that may have affected or otherwise distorted the performance of a contract. The conclusion of this paper reveals that such issues should be permitted to be raised by the arbitrators in arbitral proceedings since the principal decision-making powers of the arbitrators in the area of international trade is undeniable.

Keywords

Arbitrability, Arbitration, Corruption, Jurisdiction, Public Policy

1. Introduction

International commercial arbitration is a widely-accepted way of dispute resolution arising out of international trade contracts. Generally, the nature of arbitration is mainly private and confidential, based on party autonomy expressed in an arbitration agreement. Therefore, the arbitration proceedings are based on the parties' will to adjudicate their rights and duties by preferred private persons - arbitrators. Thus, the arbitration is generally regarded as an area reserved for the private law. The primary source of the arbitrator's mandate to draw civil consequences of a particular misconduct is determined by the parties' personal choice.

On the other hand, corruption - a criminal offence – obviously undermines the integrity of international business, create a dangerous link between business and organized crimes, distort competition and help to perpetuate corrupt regimes in the third world countries (Ajulor, 2018). The suppression of corruption is an established part of international public policy of most of the states and must be respected, even by the international arbitrators (Cremades & Cairns, 2003).

When the arbitration proceedings are commenced, the issue of corruption can quite easily occur and break the whole dispute resolution process into pieces. There are too many obstacles lying in front of arbitrators that have been discussed among scholars, experts and legislators for decades, but have not been enshrined in a unified way of international consensus yet.

Every one of us knows how corruption or rather bribery works in everyday life. We are aware of the consequences, but in order to achieve the aim, we are not afraid to try it. Adequately, in the international business the value of the corrupt advantage and the risk of being detected is higher. Despite of the potential exposure, actors are not afraid to disobey the law and certain moral values, because „with great risk comes great reward". However, there are two sides of the same coin. The possible reward of the hazardous transactions blinds the actors so they do not consider the risk they are taking as serious as it really is.

Corruption is a serious crime from national perspectives. The same applies for the international status. We can no longer talk about corruption as a phenomenon that is destroying economic situations of a particular state. We can no longer look at how other countries must combat corrupt activities on their territories. Unfortunately, we all are a part of it. Transnational corruption is the reality and we must face it. Criminal activities are crossing borders just as individuals. What can we do about it? Are our actions of a combat against such an illegal and immoral behavior sufficient? Do we have the capacity to move forward or we are stuck at one point? It is clear that the international community has widely condemned these

actions. This approach is reflected in its efforts to codify and define corruption and its forms with regard to criminal and civil law in the main international conventions and resolutions in support of combating such a phenomenon worldwide. But do they provide the sufficient international mechanism to enforce anti-corruption norms? Or is it only about the general principles and proscriptions? Notwithstanding, the international commercial arbitration has been considered as a "safe harbor" for commercial activities contaminated by corruption despite of the numerous enacted international agreements. Sadly, there is still a room for such a behavior. Therefore, the next step in a global engagement against corruption is to secure the field of international arbitration from such manners and provide the sufficient mechanism for handling such cases during the arbitral proceedings.

The aim of this paper is to analyze whether it is appropriate, in the context of the international arbitration proceedings, to raise an issue of corruption that may have affected or otherwise distorted the performance of a contract.

We will discuss the general, international approach to corruption in the international trade, the notion of corruption in the course of arbitration and obstacles related to jurisdiction of the arbitrators when they must resolve a dispute tainted by corruption.

2. Brief Literature Review

The issue of corruption in international commercial arbitration has been discussed among scholars and practitioners for decades. Such a conclusion is quite obvious. Corruption undermines the integrity of international business, create a dangerous link between business and organized crimes, distort competition and help to perpetuate corrupt regimes in the third world countries. As the findings of the most of the studies and research show, the unified approach to problematic issues related to corruption and international commercial arbitration does not exist. However, the discussions are trending to show the need for such a resolution, since the quantity of corrupt cases and the impact of such behaviors on the international society is nowadays much tangible. Such conclusion is reflected in the work of Jenkins (2003), Sayed (2004), or Fox (2009).

The role and position of arbitrators in relation to the dealings with corruption has been the subject of studies of Mourre (2006) and Fortier (2015), who consider arbitrators as guardians of the international trade. On the other hand, Pavić (2012) assumes that the arbitrators are obviously the servants of individual interests of parties. Consequently, the issue of arbitrators' jurisdiction depends on the answer to the question of the arbitrators' position within the whole decision-making area. Unfortunately, arbitrators must face more than that. As mentioned by Redfern & Hunter (2015), Mistelis (2009), Youssef (2009), Srinivasan, Pathak,

Panjwani & Varma (2014), Cremades & Cairns (2003) and Wilske (2010), the jurisdiction of arbitrators to resolve disputes tainted by corruption is limited by the arbitrability of a dispute and the public policy rules, but arbitrators still have the power and tight to trigger safety levers that are reflected in the existence of the doctrine of separability and the transnational public policy.

3. Unified Approach To The Meaning And The Scale Of Corruption?

Certainly, the term of corruption is not unknown in the field of international trade. I doubt, that there is a businessman who would not think, not even once in his carrier, whether his behavior can be considered as corruption. That is understandable. Any activity that would go beyond legal limits and would not be transparent could be subjected to a review. Moreover, there is a very narrow line between what can be considered as a legitimate and modest expression of favor and what is already regarded as an illegal and immoral corrupt behavior. The main problem is that corruption may take different forms and usually does not occur in an isolation but rather it tends to be embedded in social practices (Jenkins, 2003).

One would suppose that when we are talking about criminal behavior such as corruption, which undermine the integrity of international trade, the unified and generally accepted definition exists. Despite of the global convergence of legal rules, authorities and opinions condemning corruption, the international society has not come with a sufficient and coherent approach while defining this manner of conduct.

Nevertheless, the phrase "the abuse of power" is considered as a common denominator in the relation to corruption. The leading non-governmental organization within "anti-corruption industry" (Pavić, 2012), the International Transparency, refers to "the abuse of entrusted power for private gain" while defining the corrupt activities. Such a definition can refer to corruption either in the private or public sector. For analyzing corruption in the public sector, I will refer to a definition used by *Abdulhay Sayed*: *"Actions of transfer of money or anything of value to foreign public officials, either directly or indirectly, to obtain favorable public decision in the course of international trade*." (Sayed, 2004). In other words, it is a violation of prescribed rules against the exercise of certain types of influence over private gains. Broadly speaking, corruption is closely linked to practices such nepotism or cronyism and the influence over public officials (Fox, 2009). On the other hand, the notion of corruption in the private sector is focused on an abuse of certain powers conferred on an employee by his superior in order to affect a particular decision of a company or a performance of a capacity (Argandoña, 2005). The nature and consequences of corruption either in the public

or the private sector are the same and constitutes obstacle of the proper functioning of the international trade.

Up to this point, it is important to realize that corruption can be performed in many forms. Mostly the illegal behavior occurs as bribery – a payment of a particular sum of money to a public figure in order to influence that official's doings and decisions (Fox, 2009). For the purpose of this paper, we will use the term corruption to capture all possible forms of this criminal action.

3.1. The Approach Of The International Community In Combating Corruption

Although corruption was always an extensive problem which influenced the development, competition and all the trust in institutions, only after 1990 it has been seriously tackled at the international level (Pieth, 2011). The global community has begun to warn international businesspeople that corruption is not acceptable and thus globally prohibited (Fox, 2009).

The international community has reached an admirable consensus on the condemnation of transnational corruption. The first step in combating corruption worldwide was made by the Organization for Economic Co-operation and Development (OECD). In 1997 the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which covers active foreign public bribery by individuals and corporations and constrain one side of corruption (Betz, 2017). The most remarkable development within the international community was carried into effect by the United Nations in 2003. The way the UN approached the transnational corruption problem in the United Nations Convention of Corruption (UNCAC) was more elaborate. The UNCAC recognized not only the active side of bribery – the individual offering or paying the bribery, but also passive side – the public official receiving or soliciting the bribery (Fortier, 2015).

The progress of the fight against transnational corruption can be seen also on the regional level. The main players on these fields were the Council of Europe, the European Union, the Organization of American states and the African Union.

Nevertheless, the question is to what extent the members of the international community respect the anti-corruption combat and what kind of mechanism of international enforcement of anti-corruption norms they have already adopted. The bone of contention is that almost all treaties combating corruption lack the international enforcement mechanism which is left to national legislation and the courts (Fortier, 2015). All treaties mentioned above are not "self-executing" which leads to the need of implementation of provisions of conventions into domestic law by each state. Leaving this important part of the combat against corruption on each state leads to uneven application of anti-corruption rules among countries, which makes the whole idea of dealing with transnational corruption insufficient.

Nevertheless, the existence of sets of rules combating corruption constitutes a powerful voice of the international community that corruption and its forms are no tolerated anymore in the international business transactions and that involved individuals will be punished.

4. The Presence Of Corruption In The Course Of International Arbitration

Generally speaking, the corrupt actions can be in the course of arbitration committed either by the private decision makers - the arbitrators, or the parties. In one or the other, the consequences and an impact on the arbitral proceedings are serious. For the purpose of this paper, we will omit potential misconducts of the arbitrators and directly focus on the parties' illegal behavior.

The allegations of corruption can be either brought before the arbitral tribunal by one of the parties which proclaim that the outward resemblance of the relationship is covering the illegal contract which has been concluded, or, in case of an absence of an accusation, the arbitral tribunal can itself raise the question of corruption of one or both parties based on suspicions of corrupt acts.

In principle, the primary duty of the arbitrators is not to discover and investigate corrupt actions, but rather to settle the dispute which is pending before them (Born, 2009). Accordingly, as *L. Yves Fortier* mentioned in his lecture, the arbitrators were and still are trying to avoid deciding issues of corruption in arbitral proceedings by many procedural excuses which in consequence lead to the scarcity of awards wherein the corruption was outcome-determinative. This is the reason why arbitration was and still is considered as a "safe harbor" for corruption (Fortier, 2015). Basically, the work of the arbitrators is similar to the task of national judges, they perform the same activities in the field of a dispute resolution. But when it comes to the issue of a criminal wrongdoing in the proceedings, the judges have clearly stated criminal rules providing the resolution mechanism and regulation of decision of this matter. National judges have to fulfill their obligation of loyalty to justice and national legal orders (Mourre, 2006). However, by the nature of arbitration, the arbitrators are in the position of parties' servants (Pavić, 2012). The arbitrators must find a balance between their allegiance of commitment to the parties and their will reflected in the arbitration agreement, and their allegiance of loyalty to the international legal order created by anti-corruption treaties and international public policy (Fortier, 2015). Unfortunately, the path of finding the balance is full of obstacles and problems.

5. The Unsolved Problem with the Arbitrators' Jurisdiction?

The primary problem that not only arbitrators, but the international scholars are confronted with, is whether the arbitrators can claim their jurisdiction over disputes tainted by corruption.

In principle, one way, the easiest one, for the arbitrators would be to refuse their jurisdiction over disputes tainted by corruption since it is a criminal offence and has nothing to do with private law. Consequently, the authority would be granted to national courts even though the existence and the validity of an arbitration agreement would not be challenged (Pieth, 2003). Such an indication would be then directed against the purpose and the nature of arbitration. Despite of the fact that criminal consequences of an illegal behavior of the parties cannot be drawn by the arbitrators, they still have the power to determine the civil outcomes of a criminal behavior.

For the purpose of this paper, we will look on two main difficulties that can lead to a refusal of arbitrators' jurisdiction over disputes related to corruption.

5.1. Is Arbitrability An Obstacle?

The discussion over the arbitrators' jurisdiction and the arbitrability of disputes related to corruption has been sparked off in the half of the 20th century by a Swedish judge *Gunnar Lagergren* in a very famous and the most cited decision regarding the issue of corruption. In a nutshell, the judge found out that a contract concluded between the parties included a particular payment which was consequently used as a bribe for the purpose of achieving a necessary public decision in favor of one of the parties. The judge decided that a dispute raised from a contract tainted by bribery is not arbitrable since it is condemned by public decency and morality (Redfern & Hunter, 2015). The statement of reasons was built on the fact that the contract was void in its entirety, including the arbitration agreement, since it was based on *"grave offence against bonos mores"* (Mourre, 2006).

Generally speaking, arbitrability of a dispute determines which types of legal claims are able to be settled by arbitration and which claims belong exclusively to the jurisdiction of national courts (Redfern & Hunter, 2015). Theoretically, every dispute arising of a particular contract is capable of being settled in litigation as well as in arbitration. However, the international trade and an out-of-court settlement are going hand in hand. Consequently, the judicial system had to give up on certain areas of law in a favor of arbitral proceedings.

On the other hand, this mechanism is set to protect sensitive public policy issues that involve certain areas of law reserved only to national courts (Mistelis, 2009). Typical unquestionable claims that are resolved by arbitration are a breach of warranty, a failure to deliver or pay and the like. Unfortunately, some matters that have a general public interest are excluded from the arbitrators' jurisdiction and are preferably settled before national judges. Therefore,

each state decides which matters and related disputes may and may not be resolved by arbitrators according to its own political, social and economic policy (Redfern & Hunter, 2015).

Even though the extent and the meaning of what can and cannot be settled by arbitration differs in many jurisdictions, the general notion about the arbitrability as a kickoff of the arbitration proceedings is universally accepted. That means that before the dispute can be settled or decided, the arbitrators must enquiry whether the certain dispute is capable of a settlement in the arbitral proceedings. It is not possible to initiate the arbitral proceedings without the proclamation of the arbitrability of an existing dispute (Mistelis, 2009).

We have to remember that arbitrability sets a limitation to party autonomy as well since it defines the boundaries within which the parties have the right to arbitrate certain disputes (Youssef, 2009). Moreover, the matter of arbitrability is closely linked to the issue of public policy. Some scholars say that the national laws define arbitrability in the term of public policy. The fact is, that public policy, as well as arbitrability, is a restriction to party autonomy. The rights which are out of the disposal of the parties were traditionally included into public policy and disputes which raised from them were in the exclusive judicial jurisdiction (Youssef, 2009).

Although the existence of a wider approach in the matter of arbitrability is generally accepted by states and other international actors, there still remains an open question whether economic crimes such as corruption should or should not be allowed to be resolved by arbitration. The universal arbitrability is becoming more and more real. But does not this approach go against the very nature of arbitration?

The general public interest in the vigorous enforcement of the anti-corruption laws, the complexity of issues encountered in corruption cases, the exclusive jurisdiction of national courts over disputes arising under national anti-corruption laws and various other factors were all advanced to prefer the courts' powers over resolution of disputes tainted by corrupt activities. This approach is no longer the law. Despite of the fact that arbitration has been used as a settlement mechanism in criminal issues just sporadically, today the arbitrators' powers to resolve disputes tainted by criminal wrongdoings and therefore draw civil consequences are generally accepted. The international community respects the arbitrability of criminal acts, including corruption, and, based on the principle of separability, it accepts the doctrine of autonomy of arbitration agreement and therefore the existence of arbitrators' jurisdiction over such claims as well (Srinivasan, Pathak, Panjwani & Varma, 2014).

Despite of the conclusion resulting from the decision of the judge *Lagergren*, the modern approach in dealing with the arbitrability of a certain disputes linked to criminal behavior is different. The international community is inclined to accept the jurisdiction of arbitrators

who are facing corruption. The justice in the area of international trade is mainly in the hands of the arbitrators and they need to have a power to settle criminal allegation (Betz, 2017).

Unfortunately, there is an obstacle which could be pointed against arbitrability of corruption. That is the issue of public policy. Corruption causes a strong problem in the international trade and this misconduct is considered against the core values of most legal systems in the world. Therefore, public policy plays an important role in the international arbitration (Srinivasan et al., 2014).

Nevertheless, the fact that the public policy can be considered confrontational to the arbitrability of a certain issue, their relationship is complementary. The possibility to resolve a dispute in arbitration would not exist if a state would not allow it. But everything comes with a price. In international arbitration the prices are paid by observing the mandatory rules and public policy of particular countries, as well as of the international community (Srinivasan et al., 2014).

5.1.1. The Notion Of Public Policy

The criminal rules such the ones which prohibit and incriminate corruption are generally considered as mandatory rules which create public policy of any given state. The problem occurs when the arbitrators face a mandatory rule which prohibit a particular corrupt activity that occurred in relation to the arbitration. Contrary to national judges, the arbitrators do not have the duty to apply such provisions automatically, but they may take them into considerations if they have a reasonable title why such rules must be applied in a pending case (Mourre, 2006).

The imperative to protect public policy and mandatory rules known from the litigation practice in similar cases arises in arbitral proceedings only if the arbitral tribunal finds that there is a certain public policy rule which prohibits a particular criminal conduct and according to applicable law, this public policy rules must be applied (Pavić, 2012). Nowadays a general consensus on the matter of applicability of public policy exists. The arbitrators, generally, have a duty to observe public policy rules and mandatory rules and draw civil consequences of a potential violation of the mentioned provisions (Pavić, 2012). Nevertheless, the primary question which the arbitrators must answer is the public policy of which country they should take into consideration? Which rules are applicable on the issue of corruption invoked during arbitral proceedings?

Generally, the violation of public policy can be divided into three levels - national, international and transnational. The violation of national public policy does not necessarily justify the refusal of recognition or enforcement of an arbitral award unless such abuse constitutes a breach of international public policy.

The performance of public policy allows to eliminate agreements, rules of decisions that would contravene certain fundamental values. Although the nature of international and transnational public policy is diametrically different, both of these sets of rules have an impact on the course of arbitral proceedings.

5.1.1.1. International Public Policy

The content of international public policy has been changing by the globalization process which has brought new international norms relating to the condemnation of corruption and other economic crimes in the international trade. The above mentioned international conventions have influenced the development of the international public policy remarkably. There is no doubt that the corruption is not welcomed or tolerated among nations and that the rules which condemn such a behavior are a part of the international public policy (Cremades & Cairns, 2003).

The corruption is *"considered to act as a threat to the international public order as it enables individuals to exert the influence over other areas of business (...)."* (Wilske, 2010) Therefore, the general and international condemnation of corruption that is reflected in the existence of international public policy prohibiting corruption is not surprising. Evidently, the existence of international public policy cannot be denied since many authorities all over the world accept such set of rules and prohibit the national courts and tribunal not to respect it when a particular behavior is in breach. Consequently, the duty of arbitrators to observe the international public policy of a state, wherein the arbitral award is issued, is an absolute essential. If the arbitrators would allow a claim tainted by corruption and skip the application of international public policy, they could risk its violation and subsequently the non-enforcement of the award (Srinivasan et al., 2014).

5.1.1.2. Transnational Public Policy

"(...) transnational public policy mediates between morality and law." (Sayed, 2004). The source of transnational public policy is not to be found in the national or international law. It is upon the arbitrators what principles they consider as necessary and worthy of being respected. In particular, the arbitrators may apply a moral rule as a part of transnational public policy which they find "deeply entrenched" in their mind as long as this rule is universally accepted among nations too (Sayed, 2004).

The issue of corruption is considered against the transnational public policy since has been mentioned for the first time in the *Lagergren case*. The corruption was claimed against the general principles of law recognized by civilized nations which seriously violates good morals (Srinivasan et al., 2014). Presently, the notion of transnational public policy includes *"fundamental rules of natural law; principles of universal justice; jus congens in public in-*

ternational law; and the general principles of morality accepted by what are referred to as 'civilised nations'." (Mayer & Sheppard, 2003) The universal values which create the transnational public policy are perceived as essential and therefore supported by a broad consensus of states (Sayed, 2004).

By all means, the transnational public policy plays an important role in the international arbitration. Although the arbitrators must consider the international public policy of a particular state, the rules included in such policy may not prohibit certain corrupt actions.

Therefore, they need to have their own public policy which would be easier and more satisfactory for them to apply on a case (Mayer, 2006).

Transnational public policy is imposed and made by the arbitrators who must choose which principles are seen inviolable by the community of men and states (Mayer & Sheppard, 2003). Even though the New York Convention does not refer to transnational public policy, its existence and applicability when it comes to corruption in international arbitration is not questionable (Srinivasan et al., 2014). Generally, the arbitrators, when face a situation such as corrupt acts of the parties, must ask themselves whether there some overriding principle which should be apply despite the arbitration agreement exists.

The main problem, however, arises when the arbitrators must consider whether condemnation of corruption constitutes a part of transnational public policy and if the answer is affirmative, under what conditions this rule should be applied. Is there a broad consensus amongst the nation states on forbiddance of corruption so it can be considered as an element of transnational public policy? As long as we are talking about corruption in the public sector, yes. No such conclusion can be made with regard to corruption in the private sector.

The universal prohibition of bribery of the state officials or other public figures is not debatable, the restriction on corruption in the private sector is not that apparent (Srinivasan et al., 2014). The reason which stands behind such a conclusion is obvious. Evidently, there exists numerous jurisdictions and legal systems wherein different approach exists with regard to prohibition and incrimination of particular forms of corruption. For instance, a practice such as an influence peddling is specifically permitted in certain countries such as the US, Australia or Canada (Srinivasan et al., 2014). On the other hand, such misconduct is expressly prohibited in France. Moreover, the UNCAC does not require the criminalization of this form of corruption, but provides that states should consider criminalization of such a behavior.

Consequently, the arbitrators are in a difficult position. They must draw a line between actions that can be categorized as against the transnational public policy and that cannot. They must take into a consideration all circumstances with regard to a particular illegal be-

havior and consequently conclude whether the notionally line was exceeded. Moreover, the general unity over the condemnation of corruption in the private sector cannot be neither drawn from the existence of above mentioned international conventions since it is more likely that the rules included in international pacts constitute international rather than transnational public policy.

Nevertheless, the threat that the arbitrators and the arbitral process would be used to validate the legality of a contract tainted by corruption invoke a need to confirm that corruption is the international evil and definitely it is against *bono mores* of the international community. It is often referred to the conclusions of judge *Lagergren* which are considered among many arbitrators as an arbitration practice when it comes to the corruption in the course of the arbitral proceedings. Consequently, the arbitrators consider themselves bound by a transnational public policy rule condemning the corruption (Sayed, 2004).

5.2. The Principle of Separability – A Safety Lever for the Arbitrators?

The relations between the validity of an arbitration agreement and arbitrability is quite important since the matters considered arbitrable are identical with those in relation to which the arbitration agreement can be concluded. Consequently, the non-arbitrability of certain disputes affects the potential loss of the arbitrators' jurisdiction (Sayed, 2004).

The impact of an illegal conduct on the contract can definitely effect the arbitration agreement, primary its validity. The "safety lever" for the arbitrators is particularly the doctrine of separability – a basic principle of Model Law on International Commercial Arbitration which has been adopted and recognized by most countries of the world. Basically, the relation of separability exists between the contract and the arbitration clause, whether included in the main contract or not. In case that the contract is claimed to be void or voidable, by the application of the doctrine, the validity of the arbitration agreement is secured. Consequently, the arbitrators have the power to decide issues even when the main contract itself is void for corruption or bribery (Pengelley, 2007).

Even though the judge *Lagergren* denied the applicability of the principle of separability when the main contract was tainted by corruption, the position on this matter has changed since 1962. The main case that had strengthened decision-makers' approach to maintain the validity of the arbitration agreement despite of the illegality of the main contract was *Fiona Trust and Holding Corp. v. Privalov*. The parties in this case concluded numerous contracts that were concluded by a particular businessman. It was alleged that this businessman bribed employees of corporations in order to gain advantageous commercial terms for his own benefit. One of the parties commenced the arbitration proceedings based on the arbitration clause included in the above mentioned contract. Nevertheless, the counterparty

sought to restrain the arbitration on the basis that both the main contract and the arbitration clause were rescinded because of the bribery (Pengelley, 2007). The application of the principle of separability was more than welcomed. The House of Lords explained how the principle under stated conditions works. Arguing that the invalidity of the main contract does not necessarily entail the invalidity of the arbitration agreement, because the latter one must be treated as a "distinct agreement" and only on the grounds related directly to the arbitration agreement can be declared void or voidable (Hwang & Lim, 2012). The usual argument used by the parties to support their statement that illegality necessary means that both the main contract and the arbitration agreement are void or rescinded, is that the parties would not conclude the main contract in the first place if they were aware of the illegal behavior of the counterparty. As a consequence, the arbitration agreement would not existent neither – *"if the one falls, then both fall"* (Pengelley, 2007). Nevertheless, this argument was rejected in favor of more rational explanation of the doctrine of separability. The contract, despite of the fact that was proclaimed void, took some form and particular activities were performed. These actions pursuant to the contract gave rise to rights and duties as well as to a dispute. The arbitration agreement survived the challenge of the main contract tainted by corruption in order to uphold the existence of the arbitration and the need for determination of the arisen dispute (Pengelley, 2007).

6. Conclusion

The powers of the arbitrators are partially granted by states which makes the arbitration a mechanism of a dispute resolution entrusted with a performance of a set of public competencies instead of national authorities. In the case when the arbitration is the only sufficient authority on a particular field, it must possess powers to face and decide disputes which may not be their primary duty, but are necessary to be resolved in order to achieve a fair decision and harmony in the international community. The combat against corruption in the international trade is not easy. Although the legislative activity of states and international organizations has been in the flourish, the sufficient law enforcement mechanism is still unreal.

While the arbitrators' jurisdiction over disputes tainted by corruption has not always been supported and welcomed by states, the reality is that they are probably the only ones who could protect the international trade from such manners.

The approach of arbitrators to restrain themselves from appropriate actions when the issue of corruption occur in the course of international arbitration is not correct. The trust in this institution should not be doubted. Nowadays, the arbitrators are becoming more open to deal with criminal behavior of the parties in the course of arbitral proceedings. The interna-

tional arbitrators should be recognized as natural judges in the field of international trade and be able to face such behaviors and apply necessary rules to combat it.

The acceptance and the applicability of the doctrine of separability has not always been so prevailing. But today, the arbitrators should *apriori* consider the validity of a contract which is supposed to be tainted or otherwise related to corruption and consequently, if the illegality does not link directly to the arbitration agreement, they should declare the invalidity of the contract without questioning the validity of the arbitration agreement. The applicability of the principle of separability primary secures the existence of the arbitrators' jurisdiction over a dispute arisen from corrupted contracts.

Although, the arbitrability of disputes tainted by corruption is commonly respectable, the problem can occur in relation to the applicability of public policy.

We think that the arbitrators must take into considerations the rule of general and universal prohibition of corruption in the international trade as a general interest which must be protected under any circumstances. As long as the only actors of dispute resolution in this filed are the arbitrators, they must obey such a rule. Consequently, the arbitrators must consider whether the issue can be in breach with international public policy of a particular state wherein the final arbitral award is about to be enforced. Otherwise they would risk the non-enforceability and the breach of their primary duty to issue an enforceable decision. But it does not necessary implicate that they cannot claim the jurisdiction over such disputes. They must take all possible tools to combat such behavior during arbitral proceedings so the result – an arbitral award – would be fair and according to law.

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