

## International Financial and White Collar Crime, Corporate Malfeasance and Compliance

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*This section edited by Margot Seve in Paris and Michel Perez in New York aims at presenting and analyzing legal developments related to cross-border enforcement actions in financial and white collar crime cases. It also focuses on the growth of compliance and corporate governance regulatory standards. Comments and suggestions are welcomed, including articles proposals.*

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### The U.S. Foreign Corrupt Practices Act in International Commercial Arbitration

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1. Over the last fifty years, global actors have come together to address and combat public corruption and bribery in unprecedented ways.<sup>2</sup> Following the lead of the United States,<sup>3</sup> which had enacted the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. (“FCPA”) in the wake of the Watergate and other scan-

dals,<sup>4</sup> members of the Organisation for Economic Co-operation and Development (“OECD”) negotiated and adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention”).<sup>5</sup> The OECD Anti-Bribery Convention signified growing agreement among the international community on the need for a united approach in the fight against corruption.<sup>6</sup> Together with other international instruments, the OECD Anti-Bribery Convention strengthened the enforcement of the FCPA and catalyzed anti-bribery and corruption efforts at the intergovernmental and national levels.<sup>7</sup> As a result of these efforts, the FCPA and other state corruption laws began to influence and shape international business and contracts.

2. The FCPA is enforced by the United States Department of Justice (“U.S. DOJ” or “DOJ”) and the Securities and Exchange Commission (“U.S. SEC” or “SEC”) and does not confer a private right of action.<sup>8</sup> But over the past two decades, the substantive and extraterritorial reach of the FCPA has had substantial and long-lasting effects on contracts with international corporations by spurring the development of sophisticated compliance programs, which often require anti-bribery and corruption commitments from commercial partners. Further, it is not uncommon for the DOJ to require U.S. companies to commit to entering into anti-corruption and audit agreements with third parties when evaluating the effectiveness of a company’s FCPA compliance program.<sup>9</sup>

3. International arbitration has become a key forum for the resolution of international trade and foreign investment disputes, which often raise issues relating to corruption

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2 - See, e.g., A. Posadas, *Combating Corruption under International Law*, 10 *Duke J. Comp. & Int’l L.* 345, 370-404 (2000).

3 - See, e.g., R. Bismuth, J. Dunin-Wasowicz & E. Glucksmann, *Infracciones económicas – La transnationalisation du droit de l’anti-corruption*, *Sem. Jur. Entreprise et Aff.* n° 42, October 17, 2019, 1470; International Monetary Fund (“IMF”), *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions at ¶ 3 (2001)* (hereinafter, the “IMF 2001 Note”), available at: <https://www.imf.org/external/np/gov/2001/eng/091801.pdf> (last visited June 23, 2020).

4 - See, e.g., L. Lonvenfels, *Questionable Corporate Payments and the Federal Securities Laws*, 51 *N.Y. L. Rev.* 1 (1976); *United States v. Cas-tile*, 925 F.2d 831, 834 (5th Cir. 1991).

5 - Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) (the “OECD Anti-Bribery Convention”).

6 - G. Sacerdoti, *The 1997 OECD Convention against Trans-national Bribery: Effective Monitoring and Implementation*, in *Arbitration: Money Laundering, Corruption and Fraud* at 47-48 (Karsten & Berkeley (eds) 2003).

7 - See generally, *OECD Country Reports on the Implementation of the OECD Anti-Bribery Convention*, available at: <https://www.oecd.org/daf/anti-bribery/countryreports/implementationoftheoecdanti-briberyconvention.htm> (last visited June, 22, 2020). At the intergovernmental level, the creation of the World Bank Group’s Sanction System is an example of procedure implementing the OECD Anti-Bribery Convention. The World Bank Group’s Sanction System completed 47 investigations and sanctioned more than 50 respondents for FY 2019 alone. See *World Bank Group Sanctions System Annual Report FY 2019*. See also, M. Diamant, C. Sullivan & J. Smith, *Sanctionable Practices at the World Bank: Interpretation and Enforcement*, 18:4 *UPenn. J. of Bus. Law* 985 (2016).

8 - See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027 (6th Cir. 1990); *Republic of Iraq v. ABB AG*, 768 F.3d 145, 170 (2d Cir. 2014); M. Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 *Colum. L. Rev.* 1085, 1103 (1979).

9 - See *infra* Section II.B; U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs* (Updated June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

laws.<sup>10</sup> While, intuitively, it may seem that the FCPA, as a U.S. criminal and regulatory law, has no place in a *private* international commercial arbitration, issues involving the FCPA or similar laws have arisen and are likely to continue to arise in international arbitration. Over the past decades, investment arbitral tribunals have refused to offer the protection of bilateral treaties to investments procured by corruption,<sup>11</sup> and international commercial arbitral tribunals have applied domestic and international laws to declare illicit or void contracts procured through or facilitating corrupt practices.<sup>12</sup> Anti-corruption policies also present fundamental—and sometimes controversial—questions in international arbitration, such as the management of parallel proceedings,<sup>13</sup> the applicable standard of proof,<sup>14</sup> and the duty of arbitrators to investigate allegations of corruption.<sup>15</sup>

4. Despite the influence that the FCPA and concerns surrounding international corruption have had in international arbitration, the ways in which international arbitral tribunals have resolved claims involving the FCPA remain relatively unexplored. This article surveys the FCPA in international commercial arbitration, assessing the role that the FCPA has played in international commercial arbitration and suggesting ways to avoid potential FCPA-related issues from arising. Part I outlines the main characteristics

of the FCPA. Part II then addresses the mechanisms through which parties have used the FCPA, both as a shield and as a sword against foreign corrupt practices in international commercial arbitration, and suggests how to avoid potential conflicts and issues from arising during arbitration. Assessing how parties have brought FCPA-related claims before arbitral tribunals under both of these approaches demonstrates the importance of evaluating a party's FCPA obligations, or general risks of corruption, at the time of contract formation and suggests that international commercial arbitration can be an effective forum for enforcing a company's FCPA compliance program.

## I. Main Characteristics of the FCPA

5. The FCPA makes it “*unlawful for certain classes of person and entities to make payments to foreign government officials to assist in obtaining or retaining business.*”<sup>16</sup> It contains anti-bribery as well as accounting provisions. These provisions apply broadly to both persons and companies acting in the territory of the United States and to persons and companies with certain connections to the United States. The following section details the requirements under the FCPA and provides an overview of the FCPA's territorial and extraterritorial reach.

### 1. Anti-Bribery Provisions

6. The FCPA prohibits inducing or influencing foreign officials to use their position to assist in obtaining or retaining business. Specifically, it prohibits offering, paying, promising to pay, or authorizing the payment of any “money, or offer, gift, promise to give, or authorization of the giving of anything of value” to a foreign official with the intention to: (i) influence any act or decision of the foreign official in their official capacity, (ii) induce such foreign official to act or omit to do any act in violation of their lawful duty as an official, or (iii) secure any other improper advantage, in order to obtain or retain business.<sup>17</sup> The Criminal Division of the U.S. DOJ and the Enforcement Division of the U.S. SEC explain in their FCPA Resource Guide that they evaluate whether a payment or offer to pay has been made to a foreign official in violation of the FCPA using the “business purpose test.”<sup>18</sup> This is a broad test to assess whether an action was taken to obtain or retain business.<sup>19</sup> The FCPA Resource Guide states that such actions to obtain or retain business include paying a bribe to: win a contract, influence the procurement process; circumvent rules for importation of products, gain access to non-public bid tender information; secure favorable tax treatment; influence the adjudication of lawsuits or enforcement actions; obtain exceptions to regulations, circumvent licensing or permit requirements; obtain gov-

10 - See, e.g., K. Betz, Economic Crime in International Arbitration, 35(2) ASA Bulletin 281 (2017); G. Born, International Commercial Arbitration at 1 (2nd ed. 2014).

11 - See, e.g., C. Lamm, B. Greenwald, & K. Young, From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption, 29(2) ICSID Review - Foreign Investment Law Journal 328 (2014); J. Yackee, Investment Treaties and Investor Corruption: An Emerging Defense for Host States?, 52 Va. J. of Int'l L. 723 (2011-2012); T. Meshel, The Use and Misuse of the Corruption Defence in International Investment Arbitration, 30 J. of Int'l Arb. 267 (2013); E. Teynier, L'office de l'arbitre d'investissement : le cas particulier de l'investissement illicite, Revue de l'Arbitrage 2019, Vol. 1 at 117; *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, No. ARB/03/26, Award ¶ 242 (ICSID 2006); *World Duty Free v Kenya*, No. ARB/00/7, Award ¶ 161 (ICSID 2006).

12 - See, e.g., ICC Case No. 15300, Award ¶ 16 (2016) (holding that the Parties' 5% commission agreement was “unenforceable for violation of international public policy standards.”); ICC Case No. 14920, Award ¶ 225 (2013) (noting that “if any accusations are made during arbitration proceedings that the underlying legal transaction is affected by corrupt practices, the arbitrator cannot ignore these facts but must instead investigate, collect arguments and evidence, to corroborate or reject the accusations and assess their implications on the parties' claims.”).

13 - See, e.g., J. Tirado, M. Page & D. Meagher, Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship, 29(2) ICSID Review - Foreign Investment Law Journal 493 (2014); ICC Case No. 13706, Award ¶ 284 (2019) (declining to order a stay of the proceedings); ICC Case No. 20952, Procedural Order on Jurisdiction ¶ 25(2019) (same); ICC Case No. 21852, Procedural Order No. 1 ¶ 38 (2019) (same).

14 - See, e.g., S. Lemaire, La Preuve de la Corruption, Revue de l'Arbitrage 2020(1), at 185; *Wena Hotels Limited v. Arab Republic of Egypt*, No. ARB/98/4, Award ¶ 189 (ICSID 2000); ICC Case No. 13914, Award ¶ 228 (2013) (applying a heightened standard of proof of “clear and convincing evidence”); *EDF (Services) Limited v. Romania*, No. ARB/05/13, Award ¶ 221 (ICSID 2009) (noting a “general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.”).

15 - See, e.g., J-Y. Garaud, L'office de l'arbitre en arbitrage commercial : caractérisation de l'illicéité et mise en œuvre des sanctions, Revue de l'Arbitrage 2019(1) at 173; C. Rose, Questioning the Role of International Arbitration in the Fight against Corruption, 31 Journal of International Arbitration 183 (2014); E. Gaillard; La corruption saisie par les arbitres du commerce international, Revue de l'Arbitrage 2017, Vol. 3 at 805. But see *International Thunderbird Gaming Corp. v. United Mexican States*, Award ¶ 150 (UNCITRAL 2006) (“[g]iven the lack of contemporaneous evidence on the record regarding the background of the [exchanges with the government], the Tribunal cannot rely on presumptions or inferences, let alone speculation concerning that background”).

16 - The United State Department of Justice (“DOJ”), Foreign Corrupt Practices Act, <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

17 - 15 U.S.C. §§ 78dd-1 (a).

18 - Criminal Div. of the U.S. Dep't of Justice & the Enforcement Div. of the U.S. Securities and Exchange Comm'n., FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act 11 (2nd Ed. 2020) [hereinafter “FCPA Resource Guide”], available at [https://fcpublog.com/wp-content/uploads/2020/07/fcpa-guide-2020\\_final.pdf](https://fcpublog.com/wp-content/uploads/2020/07/fcpa-guide-2020_final.pdf) (last visited on July 9, 2020); Criminal Div. of the U.S. Dep't of Justice & the Enforcement Div. of the U.S. Securities and Exchange Comm'n., FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) 12 [hereinafter “2012 FCPA Resource Guide”], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> (last visited on June 23, 2020).

19 - FCPA Resource Guide at 11-12; 2012 FCPA Resource Guide at 12-13.

ernment action to prevent competitors from entering a market; or avoid contract termination.<sup>20</sup>

7. The FCPA does not require the actor to accomplish the goal of whatever prohibited action they undertook in order to obtain or retain business, but instead conveys liability based on the actor's intent. In addition to having the goal of obtaining or retaining business, the FCPA requires that the offer, promise, or authorization of a payment, or a payment to a government official be made "corruptly."<sup>21</sup> The FCPA Resource Guide defines "corruptly" as "an intent or desire to wrongfully influence the recipient."<sup>22</sup> A corrupt intent is necessary to establish both corporate criminal liability as well as civil liability.<sup>23</sup> However, establishing criminal liability for an individual defendant under the FCPA, requires the individual to have acted "willfully."<sup>24</sup> U.S. courts have generally interpreted willful intent under criminal law to mean that the person acted with a bad purpose and did so voluntarily and purposefully.<sup>25</sup> The individual does not need to affirmatively know that their conduct violates the FCPA specifically; however, the government must show that the individual generally knew that their conduct was unlawful.<sup>26</sup>

8. An important aspect of the FCPA is its broad view of what comprises a bribe. Under the statute, a bribe can consist of money or "anything of value" if it is given or promised with a corrupt intent to influence a foreign official to misuse their position.<sup>27</sup> The statute does not define "anything of value," but the FCPA Resource Guide provides that "[a]n improper benefit can take many forms," including cash (possibly in the guise of "consulting fees" or "commissions" given through intermediaries), travel expenses, expensive gifts, or charitable contributions.<sup>28</sup> The FCPA Resource Guide goes on to explain that small gifts or tokens of esteem or gratitude, if given openly and transparently, recorded in the giver's books and records and permitted under local law, are appropriate and do not violate the FCPA.<sup>29</sup> Further, "[i]tems of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and as a result, are not, without more, items that have resulted in enforcement action by the DOJ or SEC."<sup>30</sup> The more extravagant the gift however, the more likely the DOJ or SEC are to view the gift as having been given for an improper purpose.<sup>31</sup> Additionally, context is important and if gifts are given or travel expenses are paid "in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent," then such gifts

or expenses are likely to be viewed as violating the FCPA.<sup>32</sup> Companies that make payments or provide gifts to third parties, such as the family of foreign officials, in an attempt to influence the foreign official, may also be liable under the FCPA.<sup>33</sup> Consequently, while what a bribe consists of may be quite broad under the FCPA, intent and context continue to be essential in determining if a company or individual has violated the FCPA.

9. The FCPA defines a foreign official as "any officer or employee of a foreign government or any department, agency, or instrumentality therefore, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."<sup>34</sup>

10. The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities. The first category is "issuers" and their officers, directors, employees, agents, and shareholders.<sup>35</sup> The second category is "domestic concerns" and their officers, directors, employees, agents, and shareholders. The third category consists of other entities and individuals that take certain actions while in the territory of the United States.

11. The FCPA Resource Guide explains that under the FCPA, a company is an "issuer" if it has a class of securities registered under Section 12 of the Exchange Act or if it "is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act."<sup>36</sup> In practice, this means an issuer is "any company with either a class of securities listed on a national securities exchange in the United States or a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with the SEC."<sup>37</sup> Therefore, foreign companies that have American Depository Receipts listed on a U.S. exchange are also issuers.<sup>38</sup> Importantly, officers, directors, employees, agents, or stockholders acting on behalf of an issuer, regardless of nationality, can also be prosecuted under the FCPA.<sup>39</sup>

12. The second category of persons and entities subject to the requirements of the FCPA are "domestic concerns."<sup>40</sup> According to the statute, a "domestic concern" is "any individual who is a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."<sup>41</sup> Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, may also fall under this category.<sup>42</sup>

20 - FCPA Resource Guide at 12; 2012 FCPA Resource Guide at 13.

21 - FCPA Resource Guide at 13; 2012 FCPA Resource Guide at 14.

22 - *Id.* The FCPA Resource Guide notes that the FCPA does not explicitly define "corruptly," but when drafting the FCPA Congress intended to adopt the same meaning of "corruptly" as in the domestic bribery statute, 18 U.S.C. § 201(b). (FCPA Resource Guide n. 73; 2012 FCPA Resource Guide n. 74).

23 - FCPA Resource Guide at 13; 2012 FCPA Resource Guide at 14.

24 - *Id.*

25 - *Id.*

26 - *Id.*

27 - 15 U.S.C. § 78dd-1.

28 - FCPA Resource Guide at 14-16; 2012 FCPA Resource Guide at 14-16.

29 - FCPA Resource Guide at 14; 2012 FCPA Resource Guide at 15.

30 - FCPA Resource Guide at 15; 2012 FCPA Resource Guide at 15.

31 - *Id.*

32 - *Id.*

33 - FCPA Resource Guide at 16; 2012 FCPA Resource Guide at 16.

34 - 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3.

35 - 15 U.S.C. § 78dd-1.

36 - FCPA Resource Guide at 9; 2012 FCPA Resource Guide at 11.

37 - *Id.*

38 - FCPA Resource Guide at 9-10; 2012 FCPA Resource Guide at 11.

39 - FCPA Resource Guide at 10; 2012 FCPA Resource Guide at 11.

40 - 15 U.S.C. § 78dd-2.

41 - *Id.*

42 - FCPA Resource Guide at 10; 2012 FCPA Resource Guide at 11.

13. The final category includes certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.<sup>43</sup> The FCPA reaches this category of persons and entities through its territorial jurisdiction. As with the first two categories, officers, directors, employees, agents, or stockholders who act on behalf of such persons or entities may also be liable under the FCPA.<sup>44</sup>

## 2. Accounting Provisions

14. In addition to its prohibitions against bribery, the FCPA includes accounting requirements that apply to public companies. These provisions focus on two areas. The first requires that public companies maintain detailed and accurate books and records.<sup>45</sup> The second requires that these companies also have sufficient internal accounting controls over the company's assets.<sup>46</sup> The U.S. government takes the view that books and records as well as internal controls requirements are important in preventing corruption because “[b]ribes, both foreign and domestic, are often mischaracterized in companies’ books and records” and “[t]he payment of bribes often occurs in companies that have weak internal control environments.”<sup>47</sup> These provisions therefore seek to safeguard against bribery and corruption.

15. The books and records and internal controls provisions do not specify the exact requirements to meet the necessary level of detail for books and records nor do they specify the exact controls that a company must implement and maintain. Instead, these provisions provide that issuers must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer” (emphasis added).<sup>48</sup> With regard to internal controls, the statute requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that

- (i) transactions are executed in accordance with management’s general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.<sup>49</sup>

16. The statute defines “reasonable detail” and “reasonable assurances” as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”<sup>50</sup> By not defining the exact set of accounting stand-

ards and controls that a company must have, the FCPA allows companies the ability to develop a system of controls that meets the needs of the company. The FCPA Resource Guide explains that “the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption.”<sup>51</sup> This is the same starting point that DOJ uses in evaluating a company’s compliance program when determining whether to bring charges, and negotiating plea or other agreements.<sup>52</sup>

17. Importantly, the FCPA’s accounting requirements apply beyond anti-bribery enforcement. Companies can therefore be charged by the SEC for violating the accounting provisions of the FCPA without any allegation of corruption or bribery.<sup>53</sup> For example, in 2018, Agria Corporation reached a settlement with the SEC to settle charges that Agria had engaged in a course of fraudulent accounting related to a divestiture of a consolidated affiliated entity and “materially overstated the value of the consideration it received in the transaction and concealed material losses as a result of the divestiture.”<sup>54</sup> The SEC found that these accounting failures resulted in Agria violating the books and records provision and the internal accounting controls provision of the FCPA.<sup>55</sup> Under the terms of the settlement, the SEC and Agria agreed that Agria would pay a civil money penalty in the amount of \$3 million.<sup>56</sup>

## 3. Territorial and Extraterritorial Reach

18. The FCPA has broad jurisdictional reach and can apply to conduct both within and outside the borders of the United States through the establishment of jurisdiction in three ways. First, the FCPA applies to conduct within the territory of the United States under 15 U.S.C. § 78dd-3. Under this section, the FCPA’s anti-bribery provisions cover any person or entity, including “foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.”<sup>57</sup> Second, issuers and domestic concerns, as well as their officers, directors, employees, agents, or stockholders, may be liable under the FCPA for using the U.S. mails or any means of interstate commerce in furtherance of a corrupt payment to a foreign official.<sup>58</sup> Under U.S. law, interstate commerce is trade, commerce, transportation, or communication among states or between any foreign country and any state or between any state and

43 - 15 U.S.C. § 78dd-3.

44 - FCPA Resource Guide at 10; 2012 FCPA Resource Guide at 11.

45 - §13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)).

46 - §13(b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B)).

47 - FCPA Resource Guide at 40; 2012 FCPA Resource Guide at 39-40.

48 - §13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).

49 - §13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).

50 - *Id.*

51 - FCPA Resource Guide at 40-41; 2012 FCPA Resource Guide at 40.

52 - See U.S. Department of Justice Criminal Division, Evaluation of Corporate Compliance Programs.

53 - See e.g. In the Matter of Agria Corporation, Order Instituting Cease-And-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order, Securities Exchange Act of 1934, Release No. 84763 (Dec. 10, 2018), Accounting and Auditing Enforcement, Release No. 3996 (Dec. 10, 2018), Administrative Proceedings, File No. 3-18917, <https://www.sec.gov/litigation/admin/2018/34-84763.pdf>.

54 - *Id.*

55 - *Id.*

56 - *Id.*

57 - FCPA Resource Guide at 10; 2012 FCPA Resource Guide at 11.

58 - 15 U.S.C. §§ 78dd-1 and 78dd-2.

any place or ship outside of the United States.<sup>59</sup> It also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality.<sup>60</sup> Finally, the “*alternative jurisdiction*” provision in 15 U.S.C. § 78dd-1, which applies to issuers, and in 15 U.S.C. § 78dd-2, which applies to domestic concerns, provides that the conduct in furtherance of a corrupt payment does not need to take place in the United States for the statute to apply. Under the “*alternative jurisdiction*” provision of the FCPA, which was enacted in 1998, “*U.S. companies or persons may be subject to the anti-bribery provisions even if they act outside the United States*” (i.e., jurisdiction based on the nationality principle).<sup>61</sup>

19. The accounting provisions of the FCPA create mandatory requirements for any issuer. Issuer is defined in the same way it is in § 78dd-1 of the anti-bribery provisions.<sup>62</sup> Unlike the FCPA’s bribery provisions, however, the FCPA’s accounting provisions do not apply to private companies.<sup>63</sup>

## 4. Inchoate Violations: Aiding and Abetting, Conspiracy

20. Under federal law, individuals or companies that aid or abet an FCPA violation, may be held liable as if they had directly committed the offense themselves.<sup>64</sup> Individuals and companies, both U.S. and foreign, may also be liable for conspiring to violate the FCPA – i.e., for entering into an agreement to commit an FCPA violation.<sup>65</sup>

21. The 2018 Second Circuit opinion in *United States v. Hoskins* clarifies and limits the jurisdictional reach of the FCPA for aiding and abetting and conspiracy.<sup>66</sup> Prior to *Hoskins*, the government’s position was that “[a] foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States.”<sup>67</sup> Further, the 2012 U.S. DOJ and SEC FCPA Resource Guide stated that foreign nationals and companies could be liable for conspiring to violate the FCPA “*even if they are not, or could not be,*

*independently charged with a substantive FCPA violation.*”<sup>68</sup> The U.S. Court of Appeals for the Second Circuit held in *Hoskins* that a person may not be guilty as an accomplice or a co-conspirator for an FCPA crime if he or she is a “*foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder.*”<sup>69</sup>

22. The second edition of the FCPA Resource Guide, published in July 2020, maintains that “[u]nder normal principles of conspiracy liability, foreign nationals and companies may be liable for conspiring to violate the FCPA ... even if they are not, or could not be, independently charged with a substantive FCPA violation,” but acknowledges the Second Circuit’s opinion in *Hoskins*.<sup>70</sup> The 2020 edition states “*at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA anti-bribery provisions or aiding and abetting an FCPA anti-bribery violation only if that individual’s conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA’s anti-bribery provisions.*” However, the FCPA Resource Guide then notes that “[a]t least one district court from another circuit has rejected the reasoning in the *Hoskins* decision, and concluded that the defendants could be criminally liable for conspiracy to violate the FCPA anti-bribery provisions, and aiding and abetting a violation, even though they do not ‘belong to the class of individuals capable of committing a substantive FCPA violation.’”<sup>71</sup> Consequently, for now, the U.S. DOJ’s ability to prosecute foreign nationals and companies for conspiracy if they fall outside the statute’s listed categories of persons remains somewhat unclear.

## 5. The Absence of a Private Right of Action

23. Unlike the Racketeer Influenced and Corrupt Organizations (“RICO”) Act,<sup>72</sup> the FCPA does not confer a private right of action.<sup>73</sup> As the Second Circuit Court of Appeals noted in *Republic of Iraq v. ABB AG*, “[t]he statute’s prohibitions focus on the regulated entities; the FCPA contains no language expressing solicitude for those who might be victimized by acts of bribery, or for any particular class of persons.”<sup>74</sup>

24. The increased enforcement of the FCPA has, however, led to a rise in collateral civil litigation.<sup>75</sup> In some cases, plaintiffs have relied on Section 10b of the Securities Exchange Act to “*bring a cause of action to recover damages incurred by shareholders ... alleging that the [officers and*

59 - 15 USC § 78c(a)(17).

60 - *Id.*

61 - FCPA Resource Guide at 11; 2012 FCPA Resource Guide at 12; see Benjamin, et al. at 1345-46.

62 - FCPA Resource Guide at 43; 2012 FCPA Resource Guide at 42-43 (“The FCPA’s accounting provisions apply to every issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file annual or other periodic reports pursuant to Section 15(d) of the Exchange Act. These provisions apply to any issuer whose securities trade on a national securities exchange in the United States, including foreign issuers with exchange-traded American Depository Receipts. They also apply to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the Commission, such as annual and quarterly reports.”) (internal citations omitted).

63 - FCPA Resource Guide at 43; 2012 FCPA Resource Guide at 43.

64 - FCPA Resource Guide at 35; 2012 FCPA Resource Guide at 34 (“The aiding and abetting statute provides that whoever ‘commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission,’ or ‘willfully causes an act to be done which if directly performed by him or another would be an offense against the United States,’ is punishable as a principal.”).

65 - *Id.*

66 - *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

67 - 2012 FCPA Resource Guide at 34.

68 - *Id.*

69 - *Hoskins* at 85.

70 - FCPA Resource Guide at 35-36.

71 - FCPA Resource Guide at 36 (quoting *United States v. Firtash*, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019)).

72 - 18 U.S.C.A. § 1964(c) (“Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit[.]”). But note that “[a] private RICO plaintiff ... must allege and prove a domestic injury to its business or property.” *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016).

73 - *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027 (6th Cir. 1990); *M. Siegel, The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 Colum. L. Rev. 1085, 1103 (1979).

74 - *Republic of Iraq v. ABB AG*, 768 F.3d 145, 170 (2d Cir. 2014).

75 - *B. Benjamin, K. Drummonds, D. Farag & C. Tum, Foreign Corrupt Practices Act*, 53 Am. Crim. L. Rev. 1333, 1357 (2016); *J. Prince, A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, 52 Advocate 20, 23 (2009).

directors of a corporation] made materially false and misleading statements concerning the adequacy of internal controls designed to prevent FCPA violations.”<sup>76</sup> These efforts have achieved mixed results due to plaintiffs’ failure to prove the required scienter requirement.<sup>77</sup>

## II. FCPA-Related Disputes in International Commercial Arbitration

25. Parties have come to raise corruption issues in two different ways in international commercial arbitration. First, they have used corruption as a shield to defend against contract performance, claiming that the contract violates the FCPA and public policy (including as evidenced in the FCPA). Second, parties have used the FCPA and their compliance programs in contractual disputes to enforce their internal compliance programs’ disciplinary policies and pursue contractual sanctions. Assessing how parties have brought FCPA-related claims and defenses under both of these approaches demonstrates a continued need to evaluate a party’s FCPA obligations, or general risks of corruption, at the time of contract formation and suggests that international commercial arbitration can be an effective forum for enforcing a company’s FCPA compliance program.

### 1. The FCPA as a Shield: Foreign Corrupt Practices as a Defense to Contract Performance

#### 1.1. Contracts Governed by U.S. Law

26. Under long-standing U.S. common law principles, “[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>78</sup> For example, in *S. T. Grand, Inc. v. City of New York*, the New York Court of Appeals held that “where work is done pursuant to an illegal ... contract, no recovery may be had ... either on the contract or in [q]uantum meruit.”<sup>79</sup> The illegality may take root in the promise, the consideration, the object, or the performance of the contract.<sup>80</sup>

27. However, “not every minor wrongdoing in the course of contract performance will insulate the other party from liability for work done or goods furnished. There must at least be a direct connection between the illegal transaction

and the obligation sued upon.”<sup>81</sup> An arbitral tribunal may decide that “[i]f less than all of an agreement is unenforceable” the rest of the agreement may be enforceable “in favor of a [good faith] party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange[.]”<sup>82</sup> For example, some courts have noted that “[a] mere agent or depository of the proceeds of an illegal transaction will not be permitted to assert the defense of illegality in an action to recover the proceeds by a party to the illegal transaction[.]”<sup>83</sup> Under the Restatement (Second) of Contracts, a party may seek “restitution for performance ... rendered ... in return for a promise that is unenforceable on grounds of public policy if ... he was excusably ignorant of the facts ... in the absence of which the promise would be enforceable, or ... he was not equally in the wrong with the promisor.”<sup>84</sup>

28. In ICC Case No. 13914, an arbitral tribunal, seated in London and applying Texan law, relied on the FCPA to determine whether the underlying contract should be unenforceable as against public policy. In this dispute, a U.S. corporation entered into a consulting agreement with a consultant with experience working with the government of an African state, in order to “diligently seek and solicit orders for the provision of [offshore seismic studies services] to be provided by [the U.S. Company] in the [African state.]”<sup>85</sup>

29. Under the consulting agreement, the U.S. corporation had to pay commissions to the consultant on the sales of seismic data gathered by the U.S. corporation. The consulting agreement also contained an anti-bribery and corruption representation and warranty.<sup>86</sup>

30. Following a refusal by the U.S. corporation to pay commissions under the contract, the consultant initiated an arbitration for breach of contract. As a defense, the U.S. corporation argued that the consultant had “engaged in unlawful activities, including bribing officials in the state-owned company ... that was responsible for granting rights relating to offshore mining in State X, and that consequently he had no right to any payments, which, besides, would infringe the Foreign Corrupt Practices Act.”<sup>87</sup>

31. “[C]onvinced that the payments made by Respondents under the Consulting Agreement were greatly used by [the consultant] to [bribe] key ... officials [of a State-owned company]” the arbitral tribunal found that the consulting agreement was null and void and that “[n]either party may ... seek restitution under [the consulting agreement].”<sup>88</sup>

76 - P. Huskins, FCPA Prosecutions: Liability Trend to Watch, 60 Stanford Law Review 1447, 1451 (2008).

77 - See, e.g., Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 745 (9th Cir. 2008).

78 - Restatement (Second) of Contracts §178(1). The Restatement provides balancing factors in considering whether enforcement is outweighed by a public policy, including the interest in the enforcement of a term, any forfeiture that would result if enforcement were denied, the strength of the public policy as manifested by legislation or judicial decisions, the likelihood that a refusal to enforce the term will further that policy, the seriousness of any misconduct involved and the extent to which it was deliberate, the directness of the connection between that misconduct and the term. *Id.* §178(2)-(3).

79 - *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 305 (N.Y. 1973).

80 - See, e.g., *Sayres v. Decker Auto. Co.*, 239 N.Y. 73, 77 (N.Y. 1924); *Sw. Shipping Corp. v. Nat’l City Bank of New York*, 6 N.Y.2d 454, 459 (N.Y. 1959); *Prote Contracting Co. v. Bd. of Educ. of the City of New York*, 230 A.D.2d 32, 40 (1st Dep’t 1997).

81 - *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 471 (N.Y. 1960).

82 - Restatement (Second) of Contracts § 184.

83 - *Sw. Shipping Corp. v. Nat’l City Bank of New York*, 6 N.Y.2d 454, 460 (N.Y. 1959)

84 - Restatement (Second) of Contracts § 198; see also J. Kostriksky, *Illegal Contracts and Efficient Deterrence: a Study In Modern Contract Theory*, 74 Iowa L. Rev. 115 (1988).

85 - ICC Case No. 13914, Award ¶ 194 (2013).

86 - The representation and warranty provided that “[c]onsultant warrants, represents, and covenants that neither it nor any of its employees or representatives, directly or indirectly, (i) has or shall have any agreement or arrangement with, (ii) made or shall make any offer to, (iii) gave or shall give to, or (iv) promised or shall promise to, any official, employee, or representative of any customer, government, governmental agency, or political party, under which any such official, employee, representative, or political party shall receive either directly or indirectly anything of value whether monetary or otherwise.” *Id.* ¶ 237.

87 - *Id.*, Case Summary.

88 - *Id.* ¶ 238.

Importantly, the arbitral tribunal found that, through their choice of the laws of Texas, the parties agreed to incorporate U.S. federal law, including the FCPA.<sup>89</sup> The arbitral tribunal relied on the U.S. DOJ FCPA Guidance, including the list of “red flags” indicating a possibility of improper conduct by intermediaries or third parties,<sup>90</sup> and held that “[t]he antibribery provisions of the FCPA ... make it unlawful for a US person and certain foreign issuers of securities to make payments to a foreign official for the purpose of obtaining or retaining business[.]”<sup>91</sup> ICC Case No. 13914 thus illustrates that the FCPA may be relied upon to establish the illegality of a contract governed by a U.S. choice-of-law clause in international commercial arbitration.

## 1.2. Contracts Not Governed by U.S. Law

32. With regard to contracts that do not contain a U.S. choice-of-law clause, a distinction must be drawn between contracts that do not contain any choice-of-law clause, and contracts that contain a non-U.S. choice-of-law clause.

33. The taking into account of the FCPA in contracts that do not contain a choice-of-law clause will be left to the discretion of the arbitral tribunal, which will either proceed through a classical two-step conflict of law analysis, or directly apply the law it deems appropriate.<sup>92</sup> With regard to issues of corruption, an arbitral tribunal is more likely to take the FCPA into consideration if there is a close nexus between the dispute and the United States,<sup>93</sup> and may under some circumstances apply the concept of *dépeçage* to hold that some—but not all—issues arising under the contract, including FCPA compliance, shall be governed by U.S. law.<sup>94</sup>

34. The taking into account of the FCPA in disputes governed by a non-U.S. choice-of-law clause reveals to be a more difficult—although not impossible—endeavor. As a starting point, it must be underscored that courts and arbitral tribunals alike are particularly deferential to the parties’ choice-of-law clause in international contracts, a choice that has been qualified by the U.S. Supreme Court as an “almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction[.]”<sup>95</sup> Choice-of-law clauses are thus presumptively valid in international arbitration,<sup>96</sup> and only in limited circumstances an arbitral tribunal may apply or take into consideration a law other than the law chosen by the parties.

35. In a dispute governed by a non-U.S. choice-of-law clause, an arbitral tribunal may decide to take the FCPA into account if the dispute has a close nexus with the United States and the United States has substantial public policy interests in regulating the matter. For example, under article 9(3) of Regulation (EC) No 593/2008 (“Rome I Regulation”), an arbitral tribunal may give “[e]ffect ... to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be ... performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.”<sup>97</sup>

36. Article 9(3) of the Rome I Regulation is close to U.S. conflict of law principles, which allow for the application of the law of the state “which has a materially greater interest than the chosen state in the determination of the particular issue and which ... would be the state of the applicable law in the absence of an effective choice of law by the parties.”<sup>98</sup> However, the two choice-of-law rules diverge insofar as, under U.S. common law, a court may look beyond the place of performance to evaluate the applicable law.<sup>99</sup> This distinction was critical in the Paris Court of Appeals’ refusal to

89 - *Id.* ¶ 191.

90 - *Id.* ¶ 192 The arbitral tribunal, in particular, relied on the unusual payment patterns or financial arrangements; a history of corruption in the country; a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the US firm to be in violation of the FCPA; unusually high commissions; lack of transparency in expenses and accounting records; apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

91 - *Id.* ¶ 233. Note that the arbitral tribunal also relied on international law, including the United Nations Convention against Corruption, the OECD: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the Council of Europe: Criminal Law Convention on Corruption; and the OAS: Inter-American Convention Against Corruption, as well as precedents from international commercial arbitration to show that anti-corruption “is an integral part of the international public policy[.]” *Id.* ¶ 230.

92 - G. Born, *supra* n. 10 at 2625-35. Arbitrators generally have discretionary powers in determining the applicable conflict of law rule. See *id.* at 2633-34; see also, UNCITRAL Model Law, Art. 28(2); English Arbitration Act §46(3) (1996); Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 CIV. 283 GBD, 2013 WL 789642, at \*6-7 (S.D.N.Y. Mar. 4, 2013), *aff’d*, 557 F. App’x 66 (2d Cir. 2014); French Code of Civil Procedure, Art. 1511; 2010 UNCITRAL Rules, Art. 35(1); 2012 ICC Rules, Art. 21(1). Note, however, that it is debatable whether the arbitral tribunal will apply the choice-of-law rules of the seat of arbitration. See, e.g. G. Born, *supra* n. 10, at 2640-41; G. Bermann, Mandatory Rules of Law in International Arbitration, 7(1) European International Arbitration Review 101 (2018); ICC Case No. 9771, Award ¶ 19 (2001) (applying the choice of law rules of the seat of arbitration).

93 - Restatement (Second) of Contracts Section 188; Rome I Regulation Art. 4, 9(3).

94 - See, e.g., *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 n.8 (2d Cir. 1980) (“*Dépeçage* occurs where the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate the other issues. The technique permits a more nuanced handling of certain multistate situations and thus forwards the policy of aptness.”);

Hutner v. Greene, 734 F.2d 896, 901 (2d Cir. 1984); *Fiieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 397 (2d Cir. 2001); W. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58 (1973).

95 - *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

96 - See, e.g., G. Born, *supra* n. 10 at 2671-72; UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) (hereinafter, the “UNCITRAL Model Law”), Art. 28(1); French Code Civil Procedure, Art. 1511, Swiss Law on Private International Law, Art. 187(1); ICC Case No. 4145, Second Interim Award ¶ 11 (1984), in 12 Y.B. Comm. Arb 97 (1987) (“The principle of autonomy – widely recognized – allows the parties to choose any law to rule their contract, even if not obviously related with.”).

97 - Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (“Rome I Regulation”).

98 - Restatement (Second) of Conflict of Laws § 187(2). See also *Lehman Bros. Commercial Corp. v. Minmetals Intern. Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 138-39 (S.D.N.Y. 2000) (“[t]he fact that New York law governs the parties’ contract [through a choice of law clause] does not necessarily mean that the contract is enforceable; New York law does not ignore an illegality in China. A contract that is illegal in its place of performance is unenforceable in New York if the parties entered into the contract with a view to violate the laws of that other jurisdiction.”).

99 - Restatement (Second) of Conflict of Laws § 188(2) (taking into account the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.). Note that “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.” *Id.* But see, e.g. *Kashfi v. Phibro-Salomon, Inc.*, 628 F. Supp. 727, 737 (S.D.N.Y. 1986) (“The legality of a contract is ordinarily determined in accordance with the law of the place where the contract is performed.”); Restatement (Second) of Conflict of Laws § 202(2).

give effect to the U.S. Code of Federal Regulations prohibiting the exportation or sale of merchandise to Iran or the Iranian government to a contract which did not call for performance in the United States.<sup>100</sup>

37. The *Hilmarton* saga illustrates the difficulties that can arise when a party seeks to apply the anti-bribery and corruption laws of a state other than the state that both parties had originally selected. In *Hilmarton*, a French company, Société Omnium de Traitement et de Valorisation (OTV), entered into an agreement with Hilmarton under which Hilmarton was to provide legal, fiscal, and administrative consulting services in support of a public bid in Algeria. A dispute arose between the parties, and Hilmarton sought to recoup its commission by commencing an arbitration governed by a Swiss choice-of-law clause.<sup>101</sup> As a defense, OTV invoked an Algerian *loi de police* which, in essence, “forbids any bribery, including any intervention involving real or supposed relations within the State or bodies of the Algerian State[.]”<sup>102</sup>

38. Finding in favor of OTV, the sole arbitrator declared the award void and held that the parties’ consulting agreement violated Algerian law, which “is encompassed in public international law and must be found to be against the principle of morality of article 20 al. 1 of [the Swiss Code of Obligations] and the Swiss ordre public.”<sup>103</sup>

39. The subsequent procedural history of *Hilmarton* is well known. Applying two different standards of review,<sup>104</sup> French and Swiss courts respectively enforced and annulled the award. Swiss courts annulled the award on the basis that it was “arbitrary,” because OTV did not bring any evidence of bribery and Swiss law allows contracts of intermediaries.<sup>105</sup>

40. While the precedential value of the *Hilmarton* saga may be limited due to the especially intrusive standard of review applied by Swiss courts at the time,<sup>106</sup> subsequent arbitrations have showed that some arbitrators do not easily override a choice-of-law clause in favor of the application of the FCPA. In ICC Case No. 9333, a French company entered into a consulting agreement with an individual in relation to the obtaining of a contract with an African public company. Under the agreement, the individual, whose father was a well-known senior advisor to the head of state, introduced the French company to the African public company, and kept the French company informed of the commercial aspects of its competitor’s bids. In exchange, the French company, which did not usually exercise

in the target strategic sector and was unknown to the African public company, agreed to pay a commission of 4,000,000 French francs. The French company ultimately won the bid at a price of 7,000,000 million French francs – around half the amount proposed by their competitor<sup>107</sup> – and the parties agreed to reduce the commission to 1,900,000 French francs.<sup>108</sup> The consultant however requested that all payments be made to a Swiss bank account.

41. Following the acquisition of the French company by a U.S. company, it refused to make payments to the Swiss bank account, alleging that the U.S. company and its group had a new FCPA policy pursuant to which it was prohibited from making payments to countries outside of the agent’s country.<sup>109</sup> A dispute between the parties arose, and the consultant commenced an arbitration against the company. The parties’ arbitration agreement provided for an ICC arbitration by a sole arbitrator and applied Swiss law.<sup>110</sup> As a defense against the enforcement of the consulting agreement, the U.S. company claimed that the FCPA was “fully applicable to the parties’ contractual relationships”<sup>111</sup> and that the consulting agreement was void because its object was illicit and contrary to public morals.<sup>112</sup>

42. Before determining whether the FCPA was applicable to this dispute, the sole arbitrator analyzed whether the defendant had effectively proved any corrupt practices. In so doing, the sole arbitrator applied the common “red flags” analysis, focusing primarily on the substantial amount of the commission paid to the consultant. The arbitral tribunal found that the commission was justified because of the strategic nature of the target market and of the high barriers to entry that the defendant would face as a new entrant.<sup>113</sup> The sole arbitrator found that the “lack of any documentary proof” substantiating the illegality defense was an important indicia in resolving the dispute. In fact, the defendant did not even bring evidence of the implementation of its alleged FCPA policy or of the suspension of payments in similar contracts,<sup>114</sup> and made two payments to the Swiss bank account prior to the suspension of payments in this dispute.<sup>115</sup> For the arbitrator, the lack of any evidence of corruption was particularly telling in light of the U.S. parent company’s duty to keep complete books and records under the FCPA, and the likely due diligence that preceded the acquisition of the French company.<sup>116</sup> Finally, the sole arbitrator considered that the consultant’s agreement to reduce the amount of the commission and the African company’s agreement to accept the French company’s substantially lower offer militate against a finding of bribery.<sup>117</sup>

43. The arbitrator then rejected the applicability of the FCPA on the ground that “it does not apply to subsidiaries of U.S. companies located abroad” and instead only binds

100 - Paris Court of Appeals, n° 12/23757 (February 25, 2015). See also M. Audit, *L’arbitrage International Confronté à l’Extraterritorialité des Lois*, Revue de l’Arbitrage 2015, Vol. 4 at 1030; M. Winkler & A. Lacombe, *Mesures à vocation extraterritoriale et lois de police : un revers à l’hégémonie juridique outre-Atlantique ?*, Recueil Dalloz 2015 at 1260.

101 - Société H. v Société O., Award, ICC Case No. 5622 ¶ 147 (1988) (excerpts in Revue de l’Arbitrage 1993(2) at 327) (original in French).

102 - *Id.* ¶ 159.

103 - *Id.* ¶ 164.

104 - P. Fouchard, *La portée internationale de l’annulation de la sentence arbitrale dans son pays d’origine*, Revue de l’Arbitrage 1997, Vol. 3 at 348.

105 - Société Hilmarton v. Société OTV, Cour de Justice du Canton de Genève, November 17, 1989, in Revue de l’Arbitrage 1993, Vol. 2 at 342. See also, V. Heuzé, *La morale, l’arbitre et le juge*, Revue de l’Arbitrage 1993, Vol. 2 at 179; P. Fouchard, supra n. 102; S. Besson & L. Pittet, *La reconnaissance à l’étranger d’une sentence annulée dans son Etat d’origine - Reflexions à la Suite de l’Affaire Hilmarton*, 16(3) ASA Bulletin 498 (1998).

106 - P. Fouchard, supra n. 102.

107 - ICC Case No. 9333, Award ¶ 9.2. (1998), in 19(4) ASA Bulletin 757 (original in French).

108 - *Id.* ¶ 9.3.

109 - *Id.* ¶ 1.7.

110 - *Id.* ¶ 1.2.

111 - *Id.* ¶ 12.1.

112 - *Id.* ¶ 7.

113 - *Id.* ¶ 9.6.

114 - *Id.* ¶ 10.3.

115 - *Id.* ¶ 10.5.

116 - *Id.* ¶¶ 10.7-10.8.

117 - *Id.* ¶ 10.9.1-10.9.2.



the U.S. parent company.<sup>118</sup> The sole arbitrator further found that, although Swiss law “*may eventually*” allow the application of foreign law as a mandatory law of public policy,<sup>119</sup> the FCPA was primarily designed to restore the public trust in the integrity of U.S. companies domestically, and that although the *objectives* pursued by the FCPA were evidently transnational, this does not necessarily imply that the *methods* employed by the United States in this context must be applied transnationally.<sup>120</sup> The sole arbitrator concluded that “*transposed to the present dispute, ... the objective [of fighting against corruption], although laudable, does not necessarily justify the exportation of the singular methods or of the codes of conduct of the FCPA in order to achieve this goal (methods which have in fact [prompted] much criticism, in the United States and abroad).*”<sup>121</sup> ICC Case No. 9333 illustrates the difficulty that some parties may have in raising issues of FCPA compliance as a defense to enforcement in disputes subject to non-U.S. law and underlines the need to evaluate a party’s FCPA obligations or general risks of corruption at the time of contract formation in order to avoid potential issues arising later. One way of addressing this may be through the inclusion of FCPA representations and warranties in sales agreements.<sup>122</sup>

44. Commentators have recommended that arbitrators turn to international public law to resolve issues of corruption.<sup>123</sup> On the one hand, this solution has a practical appeal because – in light of the importance of international conventions in the field<sup>124</sup> – the results achieved by applying international treaties and principles of public international law may not create a significant deviance from domestic legislation. On the other hand, parties and arbitral tribunals should be attentive to the risk that “[a] choice-of-forum and [a] choice-of-law clause[] operate[] in tandem” to shield a contract from any anti-bribery scrutiny,<sup>125</sup> which could

118 - *Id.* ¶ 12.4.

119 - *Id.* ¶ 12.3.

120 - *Id.* ¶ 12.5.

121 - *Id.* ¶ 12.5.

122 - See *infra* Section II.2.

123 - E. Gaillard, *supra* n. 15 at 829-30 (as “a judge of the common international order, the arbitrator must enforce, if need be above the law chosen by the parties, the strong values generally shared by the international community ... [including] the condemnation of corruption.” (original in French)). See also ICC Case No. 6474, Award ¶ 14(1992), in 25 Y.B. Comm. Arb. 279 (“[i]n international commercial arbitration, the first and foremost duty of the arbitrator is undoubtedly to base his decisions, whether relating to jurisdiction or to the merits of the dispute, on the common will of the Parties, regarding for instance the applicable law, a method which does not exclude consideration, in proper circumstances, of a national or international public policy.”).

124 - See IMF 2001 Note, *supra* n. 3 at 18.

125 - Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985). In Mitsubishi, the parties entered into a sales agreement governed by Swiss law and had entered into an agreement to arbitrate under the Japan Commercial Arbitration Association rules and regulations, and the seat of arbitration was located in Japan. However, “counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis.” *Id.* The transposition of Mitsubishi Motors Corp. to the FCPA remains an open issue, as the FCPA does not contain a private right of action, unlike the Shearman Antitrust Act and the Racketeer Influenced and Corrupt Organizations Act. See, e.g., Grynberg v. BP P.L.C., 585 F. Supp. 2d 50, 54 (D.D.C. 2008) (“Plaintiffs style their claim as a criminal FCPA action, but ignore the fact that the FCPA does not provide private plaintiffs with a cause of action. Rather, this is a RICO action and RICO actions are arbitrable. Indeed, the thrust of plaintiffs’ complaint is that the bribes the defendant oil companies allegedly paid to Kazakh officials deprived plaintiffs of profits they are entitled to under the Agreements. ... That claim, stripped of its FCPA veneer, plainly falls within the broad reach of the arbitration clause.” (internal citations omitted)).

cause a national court to annul or deny the enforcement of an award under the public policy exception of the New York Convention.<sup>126</sup> Arbitral tribunals may also need to determine whether the conduct allegedly violative of public international law is legal under the relevant domestic laws – and the consequences of such legality.

### 1.3. The Potential Limitations on the Use of FCPA Settlements

45. In order to prove a defense of illegality, some parties have attempted to rely on settlements concluded with U.S. regulatory agencies to show that their co-contracting party was guilty of having committed a corrupt practice. In *Vantage Deepwater v. Petrobras America*, the parties had entered into a drilling services agreement in 2009 pursuant to which Vantage Deepwater leased an oil drilling rig to Petrobras America for an eight-year period. Less than three years into the contract, Petrobras America terminated the agreement and refused to pay the lease for the remainder of the term. Vantage Deepwater initiated an ICDR arbitration to recoup damages for early breach of the agreement. In response, Petrobras American denied liability and claimed that “*Vantage materially breached the DSA due to alleged bribery and corruption[.]*”<sup>127</sup> including “*non-compliance with the FCPA.*”<sup>128</sup>

46. In order to substantiate its allegation of corruption and bribery, Petrobras America submitted “[a] Form 10-Q filed with the SEC on 4 May 2018 by Vantage Drilling International” which “*disclosed an agreement ... between Claimants and the SEC ... to settle Claimants’ alleged violations of the FCPA, including a payment of US\$5 million.*”<sup>129</sup>

47. The arbitral tribunal found that it could not “*give any weight*” to the FCPA settlement because it constituted an “*offer of settlement, not a confession or proof with respect to violation of the FCPA or the commission of bribery and corruption*” and the “*consideration of that settlement offer would be contrary to a long-standing public policy at the arbitral seat (the United States) which aims to promote voluntary resolution of disputes.*”<sup>130</sup>

48. The finding of the ICDR tribunal in *Vantage Deepwater v. Petrobras America* arguably continues an evidentiary practice, observed by United States courts, which holds that settlement agreements (or overtures) are not to be used in proof of liability of the underlying allegation that led to the settlement (or offer). Under Rule 408 of the Federal Rules of Evidence, “[e]vidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim ...”<sup>131</sup>

126 - New York Convention, Art. V(2)(b).

127 - *Vantage Deepwater Co. v. Petrobras America Inc.*, ICDR Case No. 01-15-0004-8503, Award ¶ 349 (2018).

128 - *Id.* ¶ 349. Under the DSA, the contractor agreed to respect the FCPA and made various representations and warranties related to corruption and bribery, including with regard to the FCPA. See *id.* ¶ 37.

129 - *Id.* ¶ 163.

130 - *Id.* ¶ 173.

131 - Federal Rules of Evidence, Rule 408(a); see also, Sec. Inv’r Prot. Corp. v. Stratton Oakmont, Inc., 234 B.R. 293, 336 (Bankr. S.D.N.Y. 1999) (striking references to an SEC Consent Order); Leonard Global Macro

49. The award in *Petrobras* relied on this rule on the basis that the arbitration was seated in the United States – with the seat of arbitration providing the background *lex arbitri*. The question remains, however, whether an arbitral tribunal seated outside of the United States could exclude settlement evidence on the same basis. Some may argue that a simple *a contrario* interpretation of *Petrobras* could mean that the evidentiary rules of the United States are inapplicable. Further, a party could argue that a choice of law clause designating the laws of a state of the United States will not incorporate the evidentiary rules excluding settlement discussions.<sup>132</sup>

50. Against this, it could be argued, it would seem incongruous to give settlements with regulatory agencies a greater strength abroad than in the United States. Arguably, it could chill the efforts of regulatory agencies to conclude settlements if the signatory party were concerned with exposure outside of the United States for this conduct. Moreover, an arbitral tribunal seated outside of the United States could still exclude settlement materials pursuant to article 9(2)(b) of the IBA Rules, which allows the “*exclusion from evidence ... [of] any Document ... [on the ground of a] legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.*”<sup>133</sup> Or, settlements concluded with U.S. regulatory agencies which do not contain an admission of liability<sup>134</sup> could arguably be excluded on the basis of article 9(2)(a) of the IBA Rules for “*lack of sufficient relevance to the case or materiality of the outcome.*”<sup>135</sup> International arbitration conventions, national arbitration legislations, and institutional rules also provide for enough flexibility to account for the policy and evidentiary practices surrounding settlement.<sup>136</sup>



Fund LLC v. North American Globex Fund, L.P., No. 150346/13, 2014 WL 4542674, at \*13 (N.Y. Sup. Ct. Aug. 29, 2014) (an “SEC order has no evidentiary value and no collateral estoppel effect in this litigation[.]”); *In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 594 (S.D.N.Y. 2011). See also *Iran v. United States*, Decision No. Dec. 12-AI -FT1, 1 Iran-U.S. Cl. Trib. Rep. 189, 190-91 (Aug. 3, 1982) (“a court cannot take account of that which one party proposes to another in a confidential manner in an effort to achieve a resolution of their disputes”); Jean-Jacques Arnaldez, Yves Derains & Dominique Hascher (eds.), *Collection of ICC Arbitral Awards, 1991-1995*, ICC Award No. 6653 of 1993 at 513 (1997) (“The arbitral tribunal also considers that it is customary, not only in French law - where the custom is equally a rule of professional conduct for *avocats* - but also in the field of international commerce, that exchanges of proposal[s] between parties with a view to reaching an agreement aimed at resolving a dispute submitted to a tribunal – arbitral or not – are and must remain confidential. If the parties have tried in good faith to reconcile their positions, one of them cannot, in the event the negotiations fail, use for its benefit the proposals of the other to deduce an alleged admission of fault.”).

132 - See, e.g. G. Born, *supra* n. 10 at 1600-02; ICC Case No. 5029, Award ¶ 5 (1986).

133 - IBA Rules Article 9(2)(b).

134 - Compare *United States v. Metcalf & Eddy, Inc.* 99-CV-12566-NG (D. Mass Dec. 17, 1999) Consent and Undertaking, ¶ 1 (“without admitting or denying the allegations of the Complaint”), and *In the Matter of Nordion (Canada) Inc., Cease and Desist Order* (March 3, 2016) (“without admitting or denying the findings herein”); with SEC v. Braskem, S.A., 1:16-cv-02488 (D.D.C. December 21, 2016), Consent of Defendant Braskem, S.A. ¶ 2 (“[d]efendant has agreed to plead guilty to criminal conduct relating to certain matters alleged in the complaint in this action.”). See also, M. Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 *Michigan State International Law Review* 961, 1005 (2014); D. Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn’t*, 103 *Iowa L. Rev.* 113 (2017); V. Winship & J. Robbenolt, *Admissions of Guilt in Civil Enforcement*, 102 *Minn. L. Rev.* 1077 (2018).

135 - IBA Rules Article 9(2)(a).

136 - See, e.g.; G. Born, *supra* n. 10 at 2144-54; ICC Rules Art. 19; UNCITRAL Rules Art. 17(1); LCIA Rules, Art. 16(1); UNCITRAL

## 2. The FCPA as a Sword: Mandatory Compliance Programs and Contractual Commitments

51. While the FCPA does not confer a private right of action, corporations often incorporate FCPA commitments in their internal compliance programs as well as their contractual agreement with third parties. Over the past two decades, the U.S. DOJ and SEC have encouraged U.S. companies to develop “*effective [and dynamic] compliance programs ... tailored to the company’s specific business and to the risks associated with that business.*”<sup>137</sup> Pursuant to the U.S. DOJ and SEC, “[a]n effective compliance program promotes an organizational culture that encourages ethical conduct and a commitment to compliance with the law,” which in turn, “*protects [the] company’s reputation, ensures investor value and confidence, reduces uncertainty in business transactions, and secures [the] company’s assets.*”<sup>138</sup> Compliance programs should thus preferably be “*thoughtfully implemented, and consistently enforced ... [to] help[] prevent, detect, remediate, and report misconduct[.]*”<sup>139</sup> It is with these parameters that the U.S. DOJ and SEC “*consider the adequacy of a company’s compliance program when deciding what, if any, [enforcement] action to take*” when evaluating possible violations of the FCPA.<sup>140</sup>

52. Compliance programs may include requirements that a party “*include standard provisions in agreements ... with all ... business partners that are reasonably calculated to prevent violations of the anti-corruption laws, which may ... include: (a) anti-corruption representations and undertakings ...; (b) rights to conduct audits of the books and records ...; and (c) rights to terminate an agent or business partner as a result of any breach of anti-corruption laws...*”<sup>141</sup> These anti-corruption and bribery commitments have led to the development of ancillary FCPA contractual disputes.

53. The seminal decision of the French *Cour de Cassation* in *Biomet* illustrates the importance of anti-corruption agreements. In *Biomet*, two French companies entered into a brokerage agreement pursuant to which Biomet France agreed to pay a commission of 35 % of sales made in France by the agency of Equilibre Implant Chirurgical (EIC). Under article 14 of the brokerage agreement, EIC committed to exert its activities according to the applicable rules and regulations. In August 15, 2010, EIC subscribed to the global anticorruption policy of the Biomet Group, which included a commitment to regularly sign a certification to their adhesion to the policy and to satisfactorily



Model Law, Art. 19(2); LCIA Rules Art. 22.1(f); J. Waincymer, *Procedure and Evidence in International Arbitration* at 752 (2012).

137 - FCPA Resource Guide at 56; 2012 FCPA Resource Guide at 56.

138 - *Id.* (internal quotation omitted).

139 - *Id.*

140 - *Id.* at 56; see U.S. Department of Justice Criminal Division, *Evaluation of Corporate Compliance Programs*.

141 - March 14, 2011 Non-Prosecution Agreement between the U.S. DOJ and Tenaris S.A., available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/12/08/2011-03-14-tenaris.pdf> (last visited on June 23, 2020). See also *United States v. Panalpina World Transp. (Holding) Ltd.*, No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010) ¶ C-12; *United States v. Metcalf & Eddy, Inc.* 99-CV-12566-NG (D. Mass Dec. 17, 1999) Consent and Undertaking, ¶ 4(i) (requiring that certain contracts (i) “contain an agreement by each prospective agent, consultant, and representative for business development in a foreign jurisdiction that it shall not retain any sub-agent or representative without the prior written consent of a senior officer of METCALF & EDDY” and (ii) “further provide for termination of said contract as a result of any breach of such undertakings, representations, and agreements.”).

participate in trainings on the laws applicable to the fight against corruption.<sup>142</sup>

54. Biomet's global anticorruption policy was essential since, on March 26, 2012, the U.S. parent of Biomet entered into a deferred prosecution agreement with the DOJ pursuant to which Biomet agreed to “develop and promulgate compliance standards and procedures designed to reduce the prospect of violations of the anti-corruption laws and Biomet's compliance code and will take appropriate measures to encourage and support the observance of ethics and compliance standards and procedures against foreign bribery at all levels of the company. These standards and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of Biomet in a foreign jurisdiction, including but not limited to, agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners[.]”<sup>143</sup>

55. Yet, in July 2013, following the expiration of the first certification, EIC refused to recommit to this certification. Biomet thus terminated the contract for material breach of the brokerage agreement.<sup>144</sup> EIC challenged Biomet's termination and stated a claim against Biomet for tortious breach of an established commercial relationship.<sup>145</sup>

56. Finding against EIC, the *Cour de Cassation* held that “EIC's breach of its contractual obligations, in that they were susceptible of causing the liability of Biomet, was sufficiently material to justify the termination of the contractual relationship without notice.”<sup>146</sup>

57. *Biomet* is destined to play a central role in the enforcement of anti-corruption clauses. In this case, neither the *Cour de Cassation* nor the Paris Court of Appeals required Biomet to bring evidence of an act of corruption. *Biomet* is also the consecration of broader corporate initiatives to detect and prevent corruption, including FCPA violations.<sup>147</sup>

58. In 2004, the UN Global Compact – a non-binding United Nations framework encouraging businesses and CEOs to implement universal sustainability principles and to take steps to support the goals of the United Nations<sup>148</sup> – included an anti-bribery and corruption mandate under which “[b]usinesses should work against corruption in all its forms, including extortion and bribery.”<sup>149</sup>

59. Parties developing voluntary compliance programs may look to various international guidance, such as the Interna-

tional Chamber of Commerce's (“ICC”) 2011 Rules on Combating Corruption. The 2011 ICC Rules on Combating Corruption “play an important role in assisting [e]nterprises to comply with their legal obligations and with the numerous anti-corruption initiatives at the international level[.]”<sup>150</sup> Parties may incorporate these rules through the ICC model anti-corruption clause.<sup>151</sup>

60. With the background of the U.N. Global Compact and the 2011 Rules on Combating Corruption, parties may seek to integrate contractual disciplinary policies to ensure “that violations are addressed in a fair, purposeful and accountable way[.]”<sup>152</sup> In fact, the enforcement of internal compliance programs through disciplinary policies and contractual sanctions allows parties to ensure that anti-bribery and corruption policies are duly respected and to effectively monitor and remedy deviations from these standards. The United Nations Office on Drug and Crime (“UNODC”) has published guidelines (the “UNODC Guidelines”) recommending that companies include a “catalogue of sanctions” as well as “guidelines on procedures and responsibilities.”<sup>153</sup> By encouraging companies to define sanctions that “may be imposed to penalize employees and business partners who violate the company's anti-corruption policies and procedures[.]” the UNODC Guidelines provide support to companies desiring to create complex and dynamic procedural rules to address and remedy corruption. The suggested sanctions include the termination of relationships, the exclusion from business opportunities, and the assignment of unfavorable conditions. Recourse to commercial incentives – e.g. preferred supplier status or reduced monitoring frequency – are also suggested.<sup>154</sup> Importantly, the UNODC Guidelines make clear that “companies can also seek to utilize the legal system to apply sanctions to business partners[.] ... impose a



142 - Paris Court of Appeals, n° 15/19388 (November 30, 2017).

143 - March 26, 2012 Deferred Prosecution Agreement between the U.S. DOJ and Biomet, Inc (emphasis added).

144 - *Id.*

145 - See, e.g., French Commercial Code, Art. L. 442-1(II); D. Sindres, La rupture du contrat international, *AJ Contrat* 2016 at 464; N. Rontchevsky, Rupture de relations commerciales établies : le contentieux interne et les modes alternatifs de règlement des différends, *AJ Contrat* 2019 at 17.

146 - Cour de cassation, Com., n° 18-12.817 (November 20, 2019). See also, J-C. Roda, Quand la compliance américaine s'invite dans le contentieux contractuel français, *Recueil Dalloz* 2020 at 913.

147 - See R. Bismuth et al., supra n. 3 at ¶ 11.

148 - By 2018, the UN Global Compact was the “the largest corporate sustainability initiative in the world, with more than 9,500 companies and 3,000 non-business signatories based in over 160 countries[.]” United Nations Global Compact Progress Report (2018), available at: <https://d306pr3pise04h.cloudfront.net/docs/publications%2FUN-Globa-Compact-Progress-Report-2018.pdf> (last visited June 23, 2020).

149 - U.N. Global Compact, 10th Principle.



150 - ICC Rules on Combating Corruption (2011) (Introduction). See also ICC Business Integrity Compendium (2017).

151 - The ICC Anti-Corruption Clause (Option I) provides that: “1. Each Party hereby undertakes that ... it has taken reasonable measures to prevent subcontractors, agents or any other third parties, subject to its control or determining influence, from [offering, promising, giving, authorizing, soliciting or accepting any undue pecuniary or other advantage of any kind]. 2. “The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents or other third parties, subject to their control or determining influence, will comply with Part I of the ICC Rules on Combating Corruption 2011, which is hereby incorporated by reference into the Contract, as if written out in the Contract in full.” 3. “If a Party, as a result of the exercise of a contractually-provided audit right ... brings evidence that the latter Party has been engaging in material ... breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action ... it may invoke a defence by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anticorruption preventive measures .... If no remedial action is taken or, as the case may be, the defence is not effectively invoked, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law. 4. Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause.”

152 - United Nations Office on Drug and Crime (UNODC), An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide (2013) at 86, available at: [https://www.unodc.org/documents/corruption/Publications/2013/13-84498\\_Ebook.pdf](https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf) (last visited June 23, 2020).

153 - *Id.*

154 - *Id.*

*contractual penalty on a supplier[,] ... [and] claim compensatory damages.*<sup>155</sup>

61. The UNODC Guidelines are of particular interest inasmuch as they offer a detailed and enforceable framework to address corruption issues with business partners. As KPMG noted in its 2014 Third-Party Risk Management Survey, one of the “*most challenging anti-bribery and corruption issues*” faced by multinational corporations is “*the difficulty in performing effective due diligence.*”<sup>156</sup> In response, “*organizations are looking to build processes and programs to manage third-party risk that is efficient, scalable... [and] embedded into their overall compliance program.*”<sup>157</sup>

62. When choosing a forum to adjudicate issues to enforce commercial sanctions for non-compliance with anti-bribery and corruption policies, parties to international contracts may consider opting for international commercial arbitration for a variety of reasons. First, international commercial arbitration alleviates the high concern of partiality that is perceived in corruption matters.<sup>158</sup> Second, international commercial arbitration allows parties to adopt flexible procedural rules of discovery as well as witness and expert testimony that can be narrowly tailored to issues of corruption.<sup>159</sup> Third, some parties may desire to nominate arbitrators with knowledge of specific issues raised by compliance disputes.<sup>160</sup> The parties may adopt the Hague Rules on Business and Human Rights Arbitration, which are based on the 2013 UNCITRAL Arbitration Rules and provide for a Code of Conduct for arbitrators,<sup>161</sup> recommend the constitution of a diverse tribunal,<sup>162</sup> require that the presiding arbitrator demonstrates expertise in the areas relevant to the dispute,<sup>163</sup> and allow for dispositive motions to object to defenses which are manifestly without merit.<sup>164</sup> Specifically, under the Hague Rules on Business and Human Rights Arbitration, parties have the “*broadest possible flexibility in choosing the normative sources from which the applicable law is drawn, including, for example, industry or supply chain codes of conduct, statutory commitments ... or any other relevant [business and] human rights norms which the parties have agreed to apply[,]*” thus offering parties the flexibility to arbitrate anti-bribery and corruption commitments while taking into account statutory commitments under the FCPA.

63. As foreshadowed at the time of the passing of the FCPA, “[t]he criminalization of foreign corporate bribery” has, “*to a significant extent act[ed] as a self-enforcing, preventative mechanism.*”<sup>165</sup> While the statute does not confer a private right of action, it encourages corporations to design preventive compliance programs of significant extraterritorial application, and to incorporate in their international contracts anti-corruption commitments from foreign corporations. With international commercial arbitration, corporations have an opportunity to design private contractual sanctions mechanisms to deter their cocontracting parties from engaging in foreign corrupt practices and to minimize the general risks of corruption during the life cycle of international contracts. ■

155 - *Id.* at 60.

156 - KPMG International, Third-Party Risk Management at 4 (2014) available at: <https://advisory.kpmg.us/content/dam/advisory/en/pdfs/third-party-risk-management-2014.pdf> (last visited on June 23, 2020).

157 - *Id.*

158 - European Commission Flash Eurobarometer 457, Businesses’ attitudes towards corruption in the EU (December 2017) at 138, available at <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/81005> (In a 2017 survey of EU companies, only 38% of companies agreed with the proposition that “measures against corruption are applied impartially and without ulterior motives” – with 54% disagreeing and 8% without opinion.).

159 - See, e.g., G. Born, supra n. 10 at 2130-31; New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959), Art. V(1)(d); UNCITRAL Model Law, Art. 19(1); French Code of Civil Procedure, Art. 1509.

160 - See, e.g., G. Born, supra n. 10 at 1751; UNCITRAL Model Law, Art. 11(5).

161 - Hague Rules on Business and Human Rights Arbitration, Art. 11(2) (“The arbitrators shall comply with the Code of Conduct.”).

162 - *Id.* Art. 11(3).

163 - *Id.* Art. 11(1)(c).

164 - *Id.* Art. 26(1).

165 - S. REP. 95-114, 10, 1977 U.S.C.C.A.N. 4098, 4108.