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SHALL WE DANCE? HOW ARBITRAL TRIBUNALS AND NATIONAL JUDICIARIES CAN MOVE IN TANDEM TO STOP CORRUPTION WHILE NOT STEPPING ON THE OTHER'S TOES

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ABSTRACT

International arbitration tribunals and the national courts that annul or recognize and enforce the final awards have had a long and sometimes tumultuous relationship with each other. This relationship becomes even more strained when corruption finds its way into an arbitral proceeding that the court must then review. While there are a number of different means a tribunal can inquire into such illegalities, and a handful of distinct levels of review a national court can pursue when reviewing an arbitral award, there is not an agreed upon set of guidelines for either system to allow both institutions to work together without a court interfering in the tribunal's independent authority or a tribunal ousting corruption in a manner the court would approve. Arbitral tribunals must ensure that issues of corruption are addressed head on while also establishing a uniform standard of proof, sufficient for a court to enforce an award without intrusive investigation of the tribunal's decision. Courts must balance the ethical duty to stop corruption while also respecting the finality of the arbitral award. There is a growing international consensus that corruption is always a violation of public policy, no matter the jurisdiction, and such

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illegalities cannot stand. Therefore, if arbitral tribunals and national courts cannot find a rhythm with one another regarding appropriate action in the face of corruption, there will be more than bruised toes as a result.

I.INTRODUCTION

Imagine for a moment, a thriller film involving high ranking members of government accepting bribes, and nearly getting away with their crimes, only to be brought down by the flashy Louis Vuitton bag filled with cash.[1] Or perhaps a legal drama telling the tale of a powerful businessman, infiltrating the banking system to conduct his evil schemes of money laundering, and the court system bringing him to justice for his wrongdoing.[2] Maybe a story of showering government officials with lavish gifts and vacations to grease the wheels of a deal is more appealing to the wider audience.[3] Unfortunately, a person need

1. *See* Cosmo Sanderson, *Cash-stuff Louis Vuitton bag helps sink Gabon award*, GLOBAL ARB. REV. (Apr. 6, 2022), https://globalarbitrationreview.com/cash-stuffed-louis-vuitton-bag-helps-sink-gabon-award [https://perma.cc/MH7T-SK4A].

2. *See* Valeri Belokon v. Kyrgyz Republic, PCA Case No. AA518, Award (Perm. Ct. Arb. Oct. 24, 2014), https://jusmundi.com/en/document/decision/en-valeri-belokon-v-kyrgyz-republic-award-friday-24th-october-2014 [https://perma.cc/C7TK-FS98].

3. *See* Webcor ITP Ltd., Grand Marché de Libreville v. Commune de Libreville, République Gabonaise, Cour d'appel [CA] [regional court of appeal] Paris, May 25, 2021, 18/18708.

not fantasize these scenarios, as they are real life cases found within the international arbitration and enforcement court adjudication systems.

Each of the aforementioned tales came before an international arbitration tribunal as well as French enforcement courts. In the *Santullo Sericom* case, where an arbitral tribunal discovered the construction contract in question came at a price much higher than industry standard, the government of Gabon submitted circumstantial evidence of cash payouts to government officials, including the infamous cash stuffed Louis Vuitton bag, and even evidence of a house built on behalf of a government official, allegedly paid for by the investor.[4] Yet, the tribunal in *Santullo Sericom* stated the evidence was too circumstantial and that the contract itself was not obtained under the guise of corruption, as the investor did complete part of the construction contractually obligated.[5] In the *Belokon* case, the tribunal once again found that the investor of the Kyrgyz bank, despite allegations and circumstantial reports of money laundering, was wronged by the Kyrgyz government because the control asserted by the government over the bank amounted to a taking.[6] Finally, the tribunal in the *Webcor* case, was not presented with any evidence of corruption, circumstantial or otherwise, but the French enforcement courts were given a different story than the original arbitral tribunal.[7]

When placed in front of a French enforcement court, each mentioned tale underwent a twist in plot. The French enforcement court set aside all of the awards the tribunals had granted due to underlying corruption with the making of or execution of each contract in

4. *See* Groupement Santullo Sericom Gabon v. Gabonese Republic, ICC Case No. 21403/MCP/DDA, Award, ¶¶ 655, 658, 659, 673 (Int'l Chamber Comm. 2019), https://jusmundi.com/en/document/decision/fr-le-groupement-santullo-sericom-gabon-c-la-republique-gabonaise-sentence-finale-tuesday-19th-november-2019 [https://perma.cc/H3ZF-KT92].

5. *See id.*

6. *See Belokon*, PCA Case No. AA518, Award (2014), ¶ 215.

7. *See Webcor*, CA Paris, May 25, 2021, No. 18/18708; Webcor ITP Ltd., Grand Marché de Libreville v. la Commune de Libreville, le République Gabonaise, Case No. 21458/MCP/DDA, Award, (Int'l Chamber Comm. 2018), https://jusmundi.com/en/document/decision/fr-webcor-itp-limited-grand-marche-de-libreville-c-la-commune-de-libreville-la-republique-gabonaise-sentence-arbitrale-finale-thursday-21st-june-2018#decision_6405 [https://perma.cc/YVY4-HHBA].

question.[8] The French courts claimed in each case that the award had the effect of allowing a party to benefit from such corrupt practices, thus violating international public order.[9] This was even the case in *Webcor*, where allegations of corruption were only brought to the national court, as the information was discovered after the tribunal had issued the award.[10] While the French courts are known for stretching the boundaries when enforcing or setting aside an award, the decisions by the French courts in these three cases are potentially up for serious debate within the international arbitral community as to whether the level of review used by the courts exceeded the court's power. There is also disagreement on the tribunal level of which standard of proof is appropriate for proving the existence of corruption.[11] The combination of lacking guidance at both the tribunal and enforcement court levels leads to the back and forth seen in the mentioned cases and could lead to a decrease in trust in the overall arbitral system.

Corruption in international arbitration is nothing new to anyone who keep tabs on the international arbitration sector. However, the difference in opinion of both the standard of detection of corruption at the tribunal level and the variations of review of the tribunal's decisions at the enforcement court stage, can lead to unwanted discrepancies between jurisdictions. Given the international scale of this field of law, consistency should be the goal to avoid actions such as forum shopping and to increase trust in the arbitral system as a whole. The first part of this essay will review the different standards of proof used by tribunals in uncovering corruption and the pros and cons of each. The second piece of the article will examine the laws available to courts to annul or enforce an award using public policy, narrow in on the definition of the term "public policy", and examine how the French are using public policy to possibly overstep and reduce the finality of arbitral awards. The third element of this piece will analyze 1) the international

8. *See Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 67–68; Valeri Belokon v. Kyrgyz Republic, Cour de cassation [Cass.] [supreme court for judicial matters], civ., Mar. 23, 2022, No. 17-17.981, ¶ 11; Groupement Santullo Sericom Gabon v. Gabonese Republic, Cour d'appel [CA] [regional court of appeal] Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

9. *See id.*

10. *See Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶ 67.

11. *See* Michael Hwang SC & Chem & Clarissa Chem, *Standards of Proof and Requirements for Evidence in Special Situations*, GLOB. ARB. REV. (Sept. 3, 2021), https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/1st-edition/article/standards-of-proof-and-requirements-evidence-in-special-situations [https://perma.cc/W5DF-6Y2B].

standards holding States and State entities accountable for ousting corruption, 2) a tribunal's responsibility to ensure the finality of the award while balancing conceivable ethical obligations to *sua sponte* investigate and condemn corruption, and 3) a court's ethical duties to fight corruption while respecting a tribunal's authority, what actions are appropriate when evidence of corruption is discovered after the tribunal grants an award, and whether to waive the right to claim or object to corruption due to party inaction. The fourth element of this paper will explore a possible balance between the tribunal's standard of proof and the court's review, which would allow the tribunal to maintain its authority and autonomy from the court system while still allowing the court to consider whether the alleged corruption was properly handled. Finally, the conclusion will summarize the appropriate balance between tribunals and national courts when faced with corruption so that each system can move in tandem with one another.

II.STANDARDS OF PROOF USED BY TRIBUNALS TO ESTABLISH THE PRESENCE OF CORRUPTION

There is not a standard set of rules to guide an arbitral tribunal in detecting the presence of corruption.[12] Not having guidance for this special set of evidence is especially tricky because producing direct, tangible proof of corruption can be quite difficult.[13] Common law tribunals have typically used one of two options to determine whether corruption was present in the making or execution of a contract now in front of the adjudicators; the clear and convincing evidence standard and the balance of probabilities standard.[14] Civil law jurisdictions

12. *See id.*

13. *See id.*

14. *See* Paul Stothard & Lolan Sagoe-Moses, *Proving Corruption Allegations – Return to the Balance of Probabilities Standard?*, LEXOLOGY (Feb. 11, 2021), https://www.lexology.com/commentary/arbitration-adr/international/norton-rose-fulbright/proving-corruption-allegations-return-to-balance-of-probabilities-standard [https://perma.cc/NUU4-33KD]. However, common jurisdictions also have the prima facie standard in cases of corruption, tribunal typically raise the standard of proof. See Aceris Law LLC, *The Standard of Proof in Arbitration*, ACERIS LAW (Feb. 1, 2023), https://www.acerislaw.com/the-standard-of-proof-in-arbitration/ [https://perma.cc/QQ27-2VSS].

generally use what is known as intime conviction.[15] Despite having three available options to detect illegal activity, there is not an established approach for tribunals yet.[16] Thus, the trouble for tribunals is walking the line between requiring too high a standard, as corruption is difficult to prove, and being too flexible and perhaps alleging corruption when no such activity occurred. A deeper examination of the available standards clarifies what helps and what hinders investigations into corruption within each standard.

A. The Clear and Convincing Evidence Standard

The clear and convincing evidence standard is a high bar that tribunals have used in the past to determine whether corruption is present.[17] By setting the standard high, a tribunal is able to determine whether corruption is present with a greater degree of certainty.[18] Tribunals have traditionally taken claims of corruption very seriously and by having greater certainty, the tribunal is able to ensure that a party is not deprived of any treaty protections and that the contract in question is not voided arbitrarily.[19] However, having such a high standard in place also comes with its own downsides.

In an investor State arbitration, for example, the clear and convincing evidence standard can weigh heavily in favor of the State.[20] States have the ability to conduct investigations and require the production of evidence that can prove corruption occurred.[21] An investor, on the other hand, cannot conduct such investigations, and if the corruption involves members of the State government, those officials can actually hinder an investigation because they can hide or destroy evidence as well as weaken the investigation as a whole if the corruption is pervasive.[22] Problems also exist in arbitrations between two private parties.

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15. *See* Demetra Fr. Sorvatzioti & Allan Manson, *Burden of Proof and L'intime conviction: Is the Continental Criminal Trial Moving to the Common Law*?, 23 CAN. CRIM. L. REV. 107, 107 (2019).

16. *See* Stothard & Sagoe-Moses, *supra* note 14.

17. *See* Hwang SC & Chem, *supra* note 11.

18. *See* ACERIS LAW, *supra* note 14.

19. *See id.*

20. *See* Stothard & Sagoe-Moses, *supra* note 14.

21. *See id.*

22. *See id.*

In a private arbitration, a party will never confess to corruption due to the risk of being prosecuted in a criminal court setting, and given that arbitral tribunals do not have the power of the courts to compel evidence, either physical documents or witness testimony, proving corruption in an arbitration between two private parties can be even more difficult than an investor State arbitration, even if the allegations are credible.[23] With the issues presented with the clear and convincing evidence standard in recent years, tribunals have shifted their thinking and have established a new level of scrutiny that is more flexible.

B. The Balance of Probabilities Standard

The balance of probabilities standard allows for a more flexible level of scrutiny and requires that the evidence convince the tribunal that the claim is "more likely than not" true, i.e., preponderance of the evidence.[24] *Metal-Tech v. Uzbekistan* gives an example of such review; evidence of corruption, in the form of lobbying payments, came about after oral testimony from the claimant's primary witness and the tribunal examined the purpose of the payments more thoroughly.[25] The tribunal in the *Metal-Tech* case moved away from a clear and convincing evidence standard and instead stated the tribunal could use circumstantial evidence to establish the presence of corruption and use what is now referred to as a red flag analysis, taking into account different indicators of corruption.[26]

A red flag analysis is an examination of circumstantial evidence; the more indicators, or red flags, a party is able to provide in evidence, the more likely a tribunal is to find the presence of corruption.[27] The tribunal in *Vale v. BSG Resources Limited* shows an example of the balance of probabilities at work, as the tribunal used red flags as a

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23. *See id*.

24. *See* Hwang SC & Chem, *supra* note 11.

25. *See* Metal-Tech LTD. V. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Certified Award, ¶¶ 240-41, 359-72 (Int'l Ctr. for Settlement of Inv. Disps. 2013), https://jusmundi.com/fr/document/decision/en-metal-tech-ltd-v-republic-of-uzbekistan-award-friday-4th-october-2013 [https://perma.cc/CM6F-DJYV].

26. *See id.* ¶ 243.

27. *See* Swee Yen Koh & Alexis Foucard, *Practical Insights on Fraud and Corruption*, *in* PRACTICAL INSIGHTS ON ARBITRAL PROCEDURE, § III (1) (Joshua Karton et al. eds., Kluwer Law Int'l 2021). For a non-exhaustive list of "Red Flags," see Betz, *supra* note 15, ch. 1(A), tool 1.

starting point and required the parties to provide a preponderance of evidence standard.[28] Under the balance of probability model, a tribunal can also consider adverse inferences from a party's failure or ineptitude in producing evidence to counter a *prima facie* case for the party's involvement in corruption.[29] A tribunal should act with caution, however, when taking into account adverse inferences and only consider those that are so compelling that the inference tips the preponderance of the evidence in favor of the presence of corruption.[30] The nuance of the balance of probabilities standard, incorporating the red flag analysis and adverse inferences, does away with the problems of finding corruption under the clear and convincing evidence standard.[31] However, both the clear and convincing evidence standard and the balance of probabilities are common law concepts.[32] Civil law jurisdictions use a different, third standard, making potential inconsistencies in standard of proof approaches a very real possibility.

C. Intime Conviction Standard

A third option for an arbitrator to fall back on, if in a civil jurisdiction, is the "intime conviction" standard.[33] Intime conviction is the arbitrator's inner conviction where the arbitrator is convinced the evidence is sufficient to corroborate suspected or alleged corruption.[34] While intime conviction is used in civil jurisdictions, in practice both the balance of probabilities and the intime conviction typically achieve results that are relatively the same.[35] Because the "standard of proof" ideal does not exist in civil jurisdictions, intime conviction has taken

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28. *See* Vale S.A. v BSG Resources Ltd., LCIA Case No. 142683, Award, ¶¶ 358, 362.3.2, 364 (London Ct. Int'l Arb. 2014), https://jusmundi.com/fr/document/decision/en-vale-s-a-v-bsg-resources-limited-award-thursday-4th-april-2019#decision_5198 [https://perma.cc/N3TM-QVGK].

29. *See* Hwang SC & Chem, *supra* note 11.

30. *See id.*

31. *See id.*

32. *See* Vera van Houtte, *Adverse Inferences in International Arbitration*, *in* WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION: NEW ISSUES AND TENDENCIES 195, 198 (Teresa Giovannini & Alexis Mourre eds., Int'l Chamber of Com. 2009).

33. Betz & Pieth, *supra* note 15, ch.1 (B), tool 5.2.

34. *See id.*

35. *See* van Houtte, *supra* note 32, at 198.

the place of such an ideal.[36] However, the definition of intime conviction varies across jurisdictions, like in France where intime conviction is described as "the subjective 'intimate' persuasion of the single judge, relying mainly on her individual and even emotional beliefs"[37] and in Germany, where they title the intime conviction idea as "free evaluation of proof" and state "the court is to decide upon consideration of the entire content of the arguments and the results of reception of evidence according to its free conviction whether a factual assertion is to be regarded as true or untrue"[38]. While the intime conviction principle appears more subjective, it is essentially the same in result as the more flexible standard of proof options available in common law jurisdictions. However, with multiple options for the standards of proof in common law countries and a seemingly more subjective, and potentially more stringent process in civil law States, different jurisdictions will likely produce inconsistent outcomes, which could potentially make establishing corruption within the arbitral proceeding more onerous.[39]

With the lack of guidance and uniformity in establishing the presence of corruption at the tribunal level, the enforcement courts are left with a difficult question of whether to abide by the tribunal's decision and enforce the award or strip the tribunal of its authority and autonomy and set the award aside.

III. A COURT'S REVIEW OF A TRIBUNAL'S DECISION

Once a tribunal has issued an award, if that award is not voluntarily complied with by the losing party, the winning party can take the award to the applicable national court, wherein the court determines whether to enforce the tribunal's award. The loser can also bring annulment proceedings, wherein the court sets the award aside

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36. *See* Michael J. Bond, *The Standard of Proof in International Commercial Arbitration*, 77 INT'L J. ARB, MEDIATION & DISP. MGMT. 304, 313 (2011).

37. Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 667 (2003).

38. Bond, *supra* note 36, at 314.

39. *Anti-Corruption in International Arbitration: A Toolkit for Arbitrators*, WILMERHALE W.I.R.E. UK (July 1, 2019), https://www.wilmerhale.com/en/insights/blogs/wilmerhale-w-i-r-e-uk/20190701-anti-corruption-in-international-arbitration-a-toolkit-for-arbitrators [https://perma.cc/5KT2-Q8QT].

and disregards it. As seen in the cases of *Santullo Sericom*, *Belokon*, and *Webcor*, that is precisely what the French enforcement courts did, annulling every award granted in the three cases.[40] However, what the French national courts have done in annulling these awards is quite rare in the international arbitration community. The majority of State enforcement courts take on a "pro-enforcement" perspective when examining an award and an overwhelming portion of those courts do eventually recognize and enforce such awards.[41] Pro-enforcement, with very few exceptions, and maintaining the authority and autonomy of the arbitral tribunals is enshrined in international treaties and guidelines, such as the New York Convention[42] and the UNICITRAL Model Law[43]. In a case where corruption appears present, however, courts must decide whether to abide by the tribunals award and conduct a "traditional" pro-enforcement review or to delve further into the facts and law and examine beyond potential procedural flaws within the tribunals proceeding and final award. Enforcement proceedings and annulment proceedings also entail different processes.

A. Enforcement and Annulment Proceedings

The New York Convention states that all contracting States to the treaty must acknowledge that an arbitral award is binding and proceed to enforce said award according to the rules of the convention as well as the laws of the jurisdiction in which enforcement is sought.[44] For the most part, national legislation mirrors the New York Convention, especially in regard to Article III, mentioned in the sentence prior, and Article V, the pro-enforcement perspective and refusal provisions.[45] If a party is asking the court to recognize and enforce an award, they can

40. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶ 11; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

41. GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 453 (Wolters Kluwer, 3rd ed., 2021).

42. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

43. *United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration*, U.N. Sales No. E.08.V.4 (1985) [hereinafter UNCITRAL Model Law].

44. New York Convention, *supra* note 42, art. III.

45. BORN, *supra* note 41, at 455.

present the court with an authenticated award and the original arbitration agreement.[46] The opposing party can then raise on objection under Article V, if they so choose. If a party is looking to have the award annulled, the party can give proof that there was a violation during the arbitral process found within the local law of the national court chosen, typically the national court where the award was granted.[47] While The New York Convention is for the recognition and enforcement of awards only, many jurisdictions have surmised that actions to annul an international arbitration award should be limited to the grounds listed under Article V and prevailing international ethics and rules.[48] In practice, a party commonly uses the national law and international norms to justify an annulment, as the New York Convention does not limit annulment grounds and leaves any restrictions up to local law.[49] Article V of the convention does however lay out an exhaustive list of when an award may be refused in an enforcement proceeding[50], and is a good reference point, as most local jurisdictions do parallel Article V within their own legislation.[51]

In Article V of the New York Convention, the list of reasons to refuse recognition and enforcement of an award is broken down into two sections.[52] The first section deals with review of the procedural aspects of the arbitration, including if a party was incapacitated, the arbitration agreement is not valid under the law the parties have chosen to govern the agreement, proper notice was not given to the party the award is against for the appointment of arbitrators, the proceedings themselves, or the party was not granted the ability to present their case to the tribunal, the award exceeds the scope of the submission to arbitration, the tribunal composition or procedure did not align with the arbitration agreement or, if no agreement, the law of the State where the parties underwent arbitral proceedings, and finally the arbitral award is not yet legally binding or has been set aside by the competent State court where the award was granted.[53] For the most part, objections

46. New York Convention, *supra* note 42, art. IV.
47. *See* BORN, *supra* note 41, at 374–75.
48. *See id.* at 375.
49. *See id.* at 373.
50. New York Convention, *supra* note 42, art. V.
51. *See* BORN, *supra* note 41, at 375, 458–59.
52. New York Convention, *supra* note 42, art. V.
53. *Id.* art. V (1) (a–e).

based on section 1 are not controversial, as they relate to procedural elements. However, section 2 of Article V is a bit stickier in nature, as it pertains to the subject matter.

The second section of Article V deals more with the substance of the dispute. A court can refuse the recognition and enforcement of an award if the subject matter of the dispute does not fall within the arbitrable issues under the national law of the State where enforcement is sought and if the recognition of the award is contrary to public policy within that country.[54] The more difficult to pin down of the two reasons to refuse enforcement is the public policy objection because public policy is more subjective in nature. However, the French courts cited public policy in all three cases of *Santullo Sericom*, *Belokon*, and *Webcor* as reasoning to delve further into the substance of the dispute and to annul the arbitral awards.[55] Because national courts in the majority of cases do not annul awards, or refuse to enforce, and thereby strip the tribunal of its authority and autonomy, the use of public policy to enact such action requires further review.

B. Public Policy Defined

Public policy is a sweeping phrase and has been invoked by many a party to national courts when objecting to enforcement of an arbitral award or bringing annulment proceedings. In order to obtain a better understanding of how the national courts interpret public policy and decide whether to enforce or potentially annul an arbitral award, defining public policy in more narrow terms is required.

Article V of the New York convention allows for refusal of an award if the award is antagonistic to the public policy of the country where enforcement proceedings are being sought.[56] The term "public policy", however, is potentially quite broad and can vary in each jurisdiction. The International Law Association (ILA) issued a resolution interpreting the term public policy and stated "public policy" is a set of rules or principles used by countries to decide whether an

54. *Id.* art. V (2) (a–b).

55. *Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 28, 51, 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 72, 113–14.

56. *See* New York Convention, *supra* note 42, art. V(2)(b).

award violates said principles on a procedural or substantive level.[57] The ILA then goes on to give further detail, stating that public policy can include principles of morality and justice that the country wants to safeguard (fundamental principles), rules essential to the political, economic, and social interests of the country (Public Policy Rules) and a country's obligation towards international organizations as well as other States (International Obligations).[58] The ILA then expands on the three aforementioned principles in section two, three, and four of the resolution.[59]

Practical research of both enforcement and annulment proceedings has given further insight on the definition of public policy and includes the most common examples of a breach of State sovereignty[60], duress, *corruption and fraud*, disproportionate penalty or damages awarded, lack of impartiality leading to a violation of due process, failure to sufficiently trigger the award, and excluding an arbitrator from deliberations with the rest of the arbitral panel[61]. Fraud and corruption are listed as one of the exceedingly prevalent claims for the use of public policy in annulling an award, so looking deeper into the statistics surrounding this type of claim is useful in understanding the national and international viewpoints at play.

The same research that sought out the common reasonings for invoking a public policy claim in an effort to annul an award also states that the public policy claim is raised in 38% of annulment proceedings and 44% in enforcement cases.[62] Courts have then approved 21% and 19% of these, respectively.[63] 21% and 19% may seem like a small number in certain circumstances, but in approval of a public policy claim for annulment or refusal of an arbitration award, 21% and 19%

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57. International Law Association, *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 213, art. 1(1)(c) (2003).

58. *See id.* art. I (1)(d).

59. *See id.* art. I (2–4).

60. For example, an order to return national waters. *See* Monique Sasson, *Public Policy: Is This Catch-All Provision Relevant to the Legitimacy of International Commercial Arbitration?*, KLUWER ARB. BLOG (June 18, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/18/public-policy-is-this-catch-all-provision-relevant-to-the-legitimacy-of-international-commercial-arbitration/ [https://perma.cc/4TAK-YZVS].

61. *See id.*

62. *See id.*

63. *Id.*

is quite significant given that tribunals are meant to retain authority and autonomy separate from a country's judicial system. Particularly in the case of corruption, there is a growing trend on the international level that places corruption squarely against public policy and because of this, where corruption is suspected, the tribunals' authority and autonomy may be pierced more often without regard for said separation from the judiciary.[64] There are national jurisdictions that mirror this international trend and take a "maximalist" approach when examining the tribunal's decision.

C. France and the Maximalist Approach to Public Policy Violations

A maximalist jurisdiction allows the national courts to determine whether a violation of public policy occurred in much further detail than usual.[65] A court is given the power to investigate the claims made on public policy grounds and make the decision even if the arbitral tribunal has determined an outcome on the same issue.[66] This type of oversight can take away the authority and autonomy of the arbitral tribunal. However, some of the jurisdictions friendliest to arbitration are taking up this approach despite the criticism.

Going off the three aforementioned cases, France is a prime example of a maximalist jurisdiction and how State legislation does not have to precisely mirror the New York Convention, with the national legislature and courts adopting procedures specific to that jurisdiction. The courts in *Santullo Sericom*, *Belokon*, and *Webcor* all cited public policy as the reason for annulment using Article 1520(5) of the French Code of Civil Procedure as the legal basis for said decisions.[67] Article 1520(5) simply states that an award may be annulled if it is adverse to "international public policy."[68] The term public policy appears in a few other places within the code, but for the most part, the guidance is very

64. *See* Koh & Foucard, *supra* note 27, § I.

65. *See* Sasson, *supra* note 60.

66. A minimalist approach binds the court to the tribunals decision on whether there was a violation of public policy. *See id.*

67. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 28, 51, 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 72, 113–14.

68. CODE DU PROCÉDURE CIVILE [C.P.C.] [Civil Procedure Code] art. 1520(5) (Fr.).

vague and does not give express permission for the court to reassess the case if corruption is suspected.[69]

However, in *Belokon*, Kyrgyzstan brought a claim to the Paris Court of Appeals stating that enforcing the award would violate the forbiddance of money laundering found under the UN Anti-Corruption Convention of December 9, 2003, in which France and Kyrgyzstan are both signatories, and thus violate France's notion of "international public policy" found in Article 1520(5).[70] The decision from the Cour de Cassation then confirmed that the Paris Court of Appeals determined correctly that combatting money laundering comprised a central element of international public policy in France, against *Belokon's* claim that the Court of Appeals exceeded its powers under Article 1520(5) because they reviewed the merits of the award *de novo*.[71] The Cour de Cassation stated that because of the potential violation of international public policy, the Court of Appeals was within its rights to exceed past the evidence given to the arbitral tribunal and that the Court of Appeals did not conduct a *de novo* review on the merits, but examined only the new facts presented when making the decision.[72] Further, the Cour de Cassation explained that judges in France have complete authority and can widen the sphere of their powers in fact-finding when examining an award which may violate Article 1520(5) because of corruption if enforced.[73] France appears to be leading the way in committing to the maximalist approach, but given the growing international movement surrounding the concept of international public policy, and corruption's breach therein, it would not be surprising to see additional jurisdictions leaning into the maximalist ideals.

The maximalist approach is criticized for negating the arbitral award's finality and eliminating the separation between an international arbitration tribunal and a national judiciary.[74] On the other side of the coin, the minimalist approach would have the national

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69. *See id.* arts. 1488, 1492, 1514.

70. Roslyn Lai & Charles Ho Wang Mak, *Belokon v. Kyrgyzstan: Practical Implications of Award Set-Asides Arising from Corruption Allegations*, 26 AM. SOC'Y INT'L L: INSIGHTS (Dec. 14, 2022), https://www.asil.org/insights/volume/26/issue/14 [https://perma.cc/KD4L-NC77].

71. *See id.*

72. *See id.*

73. *See id.*

74. *See* Sasson, *supra* note 60.

judiciary follow the tribunal's decision regarding corruption and violations of public policy without any scrutiny.[75] While keeping the separation between a tribunal and a national judiciary is key to maintaining the institution of arbitration as the world knows it, following the tribunal's decision almost blindly raises the question of whether the tribunal has a duty to investigate and ensure compliance with international public policy and whether the national courts have an obligation to stop potential corruption if the tribunal has made a decision against international standards or if evidence of corruption has presented itself after an award is rendered.

IV. THE TRIBUNAL'S DILEMMA IN INVESTIGATING CORRUPTION AND THE COURT'S ETHICAL DUTY TO PREVENT THE FURTHERANCE OF CORRUPTION IF THE TRIBUNAL DID NOT

There is a balance needed between an arbitral tribunal and the national judiciary. With criticism of either allowing the court to disregard the tribunals decision on corruption and conduct a new investigation or following the tribunal's decision even if corruption is suspected[76], both the tribunal and the national court system have obligations towards the parties, but also in protecting the concept of international public policy[77]. There are certain international standards upholding international public policy that may come into play within a tribunal or court, but there is not a hard or fast rule that requires a tribunal to apply these standards.[78] The next section will examine the common international standards getting to the core of international public policy, the tribunal's dilemma of how to examine corruption while producing an award that will be enforced, the court's potential obligation to root out corruption if the tribunal did not, or if new facts shed light on illegality after an award is granted, and what effect the actions of the parties have on corruption investigations at both the tribunal and national judiciary levels.

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75. *See id*.

76. *See id*.

77. *See* Kathrin Betz, *Arbitration and Corruption: A Toolkit for Arbitrators*, 2 J. ANTI-CORRUPTION L. 183, 189–90 (2018).

78. *See id*. at 190.

A. The United Nation Convention Against Corruption and the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions

The international fight against corruption incorporates two main documents that have shaped the fight against this particular form of illegality. The United Nations Convention Against Corruption (UNCAC) and the Organization for Economic Cooperation and Development's (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (The Anti-Bribery Convention) have been crucial in the development and acceptance of certain anti-corruption norms.[79] A closer look at both conventions can illuminate the usefulness of their guidance.

The UNCAC came into being somewhat recently in December 2005 and is the only universal legally binding anti-corruption mechanism.[80] The convention is made up of five sections: 1) preventative measures, 2) international cooperation, 3) criminalization and measures by law enforcement, 4) information exchange and technical assistance, and 5) recovery of assets; preventative measures being the most applicable to this essay.[81] Article 5 of the Convention is most relevant to the idea that tribunals and courts should uphold international public policy by identifying and quashing corruption over the rights of the parties when reviewing a case.[82] Article 5(1–2) states that each party to the convention must cultivate and put into action or retain effectiveness of anti-corruption policies, in line with that State's own domestic legislation, and aim to create and advance effective protocols targeted at corruption prevention.[83] When examining the cases of *Santullo Sericom*, *Belokon*, and *Webcor*, the French court system, as France is a party to the convention,[84] has done exactly as

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79. *See id*. at 189.

80. *See Learn about UNCAC*, UNITED NATIONS, https://www.unodc.org/corruption/en/uncac/learn-about-uncac.html [https://perma.cc/7S8R-FWY5] (last visited Aug. 21, 2023).

81. *Id.*

82. *See* G.A. Res. 58/4, annex, United Nations Convention Against Corruption, art. 5 (Oct. 31, 2003) [hereinafter UNCAC].

83. *Id.*

84. *Signature and Ratification Status*, UNITED NATIONS, https://www.unodc.org/unodc/en/corruption/ratification-status.html [https://perma.cc/2ZPL-QJUU] (last visited Aug. 21, 2023).

UNCAC lays out, uncovering and preventing further corruption by annulling each award, despite the tribunal's opposing decision.[85] Another international document also has some sway in the fight to combat corruption.

The OECD's Anti-Bribery Convention is another international document providing guidance for opposing corruption and upholding international public policy. The Anti-Bribery Convention came into force on February 15, 1999.[86] This convention is more narrowly situated, focusing on only bribery, however, as we've seen in the *Santullo Sericom* and *Webcor* cases, bribery is considered by the French court system as corrupt and a violation of international public policy.[87] The Anti-Bribery Convention is short and to the point, with the most applicable piece to this essay being Articles 1 and 2.[88] In promoting the concept of international public policy, Article 1(1–2) states that parties to the convention must initiate measures necessary to cement that bribery of a public official to obtain business or improper advantage within the context of international business is a criminal offence and that each party to the convention must also take measures marking complicity, incitement, authorization, and aiding and abetting in the face of bribery as criminal offenses as well.[89] Article 2 then states that parties to the convention must establish measures necessary, which align with the domestic legislation, to hold persons liable of the crime of bribery.[90] Once again, in the cases of *Santullo Sericom* and *Webcor*, the French courts have examined the acts of alleged bribery through the lens of the OECD Anti-Bribery Convention and determined that a violation of international public policy occurred.[91] Not only that, but the French courts then held the parties responsible for the violation

85. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 28, 51, 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 72, 113–14.

86. *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 72–79, 112–14; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 48–50.

87. *Id*.

88. OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD/LEGAL/0293, arts. 1, 2 (Nov. 21, 1997) [hereinafter Anti-Bribery Convention].

89. *Id.* art. 1(1)–(2).

90. *Id.* art. 2.

91. *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 72–79, 112–14; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 48–50.

liable for damages to the other harmed party.[92] In the face of courts throwing out a tribunal's decision when corruption is present, using the legal basis of international public policy, tribunals must tread carefully when evaluating and issuing their final award.

Tribunals are autonomous from the national judiciary, and needing to examine multiple sets of laws applicable to one arbitration case, i.e., the law of the underlying contract, the law where the alleged corruption occurred, and the law of nationality of the parties, a conflict of law may arise where one jurisdiction deems the actions corrupt and another may not find issue.[93] Given this dilemma, alongside the domestic and international laws combatting corruption, and courts using the aforementioned international instruments to justify annulment of arbitral awards, the tribunal must consider several elements when making their final decision. The tribunal must find a delicate balance to ensure the final award is enforced and investigation of potential corruption occurs, while still honoring the autonomy of the parties and respecting the arbitral institution as a whole.

B. The Tribunal's Choice and the Potential Consequences

"International arbitration dwells in an ethical no-man's land."[94] Historically, arbitrators have shied away from directly addressing matters of corruption because without a universally identifiable legal or moral rule concerning corruption, arbitrators viewed the considerations of such acts irrelevant and used excuses, such as stating there was a lack of clear evidence, to avoid the need for examination.[95] However, this perspective has seen backlash with the annulment of awards in *Santullo Sericom*, *Belokon*, and *Webcor*,[96] and with the growing influence of international instruments fighting against corruption, arbitral tribunals can no longer sidestep addressing issues of corruption when they arise.[97] The tribunal must now look deeper at

92. *See Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶ 118(5); *Webcor*, CA Paris, May 25, 2021, No. 18/18708, § IV (2).

93. *See Anti-Corruption in International Arbitration*, *supra* note 39.

94. Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 342 (2002).

95. *See* Emmanuel O. Igbokwe, Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe 38–39 (Wolters Kluwer, 2022).

96. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

97. *See* Betz, *supra* note 77, at 189.

whether ignoring such suspected corruption will lead to an award annulment or refusal to enforce, and also examine whether the tribunal has an ethical duty to call out corruption, even if the parties to the arbitration do not raise the issue.

1. Ensuring Enforcement and Avoiding Annulment of the Arbitral Award

When incorporating the consistently growing trend of protecting international public policy into their deliberations, a tribunal must walk a fine line in maintaining the parties' autonomy, respecting the arbitral institution and its authority, and doing their best to make sure a court will not annul or refuse to enforce the award that they grant. Corruption has the international reputation of going against public policy, therefore tribunals must acknowledge that if corruption is suspected and not dealt with or dealt with in a manner ill-suited to the situation, a court may very well disregard the final award granted by the tribunal.[98] In line with the potential annulment or refusal of the award, a court is likely to conduct a new investigation of the facts and law if there is potential corruption in the process of reviewing the award, especially if they are a maximalist jurisdiction.[99] When determining the final award, the tribunal should consider whether they are in a maximalist or minimalist jurisdiction, or if any law applicable to the arbitration stems from a maximalist or minimalist State. Knowing such information *could* be a helpful aid for tribunals to avoid a more thorough review and possible annulment or refusal by the national courts. However, as momentum continues in favor upholding international public policy, including combatting corruption, tribunals may be stuck between a rock and hard place in determining whether an enforcement court will annul or refuse the award, minimalist jurisdiction or not.

As the world has seen in France, the French national courts have shifted away from the traditional pro-enforcement, minimalist ideals, and moved closer to a maximalist frame of mind, at least regarding activity like bribery and corruption. This shift can be specifically seen in the case of *Gulf Leaders for Management and Services Holding Company v. SA Crédit foncier de France* in 2014 when the Paris Court of Appeal stated:

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98. *See* IGBOKWE, *supra* note 95, at 326–27.
99. *See id.* at 327.

> When it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings, seized of an application based upon Article 1520(5) of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an effective or concrete manner.[100]

Once more, this maximalist approach has been criticized for being too intrusive, with even French scholars, like Serge Lazareff, stating that a State court's ability to examine a tribunal's findings of fact is completely against what the institution of arbitration stands for.[101] As mentioned, however, even if the tribunal has noted whether they are dealing with the law of a maximalist jurisdiction, this is not the sole determining factor of whether the national court will investigate the facts and law on their own.

England, a jurisdiction known for its pro-enforcement stance, has also had proponents of further investigation of arbitral awards. Lord Justice Michael Kerr has stated that "[n]o one having the power to make legally binding decisions in [England] should be altogether outside and immune from this system. No one below the highest tribunals should have unreviewable legal powers over others" and argued that review of arbitral awards by the English judiciary is the "bulwark against corruption, arbitrariness, bias, improper conduct and – where necessary – sheer incompetence, in relation to acts and decisions with binding legal effect for others."[102] The English Arbitration Act even provides for courts to pursue deeper scrutiny of the arbitral tribunal's decision, at least as concerning points of law.[103] Other civil countries, like France, have also acted in ways which may suggest the embracing of this concept that international public policy reigns supreme.

Germany, another traditionally pro-enforcement jurisdiction, has taken on the view that German courts have the ability to review an

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100. *Gulf Leaders for Management and Services Holding Company v. SA Crédit foncier de France*, Cour d'appel [CA] [regional court of appeal] Paris, Mar. 4, 2014, 12/17681, ¶ 14.

101. *See* IGBOKWE, *supra* note 95, at 331.

102. Michael Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMPAR. L. Q. 1, 15–16 (1985).

103. Arbitration Act 1996, c. 23, § 69 (Eng.).

arbitral award without being bound by the tribunal's factual findings if a violation of public policy is suspected.[104] The Bundesgerichtshof (BGH – The Federal Court of Justice in Germany) stated as far back as 1972 that "it is in accordance with the established case law of the Federal Court of Justice (BGH) that the ordinary courts have to judge independently whether the recognition of an arbitral award would violate public policy."[105] With courts in both maximalist and minimalist jurisdictions coming to the conclusion that violations of international public policy must be judged independently of an arbitral tribunal in order to uphold the principles of justice, tribunals are placed in a seemingly unwinnable predicament. There are schools of thought in the world though that could aid in this dilemma and encourage tribunals to be more proactive in their evaluations and to hold themselves to a higher standard when conducting their analysis.

2. The Tribunal's Potential Duty to Investigate Corruption Without Party Action and the Ethical Obligations of Tribunals

International arbitral tribunals are faced with a now very real possibility that a national court will refuse to enforce or annul the final arbitral award based on a violation of international public policy. However, there are certain actions tribunals can take to ensure that the final award abides by public policy and prevent the court from taking the drastic move of independently reviewing the tribunal's decision. If the tribunal can adjust its processes slightly while still maintaining the traditional arbitral concept of autonomy, the arbitral tribunal can potentially find a solution to the public policy dilemma internally.

a) Tribunals Conducting Investigations of Their Own

Members of the international arbitration community have set forth the argument that tribunals must investigate potential issues of corruption, even if the parties have not raised claims alleging such behavior.[106] Others have stated this type of investigation goes against the concept of autonomy expected by the parties.[107] With that said,

104. *See* IGBOKWE, *supra* note 95, at 332.
105. *Id.*
106. Koh & Foucard, *supra* note 27, § II(2).
107. *See id.*

party autonomy may be limited when issues of international public policy are present.[108] Tribunals in most jurisdictions are thus faced with the dilemma of infringing on the autonomy of the parties and rooting out potential corruption, or respecting the autonomy of the parties and possibly leaving the door open to refuse their final award.

One can argue that tribunals have taken on a public function by providing rulings with the finality of the judiciary for private international business and States,[109] and because of this public function, the arbitral tribunal has an obligation to investigate corruption without need of party action.[110] Scholars, like Julian Lew, have opined that a proactive approach to responding to corruption demonstrates the responsibilities of the arbitrators, recognized as private protectors of international commercial transactions, to maintain the essential and embraced principles of international trade and to not settle into a position of imposing international standards even if those standards do not comport with the accepted, applicable law and recognized international commercial obligations.[111] With this in mind, an arbitrator can justify an action to investigate a violation of international public policy, even if neither party has raised the issue.[112] Arbitrators must also uphold "the rule of law" and, in circumstances where corruption is present, the rule of law requires that the law withholds enforcing immoral or illegal contracts and that the parties responsible for administering the law, arbitrator or judge, shall safeguard the rule of law as it is defined.[113] There is a jurisdiction that has embodied these

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108. *See* Penny Madden et al., *Arbitrability and Public Policy Challenges*, GLOBAL ARB. REV. (June 8, 2021), https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/arbitrability-and-public-policy-challenges [https://perma.cc/2Z3X-WSZE].

109. *See* Edoardo Marcenaro, *Arbitrators' Investigative and Reporting Rights and Duties on Corruption*, *in* ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION 141, 145 (Domitille Baizeau & Richard Kreindler eds., 2015).

110. IGBOKWE, *supra* note 95, at 197.

111. *See* Julian D. M. Lew, *Determination of arbitrators' jurisdiction and the public policy limitations on that jurisdiction*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 73, 85 (1987).

112. *Id.*

113. The concept of rule of law is vague and ambiguous. The United Nations Secretary General in a 2004 Report refined the definition somewhat and stated the rule of law relates to principles of governance where all institutions, persons, and entities, both private and public and including the State, are answerable to the laws that published publicly. Another definition from more of a commercial setting comes from Lord Bingham and states that "all persons and

principles and charged the tribunal to uphold this public function and the rule of law and investigate the possible corruption claims without the need for a party to present a claim of illegality.

France, once again, gives the world an example of what it looks like when a tribunal can investigate issues of international public policy on their own, regardless of whether a party has raised a claim of illegality. In a case from 1981, the Cour de Cassation affirmed a Paris Court of Appeal decision stating that the arbitrators and tribunal must investigate problems with international public policy on their own accord.[114] Given the pattern of the French courts in recent years, this point of view is not surprising. However, what is surprising is that other, very pro-enforcement States, are perhaps jumping in with France in holding this perspective. A 2007 case in front of the Swiss Federal Supreme Court stated that the tribunal "must take a position" regarding corruption.[115] Even the Swiss Rules of International Arbitration dedicate an article which states that "at any time during the arbitration proceedings, the arbitral tribunal may require the parties to produce documents, exhibits, or other evidence . . ." leaving the door open for the tribunal to conduct its own investigation if they suspect foul play.[116] While this is not as clear as the trend in the French Courts, it seems to have undertones of the tribunal taking responsibility when faced with issues of corruption.

For those jurisdictions where the tribunal is not under court precedent, or pressure from arbitral rules or domestic legislation, to investigate potential corruption, the tribunal should thoroughly examine whether not investigating will lead to setting aside the award or if infringing on party autonomy is of worth in making sure the award remains final and respect for the arbitral institution stays intact. In navigating a difficult decision such as the aforementioned predicament, looking further into the ethics of tribunals and whether the tribunals are enacting proper ethical standards is one way to conceivably make this decision easier for arbitrators.

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authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts." In either case, the definition of the rule of law varies by the context of the situation. *See* IGBOKWE, *supra* note 95, at 207–08.

114. *Id.* at 195.

115. *Id.* at 196.

116. Swiss Arbitration Centre, SWISS RULES OF INTERNATIONAL ARBITRATION art. 26(2) (June 2021).

b) The Tribunal's Ethical Duties

As with any forum that purports to seek justice, there is a level of ethical responsibility owed, not only to the parties that subject themselves to the proceedings, but also society as a whole. Ethical responsibilities can become murky, however, in the context of international arbitration, as concepts of fairness and justice, as broad terms, take on a different interpretation depending on the jurisdiction.[117] Given the growing concept of international public policy, it does not do any participant to the arbitration or international arbitration as an institution any service becoming the "billboard" for how to disregard or mishandle suspected corruption.[118]

International arbitral tribunals have received critiques saying that international arbitration allows for parties to escape mandatory laws of one jurisdiction by using the law of another jurisdiction.[119] However arbitrators have the ability to limit a party's potential avoidance of a certain jurisdiction's laws or international standards.[120] One of the most generally agreed upon ways for tribunals to avoid a party's original choice of law is when a violation of international policy would result.[121] Most arbitration experts have even openly expressed the following sentiment: "there is no doubt that arbitrators are entitled to disregard the provisions of governing law chosen by the parties where they provisions to be contrary to international public policy."[122] Tribunals have used such ideals on a somewhat regular basis to invalidate contracts in the face of potentially promoting corrupt actions.[123] In the same light as preventing parties from avoiding certain national laws, the tribunal also has the responsibility of ensuring the parties do not avoid international standards of public policy, such as the UNCAC and the OECD Anti-Bribery Convention.[124] Tribunals should operate with great prudence when examining aspects of a dispute which were not

117. *See* Rogers, *supra* note 94, at 342, 362.

118. *See* Catherine A. Rogers, *The World Is Not Enough: Ethics in Arbitration Seen Through the World of Film*, 37 ARB. INT'L 397, 407 (2021).

119. *See* Catherine A. Rogers, *The Vocation of International Arbitrators*, 20 AM. U. INT'L L. REV. 957, 997–98 (2005).

120. *Id.* at 997–98.

121. *Id.* at 998.

122. *Id*.

123. *See id.* at 998–99.

124. *See id.*

originally introduced by the parties' submissions, however the tribunal is ethically bound to probe further into suspected corruption, so as to avoid becoming an accomplice to the fraud and to ensure the award is enforced by the national judiciary.[125]

Tribunals and their actions within the arbitral proceeding are merely one piece of a larger puzzle when evaluating what obligations are held by which actors and what conduct is permissible throughout the course of the international arbitration as well as the national court hearings. The national court system also has to look at whether a new investigation of the arbitration proceedings is detracting from the authority and autonomy of the arbitral tribunal and the respect and trust of the institution of international arbitration. The court must also examine the growing acceptance of corruption as a violation of international public policy, the ethical duty this acceptance places on the national judiciary if the tribunal has failed to handle suspected corruption properly, and whether party inaction and newly found evidence of corruption changes those ethical responsibilities.

C. The Court's Ethical Duty to Stop Corruption

Traditionally, national courts have steered clear of new investigations into arbitration proceedings[126] and have held a pro-enforcement, minimalist perspective, as dictated in the New York Convention and other international arbitration instruments, such as the UNCITRAL Model Law[127]. State courts, however, as exemplified by France especially, seem to be moving closer towards a maximalist point of view and are disregarding the tribunals authority and autonomy at points in an effort to safeguard international public policy by combatting corrupt acts.[128] Courts must make the tough decision to investigate anew if necessary, and they also face other complications like evidence of corruption arising after the tribunal has granted the final award and whether to take into account a party's failure to raise

125. *See* Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 ARB. INT'L 95, 110–11 (2006).

126. IGBOKWE, *supra* note 95, at 337.

127. UNCITRAL Model Law, *supra* note 43, art. 5.

128. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

corruption claims during the arbitral proceedings. Just like tribunals, the State courts also walk a fine line of the obligation to fight corruption versus showing respect for the tribunal's autonomy.

1. The Courts Ethical Dilemma in Choosing to Investigate

"Judicial review of arbitral awards constitutes a form of risk management designed to safeguard against perverse arbitrators and shameless intermeddlers."[129] National courts are constantly straddling two opposing goals of promoting finality of the arbitral awards, thus freeing said awards from challenge, and maintaining confidence from the community in the mechanisms set to protect against enforcement of deviant decisions from an arbitral tribunal.[130] However, national courts, just like tribunals, are subject to the ever-growing concept of international public policy, which can pressure the national court to step further into the authority and autonomy of a tribunal than it normally would if suspected violations of international public policy are present.

The UNCITRAL Model Law, regarded as one of the international standards for conduct in international arbitration, goes into some detail on when a national court should set aside (or annul) an arbitral award.[131] Article 34(b)(ii) allows the national judiciary to annul an award if the court finds that "the award is in conflict with the public policy of this State."[132] This language sets the standard for review according to the local legislation and court precedent, and in the case of jurisdictions like France, a violation of international public policy by corruption is a violation of the public policy of the State itself.[133] Much like the New York Convention, the UNCITRAL Model Law leaves a determination of what "public policy" consists of to the domestic laws,[134] and with each jurisdiction potentially having a

129. William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805, 808 (1999).

130. *See id.*

131. *See* UNCITRAL Model Law, *supra* note 43, art. 34.

132. *Id.*

133. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 67–68; *Santullo Sericom,* CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

134. *See* UNCITRAL Model Law, *supra* note 43, art. 34.

different definition,[135] national courts have the potential of issuing contradictory judgments on the same arbitral proceeding.[136]

One standard that seems to remain universal, at least in recent years, is the concept that corruption is always a violation of public policy and courts therefore must annul or refuse to enforce any award that contains any form of such corruption. Under Article 52 of the International Centre for Settlement of Investment Disputes (ICSID) Convention, Regulation and Rules, a party to an arbitration can request an annulment of the arbitral award if there was corruption stemming from any participant of the tribunal.[137] The Federal Arbitration Act of the United States allows parties to apply for annulment if the award was obtained through corruption, fraud, or undue means and if the arbitrators showed signs of corruption.[138] Under the International Arbitration Act of Singapore, section 24 adds to Article 34 of the UNCITRAL Model Law and states that courts can annul an award if it was obtained or affected by corruption or fraud.[139] Qatar considers the influencing of public officials against public policy, and the beliefs of England are reflective of the same ideal as Qatar.[140] Combine UNCAC and the OECD Anti-Bribery convention, dictating the guidelines for States and State entities, including the judiciary, to combat corruption and protect international public policy,[141] with many national jurisdictions expressing the same desire as the international standards, and there is a clear movement for courts to hold stopping corruption in a higher regard then the pro-enforcement policy of maintaining the finality of awards. Despite this clear direction, it is still worth

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135. *See* Sasson, *supra* note 60.

136. Lisa Stefani, *New Developments in France on the Alstrom Saga: The French Supreme Court Overrules the Paris Court of Appeal's Decision to Deny Enforcement of the Arbitral Award on Grounds of Corruption*, KLUWER ARB. BLOG (Dec. 18, 2021), https://arbitrationblog.kluwerarbitration.com/2021/12/18/new-developments-in-france-on-the-alstom-saga-the-french-supreme-court-overrules-the-paris-court-of-appeals-decision-to-deny-enforcement-of-the-arbitral-award-on-the-grounds-of-corruption [https://perma.cc/G953-5DA].

137. ICSID Convention, Regulations, and Rules, art. 52(1), Apr. 10, 2006, ICSID/15 [hereinafter ICSID CONVENTION].

138. Federal Arbitration Act, 9 U.S.C. § 10 (1925).

139. International Arbitration Act 1994, c. 143A, § 24(a) (Sing.).

140. *See* Michael Hwang SC & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8 ASIAN INT'L ARB. J. 1, 59 (2012).

141. UNCAC, *supra* note 82, art. 5; Anti-Bribery Convention, *supra* note 88, arts. 1, 2.

considering how thorough of a review a court should initiate when corruption is present.

It appears that courts do have an ethical duty to stop corruption and annul or refuse to enforce arbitral awards that would further such illegality. But the court now faces the question of how far to probe into the tribunal's decision and how much *sua sponte* investigation is considered too much by the international arbitral community. As discussed previously, there is minimalist review and maximalist review, but there is also a third option known as a contextual review.

First, a court can conduct a minimal review, as used in minimalist jurisdictions, which includes 1) refraining from evaluating the tribunals' application and identification of law and 2) generally abstaining from re-examining the tribunal's finding of fact.[142] However, a minimal review court does have the ability to reopen the facts if a party presents new evidence of corruption with sufficient weight that likely would have produced a different outcome from the tribunal.[143] Second, a court can initiate a maximal review, as used in maximalist jurisdictions, which some have described as complete scrutiny of the tribunal's decision that examines both matters of law and of fact.[144] Finally, a court can administer a contextual review, which lies between minimal and maximal and is comprised of two steps.[145] First, if the court sees *prima facie* evidence of corruption, the court should commence a preliminary inquest (not complete deference, but also not a full trial) and consider whether the award is worthy of "full faith and credit."[146] If the award cannot receive full faith and credit, the court can move forward with a complete investigation to decide the issues of illegality.[147] Courts have the immense task of determining which level of review is most appropriate while trying not to infringe on the tribunals authority and autonomy if unnecessary. The decision on the level of review when corruption is already suspected can be quite tense, however when new evidence comes to light after the

142. Hwang SC & Lim, *supra* note 140, at 76–78.

143. *Id.* at 78–79.

144. *Id.* at 85.

145. *Id.* at 93–94.

146. Elements to consider in step one are: 1) availability of the evidence of illegality, 2) the process of how tribunal reached their decision on the illegality, 3) the tribunal's level of competency, and 4) the manner in which the arbitration was administered. Specific considerations are given to check if the award was obtained through corruption, fraud, or bad faith. *Id.* at 95–96.

147. *Id.*

tribunal grants the award, the court's decision to investigate becomes a little easier.

2. Appropriate Court Action When Corruption is Discovered After the Tribunal's Final Award

Most national courts will not reexamine the tribunal's decision on illegality. However, jurisdictions will open the door to a new investigation and revision where the evidence needed to bring a claim of corruption or fraud was not available to the alleging party during the hearings before the arbitral tribunal.[148] To induce court revision of an award, the evidence in this type of exception typically must be so powerful that the court would reasonably expect that the tribunal would have decided differently if the party presented the evidence during the arbitration hearings.[149] Revision of an award, just like an annulment, is considered an exceptional solution and is triggered when new facts that were unknown at the time the award was granted are discovered.[150] While revision is not an annulment, it is a stepping stone towards annulment if newly discovered facts of corruption are the reason for the revision request.[151] Being set at such a high bar, however, is not to say courts do not initiate revisions in a number of different jurisdictions and under various sets of rules.

As expected, France is one such jurisdiction that allows revision of an award if evidence of fraud or corruption is discovered after the tribunal has granted the final award.[152] French national courts believe that the presence of schemes intended to hoodwink the arbitrators, if effective, renders the enforcement of the award granted adverse to international public policy.[153] This belief was confirmed in a 1993

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148. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 26.05 (C)(9)(i)(ii) (3d ed. Kluwer Law Int'l 2021).

149. *See id.*

150. Marie Louise Seelig & Anna Giulia Tevini, *Revision Proceedings under the ICSID Convention: Suggestions for a Possible Interpretation of the Prerequisites of Article 51 of the ICSID Convention*, 26 ARB. INT'L 467, 470 (2010).

151. This assertion is based on corruption being a standard violation of public policy, which is held in higher regard then keeping the concept of finality of the arbitral award. *See* section IV(C)(1) above.

152. *See* EMMANUEL GAILLARD & JOHN SAVAGE, *French Law*, *in* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 887, 919 (Wolters Kluwer 1999).

153. *See id.* at 919–20.

decision from the Paris Court of Appeal where it came to light that documents detailing expenses, in which the tribunal based the award on, were fictional.[154] This position was reaffirmed in 1998 in the case of *Thomson C.S.F*[155] and most recently in the *Webcor* annulment.[156] Other jurisdictions also apply this ideal.

The Netherlands and Switzerland both incorporated the idea of revision after the final award, whether by the court or sending the case back to the tribunal, into legislation and court precedent.[157] The ICSID Convention under Article 51(1) states that a party may apply for revision if new facts are discovered that would have a decisive effect on the tribunal's award.[158] Stepping outside of the realm of arbitration, the Protocol on the Statute of the Court of Justice of the European Union allows revision of previous judgments under Article 44,[159] the Statute of the International Criminal Tribunal for the Former Yugoslavia under Article 26,[160] and Article 25 of the Statute of the International Tribunal for Rwanda[161] all express a right to apply for revision that mirrors the reasoning under ICSID Article 51(1). While some of the above listed rules are not focused on arbitration, there is enough combined rules, legislation, and precedent to indicate that revision of arbitral awards is a needed remedy to further the interest of justice,[162] especially in the context of corruption. In addition to the needed remedy of revision to uphold the interest of justice, the court must also consider whether a party can waive the right to object or bring a claim under public policy or if such a right is non-waivable in the context of corruption.

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154. *See id.*

155. *See id.* at 920.

156. *See Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶ 28 "[The rule of waiver] does not prevent the parties from invoking new grievances if they are based on Article 1520(5) of the code of civil procedure and based on what the recognition or execution of the award would manifestly violate, effective and concrete substantive international public order, which, by their nature, may be raised *ex officio* by the annulment judge and raised for the first time before him."

157. *See* Gaillard & Savage, *supra* note 152, at 920.

158. ICSID CONVENTION, *supra* note 137, art. 51(1).

159. Protocol on the Statute of the Court of Justice of the European Union, 2004 O.J. (C 310) 207, art. 44.

160. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 26 (May 25, 1993).

161. Statute of the International Tribunal for Rwanda, S.C. Res. 955, annex, art. 25 (Nov. 8, 1994).

162. *See* Seelig & Tevini, *supra* note 150, at 471.

3. The Failure to Raise Corruption Claims and the Effect of Such Inaction

During a typical court proceeding, most objections or claims not brought by a party in the lower courts are considered waived, or unavailable, when appealing to a higher court. But in the case of corruption, where the international community has said it will not tolerate such action, there is a question of if a party can waive the right to oust illegality, even if they could have raised the issue earlier in the proceeding. While there are not many authorities that have analyzed the question of whether a party to an arbitration may waive objections under the public policy umbrella, the insight found under Article V(2)(b) of the New York Convention for the court to possibly raise potential violations of public policy on their own places this particular issue of waiver in a different category than other failed claims or objections, such as failing to raise procedural unfairness or excess of jurisdiction.[163] The United States Supreme Court has even stated that allowing parties to waive their rights for public policy objections would "effectively negate the court's authority to deny enforcement under Article V(2)(b) . . . elevating the parties contractual choices above the fundamental need of the federal courts to protect their own integrity."[164] While the previous example and the New York Convention deal specifically with recognition and enforcement of awards, it is sensible to apply this same logic to an annulment proceeding; the theory of upholding party choice over a court's ability to combat illegalities and safeguard international public policy is illogical at the annulment level as well.[165]

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163. *See* BORN, *supra* note 148, § 26.05 (C)(9)(m).

164. *Enron Nigeria Power Holding, Ltd v. Federal Republic of Nigeria*, 844 F.3d 281, 288 (D.C. Cir. 2016) (citing *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers of Am.*, 461 U.S. 757, 766 (1983)).

165. There are arguments stating that public policy claims, objections, and reasoning should only be accounted for in enforcement proceedings, as annulments do not legally implement the content of award and thus an annulment court should refrain from imposing their national standards of said public policy on another State where a party intends to enforce the award. Uglješa Grušić & Manual Penades Fons, *Illegality in English Arbitration Law After Patel v Mirza*, *in* CONTENTS OF COMMERCIAL CONTRACTS: TERMS AFFECTING FREEDOMS 381, 398, 400 (Paul S. Davies & Magda Raczynska eds., 2020). However, when there is acceptance at an international level that certain actions are never acceptable, such as corruption, the worry of imposing one State's view of public policy on another is no longer applicable.

On the other hand, a court must consider whether, and for how long, the party who failed to raise the public policy objections had the relevant information to make a claim.[166] A party should not be allowed to hold back public policy objections and then rely on them during an enforcement or annulment proceeding if the party had the applicable knowledge for a long enough period of time to bring a claim.[167] As one court has stated, "to refuse to enforce a valid award in these circumstances would run counter to the strong public policy in favor of arbitration."[168] This raises the issue though of whether corruption is so severe of a violation to public policy that the public policy in favor of arbitration is still not enough to waive a party's rights to object, even if that party had the specific information needed to raise said objection earlier in the process, i.e. ,a non-waivable right.

As stated previously in this essay, corrupt activities present a significant danger to fundamental values and society as a whole, and there is a growing international movement developing international public policy against corruption.[169] Members of the arbitral community have argued that tribunals have an obligation to investigate suspected corruption, even if neither party presents a claim.[170] The question then becomes whether national courts are under the same obligation, or if the judiciary will enforce an award potentially obtained through corruption and allow the suspected corrupt party to benefit from their illegal actions.

Both tribunals and courts have a myriad of factors to consider when examining and reviewing issues of corruption either during the arbitral process or the annulment or enforcement proceedings. And while the arbitration tribunal is inherently separate from the system of the national judiciary, the two systems must work in tandem to ensure that the tribunals' decisions are not thrown out on a whim and the courts' choice to enforce do not further any illegal actions that go against domestic and international public policy. A uniform set of rules does not exist to provide more detailed guidance to either system on what actions are appropriate if, and more likely, when corruption presents itself, and thus different jurisdictions use different approaches, leading to more inconsistencies for proper conduct in this area. If

166. *See* BORN, *supra* note 148, § 26.05 (C)(9)(m).
167. *See id.*
168. *Id.*
169. *See* Koh & Foucard, *supra* note 27, § I.
170. *See id*. § II(2).

tribunals and courts are to reflect the direction taken by the international community and fulfill the obligation to prevent corruption as well as uphold the authority and autonomy of the international arbitration system, both structures must work together and establish firm ground rules.

V. STRIKING A BALANCE BETWEEN A SUFFICIENT STANDARD OF PROOF AND AN APPROPRIATE LEVEL OF REVIEW

National courts and arbitration tribunals have had to orchestrate a dance with one another for decades. Corruption has always been present, but as the world becomes more integrated, with industrialization and technology allowing for further globalization, corruption is able to spread further. The international community has made it clear that corruption cannot stand and expects all States to ensure that corruption is nipped in the bud.[171] National courts are thus put under pressure to stop corruption in their decisions, even if that means cutting off an arbitral tribunal's authority and overruling a final award. However, tribunals should also take note of this growing movement to stop corruption and take steps to halt illegal activities, making sure that courts do not have to annul or refuse to enforce an award, by aligning with the international standard for public policy. Arbitral tribunals and courts thus require a go-to guide on standards of proof for a tribunal and appropriate levels of review for a court when dealing with the presence of corruption. But until there is an international treaty or protocol outlining the actions to take in such circumstances, the tribunals and courts must try to find uniformity in the midst of different jurisdictional rules. The next section will discuss what tribunals can do during arbitral proceedings to prevent corruption from spreading and ensure the final award is upheld, and what actions are appropriate for a court if the tribunal has conducted its own due diligence when reviewing a final award.

171. *See* UNCAC, *supra* note 82, art.5; Anti-Bribery Convention, *supra* note 88, arts. 1, 2.

A. How Tribunals Can Incorporate International Public Policy into the Arbitral Proceedings and Final Awards

Tribunals can prevent challenges to their award and stop corruption by agreeing within the arbitral community on a specific standard of proof to use when corruption is present and by directly addressing said corruption head on. Gone are the days of the "eyes wide shut" attitude in arbitration[172], and tribunals must now face down corruption in a way that is sufficient for any national court system, especially the French national courts who seem to be leading the international public policy charge.

First, tribunals must establish within their own community a uniform standard of proof to use in instances where the tribunal suspects corruption. In the past, tribunals have used the clear and convincing evidence standard as a way of side stepping a question of corruption, instead of directly addressing the issue.[173] However, in todays' globalized world where corruption is an ever-growing threat, avoiding the matter of corruption is no longer an option and tribunals must make determinations on such concerns to avoid annulment or refusal of enforcement, as well as fulfill their ethical duties to the parties and society in general by prohibiting persons from benefiting from illegal activity.[174] For common law jurisdictions, the balance of probabilities is the most appropriate standard of proof, while in civil law jurisdictions, intime conviction is applicable, as it generally produces the same result as the balance of probabilities.[175] The balance of probabilities is better suited for cases of corruption because it allows for more flexibility in evidence for parties while still maintaining a decently high burden of proof, enabling the tribunal to address corruption directly. Balance of probabilities allows for analysis of circumstantial evidence (under the "red flag" test) and adverse inferences,[176] which are crucial where corruption is suspected as

172. IGBOKWE, *supra* note 95, at 39–40.

173. *See id.*

174. *See* Rogers, *supra* note 119, at 998; Mourre, *supra* note 125.

175. *See* van Houtte, *supra* note 32, at 198. Because intime conviction is similar to and typically produces the same results as the balance of probabilities, the rest of this essay will only discuss the balance of probability standard to avoid redundancies.

176. *See* Koh & Foucard, *supra* note 27, § III(1); Hwang SC & Chem, *supra* note 11.

corruption is notoriously difficult to prove[177]. While flexibility in evidence is one part of the balance of probabilities, the other half is using preponderance of the evidence as the burden of proof, making the bar higher than a *prima facie* case but lower than the clear and convincing standard.[178] By keeping the burden of proof somewhat high, the tribunal can make a ruling with reasonable certainty, and by allowing flexibility in evidence, the parties can more easily prove their case.

Second, using the balance of probabilities will also likely avoid more intrusive examinations of the final award by the courts. A tribunal will never be able to lessen the challenges to awards[179] but, by addressing the corruption and doing a more thorough investigation of the potential illegalities, a court receiving an annulment request or refusal to enforce application will be able to make a ruling knowing the tribunal has exhausted its duties in investigating the illegal activity. While applying the balance of probabilities standard is not a guarantee a court will not conduct an intrusive investigation of the tribunal's decision, it does potentially reduce these infringing investigations if the court sees the tribunal has done the work already, unlike if the tribunal had skirted the issue. The arbitral community, knowing investigations will help reduce annulments, refusals to enforce, and invasive judiciary reviews, must also agree *when* a tribunal should conduct an investigation within the arbitral proceedings.

Third, tribunals must act even when the parties do not. When a party raises a claim of corruption, the tribunal will always conduct an analysis. But when a party fails to submit such a claim, and the tribunal suspects corrupt activity, the tribunal should proceed with an investigation on its own. Tribunals should assume a national court will review their rulings as a baseline in determining whether to initiate an investigation into illegal actions. When in doubt, root corruption out. Because of the growing movement in the international space condemning corruption in all its forms,[180] and with jurisdictions already subscribing to this mentality,[181] a tribunal must investigate such

177. *See* Hwang SC & Chem, *supra* note 11.

178. *See id.*

179. Because it is human nature for a party to want to win and have things weigh in their favor.

180. *See* Koh & Foucard, *supra* note 27, § I.

181. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Webcor*, CA Paris, May 25, 2021, No. 18/18708, ¶¶ 67–68; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

action *sua sponte*, not only to prevent a court from overturning an award, but also to reflect the same mindset of what is forming the current international public policy. As with using the balance of probabilities, instigating an investigation if the tribunal suspects illegalities will allow courts to enforce awards knowing the tribunal has done their due diligence. It will likely limit the number of intrusive reviews by a national court and will prevent parties and possibly other persons from benefitting from corruption. Tribunals must take a note from the French national courts,[182] conduct investigations when needed, and, more importantly in the eyes of the French, ensure they are fulfilling their ethical duties by upholding international public policy.

Finally, tribunals must take on the responsibilities of stemming corruption just as States and State entities do under anti-corruption treaties. Tribunals are not an entity of the State like the national judiciary and are thus not held to the same responsibilities under conventions like UNCAC and the OECD Anti-Bribery Convention like the courts are if the State in question is a party to such conventions. However, it is worth noting the international sentiment around corruption and the like, and whether it is in the best interest of the tribunal and the international arbitration community as a whole to incorporate the same ethical duties the courts are subjected to into international arbitral proceedings. International arbitration has built itself on a legacy of businesses, investors, and States being able to trust the process and the finality of the award. If international arbitration does not keep up with international sentiment voluntarily, and more jurisdictions shift to the maximalist ideals, as seen in France, courts are going to annul or refuse to enforce more awards on the basis of international public policy, and the parties that once trusted the process may have second thoughts in putting their disputes in the hands of a system that no longer has sound footing. The international arbitration community should therefore embrace the international movement condemning corruption and treat issues therein as if the same responsibilities found under UNCAC and the OECD Anti-Bribery Convention also apply to arbitral tribunals as they do State entities.

Arbitral tribunals can adjust their actions in a way that does not tear down the institution of international arbitration as the world knows it. By using a uniform standard of proof and taking on an obligation to

182. *Id.*

aid the global fight against corruption, tribunals can maintain trust in the finality of arbitral system by likely reducing the number of annulments, refusals to enforce awards, and overbearing judicial reviews. Once a tribunal has rendered an award, the court must then take up their part of the dance and make sure no toes are injured in the process.

B. Courts Must Ensure Corruption is Stopped Without Infringing on the Arbitral Tribunal's Authority and Autonomy

Courts also have a number of different elements to consider when trying to reach a balance between their obligations to stop corruption and respecting the arbitral institution. However, establishing a uniform way of reviewing arbitral awards is not likely to happen, unless such actions are enshrined in a legally binding international treaty, because each jurisdiction has its owns laws to provide guidance. International guidance on court actions when reviewing an arbitral award involving corruption is an ideal solution, but for the time being, courts should do their best to walk the line between overbearing and blind acceptance. Courts must take into account the concept of international public policy, as set out by existing international treaties like UNCAC and the OECD Anti-Bribery Convention, while respecting the finality of arbitral awards, unless there is a truly exceptional reason to intervene.

The New York Convention, as well as many domestic laws, allow for refusal of recognition and enforcement of an award if the award would violate public policy.[183] Annulment proceedings typically allow annulment along the same reasoning.[184] The term "public policy" is too vague for every jurisdiction to understand the phrase in the same way. However, there is an international consensus that corruption and other similar illegal actions will always go against public policy,[185] no matter which jurisdiction is handling the annulment or recognition and enforcement proceedings. Courts therefore must always consider corruption in any form a violation of public policy on a domestic and international level. Nonetheless, accepting that corruption is a breach

183. *See* New York Convention, *supra* note 42, art. V(2)(b); CODE DU PROCÉDURE CIVILE, *supra* note 68, art. 1520(5).

184. *See* BORN, *supra* note 41, at 375.

185. *See* Koh & Foucard, *supra* note 26=7, § I.

of public policy does not give courts the right to toss the arbitral award to the side and conduct a brand-new investigation in most cases.

National courts are under an ethical duty to ensure violations of public policy are handled[186] and courts have traditionally taken on one of three different levels of review of an award when corruption is suspected. The minimal review indiscriminately follows the decision of the arbitral tribunal and potentially gives too much deference.[187] A minimal review has the capability of letting corruption slip through the cracks if the tribunal has either not addressed an issue of corruption, mishandled the issue, or if part of the tribunal was in on the corruption scheme. While the minimal approach gives the utmost respect to the finality of an award, blind acceptance can lead to funny tasting Kool-Aid. On the other side of the coin, the maximal approach allows the court to almost disregard the decisions of the arbitral tribunal and conduct its own investigation into suspected corruption.[188] The maximal review is also inappropriate in the dance the courts must orchestrate with the tribunals because it strips the tribunal of its independent authority, making the arbitral system almost a part of the judiciary, which can lead to parties' unease in commencing an arbitration for fear the award will not maintain its finality. As seen in France, an overbearing review can render a prior arbitration almost useless.[189] Instead of accepting everything the tribunal decides or ignoring the tribunals decision, courts should adopt a middle ground with the contextual approach. The contextual approach allows for a middle of the road solution where a court can conduct a preliminary overview, so as not to detract from an award's finality, and only if upon that review is it necessary to review further can the court infringe on a tribunal's authority.[190] The contextual way allows courts to retain their ethical duties while respecting the independence of international arbitration proceedings, ensuring the dance ends in a dip and not a drop.

Some extenuating circumstance will, however, require the court to step in. As seen in *Webcor*, when issues of corruption are discovered

186. UNCAC, *supra* note 82, art. 5; Anti-Bribery Convention, *supra* note 88, arts. 1, 2.

187. *See* Hwang SC, *supra* note 140, at 52, 54, 63, 74, 75.

188. *See id.* at 73.

189. *See Belokon*, Cass. civ., Mar. 23, 2022, No. 17-17.981, ¶¶ 14–15; *Santullo Sericom*, CA Paris, Apr. 5, 2022, No. 20/03242, ¶¶ 113–14.

190. Hwang SC, *supra* note 140, at 93–94.

after the tribunal has granted the final award, the court must ensure that the newly discovered evidence is properly analyzed.[191] This does not give the court free reign to reopen the entire previous arbitration proceeding. When a court is faced with such a situation, the court should examine only the new evidence presented or, if the tribunal is not yet disbanded, take the opportunity to send the issue back to the tribunal for a new review. By only reviewing the new evidence or sending the issue back to the tribunal, the courts will once again show respect to the independence of international arbitration while upholding the ethical duties to uproot corruption.

Another murky circumstance a court may potentially need to handle is whether a party's inaction during the arbitral proceedings, or in annulment court if the issue is before an enforcement court, prevents that party from bringing a claim or objection of corruption to the present review. In a traditional common law court system, if a party has knowledge of something but does not bring a claim or objection to the attention of the lower court, that party has typically "waived" that claim or objection and cannot then bring said claim or objection to the appellate court's review. In circumstances of corruption, though, courts must consider the right to claim or object based on grounds of illegality as non-waivable. The courts are held to ethical duties to oust corruption when they find any.[192] There are arguments that tribunals should also investigate suspected corruption regardless of party action.[193] The international community sees corruption as so condemned that it is said to always violate public policy of any jurisdiction.[194] To prevent parties from raising issues of corruption because of previous inaction does not comport with the aforementioned ideals, and to allow persons to benefit from said corruption because of such inaction is illogical. Therefore, courts must always allow for claims and objections based on corruption, regardless of when in the proceedings a party raises them. Prohibiting certain actions based on when a party raises a claim of corruption is not the only issue of timeliness courts should disregard.

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191. *See Webcor*, CA Paris, May 25, 2021, No. 18/18708, §67-68.

192. *See* UNCAC, *supra* note 82, art. 5; Anti-Bribery Convention, *supra* note 88, arts. 1, 2.

193. *See* Koh & Foucard, *supra* note 27, § II(2).

194. *See id.* § I.

Finally, a court must not differentiate between annulment courts and recognition and enforcement courts when reviewing issues of corruption. An annulment court does not legally implement the content of the award, only the enforcement court can implement, as suggested by the name.[195] Because of this, the arbitral community maintains concerns that if an annulment court conducts an investigation into corruption based on the domestic views of what is considered a violation of public policy in that State, that courts will conceivably impose those domestic views on a different jurisdiction where a party intends to recognize and enforce the award.[196] There is an international movement that considers corruption a violation of public policy anywhere in the world, though. So, while the concern of imposing one jurisdiction's laws onto another may have merit in other circumstances, where corruption is the issue, the internationally accepted condemnation of such illegal actions renders said concerns moot. If courts are to truly uphold their ethical duties of ousting corruption, courts must not differentiate between investigating at the annulment court or recognition and enforcement court, and step in whenever corruption present itself.

There are a number of actions both arbitral tribunals and national courts can take to keep the separation and independence of both systems, while at the same time upholding the ever-expanding international concept that corruption is always a violation of public policy, and every jurisdiction must condemn such illegal actions. Although an international treaty or protocol providing guidance to both institutions would make appropriate actions in the face of corruption clearer, finding a balance between the two systems is possible without such an instrument if both tribunals and courts conduct their own due diligence and respect the authority of the other. Until such treaty is drafted, the dance must go on and the two systems must find a way to move together.

VI. CONCLUSION

Corruption and like actions are not a new concept, and with globalization, such illegalities have been able to spread and find their way into previously unchecked areas. Corruption will not disappear and will continue to grow if not actively rooted out by every person or

195. *See* Grušić & Fons, *supra* note 165, at 398.
196. *See id*.

entity with the ability to do so. The presence of corruption creates a particular tension between arbitral tribunals and national courts, with some judiciaries, like the French national courts, conceivably overstepping with their review process of the tribunal's decision and interfering with the finality of arbitral awards by using a public policy exception to annul or refuse recognition and enforcement of awards.

Arbitral tribunals and national courts can, however, find a balance and rhythm with one another by adopting certain actions in each system that assure each institution can uphold their own obligations without stepping on the toes of the other. Tribunals must establish a uniform standard of proof, allowing for greater flexibility in types of evidence considered and a greater degree of certainty in the tribunal's decision, as well as take on an ethical responsibility to oust suspected corruption, with or without party action, to protect the final award from overbearing judicial review. Courts must follow the internationally accepted standard that corruption is a violation of public policy everywhere in the world, not just in certain jurisdictions, to provide a greater sense of uniformity in rulings under the public policy exception. Courts must also only infringe on the finality of an arbitral award when it is found that corruption was either not handled or not handled properly during the arbitration hearings, should only consider the newly discovered evidence if corruption was uncovered after the tribunal granted the award, and should not prevent parties from raising allegation of corruption, even if the party could have made such allegations earlier in the proceedings.

If arbitral tribunals and national judiciaries can alter their ways just slightly and find some kind of uniformity on basic concepts within their own systems, not only will both institutions be able to flow in tandem with one another, but corruption will have one less place to hide. International arbitration and national judiciaries can find a proper balance and bring the benefit of expelling corruption in the process if both systems can learn and execute the appropriate moves.