

Corruption and Contract Validity: The Role of Civil Law and International Instruments

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Send Article Date:22/04/2023 Date of acceptance of the article26/05/2023:

Abstract: This article explores the impact of corruption on contracts and the role of civil law in addressing this issue. By analysing existing literature, country review reports, and case studies, including anti-corruption laws from Algeria and other countries, we examine the intersection between corruption in a criminal context and its implications on contract validity. Measures such as concession withdrawal and debarment as administrative sanctions for corruption are discussed. By examining review reports from different countries (United Nations Office on Drugs and Crime) about implementing Article 34 of the United Nations Convention against Corruption (UNCAC), we observe that most countries still need specific provisions dealing with the consequences of corruption on contracts. Without a specific provision regulating the consequences of civil law corruption, the study aims to highlight the importance of civil law in addressing corruption in contracts.

Keywords: contracts, civil law, corruption, validity, international conventions, Algerian Laws.

Introduction

Corruption is a pervasive problem that requires a multi-dimensional approach to be tackled effectively. Various branches of the law have a role in combating corruption, including tax law, employment law, public procurement regulations, corporate governance, and arbitration. However, the role of civil law in the fight against corruption has often gone unnoticed (Makinwa, 2013).

The issue of corruption in awarding contracts has recently come to the public's attention. A study by Control Risks and Simmons & Simmons found that one in three French companies lost contracts to competitors who paid bribes. The study surveyed 350 companies in seven countries and found that 43% of companies worldwide fell victim to bribery (Colloque et al., 2007).

Although national legal systems rarely include explicit provisions in private law addressing corruption, certain jurisdictions, like Kenya, have incorporated anti-corruption measures into their unfair competition legislation, as Bonell and Meyer (2015) noted.

Hence the importance of private law in combating corrupt practises. International efforts to standardise approaches to addressing the issue of corruption in contracts have also occurred through measures set out in the United Nations Convention against Corruption and the Council of Europe's Civil Law Convention on Corruption. However, treating corruption in civil law remains limited, indicating the need for further research and analysis.

Administrative law provides several mechanisms to combat corruption. One such mechanism is the withdrawal of concessions, which allows the government to revoke a contract or licence obtained through corrupt means. Another important mechanism is debarment, which entails imposing restrictions on individuals or companies guilty of corruption. Specifically, debarment prohibits them from participating in public procurement processes for a specified duration.

Based on these observations, this article focuses on analysing the Algerian legal system, which relies on civil law principles, and the importance of international conventions in the fight against corruption. Algeria has adopted specific legislation, including Algeria's Law No. 06-01, on the prevention and fight against corruption.

The Algerian anti-corruption laws define the substantive offences of corruption in Articles 25 to 47. These offences include bribery of public officials, illicit enrichment, corruption in public procurement, bribery of foreign public officials, embezzlement of private property, and other offences such as traffic in influence and conflict of interest. In addition to these offences, it is essential to note that Article 55 of Algerian Law No. 06-01 on the Prevention of and Fight against

Corruption provides that any contract, licence, concession, or authorization obtained through the commission of an offence under this law may be declared null and void by a court. However, the rights of third parties acting in good faith shall be respected.

Without explicit legislation directly targeting corruption, the civil law framework addresses contract corruption through alternative mechanisms. One such mechanism is the potential invalidity of contracts. It provides an effective deterrent by ensuring parties do not benefit from corrupt activities. By voiding these contracts, civil law upholds the principles of integrity and fairness and protects the entire contractual mechanism.

It is imperative to clearly distinguish between these two types of contracts. Specifically, in international arbitration, contracts procured for corruption and contracts produced by corruption are distinct concepts that warrant different legal treatment. While both categories of contracts share the characteristic of being illegal and unenforceable.

In addition, civil law imposes a duty of good faith on the parties to a contract, requiring that their conduct be characterised by honesty and fairness. If corruption occurs, the party acting in bad faith may be held liable for breaching this duty. In addition, civil law considers corruption to be contrary to public policy and morality, rendering contracts tainted by corruption unenforceable.

The objective of this article is to shed light on the civil law consequences of corruption by meticulously examining pertinent laws, scholarly literature, and case studies. Through this comprehensive study, our contribution aims to enrich the expanding body of knowledge in this field by underscoring the significance of addressing corruption within the framework of civil law and advocating for the establishment of specific legislation that addresses the validity of contracts tainted by corruption.

In our study, we draw on various sources to support our research. These sources include several Country Review Reports, scholarly articles, and books by authors such as Emmanuel Gaillard, Raeschke-Kessler, Michael Joachim Bonell, Olaf Meyer, Cecilia Rose, and others.

Against this background, this article, entitled "*Corruption and Contract Validity: The Role of Civil Law and International Instruments*," addresses the following question:

"How does civil law address the issue of the validity of contracts tainted by corruption? What role do international instruments play in this context?"

To answer the question, this study treats two main axes, namely:

Section 1: Examining Corruption in the Context of Criminal Law

Section 2: Consequences of Corruption

Section I Examining Corruption in the Context of Criminal Law

Corruption comprises a range of activities that can take place between private and public actors or solely between private actors. Scholars and practitioners frequently rely on definitions provided by non-governmental organizations such as Transparency International (TI) due to the need for a universal definition. Transparency International defines corruption as *"the abuse of entrusted power for private gain"* (Chaisse et al., 2021, p. 884). In order to fully understand this section, it is necessary to clarify that corruption is considered a criminal offense in Algeria and several other countries. (I) And Foreign public official bribery in international business transactions (II).

I. The criminalization of corruption in Algeria and other countries

The preamble of the United Nations Convention against Corruption (UNCAC) commences with an overview of the harmful effects of corruption:

"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to human rights violations, distorts markets, erodes the quality of life, and allows organised crime, terrorism, and other threats to human security to flourish." (UNCAC,2003).

The notion of corruption encounters obstacles such as national boundaries, inter-disciplinary demarcations, and intra-disciplinary demarcations. What is accepted in one part of the world could be illegal in another. *Corruption* is a subject that extends beyond law and is studied in various scientific fields. The perspective on the law can vary

throughout different fields, and a definition suitable for one branch may not be appropriate for another (Bonell & Meyer, 2015, p. 5).

Corruption encompasses a range of offenses, including embezzlement, influence trading, favoritism in government contracts, extortion by public officials, corruption of foreign public officials and officials of an international public organization, abuse of power, and illicit enrichment. These violations are punishable by law and can have severe repercussions.

The domestic corruption provisions of the Algerian Penal Code were amended in 2006 following Law No. 06-01 on the Prevention and Fight against Corruption. The Algerian anti-corruption law contains a variety of corruption-related offenses that apply to a wide range of individuals and situations. Corruption can manifest in active and passive forms and influence trafficking (pending influence) and conflict of interest. These potential violations may involve public officials, private individuals, legal entities, foreign public officials, or judicial officials.

As defined by Jaluzot and Meiselles (2009), active corruption is viewed from the perspective of the briber or bribe-giver. Bonell and Meyer (2015) explain that the offense is committed when there are several elements: a bribe-giver, a bribe-recipient, an offer, a promise or provision, and a benefit or advantage. Article 433-1 of the French penal code defines *active corruption* as unlawfully proffering any offer, promise, donation, gift, or reward in order to induce a person to carry out or abstain from carrying out an act about their office, duty or mandate, or to abuse their actual or alleged influence to obtain distinctions, employment, contracts or any other favorable decision (Jaluzot & Meiselles, 2009).

Passive corruption refers to corruption seen from the recipient's perspective, according to Jaluzot and Meiselles (2009). Article 432-11 of the French penal code defines *passive corruption* as the direct or indirect request or acceptance without right and at any time of offers, promises, donations, gifts, or advantages. Various individuals can commit these offenses, including but not limited to public officials (Jaluzot & Meiselles, 2009).

On the other hand, in the Algerian Law n° 06-01 of February 20, 2004, active and passive bribery are defined in Article 25. Active bribery involves promising, offering, or giving an undue advantage to a public official, directly or indirectly, to influence their actions. Passive bribery involves a public official soliciting or accepting an undue advantage to act or refrain from acting on an act relating to their duties. Both offenses require the simultaneous existence of several elements: a bribe-giver, a bribe-taker (a public official), and a direct or indirect offer, promise, request, or acceptance of a benefit or some other unjustified advantage. The briber can be anyone, including legal entities (Algerian Law n° 06-01 of February 20, 2004).

Article 40 of the Algerian anti-corruption Law describes active private-sector bribery as promising, offering, or giving an undue advantage to an individual who manages or is employed by a private-sector entity to influence their actions. Article 40-2 addresses passive bribery as soliciting or accepting an undue advantage to perform or refrain from performing an act that would violate one's duties. The sanction for offering and receiving bribes may include a fine or imprisonment for a term not exceeding five years.

The Algerian anti-corruption law criminalises both active and passive bribery of public officials in the public sector. It also criminalises active and passive bribery of non-public officials in the private sector. This makes bribery illegal in both public and private transactions.

According to Article 55 of Law N. 06-01, which stipulated:

"Any contract, transaction, license, concession, or authorization induced by the commission of any of the offenses provided for in this Law may be declared null and void by the court seized of the matter, subject to the rights of third parties acting in good faith."

Article 55 of Law N. 06-01 states that any contract or transaction influenced by corruption may be declared null and void by the court. This refers to the offences provided for in Articles 25-44 of Law No. 06-01 and does not include the offences prescribed in the Penal Code or other corruption-related regulations.

II. Bribery of foreign public officials

Foreign anti-corruption legislation has developed around the globe. The United States took the initiative in 1977 with the Foreign Corrupt Practices Act (FCPA). Multilateral international treaties followed this in 1998 and 2000 with the Organisation of Economic Cooperation and Development (OECD) Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC).

These treaties compel ratifying nations to implement domestic laws criminalising the payment of bribes to foreign public officials. (Bismuth et al., 2021, p. 64). Under the OECD Convention, it is mandatory to criminalize corrupt behaviour to a limited extent, particularly bribery of foreign public officials by natural and legal persons (Rose, 2015, p. 59). Similarly, the UNCAC also criminalizes bribery of foreign public officials and officials of public international organizations, with a non-mandatory provision for passive bribery (Rose, 2015, p. 108).

As a result of these treaties, many countries have subsequently implemented their domestic legislation to combat the bribery of foreign public officials. These efforts demonstrate a global commitment to fighting corruption and promoting transparency in international business practices.

The FCPA was enacted in response to foreign commercial bribery in the post-Watergate era. It prohibits companies, agents, and employees from making payments or gifts to foreign public officials (Rosst, 2012, p. 445-485). The implementation of the OECD Convention has contributed to the process of globalisation, and the FCPA in the United States has been revised to align it with the OECD standards (Bonell & Meyer, 2015, p. 412).

The FCPA contains two broad categories of provisions: accounting provisions and anti-bribery provisions. The accounting provisions impose various accounting obligations on companies (Geo-JaJa & Mangum, s. d., p. 445-255). They were created to increase the accountability of listed companies by prohibiting the falsification of company accounts and making false and misleading statements to auditors. The Act also mandated an internal control system to ensure that transactions were executed as authorised and adequately recorded (Bonell & Meyer, 2015, p. 425).

The anti-bribery provisions criminalise the bribery of foreign public officials (Geo-JaJa & Mangum, s. d., p. 445-255). These provisions consist of three sections, each applying to distinct types of companies: issuers, domestic concerns, and foreign companies (Rosst, 2012, p. 445-485).

It is essential to understand that several factors are considered in determining whether a company should be prosecuted for violating the FCPA. Companies may benefit from arrangements such as deferred prosecution or non-prosecution agreements as a reward for voluntary disclosure and cooperation (Handmaker & Arts, 2018, p. 132).

The US Department of Justice (DOJ) applies the Foreign Corrupt Practices Act (FCPA) to all acts of bribery within the US. Over the past few years, FCPA enforcement has reached historic highs, affecting individuals and companies in the US and abroad for a wide range of conduct in various locations worldwide (Bonell & Meyer, 2015, p. 426). A notable example of FCPA enforcement is the case of Siemens AG. Following a report in the New York Times on 15 December 2009, Siemens AG pleaded guilty to violating the FCPA and agreed to pay a fine of \$1.34 billion. The settlement includes \$450 million to resolve criminal charges brought by the Department of Justice (DOJ) and \$350 million to resolve civil charges brought by the Securities and Exchange Commission (SEC). In addition, Siemens agreed to pay \$540 million to the public prosecutor in Munich, Germany. The DOJ also charged three wholly owned Siemens subsidiaries with conspiracy to violate the FCPA (Darrough, 2010, p. 255-276).

In July 2011, the UK Bribery Act 2010 came into force, strengthening and supplementing previous criminal legislation. The Act is broad in scope, criminalising both the giving and receiving of bribes, and applies to both public and commercial corruption. The Act gives the UK authorities wide-ranging powers to tackle corrupt practices in the UK and around the world. It applies to all UK-related businesses, including those with offices or operations in the UK (Association of Corporate Counsel, 2013, p.8). The UK Bribery Act has a jurisdictional spread that makes multinational companies vulnerable to its enforcement (Handmaker & Arts, 2018, p. 133).

It is important to note that the FCPA and the UK Bribery Act only criminalise the offering, promising, or giving of bribes to foreign public officials, rather than accepting bribes by those officials.

The Algerian anti-corruption law criminalises both active and passive bribery. Active bribery is the promise, offer, or giving of a bribe to a foreign public official, while passive bribery is soliciting or accepting a bribe from a foreign public official. Article ¹ 28 of the Act provides that active and passive bribery are punishable with imprisonment for two (2) to ten (10) years and a fine of 200.000 DA.

The term "*foreign public official*" is further defined in Article ² 2(c) of the same law, which refers to any person who holds a legislative, executive, administrative, or judicial position in a foreign country. This broad definition implies that even high-ranking officials could face liability under this law if involved in corruption.

Concerning the United Nations Convention against Corruption (UNCAC), it is essential to note that Article 16 is not mandatory. Article 16(1), which relates to active bribery, is a mandatory provision, while Article 16(2), which relates to passive bribery, is a semi-mandatory provision. In other words, States Parties must consider enacting provisions that criminalise passive bribery of foreign public officials (Rose, 2015, p. 108). Criminalising foreign public officials under Algeria's anti-corruption law could have significant diplomatic implications.

Section 2: Consequences of Corruption

In previous sections, we established that Algerian legislation recognizes several forms of corruption directly linked to the consequences of corruption on contracts outlined in Articles 25–44 of Law N.06-01. We also highlighted the importance of foreign anti-corruption legislation such as FCPA and the UK bribery act 2010.

This section focuses on the consequences of corruption and comprises three sub-sections. The first sub-section provides an overview of international conventions and instruments (I), followed by a discussion of specific measures against corruption (II). The final sub-section examines the role of domestic law (III).

I- The United Nations Convention against Corruption (UNCAC) and Civil Law Convention on Corruption

Article 34 of the UNCAC establishes a new legal framework for dealing with the consequences of corruption. This provision addresses the inconsistency that individuals who engage in corrupt activities are subject to prosecution, fines, and imprisonment, while those who benefit from such acts and transactions are not similarly punished. Therefore, Article 34 expands the scope of anti-corruption sanctions to include the consequences of corruption (Makinwa, 2013, p. 367).

Makinwa (2013) explains that Article 34 of the UNCAC explicitly addresses the forms of corruption outlined in Articles 15–25 of the Convention. These articles criminalise national and international corruption (Articles 15 and 16) and private corruption (Article 21). Corrupt contracts can involve parties in either public-private or private-private arrangements. By recognising the direct link between corrupt acts and their consequences, including contracts and concessions, Article 34 extends the reach of anti-corruption measures to private arrangements. The purpose of this provision is not only to provide redress to injured parties but also to deter the corrupt exchanges that lead to such contracts (Makinwa, 2013, p. 368).

According to Lucinda A. Low (2006), Article 34 of the UNCAC breaks significant new ground in international anti-corruption conventions by encouraging the avoidance of contracts tainted by corruption. The first sentence of Article 34 creates a positive (mandatory) obligation for States Parties to take measures to address the consequences of corruption. The second sentence then lists examples of possible legal consequences. However, it does not contain any mandatory requirements in this regard, leaving the specific civil and administrative consequences to the discretion of the States Parties. Rose (2015) also notes that the UNCAC uses vague provisions, which can be observed in Article 34:

“[w]ith due regard to the rights of third parties acquired in good faith, each State Party shall take measures, following the fundamental principles of its domestic law, to address the consequences of corruption. In this context, States Parties may

*consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument, or take any other remedial action”.*³

During the drafting process, consideration was given to including specific and binding language requiring States Parties to ensure that corruption is not a basis for the annulment or withdrawal of a legal instrument. However, this proposal still needs to be adopted. This language would have applied in cases where corruption directly or indirectly influenced the formation of a legal instrument (Rose, 2015, p. 115).

The Civil Law Convention was a cornerstone as it was *"the first attempt to define common principles and rules at the international level in the area of civil law and corruption"* (Young, 2009). Article 8 (1) of the Civil Law Convention states that in most European countries, contracts or clauses of contracts that provide for corruption and have an illegal basis are null and void. In addition, Article 8(2) provides that a contract undermined by corruption may be declared void by the court. Alternatively, the parties may abide by the contract (Sotiropoulou, 2017, p. 637).

According to the Civil Law Convention on Corruption Explanatory Report:

"Paragraph 2 of this article strengthens the civil law as it applies to the fight against corruption by providing for an additional remedy to be available to those who have suffered damage due to an act of corruption. Notwithstanding the right to sue for compensation for damage, any party whose consent to enter into a contract has been undermined by an act of corruption shall have the right to apply to the court for the contract to be declared void. If they decide, it remains open to the parties concerned to continue with the contract. The draught provides that the applicant for such a declaration must be one of the parties to the contract. It remains for the court to decide on the contract's status with regard to all the case circumstances" (Council of Europe, 1999, p. 9).

In summary, Article 34 of UNCAC is a significant development in the global fight against corruption and its consequences. It addresses

the inconsistency of individuals who engage in corrupt activities facing legal consequences while those who benefit from such acts go unpunished. This article expands the scope of anti-corruption measures to include the effects of corruption and recognises the direct link between corrupt acts and their consequences. Although its language may be vague, it creates a positive obligation for States Parties to address the consequences of corruption. The Civil Law Convention also contributes to the fight against corruption by declaring contracts tainted by corruption null and void. These international legal instruments aim to promote accountability, deter corrupt exchanges, and protect the integrity of contracts and legal agreements.

II. Anti-corruption measures

In the previous sub-section, we discussed the crucial role of international instruments such as the United Nations Convention against Corruption (UNCAC) and the Civil Law Convention against Corruption in highlighting the importance of a legal framework to address the impact of corruption on contracts. In order to better understand this issue, we will examine several key issues. First, we will discuss the validity of contracts (II.1). Second, we will examine the withdrawal of concessions (II.2). Third, we will look at debarment as an administrative sanction (II.3). Fourth, we will discuss other measures (II.4). Finally, the third parties acting with good faith (II.5).

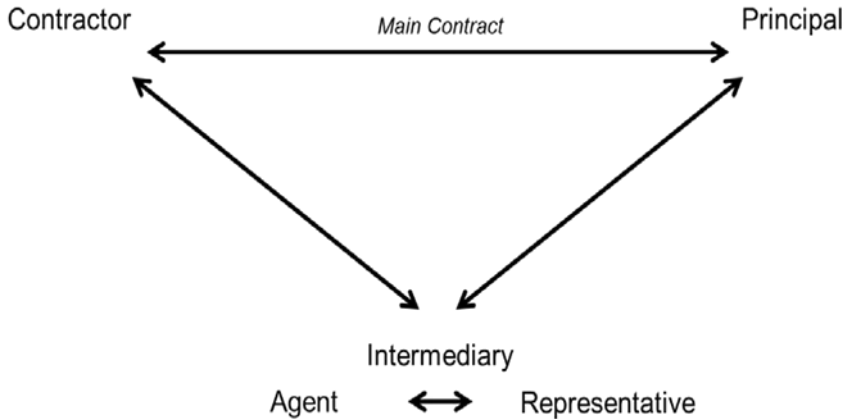
II.1- Validity of Contracts

To address the issue of the validity of transactions tainted by corruption, it is essential to distinguish between two types of contracts: "contracts providing for corruption" and "contracts provided by corruption." The first one is the examination of the legality of contracts between bribe-givers and intermediaries. (II.1.1) while the latter refers to the study of the validity of the main contract, i.e., the agreement between the principal and the bribe-giver (II.1.2).

II.1.1. Validity of Contracts Providing for Corruption

When two parties enter into an agreement to engage in corrupt activities, such as bribery, it is crucial to recognise that corruption is an inherent part of their contractual relationship (Rose et al., 2019). This acknowledgment leads us to explore the significant role played by the "corruption triangle" framework in shaping this agreement between the

agent and the bribe-giver, laying the groundwork for the emergence of a secondary contract born out of corruption (Makinwa, 2013, p. 372). Nonetheless, the inherently unlawful nature of such agreements requires the highest level of secrecy and concealment throughout the negotiation process and subsequent exchange of services. In this arrangement, one party offers or provides an improper advantage while the other party agrees to breach their duties, creating an unbalanced dynamic ⁴ (Bonell & Meyer, 2015, p. 10). However, if we shift our focus to the national level, it becomes clear that the justification for voiding bribery agreements rests on two closely related approaches: arguments of illegality and arguments of immorality ⁵ (Bonell & Meyer, 2015). These approaches provide the basis for justifying the invalidity of such agreements and underscore the recognition that bribery not only violates legal principles but also undermines moral values.



Picture (1): In the triangle model, the parties to the main contract (the contract that performs the respective main performances in the transaction, its essentialia negotii) are located in each of the two upper corners, while one or more intermediaries acting for one or both parties or independently are located at the base of the triangle—picture from Wallgren-Lindholm & Pasila's Article.

However, contracts can encourage corruption when an intermediary is hired to covertly transfer bribes on behalf of the briber. Such agreements may take various forms, including those with agents, representatives, broker-dealers, consultants, joint ventures, partnerships, or other third parties (Bismuth et al., 2021). The associated written contract is often a facade and can take the form of a consulting contract with no actual performance or intention to do so

(Wallgren-Lindholm & Pasila, s. d.). In the case of international bribery, the illicit advantage is often not paid directly to the corrupt agent but through an intermediary who poses as an adviser to the briber (Rose et al., 2019). Thus, intermediaries can play a significant role in facilitating corruption.

In response to this problem, numerous countries have adopted laws aimed at reducing corruption by prohibiting intermediaries in public procurement.⁶ Some have even gone so far as to expressly prohibit brokerage or lobbying agreements. For instance, in 1978, Algeria passed a law banning the use of intermediaries in awarding specific government contracts.⁷ Likewise, Egyptian⁸ law generally prohibits intermediaries unless they are registered consulting firms. These measures are predicated on the premise that intermediary activities pose a significant risk of concealed corrupt activities and that intermediary activities pose a considerable risk of hidden corrupt activities (Raeschke-Kessler & Gottwald, 2008). In contrast, intermediary transactions may be legitimate and necessary in some parts of the world, and any fees paid to intermediaries are not frivolous. Payments to intermediaries should not be intended as bribes or undue facilitation but as compensation for services rendered (Wallgren-Lindholm & Pasila, s. d.).

It is significant to note that using intermediaries in commercial transactions is not illegal or contrary to public policy under US or Swiss law. An example of this is ICC Case 5622 of 1988, in which the Swiss Federal Supreme Court upheld that agency agreements are not illegal under Swiss law unless the parties intended to use the agency agreement as a means of bribery and corruption. The Swiss court found that the Algerian prohibition on intermediaries, even in the absence of bribery, was overbroad and protectionist and aimed at ensuring a state monopoly on foreign trade. Referring to the different hierarchies of directives under Algerian and Swiss law, the court found that such a provision severely attacked the parties' contractual freedom (Schultz et al., 2020, p. 157). Further, different legal frameworks and their impact on intermediary agreements should be taken into account (Schultz et al., 2020, p. 157).

Intermediaries and investors often try to circumvent provisions prohibiting intermediaries by agreeing on a choice of law clause that favours a neutral law allowing intermediaries. For instance, in *OTV v. Hilmarton* in Algeria, the plaintiff (OTA) secured an agency contract for the defendant (Hilmarton) based on legal and tax advice during the tender of public work, even though Algerian law prohibited the use of intermediaries. As a result, the parties agreed to apply Swiss law, which governed the procurement contract. Such a choice of law is valid and supported by the principle of party autonomy⁹ The only constraints on the parties' contractual freedom are universally applicable norms that render any choice of law clause seeking to circumvent them unlawful (Bonell & Meyer, 2015). By doing so, they can bypass rules that forbid the use of intermediaries and involve intermediaries in their transactions.

International arbitration tribunals adhere to the principle of rejecting claims arising out of contracts that involve corruption if the arbitrators are satisfied that there was corrupt intent behind the agreement (Rose et al., 2019, p. 352). The famous 1963 ICC case N. 1110 illustrates how international arbitration tribunals reject claims arising from corruption contracts. A British company used an intermediary to secure a public works contract in Argentina in return for a commission of 10% of the contract value. The intermediary requested arbitration, but Judge Lagergren, acting as the sole arbitrator, declined jurisdiction to hear the case. (Schultz et al., 2020, p. 131) He concluded that the documents submitted by the parties while appearing to be ordinary business documents, provided for Argentine officials' bribery (Lim, 2021, p. 423). Judge Lagergren found *ex officio* that the parties entered the contract with the tacit intention of bribing Argentine government officials (Schultz et al., 2020, p. 131) and thus violated international public order. This case shows how international arbitral tribunals can reject claims arising from corruption contracts.

Title: Corruption and Contract Validity: The Role of Civil Law and International Instruments



Picture (2): Example of Contracts for Corruption: "The contracts were signed by combinations of three different former executives from the engineering giant's SNC-Lavalin International unit".¹⁰

When corruption voids a contract, the issue of reimbursing services already rendered arises. Generally, parties must return any benefits received from the other party when a contract terminates (Rose et al., 2019). However, many jurisdictions do not require refunds for exchanged services. In other words, one party can retain the benefit of the other party's performance (e.g., a commission paid) without providing the corresponding 'services' (Lim, 2021, p. 423). Although this may seem unfair, the potential loss of the intended bribe deters corruption. Overall, the complexity of tackling corruption in contractual relationships and the potential consequences for the parties involved in such arrangements are apparent.

II.1.2 - Validity of Contracts Procured by Corruption

The term 'contract procured by corruption' refers to a contract where the contract itself is lawful, but its conclusion was made possible by a corrupt act, such as bribery. Therefore, different considerations apply when assessing the validity of contracts that have been procured through corruption (Rose et al., 2019). This contract may be totally null and void or voidable, or it may be maintained by adjusting the balance of obligations and consideration (Sotiropoulou, 2017, p. 637).

While international conventions and most legal systems agree that a contract that provides for corruption is always void, opinions differ on dealing with a contract obtained through corruption. In this regard, most national legal systems distinguish between contracts obtained through corruption and contracts that provide for corruption (Bonell & Meyer, 2015, p. 6).

According to the report by Bonello and Meyer, there are three solutions for a contract obtained through corruption: 1) The contract could be considered null and void under all circumstances: 2) The contract may be voidable, and the choice between invalidity and continuation of the contract may be left to the immediate victim; if the victim chooses to keep the contract alive with knowledge of the corruption, it may lose its right to set aside the contract and avoid its obligations. 3) to consider the contract as enforceable, thereby limiting the principal's options to damages or price reduction. The choice between these solutions is left to the discretion of national legislation under international conventions (Wallgren-Lindholm & Pasila, s. d.) (Bonell & Meyer, 2015).

In the context of international investment, a distinct approach exists. In their article, Reschke-Kessler and Gottwald observe that several solutions are available:

"The first argument for invalidity is that national laws may include mandatory provisions establishing corruption as the fundamental basis for invalidity. A contract that occurred under the influence of corruption is void. This position depends on the notion that corruption is unlawful and unethical, and thus courts or arbitral tribunals should not enforce corrupt contracts. In this situation, the host state's law renders the contract null and void. Corruption is deemed sufficient to render a contract void and unenforceable. Typically, the main contract between the host state and the investor follows the rules of the substantive laws of a neutral third country, such as Switzerland. The parties' choice of law expressly precludes the arbitral tribunal from applying the mandatory laws of the host state. Under these conditions, the Swiss Federal Court ruled that the main contract is not unlawful for violating Swiss anti-corruption laws, unethical by Swiss

standards, or in light of foreign mandatory anti-corruption laws." (Raeschke-Kessler & Gottwald, 2008).

"The second argument is that the main contract can be considered invalid on the ground of international anti-corruption policy. The arbitrator must hand down a decision that is internationally enforceable and follows international public policy. Over the past few years, the international community has built a broad consensus against bribery. Anti-corruption has become an international and transnational element of public policy, just like terrorism, drug trafficking, and contraband. There is no international consensus on the legal consequences of corruption. The international community does not support ipso iure nullity, as evidenced by a recent multilateral instrument. The parties to the Council of Europe's Civil Law Convention on Corruption agreed on a solution that leaves the contract valid and only gives the parties the right to declare the contract void by a national court. The rule of ipso facto and ab initio nullity does not belong to civilized states' common legal and moral values and does not exist in international public policy" (Raeschke-Kessler & Gottwald, 2008).

"The third argument for invalidity is based on corruption results in a defect in the respondent state's consent. The state is not obligated by the contract that its corrupt official signed, as it could not exercise its freedom of choice. Numerous international documents support this perspective. The consequence of these provisions, however, is not the ipso facto invalidity of the contract, instead its avoidance at the initiative of the party affected by the defect." (Raeschke-Kessler & Gottwald, 2008).

The same approach seems to be adopted by international arbitration. The seminal case of *World Duty-Free v. Kenya*, a contract-based case submitted to ICSID arbitration, exemplifies this issue concerning state-investor arbitration. The investor obtained the investment agreement for constructing and operating a duty-free complex in Nairobi by paying the then-President of Kenya, Daniel Arap Moi, \$2 million. In his witness statement, the claimant openly acknowledged the payment of a culturally accepted bribe as a "gift."

The tribunal concluded that the investment agreement was voidable under Kenyan law and that Kenya's timely termination of the agreement required the dismissal of the claims (Schultz et al., 2020, p. 131) (Lim, 2021, p. 424).

The Arbitral Tribunal thoroughly examined numerous international awards and national judgments, as well as international legal instruments such as international conventions and declarations of the General Assembly of the United Nations about corruption and bribery in international commercial transactions. As a result of this analysis, the Tribunal determined that claims arising from contracts tainted by corruption or obtained through corrupt means are not admissible before the Arbitral Tribunal (Vadi, 2013, p. 170).

The tribunal declared that the claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of international public order or public order under the contract's applicable laws. The result of the decision ¹¹ is consistent with other decisions that have deemed contracts obtained through corruption voidable. This decision raises complicated concerns regarding the parties' ability to restore their respective performances (Lim, 2021, p. 424).

Corruption has become an essential ground for challenging the enforcement of arbitral awards. French courts have led this fight, using public policy to set aside or refuse enforcement of awards that violate internationally recognised standards. The Paris Court of Appeal has set aside several ICC awards on this basis, including two in 2020 involving fraudulent collusion between a French company and a public official in Libya. French courts have developed a circumstantial evidence standard to prove corruption due to the difficulty of obtaining direct evidence (Rowley et al., 2021, p. 93).

II.2 - Withdrawal of a Concession

Not only private or government contracts can be cancelled due to bribery, but also the decision of an administrative authority (a concession is just one example) should be invalid if obtained in a corrupt way. National law can expressly identify corruption as a reason for the withdrawal of an administrative decision.

It is sufficient if the general rules for defective administrative acts allow for the withdrawal of a concession, license, permit, or similar

decision without major obstacles. In some countries, associations that aim to fight corruption have the ability to take legal action in the public interest to establish the validity of a decision (Rose et al., 2019, p. 53).

As per the legal framework in Algeria, no statutory provisions or statutes facilitate the withdrawal of an administrative decision based on corrupt practises. The Algerian penal code, as well as Presidential Decree N. 15-247 of September 16, 2015, which regulates public procurement, and the Algerian Anti-Corruption Law N. 06-01, through its article 55, offer provisions that enable a court in certain circumstances to nullify contracts, transactions, licences, concessions, or authorizations.¹²

II.3 – Exclusion (Debarment)¹³

The exclusion of corrupt companies from bidding for contracts has become an essential and feared sanction. Debarment should be proportionate and limited in time. In addition, companies should be allowed to demonstrate self-cleaning (Lucinda A. Low, 2006). As a result, debarment is gaining ground as an anti-corruption tool. The concept of debarment appears in international instruments such as the revised WTO GPA text and the revised OECD Anti-Bribery Recommendation (Williams-Elegbe, 2012, p. 37).

According to the UNCAC self-assessment reports, the US and the UK have taken steps to exclude parties involved in corrupt activities from public procurement. The UK has introduced mandatory exclusion for economic operators convicted of corruption or bribery offenses and allows exclusion based on mere bribery allegations (Makinwa, 2013, p. 371). Exclusion is an essential concept in UK public procurement and contained in the EU procurement directives. Similarly, the US has used exclusionary measures against corrupt suppliers since 1928. In South Africa, exclusion is a legislative response to the public service anti-corruption strategy found in several legal instruments (Williams-Elegbe, 2012, p. 37 & 55). The Netherlands also has a mandatory exclusion for bidders convicted of corruption and financial crime offences (UNODC-Country Review Report of Netherland, 2017, p. 143-145).

The Algerian Penal Code provides additional penalties for corruption, including exclusion from procurement contracts¹⁴ (Articles

9 and 16 bis 2). Decree 15-247 issued ¹⁵ on September 16, 2015, regulates public procurement and outlines coercive measures such as inclusion on a list of economic operators prohibited from participating in public contracts and contract termination. Article 18 bis of the Algerian Penal Code ¹⁶ stipulates that legal persons may be held administratively liable for corruption. Such measures include withdrawing their registration or any licence granted to them, temporary or permanent exclusion from participation in public procurement procedures or other commercial activities, and a judicial winding-up order.

In addition to exclusions from public procurement, many international financial institutions and anti-corruption laws, such as the FCPA and World Bank guidelines, mandate exclusions (Williams, 2007, p. 278-305). The World Bank adopts an approach similar to the US, and disqualification is discretionary (Williams-Elegbe, 2012, p. 96). Bank uses two types of disqualification measures: rejection and debarment. Rejection excludes a contractor's bid from a specific procurement process, while debarment disqualifies a contractor from banking contracts for a specific period (Williams-Elegbe, 2012, p. 60).

II.4 Additional Measures

Article 34 encourages states to prevent corruption by any means necessary. If authorities determine that a company predominantly engages in corrupt activities, they can close it down. Additionally, accountable company members may be subject to professional suspension and exclusion from company management for several years. The disqualification of directors is one instrument that can combat corruption. This administrative proceeding prohibits a person from serving as a company's director and places additional restrictions on their activities. A disqualification order stipulates that a person may not serve as a company director, act as a receiver of a company's property, or participate in a company's promotion, formation, or management without the court's permission for a specified period (Rose et al., 2019, p. 355-356).

Additionally, the order disqualifies the individual from serving as an insolvency practitioner. A disqualification order prohibits a person from serving as a company director, but they may continue to

operate as a sole proprietor or in a partnership. Companies can be as small as a private company or as large as a multinational company (Du Plessis & Nel de Koker, 2017, p. 38). A company that engages in corruption can also anticipate losing subsidies and tax exemptions. Corruption can result in the loss of export insurance in international commerce, and the convicted agent risks losing his retirement savings. The public announcement of a conviction after criminal proceedings, resulting in a loss of reputation and trust, is another deterrent measure.

II.5 The right of the third parties acting with good faith ¹⁷

Article 34 of the United Nations Convention against Corruption (UNCAC) states that due regard shall be given to third parties who have acquired rights in good faith. This provision protects the interests of third parties who have acted in good faith instead of those who have acted in bad faith.

The right to avoid a corrupt contract applies to third parties in several jurisdictions. It implies that a third party may interfere with the principal's decision to uphold the contract, preventing its fulfilment (Bonell & Meyer, 2015, p. 23).. In the case of uninvolved third parties who have not participated in the corrupt behaviour in any way, the law of the state may intervene in their favour with specific protective mechanisms (Rose et al., 2019, p. 351). For example, many legal systems provide for a good-faith acquisition if the acquirer could not have known that the transferor had not been the rightful owner of the transferred property right because of a previous act of corruption (Rose et al., 2019, p. 351). Likewise, it is possible in individual cases to refrain from the withdrawal of an administrative authorization granted by corruption if uninvolved third parties have relied on it and a withdrawal would cause them considerable disadvantage.

On the other hand, third parties who have consciously and deliberately contributed to the corrupt agreement do not deserve protection (Rose et al., 2019, p. 351). As mentioned in this paper, intermediaries whose services have been used to facilitate bribes the law in this situation may provide that no right exists to claim payment of the fee promised for the facilitation. Another example is that banks involved in transferring bribes in breach of banking standards are not protected as good-faith third parties. (Rose et al., 2019, p. 351).

The Algerian anti-corruption law explicitly protects the rights of third parties acting in good faith. Article 55 of the law states that any contract, transaction, license, concession, or authorization obtained through the commission of an offense under this law may be declared null and void by the court. However, this is subject to the rights of good faith third parties. This provision raises the question of how a repressive jurisdiction can effectively appreciate and protect the rights of third parties acting in good faith?

III. Domestic Law

Generally, any contract with an object contrary to imperative laws, public policy, ethics, and moral standards is null and void (Lew, 1987, p. 83). Commentators and jurisprudence recognise that unlawful transactions contrary to the law, public order, or morality are null and void and give rise to civil liability. In the absence of a specific regulation, some parts of the contract resulting from acts of corruption can be classified as unlawful if they are contrary to public order or morality¹⁸ (Alpa & Zeno-Zencovich, 2007, p. 11).

Under Swiss law, the consequences of corruption are determined by general principles of civil law regarding contract nullity and contract law. A contract is considered null and void if its subject matter is impossible, illegal, immoral, or corruption has influenced its content. However, no specific provision in Switzerland outlines the consequences of corrupt practices (UNOCD, 2012). Dutch legislation provides various means to contest agreements involving corruption in the Netherlands.¹⁹ Such agreements may be void on the grounds of incompatibility with public morality or public order or declared void on the ground of vitiated consent. Proceedings may also be instituted based on an unlawful act (UNODC, 2013).

Malaysia²⁰ has a variety of legal frameworks that address the consequences of corruption under civil law. Sections 24 and 25 of the Contracts Act of 1950 provide for the nullification of contracts if specific terms are unlawful (UNOCD, 2013b). The United States has adopted measures to redress acts of corruption, including criminal, civil, and administrative sanctions. Individuals may also bring private actions for monetary damages. The FCPA addresses foreign bribery, and the government can cancel or void fraudulently obtained contracts.

The government may also administratively debar a private company from receiving further contracts based on corrupt acts (UNOCD, 2011).

Oman has measures in place to address corruption during the tender award stage. Article 41 of the Law on Procurement provides for the disqualification of a tender in violation of Royal Decree No. 112/2011. However, outside the procurement process, there are no provisions to address the consequences of corruption (UNOCD, 2015). Algeria has established legal provisions to address the consequences of corruption within its domestic law. Specifically, Articles 96 and 97 of the Algerian Civil Code provide for the nullity of contracts. Additionally, Article 55 of Algeria's Anti-Corruption Act provides for contract termination. It considers that any concession, licence, or transaction may be null and void in cases where the contractor has been convicted of corruption offences under the same law (UNOCD, 2013a).

Several countries have established legal frameworks to address the consequences of corruption within their domestic laws. These frameworks encompass various areas of law, including civil law, procurement law, administrative law, and other relevant legislation. Notably, countries such as France, Belgium, Australia, Canada, Ireland, Brazil, Cambodia, the Czech Republic, Ethiopia, Lebanon, the Sultanate of Oman, Brazil, Ethiopia, Bulgaria, Armenia, Cambodia, Greece, the Philippines, Samoa, Sri Lanka, Nigeria, the République Centrafricaine, Malaysia, Switzerland, the Netherlands, the USA, and Thailand have implemented such frameworks. However, it should be noted that the legislation on this topic varies among states, each with unique characteristics. For instance, while some states have legal frameworks for civil and procurement law, they lack specific legislation that directly implements Article 34 of UNCAC.

In contrast, Algeria has a statutory regulation dealing specifically with the civil law consequences of corruption. Anti-corruption ²¹ law N.06-01 includes Article 55, which addresses the consequences of corruption as outlined in Article 34 of UNCAC. Similarly, Italy's Legislative Decree 163/2006 contains Article 135, which provides for the termination of a contract or withdrawal of qualification in cases where a contractor has been convicted of corruption. Our findings suggest that most experts who have examined these various legislations

have concluded that provisions within civil law and procurement law are sufficient to implement Article 34 of UNCAC successfully.

Conclusion

In conclusion, this article has demonstrated the significant challenge posed by corruption in both national and international contexts. It has shown the need for a multidimensional approach to effectively combat corruption and highlighted the important role of civil law in addressing this complex problem.

In this article, we have conducted a detailed analysis of the civil law consequences of corruption on contracts. Our exploration of domestic contract law and international conventions against corruption has deepened our understanding of the impact of corruption on contracts. We have found that contracts providing for corruption, agreements between bribe-givers and bribe-takers (intermediaries), are invalid. However, contracts procured by corruption, which are between the principal and the bribe-giver, may not be subject to the same legal consequences.

Additionally, this article has highlighted the effectiveness of legal frameworks in the fight against corruption. We have demonstrated the crucial role of general contract law and international arbitration in addressing corruption within contracts. Furthermore, we have emphasized the importance of national courts in enforcing contracts tainted with corruption.

Finally, this study has identified several avenues for future research. For example, the rights of parties to claim damages involving contracts tainted with corruption is an exciting area that warrants further exploration.

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¹ Article 28 of the Act provides that: *"Shall be punished with imprisonment for a term of two (2) to ten (10) years and a fine of 200.000 DA." (1) The promise, offering, or giving to a foreign public official or an official of an international public organization, directly or indirectly, of an undue advantage, for himself or another person or entity... (2) The fact that a foreign public official or an official of an international public organization solicits or accepts, directly or indirectly, an undue advantage for himself or another person or entity...*

² Article 2 c of Algerian anti-corruption law N. 06-04: *"Foreign public official: means any person holding a **legislative, executive, administrative**, or judicial office from a foreign country, whether appointed or elected, and any person exercising a public function for a foreign county. Including for a public agency or public enterprise."*

³ Article 34 of United Nations Convention Against Corruption (UNCAC), 2004

⁴ *"...Negotiations in international business transactions are frequently conducted by agents, consultancies, or distributors. The function of these intermediaries is to represent the interests of the foreign undertaking in countries in which they themselves are not present, and to act on their behalf. Such action may take the form of market analysis, winning of customers and contracts, looking after existing customers, and the negotiation and conclusion of contracts. The advantage of the agent lies first and foremost in his or her personal connection to the territory concerned and, in his ability, to win business for their principal in that region. The agent will speak the local language, know the customs, and should also have knowledge of the local legal system. Given the key role they can play in international business, the recruitment of agents or advisors, consultants, etc. has become at the same time unavoidable and not without risk. Intermediaries work independently; they are self-employed and therefore not bound by the guidance or instructions issued by the company to its employees..."*

⁵ See Article 96 & 97 of Algerian civil code.

⁶ *"... banning intermediation in public procurement is not an international imperative rule, many countries, typically the capital-exporting or home countries of investors, do not even disapprove the intermediary's activities...."*

⁷ See Law N. 78-February February 02 11, 1978, relating to the state monopoly on foreign trade, Official Journal of the Algerian Republic, February 14, 1978, especially Article 9.

Title: Corruption and Contract Validity: The Role of Civil Law and International Instruments

⁸ Egyptian law generally prohibits the activity of intermediaries unless the intermediary is a registered consultant firm (Articles 105–8 of the Egyptian Penal Code No. 58 of 1937, as amended by Law No. 95 of 2003).

⁹ Art 3 of the Rome Convention on the Applicable Law to contractual relations reads: “*A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.*”

¹⁰ “... *Cadber Investments S.A. is an offshore company that was set up in 1999 through Mossack Fonseca, the Panamanian law firm that is the source of the massive Panama Papers data leak. The company was administered by a Royal Bank of Canada arm in Switzerland. Payments to Cadber Investments stemmed from six contracts with SNC from 2000 to 2004 for services as a representative and commercial agent. The contracts covered hundreds of millions in infrastructure deals SNC was seeking in Algeria, including a \$750-million contract it obtained to build a water treatment plant in **Taksebt**. Former SNC executive vice-president Riadh Ben Aïssa pleaded guilty in Switzerland in 2014 to paying bribes to Saadi Gadhafi, son of Moammar Gadhafi, in order to land contracts for SNC in Algeria’s neighboring country ...*”. available at <https://www.cbc.ca/news/business/panama-papers-snc-lavalin-contracts-secret-offshore-company-algeria-1.3586953> (visited February, 2023)

¹¹ The arbitral tribunal stated that: “*In light of domestic laws and international conventions relating to corruption and in light of the decisions taken in this matter by courts and arbitral tribunals, this tribunal is convinced that bribery is contrary to international public policy, or most, if not all, states, or, to use another formula, to transnational public policy.*”

¹² Article 55 of the Algerian anti-corruption law N° 06-01 of 26, February 2006, provides: “*Any contract, transaction, licence, concession, or authorization induced by the commission of an offence under this Act **may be declared null and void** by the court subject to the rights of bona fide third parties.*”; see articles 9, 18 bis, and 16 bis 2 of the Algerian penal Code, see the footnote mentioned above.

¹³ Different words are used: “*debarment*”, “*exclusion*”, “*blacklisting*”, “*Rejection*” or “*disqualification*”.

¹⁴ Article 9 of the Algerian penal Code: “*The additional penalties are: 1 - legal prohibition, 2 - prohibition from exercising civil, civic and family rights, 3 - house arrest, 4 - prohibition of residence, 5 - partial confiscation of property, 6 - temporary prohibition from practicing a profession or activity, 7 - closure of an establishment, 8 - **exclusion from public procurement**, 9 - prohibition from issuing checks and/or using payment cards, 10 - withdrawal or suspension of a driver’s license or cancellation with prohibition from applying for a new license, 11 - withdrawal of passport, 12 - dissemination or display of the judgment or decision of conviction]* ; and, the Article 16 bis 2 of the Algerian penal Code: “*The penalty*”

of **disqualification from public procurement** involves prohibition from participating, directly or indirectly, in any public procurement, either permanently or for a maximum period of ten (10) years in the event of a criminal conviction and five (5) years in that case Conviction for misdemeanour. The provisional implementation of this measure can be ordered.”

¹⁵ Article 89 of Presidential Decree N° 15-247 of September 16, 2015, regulating public procurement and public service delegations: “*without prejudice to any criminal proceedings, anyone involved in acts or maneuvers aimed at offering or granting, directly or indirectly, to a public official, either for himself or for any other entity ... to terminate or annul the procurement contract or ... and to include the company concerned on the list of economic operators prohibited from participating in public contracts. ...*”

¹⁶ Article 18 bis of the Algerian penal Code: “*The penalties incurred by the legal person in criminal and misdemeanor matters are: ... 2 - One or more of the following additional penalties: ... - exclusion from public procurement for a period not exceeding five (5) years ...*”

¹⁷ “Bona fede” means “good faith”.

¹⁸ ‘**Public morals**’ refer not only to the many aspects of sexual morality, as is often assumed (and as everyday language would imply), but rather the entire range of social and moral principles on which a society is based, and which are respected by the majority of its members.

¹⁹ Article 3:40 Civil Code 1. “A legal act that, by its contents or necessary implications, violates public morality or public order, is null and void. 2. A legal act that violates a statutory provision of mandatory law is null and void; yet, if this statutory provision merely intends to protect one of the parties to a multilateral legal act, then such a legal act can only be deemed voidable, unless the necessary implications of the provision dictate otherwise. 3. The preceding sub-section does not concern statutory provisions that do not purport to render a conflicting legal act invalid.”

Article 6:104 Civil Code “If someone, who is liable towards another person on the basis of tort or non-performance, has gained a profit because of this tort or non-performance, the court may, upon the request of the injured person, estimate the damage/loss in line with the amount of this profit or part thereof.”

Article 6:162 Civil Code (Unlawful act) “1. Anyone who commits an unlawful act vis-à-vis another person, which can be attributed to the former, shall be obliged to compensate the damage sustained by the other person as a consequence of such act. 2. An unlawful act shall be considered an infringement of a right or an act/omission contrary to a statutory duty or proper behaviour in social life under any unwritten rule, unless there is a ground for justification. 3. An unlawful act may be attributed to the perpetrator, if it is due to the perpetrator’s fault or due to a cause for which the perpetrator can be held responsible according to the law or general practice.”

Article 6:170 Civil Code “1. *The person in whose service a subordinate fulfils his duty is liable for damage/loss caused to a third party by a fault of this subordinate, if the risk of the fault has been increased by the assignment to fulfil this duty, and the person in whose service the subordinate was, had - because of the legal relationship between him and the subordinate - control over the behaviour which constituted the fault. (...)*”

Article 6:172 Civil Code “*If a representative, in the exercise of his powers vested in him under the authorization of representation, commits a fault which causes damage/loss to a third party, then the represented principal, as well, is liable towards this third party.*”

²⁰ A. Contracts Act 1950 (Act 136):

Section 24. “*The consideration or object of an agreement is lawful unless- (a) it is forbidden by law; (b) it is of such a nature that, if permitted, it would defeat any law (c) it is fraudulent; (d) it involves or implies injury to the person or property of another, or (e) the court regards it as immoral, or opposed to public policy.*”

Section 25. “*Agreements void if considerations and objects unlawful in part If any part of a single consideration for one or more objects, or any part of any one of several considerations for a single object, is unlawful, the agreement is void.*”

²¹ Article 55 « *Tout contrat, transaction, licence, concession ou autorisation induit par la commission de l'une des infractions prévues par la présente loi peut être déclaré nul et de nul effet par la juridiction saisie sous réserve des droits des tiers de bonne foi.* »