SHORTER ARTICLES, COMMENTS, AND NOTES

INTERNATIONAL ARBITRATION AND ENGLISH COURTS

The Court of Appeal, Civil Division, Longmore LJ, on 24 January 2007 handed down a decision in Fiona Trust v Privalov which clarifies the relation between sections 9 and 72 of the Arbitration Act 1996; affirms, again, in strong terms the separability (or severability) of an arbitration clause from the contract in which it is included; and, apparently for the first time in English courts, establishes that allegations of bribery may be subject to the jurisdiction of an arbitrator. The decision therefore holds interest in relation to the enforcement in the United Kingdom of agreements to arbitrate and, more generally, supports the position that arbitration has a role to play in international efforts to combat corruption.

I. BACKGROUND[1]

The case arose out of charterparties (agreements to charter ocean-going vessels) between Sovcomflot Group, the leading Russian ship-owning group, and companies owned or controlled by Yuri Nikitin, a Russian businessman. Among other activities, Sovcomflot, through subsidiary firms, each owning a single ship, hires out its ships to charterers. The Nikitin companies are charterers. The Nikitin companies chartered a number of Sovcomflot vessels. However, Sovcomflot now alleges that Nikitin or his associates bribed Yuri Privalov, who was at the time manager of the Sovcomflot office in London, in order to procure the charterparties on terms so favourable to Nikitin as to be, if not unconscionable, then commercially unviable for Sovcomflot. Sovcomflot (with Fiona Trust and other Sovcomflot affiliates) seeks substantial damages in the English courts from Nikitin and his associates (Privalov among them).[2] Sovcomflot takes the position further and asserts that it is under no obligation to continue to perform under the terms of the allegedly corrupt charterparties.

[1] At time of publication, the case was on appeal, by permission of the House of Lords granted 29 March 2007: [2007] Bus L R 686, 704. The Court of Appeal had restrained arbitration, pending a House of Lords decision whether to grant appeal. The Court of Appeal, on 24 April 2007, held that arbitration may continue on the conditions (i) that findings reached in arbitration be without prejudice to any question currently before the courts; (ii) that respondents be allowed to appoint their own arbitrator (a right on which they earlier had defaulted); and (iii) that, in the event that the House of Lords finds the arbitration clause infirm and the matter thus not arbitrable, appellants bear any additional costs resulting from arbitration: [2007] EWCA Civ 414, Longmore LJ, paras 1–2, 15. The Commercial Court in a related proceeding on 21 May 2007 acknowledged the appeal on the arbitration point, but said that it was not material to the matter before it (a request by Fiona Trust to freeze certain defendants' assets): [2007] EWHC 1217 (Comm) Steel J, paras 15–16.

[2] Sovcomflot's claims and the business structure of Sovcomflot and of the Nikitin concerns are described in the High Court judgment of 20 October 2006: *Fiona Trust v Yuri Privalov* [2006] EWHC 2583 (Comm), [2006] All ER (D) 254 (Oct), Morison J, paras 2–7, hereinafter '*Privalov* (Comm)'.

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The charterparties provide that they 'shall be construed and the relations between the parties determined in accordance with the laws of England'; and that any dispute 'arising under' them shall be decided by the English courts.[3] Sovcomflot proceeded on these provisions for choice of law and jurisdiction and instituted legal action against Nikitin in the English courts.

However, the charterparties also provide as follows: 'Notwithstanding the foregoing . . . either party may, by giving written notice of election to the other party, elect to have any such dispute referred… to arbitration in London.'[4] Nikitin seeks to arbitrate in London under the Terms of the London Maritime Arbitrators' Association.[5] His firms indeed referred the matter to arbitration and appointed a sole arbitrator. Sovcomflot, as claimant in the English courts, sought to block this move. Specifically, referring to section 72 of the Arbitration Act 1996, Sovcomflot applied for the Commercial Court to make an injunction against the arbitral proceedings. The asserted basis for an injunction was that the charterparties had been procured by bribery with the result that they are now rescinded and their arbitration provisions inoperative. If Sovcomflot's position were correct, then there would be no arbitration clause and, thus, there could be no arbitral jurisdiction. Nikitin and his associates, as defendants, applied under section 9 of the Arbitration Act 1996 for the court to stay judicial proceedings. The defendants' position was that the contracts were good and remained in force and, in any event, that the arbitration clauses give the arbitrator jurisdiction to hear Sovcomflot's allegations of bribery. Put simply, Fiona Trust seeks a day in English court; Privalov seeks to arbitrate.

Morison J, for the Commercial Court (High Court of Justice, Queen's Bench Division), stayed arbitration proceedings under section 72 and declined to stay judicial proceedings under section 9.[6] Privalov and other defendants appealed.

II. SEPARABILITY OF THE ARBITRATION CLAUSE

The position now is well established that an agreement to arbitrate is a separate agreement, severable from the substantive contract to which it relates. This extends so far as to say that an arbitration agreement, prima facie validly concluded, may apply even to allegations that the substantive contract was the result of fraud or is otherwise voidable. According to Schwebel: 'Even if it be argued . . . that the principal agreement is invalid . . . nevertheless the arbitral agreement is separable and separated, and, so separated, survives to furnish a viable basis for the arbitration tribunal to rule upon such arguments . . .'[7] Supporting this doctrine of the autonomy of the arbitration clause is the concern that, without it, arbitration could be avoided simply by making a credible allegation of invalidity—such as on grounds that bribery procured the contract. The

[3] [2007] EWCA Civ 20, [2007] All ER (D) 169 (Jan), para 5, herinafter '*Privalov* (Ct App)', quoting charterparty, para 41(a), (b).

[4] ibid, quoting charterparty para 41(c).

[5] <http://www.lmaa.org.uk/terms/lmaaterms2006.pdf>.

[6] *Privalov* (Comm), paras 48–9.

[7] SM Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications, Cambridge, 1987) 4–5. See to similar effect P Weil, 'Les Clauses de Stabilisation ou d'Intangibilité Insérées dans les Accords de Développement Economique', in CE Rousseau, *Mélanges Offerts à Charles Rousseau* (Pedone, Paris, 1974) 301, quoted by Schwebel, ibid 45.

presumption thus is strong, that an agreement to arbitrate contained in the contract is separable and forms the basis of the jurisdiction of the arbitral tribunal to decide even the issue of validity. Various arbitration rules, as well as national legislation such as section 7 of the Arbitration Act 1996, now embody separability doctrine.[8]

Separability (or severability) is applied by international arbitral tribunals, both in cases where the underlying agreement is alleged to have been terminated and in cases where it is alleged to have been invalid or non-existent *ab initio*. The Preliminary Award in *Elf Aquitaine Iran v National Iranian Oil Company* (1982) called separability 'a generally recognized principle of the law of international arbitration'. The Award further said that, '[t]he jurisdiction of an arbitrator . . . designated in accordance with an arbitration clause is unimpaired, even though the contract containing the arbitration clause is alleged to be null and void'.[9] National courts have taken a similar position. The United States Supreme Court in *Prima Paint*, its leading case on the question, stated:

> [A]rbitration clauses as a matter of federal law are 'separable' from the contracts in which they are imbedded, and . . . where no claim is made that fraud was directed *to the arbitration clause itself*, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.[10]

The rule in *Prima Paint* has guided US courts since.[11] Courts in other jurisdictions have presumed the severability of the arbitration clause as well, allegations of fraud concerning only the underlying agreement seldom, if ever, being taken to invalidate the arbitration clause.[12]

The main question in practice, therefore, usually will be whether the alleged defect (whatever the misconduct or mistake giving rise to it) relates directly to the arbitration clause. The Court of Appeal in *Privalov* affirmed this in clear terms, saying that the question to be answered 'is whether the assertion of invalidity goes to the validity of the arbitration clause as opposed to the validity of the charterparties as a whole.'[13]

According to the Court, the arbitration clause must be 'directly impeached' if it is to be found invalid by an English court. This borrowed the language of Steyn J in the decision at first instance in *Harbour v Kansa*,[14] and reviewed the development of separability doctrine in English jurisprudence generally.[15] The doctrinal position as reflected in the case law is clear enough. The analytic challenge is to define what

[8] Among arbitration rules, see eg ICC Rules, Art 6; UNCITRAL Model Law, Art 16(1); UNCITRAL Rules, Art 21(2).

[9] (1986) 11 Ybk Commercial Arbitration 98, 102, quoted by Schwebel (n 7) 55. See also *Lena Goldfields*, reported, *The Times* (London, 3 Sept 1930) 7, reprinted in (1950) 36 Cornell LQ 31; *BP Exploration Company (Libya) Ltd v The Government of the Libyan Arab Republic* (1973) 53 ILR 297.

[10] *Prima Paint v Flood & Conklin Mfg Co* 388 US 395, 402 (1967, Fortas J) (emphasis added).

[11] eg, in *Campaniello Imports Ltd v Saporiti Italia* 117 F 3d 655 (2d Cir 1997); *Shearson Lehman Brothers, Inc v Kilgore,* 871 SW 2d 925 (Tex Ct App 1994); *Teledyne, Inc v Kone Corp* 892 F2d 14404, 1410 (9th Cir 1989); *Republic of the Philippines v Westinghouse Electric Corp* 714 F Supp 1362 (DNJ 1989).

[12] See eg Judgment of 30 May 1994, (1995) 20 Ybk Commercial Arbitration 745 (Tokyo High Court); Judgment of 13 February 1978, (1981) 6 Ybk Commercial Arbitration 228 (Corte di Appello di Napoli).

[13] *Privalov* (Ct App), para 25.

[14] [1992] Lloyds Rep 81, 92, quoted at *Privalov* (Ct App), para 23.

[15] *Privalov* (Ct App) paras 23–4, discussing *Heyman v Darwins Ltd*; and *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784.

degree of directness in the relation between an alleged fraud and the arbitration clause can be tolerated, before the clause fails. The Court of Appeal did not say that this was a matter of distinguishing between a 'but for' theory of causation and the view that proximate cause is the legally relevant degree. It may be submitted, however, that a trace of such distinction can be seen in the Court's analysis. The Court summarized Sovcomflot's submissions, based on statements by one of its witnesses. The witness said that 'the owners would not have made any contract *at all* with the charterers if they had been aware that their employees had been bribed.'[16] Sovcomflot took the position then in effect that, but for the bribes, there would have been no contract, and argued from this that the contract, arbitration clause and all, must be taken as impeached. The relation between the bribe inducing the substantive terms of the contract and the arbitration clause within the contract, however, was too tenuous. The bribe, to have undermined the arbitration clause, would have had to have been directed to the clause itself—or, put in terms of causation, the bribe would have had to have been the proximate cause of Sovcomflot's acceptance of the arbitration clause—not merely a 'but for' cause. Whether or not the Court deliberately applied the theory of proximate cause,[17] it was clear that the doctrine of separability, on the facts, insulated the arbitration clause from the alleged bribes. Moreover, a stay of arbitration in the circumstances would have been 'a potential breach of the United Kingdom's international obligations in relation to commercial arbitration'.[18]

III. CONSTRUCTION OF SECTIONS 9 AND 72 OF THE ARBITRATION ACT 1996

Privalov presents a question likely to recur in the English courts—the proper relation between adjudication and arbitration—and where it does,[19] parties may approach the question with competing arguments based on sections 9 and 72 of the Arbitration Act 1996. Morison J, for the Commercial Court, considered the discretion afforded judges under section 72 of the Arbitration Act 1996 to issue stays in the interest of judicial economy. He said on that point: '[T]he Court and not the arbitrator should decide the jurisdiction issue'. Acknowledging that 'the modern trend is to treat the arbitrators as having power to decide for themselves their own jurisdiction [*Kompetenz Kompetenz*]', Morison J nevertheless concluded that 'English Law gives the Courts the ultimate right to determine such issues'. The decision of the Commercial Court went on to express concern that the issues arbitrated might be revisited in court, thus producing 'a considerable waste of resources'. In such terms was support identified for applying section 72 in preference to section 9.[20]

[16] Emphasis added: *Privalov* (Ct App), para 25.

[17] If it had wanted to do so, the Court could have referred, inter alia, to Art 14(4)(a) of the 1961 Harvard Research Draft on the International Responsibility of States for Injuries to Aliens, requiring a 'reasonable relation' between impugned conduct and detriment: LB Sohn and RR Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 AJIL 548. Compare to Art 31 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (GA Res 56/83 of 12 December 2001, annex).

[18] *Privalov* (Ct App), para 31.

[19] Indeed, it already has. See *Albon (t/a NA Carriage Co) v Naza Motor Trading SDN BHD* [2007] EWHC 665 (Ch), Lightman J, paras 13–15.

[20] *Privalov* (Comm), para 26.

The relevant part of section 72 of the Arbitration Act 1996 provides as follows: (1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question (a) whether there is a valid arbitration agreement . . . by proceedings in the court for a declaration or injunction or other appropriate relief.

To plead the converse—that court proceedings should be stayed in favour of arbitration—a party (the defendants here) may refer to section 9(1), which says:

> A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

The Court of Appeal, reversing the High Court judgment, was clear that a stay of arbitration is an appropriate remedy, only where it already has been determined that there is no valid arbitration clause. To grant a stay otherwise would be to over-extend section 72. Longmore LJ considered section 72, in particular with a view to identifying the appropriate scope of its operation:

> This combination of sections shows . . . that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. In these circumstances, although it is contemplated also by section 72 that a party who takes no part in arbitration proceedings should be entitled in court to 'question whether there is a valid arbitration agreement,' the court should . . . be very cautious about agreeing that its process should be so utilised. If there is a valid arbitration agreement, proceedings cannot be launched under section 72(1)(a) at all.[21]

Any entitlement of a party to question in court the existence of a valid arbitration clause thus is tempered by a rule of judicial caution. Considering the reference which Lord Justice Longmore makes to the international obligations of the United Kingdom (paragraph 31 of the Court of Appeal decision, quoted above), it may be submitted that one reason for a cautionary rule is to protect international arbitration from discretionary extensions of national judicial power.

Longmore LJ says further that there are two requirements, to find that a valid arbitration agreement exists: (1) the agreement must be 'wide enough to comprise the relevant dispute'; and (2) the arbitration agreement is not 'directly impeached by whatever ground is used to attack the [validity] of the contract'.[22] The first requirement reflects the freedom of the parties to specify the scope of dispute settlement under their contract. The second emanates from the separability doctrine.

The Court of Appeal considered, and rejected, a submission by Sovcomflot based on *Law Debenture Trust v Elektrim Finance BV*.[23] The case had to be distinguished because the instrument on which it turned contained a sort of fork-in-the-road clause, giving the parties a right to elect adjudication in favour of arbitration.[24] Longmore LJ nonetheless sees *Law Debenture Trust* as meriting analysis, in order further to expose the relation between sections 9 and 72. Evidently concerned that the Commercial Court had wrongly described their order of precedence—that court having considered pleadings under section 72 before pleadings under section 9—Longmore LJ said the following:

[21] *Privalov* (Ct App), para 34.
[22] ibid para 35.
[23] [2005] EWHC 1412 (Ch), [2005] 2 Lloyd's Rep 755.
[24] *Privalov* (Ct App), para 39.

> [The judge in *Law Debenture Trust*] decided . . . that . . . the section 72 application for a declaration and an injunction should be granted and the stay application should be dismissed. There is nothing in the judgment which suggests that section 72 'trumps' section 9. The judge correctly described the sections as mirror images of one another. The only minor qualification we would make to the approach of Mann J in [*Law Debenture Trust*] is to repeat that, in a case where court proceedings have begun and there is an application that they be stayed, it is more consistent with this country's obligations under the New York Convention to consider that application first, rather than the section 72 application first. But the answer to either application will, as the judge pointed out, determine the answer to the other.[25]

There are two parts to this formulation. First, because the two sections of the Act are 'mirror images of one another', there can be no question of some rule of construction forcing consideration of one before the other. But, secondly (the 'minor qualification'), there is a preference to consider a section 9 application first. This second statement does not flow perfectly from the first—at least if only the plain text of the statute is in play. If, indeed, the two sections are nothing but 'mirror images', the result under one compelling the result under the other, regardless of which is taken first, then there is no evident reason of construction to give precedence, or even preference, to section 9. The ground for examining a section 9 pleading first, then, is not within the four corners of the statute itself. It is to be found, rather, in the international obligations which are the statute's background. The New York Convention, by which its parties are obliged to sustain the institution of arbitration through their legislative and judicial acts, is the background to the Arbitration Act 1996, and it is the Convention that the Court of Appeal recognizes as suggesting—though not requiring—that the request for stay of court proceedings be treated before the request for rescission of an arbitration clause.

It may be observed, generally, that courts hesitate to issue discretionary stays of arbitration in favour of judicial proceedings. If a valid arbitration clause exists, it will be for the arbitrators to determine their own jurisdiction, a result required under the New York Convention and well recognized by writers.[26] Discretionary exercises by arbitrators in favour of courts—one might think of these as the arbitral analogy to section 72 action—are rarer still. One of the few recent examples[27] involved arbitration under an investment treaty, a situation very different from contractual arbitration where private parties have validly submitted to third party settlement.

IV. ARBITRABILITY OF A CLAIM OF BRIBERY

Morison J said that bribery claims are not ordinary claims and require accordingly special treatment—which was to say, such claims cannot be arbitrated but, instead,

[25] ibid para 40.

[26] See, eg, MJ Mustill and SC Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd edn, Butterworths, London, 1989) 464–82; MJ Mustill and SC Boyd, *Commercial Arbitration: 2001 Companion* (Butterworths, London, 2000) 95–6, 216–18, 267–72; WM Reisman, WL Craig, W Park, and J Paulsson, *International Commercial Arbitration* (Foundation Press, Westbury, NY, 1997) 440–3, 1149–53; GB Born, *International Commercial Arbitration* (2nd edn, Transnational, Ardsley, NY, 2001) 295, 395–8; CH Schreuer, *The ICSID Convention: A Commentary* (CUP, Cambridge, 2001) 66–8, 85–90.

[27] *SGS Société Générale de Surveillance SA v Republic of the Philippines* (ICSID Case No ARB/02/6) (El-Kosheri, President; Crawford and Crivellaro, Members) decision on jurisdiction and admissibility (29 Jan 2004) 8 ICSID Reports 515.

must be kept in court: 'The arbitrator does not have jurisdiction to decide this issue; the court alone does. There is no overlap between what the claims of a routine nature involve and the issue of bribery'.[28] Arbitral practice, however, tends to refute this. Serious issues of bribery have been arbitrated. It is far from an everyday occurrence for bribery claims to be arbitrated, but a sufficient number of such claims have been that there now exists a relevant body of precedents. The international position suggested by the precedents is that arbitrators, in the right circumstances, may properly serve as decision-makers with respect to evidence of fraud or corruption, including, in particular, evidence of bribery.

At least two distinct classes of cases involving evidence of corruption have been seen in the arbitral context. There are cases which present the question whether bribery induced the contract to which an arbitration clause belongs—thus, perhaps, disabling the arbitration clause. This was the specific issue in *Privalov*—and is to be dealt with as a matter of the severability of the arbitration clause. Another class of cases is that in which evidence exists that the substantive contract—the provisions of which the arbitrators are asked to address on the merits—is a contract to engage in corrupt activity—including, in particular, a contract under which a party has agreed to pay bribes to public officials or others. Distinct from the prior question of the existence of an arbitration clause, such evidence raises questions of arbitrability. While arbitrability was not directly at issue in *Privalov*, the broader point, to which the Court of Appeal now has lent support, is in such cases equally illustrated: arbitrators are not necessarily excluded from evaluating evidence of bribery or other forms of corruption. National and international tribunals confirm this position.

The first class of cases would appear to be the less common. This is the anticipated position, in light of the separability doctrine and of the relative difficulty of showing, using typical facts, that a party has directed a fraud especially to the arbitration clause. The leading American statement touching on this is the well-known Supreme Court decision in *Prima Paint*,[29] quoted above, in which Justice Fortas said that the arbitration clause is seperable, so long as 'no claim is made that fraud was directed to the arbitration clause itself'.[30] The major treatises do not provide extensive analysis of bribery or corruption in the inducement of the arbitration clause. Nor do allegations of bribery, made relative to the arbitration clause alone, appear to be particularly frequent in practice.

The other situation is that in which the claim is not that the contract was induced by bribery, but rather that the contract had the purpose of inducing one of the parties to engage in bribery (or in some other corrupt act). This is a situation in which the tribunal's jurisdiction is (more or less) secure—but the underlying, substantive contract is impugned on grounds that its purposes are *contra bones mores.* The practice involving such defects in the substantive contract is now fairly extensive.

A frequently cited[31] example of an arbitrator addressing corruption in an underlying contract is ICC Case No 1110 of 1963.[32] The arbitrator was Gunnar Lagergren, and he determined that the contract on which the claimant sought to obtain an award

[28] *Privalov* (Comm), para 25.
[29] *Prima Paint v Flood & Conklin Mfg Co* 388 US 395 (1967, Fortas J).
[30] ibid 402.
[31] See AT Martin, 'International Arbitration and Corruption: An evolving standard' (May 2004) 1 Transnational Dispute Management, n 29.
[32] (1996) 21 Ybk Commercial Arbitration 47.

'contemplated the bribing of Argentine officials for the purpose of obtaining . . . hoped-for business'.[33] Lagergren determined that a contract ' involving such gross violations of good morals and international public policy . . .'—acts 'condemned by public . . . decency and morality . . .'—was unenforceable.[34] According to Lagergren, 'there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.'[35] This came with a cautionary note. The arbitrator said:

> before invoking good morals and public policy as barring parties from recourse to judicial or arbitral instances in settling their disputes care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other.[36]

In short, it would risk an imbalance in the adversary process, to credit too readily an allegation of corruption by either side. It is of further interest that the arbitrator in ICC Case No 1110 carried out a full investigation of the business arrangement of the parties to the dispute. The matter of bribery was not pleaded but, rather, discovered by the arbitrator.[37] An arbitrator thus, drawing inferences from the evidence before him that the parties themselves never argued (and likely wished to avoid it), can reach the issue of bribery *sua sponte*.

Writers, and at least one court, have suggested that Lagergren might have taken a different approach than he did. If the contract under which an award was sought was unenforceable because it contravened general public policy, might not the arbitration provision itself have been invalid?[38] In fact, arbitral jurisdiction in ICC Case No 1110 was established under a separate *compromis*—a point overlooked by commentators who had seen only partial texts of the award.[39] The path therefore was open to the arbitrator—perhaps required—to examine the substantive provisions of the contract.

The precise approach taken by tribunals faced with evidence of corruption in an underlying contract will differ from case to case.[40] At least one proposition holds in all such cases: evidence of corruption does not necessarily invalidate the arbitration clause and, where it does not, the tribunal is presumed competent to consider the evidence. ICC Case No 3913 of 1981[41] illustrates the point. The case arose out of a contract between a French company and a British company for services to be performed by the latter in an African country. The tribunal, properly seised of the dispute, determined,

[33] ibid 51 (para 17 of award).
[34] ibid 52, 48 (paras 23, 2 of award).
[35] ibid (para 16 of award).
[36] ibid 52 (para 21 of award).
[37] ibid 52 (para 19 of award).
[38] See, eg, A El Kosheri and P Leboulanger, 'L'arbitrage face à la corruption et aux traffics d'influence' (1984) 3 Revue de l'Arbitrage 3. The Swiss Federal Tribunal, on an appeal of the Preliminary Award on Issues of Jurisdiction and Contract Validity in ICC Case No 6401 of 1991 (*Westinghouse International Projects Company v National Power Corporation*), described the award in Case No 1110 as 'dépassée': *Arrêts du Tribunal Fédéral Suisse* 119 II, 380, 385, quoted in JG Wetter, 'Issues of Corruption before International Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No 1110' (1994) 10 Arbitration International 277, 280.
[39] Wetter, ibid 280.
[40] See AT Martin, 'International Arbitration and Corruption: An evolving standard' (May 2004) 1 Transnational Dispute Management, n 30; and comment to Case No 3913, Y Derains and S Jarvin (eds), *Collection of ICC Arbitral Awards, 1974–85* (Kluwer Law International/IOC, Paris) 498.
[41] ibid 497.

however, that the British company had been hired to bribe influential persons in order to secure business for the French company. As a matter of international public order (and of French law), the contract could not be enforced. A similar illicit business deal was presented to arbitration in ICC Case No 3916 of 1982. A Greek firm had retained an Iranian national to help secure government contracts in Iran. The Greek firm had agreed to pay the Iranian national 2 per cent of the value of each contract. The Iranian national, who had been an officer of ministerial rank in his government, was never paid (apparently because the Revolution of 1979 ended the relationship that the parties had undertaken to exploit). The Iranian national sought compensation through arbitration. An Austrian sole arbitrator determined that the promise of 2 per cent commissions was in effect a promise of a bribe. The arbitrator rejected the claim.[42] Jurisdiction existed even though the underlying business agreement contemplated acts in violation of relevant municipal law and of international public order. Case No 3916 has been identified as part of a modern trend favouring arbitrability, notwithstanding the nullity of the underlying contract for reasons of contrariness to national law and general public policy.[43]

The trend continues; and, not surprisingly, less serious evidence of bribery—less serious either in the sense that it is not presented as a central part of a party's pleading or in the sense that it does not call into question the existence of the arbitration agreement—continues to be considered by arbitrators. For example, in *Tanzania Electric Supply Co Ltd (TANESCO) v Independent Power Tanzania Ltd*,[44] arbitration was instituted under a power production agreement, for alleged failures by the respondent in the construction of an electricity generating station. TANESCO did not allege bribery in order to avoid arbitration but, rather, to seek an arbitral award, modifying substantive obligations under a contract which the allegation, if accepted, would have impugned.[45] Questions of bribery thus are readily handled in the arbitral setting with respect to diverse aspects of commercial disputes.

The Court of Appeal in *Privalov* may be seen as adding English authority to the international position. This the Court did, not by reference to arbitral precedent, but rather, as would be expected, by reference to municipal law relating to the interpretation of contracts. In the advocates' arguments, the question of arbitral jurisdiction over a claim of bribery was presented as one of the breadth of the arbitration clause, as refracted in the light of English decisions. Cases were cited supporting the position of claimants that the words 'arising under', when applied to a contract, denote a narrower set of issues than the words 'arising out of'.[46] Defendants referred to precedent pointing the other way.[47] The Court of Appeal called the debate 'both technical and sterile'; the correct position, according to the Court, is that '…any jurisdiction or arbitration clause

[42] ICC Case No 3916 of 1982, Derains and Jarvin (n 40) 507.

[43] For comment see S Jarvin, ibid 511.

[44] ICSID Case No ARB/98/8, 8 ICSID Rep 220.

[45] In the event, the tribunal rejected the allegation. For other examples of tribunals considering allegations of corruption, see ICC Case No 8891 (unreported) (1998), noted in Rossel and Prager, 'Illicit Commissions and International Arbitration: The Question of Proof' (1999) 15 Arbitration International 329; 'ICC Case No 8891 (1998)' (2000) 4 Journal du Droit International 1076; ICC case No 5943 (the Northrop case) of 1990, summarized in Martin (n 40) at n 34. See also ICC case No 2930, (1984) 9 Ybk Commercial Arbitration 105.

[46] eg *Fillite (Runcorn) v Aqua-Lift* (1989) 26 Const L R 66.

[47] Especially to *Harbour Assurance Co (UK) v Kansa General International Insurance* [1993] QB 701.

in an international commercial contract should be liberally construed.'[48] The Court, in reaching this conclusion, said that distinctions drawn in older cases should no longer govern interpretations of the breadth of arbitration clauses:

> [T]he time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary business men would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words . . . If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so . . .
>
> Although in the past the words 'arising under the contract' have sometimes been given a narrower meaning, that should no longer continue to be so.[49]

Of course, it is the very vocation of the legal drafter to be concerned with 'nice distinctions . . . [between] one set of words' and another, even if the two are 'very similar'. Disputes can turn on 'nice distinctions', and, in any event, one advocate's 'sterile' debate or 'nice distinction' well may be another's critical difference. The Court of Appeal should not be taken as indifferent to the terms chosen in a commercial agreement. Nor, however, should somewhat infelicitous turns of phrase obscure the important, and welcome, clarification embodied in the decision. 'Cases arising in an international commercial context' may be understood in light of international commercial practice and law—including law as developed in arbitrations. The Court of Appeal thus confirmed that the position under English law is consistent with international tribunals: 'If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery.'[50]

This does not mean that arbitrators may reach decisions on anything they like. Apart from the usual considerations of the scope and validity of the agreement to arbitrate, there remains that domain of public policy, issues belonging to which may be excluded from arbitration, or awards encroaching on which may be denied enforcement. The New York Convention, under Article V(2)(b), is clear on this as a general matter.[51] What continues to be less clear is the precise limit of the public policy exception. The *Privalov* holding therefore is useful for the implication that may be drawn from it that bribery is not an issue over which the courts necessarily are to trump arbitration on grounds of public policy. This is so even in a period when (as discussed below) combating bribery has been identified as a goal of international public policy.

Yet, as much as they are not per se excluded from arbitration, claims of bribery are not 'of a routine nature'. In international arbitration, as in proceedings before other international tribunals, including the International Court of Justice, there is felt at a forensic level no small unease in making allegations of corruption (whether bribery or other type). Evidence of bribery or fraud will seldom be straightforward. Making a case

[48] *Privalov* (Ct App), para 17. This language already has been favourably cited: *Mabey and Johnson Ltd v Jonathan Laszlo Danos* [2007] EWHC 1094 (Ch), Henderson J, para 13; *Film Finance Inc v The Royal Bank of Scotland* [2007] EWHC 195 (Comm) Smith J,, [2007] 1 Lloyd's Rep 382, 389–90, para 47.

[49] *Privalov* (Ct App), paras 17–18.

[50] ibid para 29. The Court of Appeal also said: '[I]f the arbitration tribunal decides that the charters were indeed procured by bribery they will be able to decide what consequence that conclusion has on any claims which the charterers might otherwise legitimately have': ibid para 44.

[51] Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), adopted 10 June 1958, entered into force 7 June 1959, 330 UNTS 3, 41.

that it has occurred typically calls for inferences to be drawn from circumstance; smoking guns are rare. Such a case is not often made in part perhaps, because it is hard to prove.[52] Advocates also may be apprehensive about the possible chilling effect that an allegation of severe bad faith might have on proceedings that exist by virtue of a consent-based jurisdiction; though hard to prove, allegations of bribery or fraud are, perhaps, all too easy to make.

Corruption is by no means a routine issue; but, arbitration—which has addressed issues as vexing as the date of ripening of a 'creeping expropriation'; the 'internationalization' of private contracts; and the exhaustion of local remedies in denial of justice claims—is certainly capable in principle of addressing it.

V. ARBITRATION AND THE INTERNATIONAL POLICY TO COMBAT CORRUPTION

Parties to international arbitration are no more policy-makers than parties to a municipal court proceeding; their purpose is to make, or avoid, claims relating to their own interests. Deciding cases nevertheless has a cumulative effect much wider than would be identified, if the results for the parties alone were considered. By allowing arbitration to go forward where it is alleged that bribery induced the underlying contract, the Court of Appeal indirectly affirms that arbitration may have a role in implementing international policy to combat corruption.

Combating corruption has been an active field of international policy for approximately a decade. Anti-corruption instruments during this time have proliferated at international and regional level. Most such instruments are concerned with corruption of public officials—not with bribery and fraud in transactions involving only business enterprises. Article 15 of the United Nations Convention Against Corruption, for example, provides that parties to the Convention should adopt legislation to define as a criminal offence the offering of bribes to and solicitation of bribes by a public official.[53] Provisions to criminalize corruption at international level also are found in other general instruments[54] and in a number of regional instruments, including several adopted in Africa, Europe and the Americas.[55]

[52] See, eg ICC Case No 4145 (1987) 12 Ybk Commercial Arbitration 97, 102, paras 28–9. And an allegation of bribery weakly made is extremely unlikely to succeed: *Tanesco v IPTL,* Tariff and Other Remaining Issues (9 Feb 2001) (Rokinson, President; Brower and Rogers, members) 8 ICSID Rep 272, 282–3, paras 52–7. Cf *Société Générale de Surveillance SA v Pakistan* (3 July 2002) 8 ICSID rep 352 (S Ct Pakistan), Sheikh, Farooq and Dogar JJ, 359–60, paras 14–17.

[53] Adopted by GA Res 58/4, 31 Oct 2003; entered into force 14 Dec 2005: UNTS reg no 42146, UKTS No 14 (2006). The Convention has 84 parties and 56 further signatories as yet not parties. The United Kingdom ratified the Convention on 9 February 2006, with entry into force on 11 March 2006: Cmd Paper 6854.

[54] eg United Nations Convention against Transnational Organized Crime, adopted by GA Res 55/25 of 15 November 2000, entered into force 29 September 2003, 131 parties, 16 further signatories, ratified by the United Kingdom on 9 February 2006.

[55] eg African Union Convention on Preventing and Combating Corruption, adopted, Maputo, 11 July 2003, entered into force 5 August 2006, 16 parties, 24 further signatories having not as yet ratified; Council of Europe Criminal Law Convention on Corruption, adopted 27 January 1999, entered into force, 1 July 2002, 35 parties, including the United Kingdom, 13 further signatories having not as yet ratified, ETS No 173, 2216 UNTS 228; Inter-American Convention

The Council of Europe Civil Law Convention on Corruption of 4 November 1999[56] sets out a wide definition of corruption, to include, it would seem exceptionally, acts carried out in the course of commerce between private parties. Article 2 of the Convention defines corruption to include conduct that '…distorts the proper performance of any duty or behaviour'.[57] No limitation is expressed, as to who proposes the bribe, or to whom. The Convention therefore apparently establishes that corrupt acts can be performed by any person, whether or not they hold a formal position in government or administration.

The Convention further establishes obligations on the parties to adopt provisions in municipal law relative to corruption:

Article 8
Validity of contracts

1. Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.
2. Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.[58]

Paragraph 1 relates to the sort of transaction dealt with by arbitrators in the several cases noted above—cases in which parties sought to use arbitration to settle disputes about the execution of illicit bargains. The national legislation required by the Convention would codify the position that courts are not available to adjudicate differences arising out of such bargains. Arbitrators, as seen above, when presented with credible evidence of corruption, have reached a similar result as respects the arbitral dispute settlement facility. The first paragraph, by the phrase 'any contract *or clause of a contract* . . .' (emphasis added), would seem to preserve separability of a dispute settlement provision. In any event, separability is an autonomous doctrine, supported by extensive practice, so it would be surprising to interpret an international obligation in such a way as to cause inconsistency with it.

The second paragraph addresses situations like that in *Privalov*: as Sovcomflot was able to apply to rescind the charterparties between its firms and the Nikitin enterprise on the ground that those instruments had been induced by bribery, so would a party, under an Article 8(2) enabling statute, be able to challenge 'a contract whose consent has been undermined by an act of corruption'. The savings clause, 'notwithstanding their right to claim for damages', would seem to prevent the main provision of paragraph 2 being used to avoid an obligation. This might be seen as a solution, in treaty form, to Lagergren's problem of a party 'reap[ing] the fruits of his own dishonest conduct.' A problem may arise, however, as to the relation between the required provision ('able to apply to the *court*') and an arbitration clause. It is not immediately clear

against Corruption (Organization of American States), entered into force, 6 March 1997, 33 parties, one further signatory having not as yet ratified.

[56] Council of Europe Civil Law Convention on Corruption, adopted 4 November 1999, entered into force 1 November 2003, 27 parties, 14 further signatories having not as yet ratified, ETS No 174, 2246 UNTS 6.

[57] 2246 UNTS 6, 7.

[58] 2246 UNTS 6, 8.

whether the position under English law, as set out by the Court of Appeal, would be consistent with the provision 'for all parties . . .to be able to apply to the court'. This, perhaps, would turn on the meaning of 'to apply': a statutory right 'to apply to the court' is not a statutory prescription of the result. Though on the facts in *Privalov* an application failed, such a result in itself does not prejudice the process of application. The Court of Appeal in *Privalov* clarifies the relation between sections 9 and 72 of the Arbitration Act 1996, in particular explaining that the latter is not a licence to the courts to set aside arbitration clauses, as an exercise in judicial discretion, whenever an allegation is made that bribery has undermined the surrounding contract. The right construction of an Article 8 enabling statute would be that which reconciles the conventional obligation with separability of the arbitration clause.

The United Kingdom, as of 20 September 2007, has not ratified the Convention.[59]

VI. CONCLUSION

The adoption of anti-corruption instruments reflects that States recognize more than before that corruption is an international problem and reason that a coordinated, inter-State strategy is the correct response. Neither English courts nor arbitrators in an eventual arbitration of the claims in *Privalov* would have to look to treaty rules for a legal definition of the alleged offence; the substance for that is found in English law, which, after all, was the chosen law of the disputed charterparties. Anti-corruption instruments nevertheless form a backdrop against which to consider the position set out in *Privalov*. The position may be summarized as follows: (1) sections 9 and 72 of the Arbitration Act 1996 leave it for arbitrators to decide their own jurisdiction—a question of bribery on its own by no means precluding arbitral jurisdiction, and discretionary considerations of judicial economy not sufficing (at least on the given facts) to support a stay of arbitration; (2) following from the doctrine of separability, an allegation of bribery, so long as it does not relate specifically to the arbitration clause itself but, instead, only to the contract as a whole, does not rescind the arbitration clause; and (3) arbitrators are competent to consider a bribery allegation on the merits.

Sovcomflot Group is one of many businesses to emerge out of the collapse of the Soviet Union and later to be embroiled in disputes with investors, clients, partners or customers. The claims here are among the many, pursued under various jurisdictions, arising since the early 1990s from failed or allegedly corrupt transactions involving former Soviet businesses.[60] It is still too early to give a full account of the legal ramifications of the collapse of the Soviet Union; it at least may be ventured that the reorganization of the post-Soviet economy now numbers, along with the World Wars and certain post-revolutionary situations (eg Mexico, Iran), as a major episode contributing

[59] The United Kingdom signed the Convention on 8 June 2000: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=6/28/2007&CL=ENG>.

[60] A number of disputes involving investments in the former USSR have been arbitrated under the rules of the Stockholm Chamber of Commerce, the activity of which is reviewed by Per Runeland, 'Sweden Thrives as Neutral Arbitration Ground' [18 Oct 2004] National L J. It was suggested as early as 1989 that an increase in commerce between the West and a liberalizing Soviet Union would result in an increase in related claims: WM Reisman, 'For A Permanent US-Soviet Claims Commission' (1989) 83 AJIL 51.

to the development of international claims practice—including through the clarification of the treatment of the arbitration clause by national courts.

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