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The American University in Cairo

School of Global Affairs and Public Policy

**DO ARBITRATORS HAVE A DUTY TO REPORT CORRUPTION?
MAYBE . . . MAYBE NOT**

A Thesis Submitted to the

Department of Law

**In partial fulfilment of the requirements for
LL. M. Degree in International and Comparative Law**

By

Hussain Ahmad Hassan Alobaidi

December 2014

The American University in Cairo
School of Global Affairs and Public Policy

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DEDICATION

I dedicate this work to my parents, brothers and sisters,
especially Abdullah, Narcissus & my fiancée Hala
for supporting me all the way.
Thank you.

ACKNOWLEDGMENTS

I would like to thank Dr. Diana Van Bogaret and Dr. Hani Sayed for their guidance and support over the past years.

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ABSTRACT

This paper explores whether arbitrators' have a duty to report corruption or not. It is divided into two parts. In part one, the paper presents the legal status of arbitrators by introducing the contractual, judicial and hybrid theories. Also, it examines the national laws of the US, Egypt, and Saudi Arabia to establish whether there is a legal duty to report or not. In the second part, the paper defines both confidentiality and public policy, and shows where the conflict between the two exists. On the one hand, arbitrators have a duty to protect confidentiality. On the other hand, arbitrators have a duty to insure the award will be enforced and that the contract does not contradict public policy. With this in mind, the paper will present five cases where the competent governments knew about the corruption, yet they did not prosecute the perpetrators. The paper concludes with the contention that arbitrators have no legal duty to report corruption.

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I. INTRODUCTION

In 1963, Judge Lagergren created precedent in the international commercial arbitration (ICA) field by finding a corrupt contract null and void. Judge Lagergren contended that “such corruption is an international evil; it is contrary to good morals and . . . the community of nations.”¹ Since then, many contracts have been found null and void due to corruption. In 2006, for instance, about half a century later, the International Centre for Settlement of Investment Disputes (ICSID) continued to recognize its dangers:

The Tribunal notes that, in some of these cases, it was alleged that corruption is widespread either within the purchasing country or in the particular sector of activity. However, all arbitral tribunals concluded that such facts do not alter in any way the legal consequences dictated by the prohibition of corruption (see ICC case no 1110 paras. 19-20; ICC case no 3916, Yves Derains -*Collection of ICC awards 1974-1985* - Kluwer 1990 - p. 509; ICC case no 8891 - *Journal du droit international* 2000 no 4 p. 1083)... [t]he present Tribunal agrees with such conclusion.²

This thesis is a case study of arbitrators’ duty to report crime/corruption. In international commercial arbitration, corruption arises in a variety of contexts.³ The first one is the corruption of an arbitrator.⁴ For example, an arbitrator might ask for a bribe to adjudicate a corrupt contract. The second context is corruption in disputes that arise out of contracts where the real purpose of the contract is to bribe public officials. The third is when a contract is signed by bribing public officials such as in the Lagergren case. In the last two forms, arbitrators have three options. They can refuse to arbitrate. They can also report corruption/crime to competent courts and attorney generals, or arbitrators can accept the arbitration. If an arbitrator favours confidentiality, he/she refuses to arbitrate; therefore, the private interests of parties prevail over public interests. Moreover, if an arbitrator reports corruption, in favour of public policy, he/she will breach confidentiality and the contractual relationship with parties. Finally, if an arbitrator accepts to arbitrate, he/she will participate in a crime unless he/she decides the contract is null and void.

¹ ICC Award No. 1110 of 1963 by Gunnar Lagergren, Trans-Lex, at 10, available at <http://www.trans-lex.org/201110/pdf/> (last Retrieved Oct 26, 2014).

² World Duty Free Co Ltd v. The Republic of Kenya, ICSID Case No. ARB/00/7, at 48, available at http://www.trans-lex.org/241400/highlight_Kenya/ (last retrieved Oct 27, 2014).

³ *Id.*, at 340.

⁴ The corruption of arbitrators will not be discussed in this paper, but the duty of arbitrators to report corrupted contracts.

Courts and legal scholars focus on three issues when discussing the obligation of arbitrators' duty to report corruption. These issues are confidentiality, public policy and the arbitrators' role without neglecting the nature of the crime in the ICA.

Confidentiality is one of the important advantages of the ICA.⁵ It is considered the most vital principle in the ICA process. Confidentiality protects the privacy of parties' documents and interests. It has two definitions. The first definition provides parties with full confidentiality, and allows the private interests to prevail over the public interests. This definition of confidentiality is called the classical one by Hunter and Redfern.⁶ The second and modern definition provides parties with confidentiality as long as their interests do not contradict with the public one.⁷ Each definition can drive the legal policy of states into two different directions. Although confidentiality protects parties' commercial secrets, it is double-edged. Unfortunately some parties misuse confidentiality to cover corruption. For example, parties may ask arbitrators for a consent award, which allows unlawful payment to settle the dispute instead of going through the full process of arbitration, or they might appoint a weak defence to lose a dispute such as in *Himpurna vs. PLN*.⁸

In addition to confidentiality, public policy plays a great role in arbitration at the national and international levels. At the national level, a competent court will not accept awards that conflict with an essential public policy. At the international level, there are general principles agreed to by members of the international community which details unacceptable behaviour such as laundering money. According to such differentiation, public policy has three levels which states might utilize to prevent corruption. These levels are national public policy, international public policy and transnational public policy. Public policy is an important instrument by which the ICA can restrict corruption.

While some parties promote absolute confidentiality as a great advantage of the ICA, others fight for public policy by which states might restrict the misuse of confidentiality by parties. The former group thinks confidentiality secures their commercial interests while the latter group believes absolute confidentiality might be manipulated by parties to cover crimes. As a

⁵ Some scholars think that the ICA has lost some of its advantages such as the length of time and expanses with the increasing and complexity of disputes. *See*, N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration*, at 35-36, Oxford University Press, 2009.

⁶ *Id.*, at 137-138.

⁷ *Id.*

⁸ Priyatna Abdurrasyid, *They Said I was going to be Kidnapped*, Mealey's International Arbitration Report, Vol. 18, No. 6, June 2003.

result of the tension between these two points of view, there has been an increase in debate about confidentiality and public policy. The point of conflict regarding confidentiality falls in the tangle of public and private interests. Merchants and corporations favour a wider scope of confidentiality to protect commercial secrets, while governments prefer controlling confidentiality to prevent corruption.

Finally, the arbitrators' role in the ICA is another issue discussed while looking at the obligation of arbitrators to report crime/corruption. The privacy right directs people to appoint arbitrators who are trusted and have a limited role in how the dispute will be settled. According to the ICA, the two parties appoint one arbitrator together, or each party in a commercial dispute appoints one arbitrator each who with his/her counterpart appoints a third person to form a tribunal. The tribunal settles the dispute via investigating documents, witnesses and commercial secrets. In such a process, the importance of a trusted arbitrator's role appears. If such secrets are disclosed, reputations, commerce, or the competitive position of parties can be damaged. Furthermore, arbitrators must be assured that the award can be enforced by states. Therefore, the role of arbitrators exists amid a conflict zone. On the one hand, there is a contractual relationship between the clients and the arbitrators not to disclose information about the tribunal. On the other hand, there is an interest for the competent states in which the award will be enforced to prevent any kind of corruption via public policy.

This paper is divided into three parts to show the duty of arbitrators in the case of corruption. Part one gives background about the problem of corruption that international arbitrators deal with. It also explores the legal status of arbitrators by presenting the legal theories of arbitration. Part two defines confidentiality. It gives an idea of past definitions of confidentiality which have been articulated by the English courts. Furthermore, it presents the definition of confidentiality of the Australian courts, considered the new school. Part two presents ideas about mandatory laws and public policy to show the intersection between the public and private interests in confidentiality. The third and last part balances public policy with confidentiality. To do so, the chapter presents five examples of ICC & ICSID case law. Furthermore, it presents the ideas of scholars regarding the duty of arbitrators to report crimes. Such ideas elaborate the obstacles that legislators, courts, and scholars encounter while dealing with arbitration in cases of corruption. It concludes with the paper's contention that arbitrators' have no duty to report corruption.

II. Arbitration and Crimes: the Interplay of Public & Private Law and Nature of Arbitrators' Legal Status

Although countries abandon some of their power to international arbitrators to settle disputes and facilitate international trade, countries and arbitrators observe that arbitration is misused to cover and facilitate criminal activity. Corruption exists within the scope of criminal law which is a part of public law. Many countries look at criminal law as a mark of their sovereignty. Some argue that criminal law, as a branch of public law, and arbitration law, as a part of private law, conflict in international commercial arbitration in cases of corruption. Arbitrators have only a duty to settle commercial disputes, yet they witness criminal activities while adjudicating. In addition, they have to decide whether a contract is null and void as part of their duty to settle disputes within private law or international private law. Allowing arbitrators to report corruption, once they discover it, would be considered as providing foreign arbitrators with extra power to apply public national laws.

Moreover, reporting corruption influences the confidentiality of arbitrators before parties which is against fair trial. Once arbitrators report corruption, they will be in favor of one of the parties who does not want to abide by corrupted agreement known by parties. In this option, arbitrators could be considered as violators for the arbitration agreement which must be followed to keep confidential information. Reporting crime is a controversial issue among scholars. For example, Hwang and Chung believe that arbitrators have a duty to report corruption⁹ while others think there is an ethical duty to report but not a legal one.¹⁰ As arbitrators participate in the growth of international commerce and the economic welfare of countries, arbitrators should prevent corruption by reporting it to authorities.¹¹ Indeed, there is a legal ambiguity in arbitrators' duty to report crimes.

However, both opinions depend on the legal status of arbitrators in the ICA. Some might think that debates about the nature of the arbitrators' job are a kind of theoretical debate, yet it can be seen that the practical life of the ICA raises many problems in the case of corruption such as the arbitrators' role, the limits of their powers, their obligations and their duties which

⁹ Michael Hwang & Kevin Lim, *Corruption in Arbitration— Law and Reality*, International Council for Commercial Arbitration (ICCA), 2011-2012, available at http://www.arbitration-icca.org/media/0/13261720320840/corruption_in_arbitration_paper_draft_248.pdf (last retrieved Nov 25, 2013), at 47-50.

¹⁰ Alexis Moure, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, *Journal of International Arbitration*, Vol. 22, No. 1, 2006, at 95-97.

¹¹ Michael Hwang & Kevin Lim, *Supra* note 9, at 47-50.

are all affected by the legal status of arbitrators.¹² Arbitrators who follow contractual theory think there is no obligation to report corrupt contracts but to issue the nullity of contract while others who follow the judicial theory might think there is an obligation if national laws contain that. There are three theories to interpret the nature of arbitrators' job. Each one provides arbitrators with different kind of powers, obligations and duties. Furthermore, the three theories create different legal status for arbitrators, parties, and awards.

To sum up, this chapter discusses three theories of arbitration to elaborate the legal position occupied by arbitrators in the ICA. It begins with contractual theory, followed by jurisdictional theory, and concludes with hybrid theory.

A. Contractual Theory

According to the contractual theory, arbitration is based on the will of the parties as expressed in the arbitration agreement.¹³ The proponents of the theory look at the nature of arbitration from a contractual view. If there is no agreement, there is no arbitration. They assume that there is a trilateral contract which is created between parties and an arbitrator when he/she accepts to arbitrate. According to proponents of this theory, states do not have any kind of jurisdictional power over the parties' will although the law of states might fill gaps in the contract by referring to and interpreting the parties' will. Parties are free to choose laws which control arbitration procedures, time and place without a state's intervention. Although some proponents believe that parties' desire may be controlled by the public policy of states, they think that "*pacta sunt servanda* should prevail without pressure of state."¹⁴ This can be seen in Kellor's opinion:

[A]rbitration is wholly voluntary in character. The contract of which the arbitration clause is a part is a voluntary agreement. No law requires the parties to make such a contract, nor does it give one party power to impose it on another. When such an arbitration agreement is made part of the principal contract, the parties voluntarily forgo established rights in favour of what they deem to be the greater advantages of arbitration.³⁶ Accordingly, with the exceptions of arbitrability and public policy which are reserved for the *lex fori*, the *lex fori* has very little influence over the procedures and outcome of the arbitration. Moreover, it has been

¹² Obaid Saqer Busit, *the System of Arbitration in the A.U.E: Problems and Prospects*, Durham thesis, Durham University, 1991, at 38, available at <http://etheses.dur.ac.uk/1508/> (last retrieved April 24, 2014).

¹³ Hong-Lin Yu, *A Theoretical Overview of the Foundations of International Commercial Arbitration*, 1 (2) *Contemp. Asia Arb. J.* 255, 2008, at 265, available at http://www.law.ntu.edu.tw/center/wto/project/admin/SharePics/A_01_05%20pp%20255_Hong-%20Lin%20Yu.pdf (last retrieved April 23, 2014).

¹⁴ *Id.*, at 266.

concluded that “national arbitration laws are only to supplement and fill lacunae in the parties’ agreement as to the arbitration proceedings and to provide a code capable of regulating the conduct of an arbitration.”¹⁵

The contractual theory appears in many English and old French decisions. In England, for example, there is *Cereals S.A. v. Tradax Export S.A.* where the court held that there is a contract between parties and arbitrators as long as this contract meets requirements of the public policy of states.¹⁶ In addition to the English decision, the French cassation court held in many old decisions that the arbitration institutions do not have the character of being public but private, and they do not have the character of continuity.¹⁷ As a result, the judicial nature of arbitration does not exist. This means arbitration institutions must be a public sector, and have the continuity charter as courts to obtain the judicial nature. In another decision, the French cassation court stated that awards of tribunals had the character of an agreement, so the award, which depends on the arbitration agreement, possesses the same nature as the contract.¹⁸ Therefore, the award of arbitrators is restricted to the will of the parties.

The arbitration agreement, as a contract, is controlled by private law as the other kinds of contracts. Accordingly, the proponents of contractual theory consider the nature of the arbitrators' job as being a contractual job and not a judicial one.¹⁹ In a comparison between judges and arbitrators, the proponents consider arbitrators not to be state judges. Therefore, arbitrators can refuse to adjudicate disputes without being punished in contrast to state judges. Moreover, arbitrators might be engineers, lawyers, or merchants, but judges must be public officials.²⁰

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ As mentioned in Huda Mohammad Majdi Abdul Rahman, *Dour il-mohakim fi khsomat al-Tahkim wa hodood soltatih*, al-Qāhirah: Dār al-Nahdah al-‘Arabīyah, 1997, at 26. (the Arbitrator's Role in the dispute of arbitration and limits of his Power), Dar al-Nahadah al-Arabīyah, 1997, at 30. Also, in 1812, the French Cassation Court had decided that the arbitration has the contractual feature from the beginning, signing the contract, to the end, issuing the award. Although the Appeal Court of Paris, in 1901, had decided that the arbitration is a judicial work and the award has a judicial characteristic, the French Cassation Court had refused that in 1914 and 1928. It had decided the arbitration is an agreement. See Mahmud al-Sharqawi, *al-Tahkīm al-tijārī al-dawlī: dirāsah mokarana*, “Intenational Commercail Arbitration: a Comparative Study,” dar al-Nahda al-Arbia, Cairo, 2013, at 13.

¹⁸ *Id.*, at 30.

¹⁹ Pieter Sanders, *Arbitration*, v. XVI, 1996, J.C.B. MOHR(PAUL SIEBECK), TURBINGEN, MARTINUS NIJHOFF PUBLISHERS, DORDECHT, BOSTON, LANCASTER, at 5-7; proponents of contractual theory varies in determining .

²⁰ *Id.*, at 30.

Although the proponents of contractual theory agree that arbitrators are not judges, their opinions vary in determining arbitrators' legal status in the ICA. The range of scholars' opinions hinges on the way in which they view the nature of the contractual relationship between arbitrators and parties. Some scholars, such as Merlin and Foelix, think that the arbitrator plays a role similar to that of an agent.²¹ They qualify the arbitration agreement as an agency contract. According to Foelix, the arbitrator's job is of a private nature not a public one.²² The arbitrator works for parties' interests such as the work of an agent for the principle.²³ However, some proponents do not agree with that point of view. They believe that arbitrators play a role as contractors.²⁴ According to them, agents cannot represent parties with conflicting interests. Finally, in terms of the award, the supporters consider the award as having a contractual nature. Consequently, the award can be challenged before national courts, and needs an executive order from national courts to be enforced such as with a foreign verdict.

Although the contractual theory has many proponents whether in academic fields or judicial systems, the theory has been criticized for many reasons. First of all, the theory concentrates on the parties' will which is not enough to create the system of arbitration. For instance, the theory cannot explain the awards having the authority of the *res judicata*.²⁵ Furthermore, the theory can explain the nature of voluntary arbitration depending on the will of the parties, but it cannot explain the nature of obligatory arbitration which depends on national laws.²⁶ Some states, for instance, oblige parties to settle some disputes via arbitration. Second, the theory cannot explain the legal status of arbitrators as an agent. The agent must work for the benefit of the principle while the arbitrator adjudicates in favour of one party over the other, or against both parties.²⁷ Also, the arbitrator cannot be an agent for two parties because that would constitute a conflict of interest. In the agent theory, the agent must work for the benefit of the principle. Otherwise, the agent might be prosecuted by the principle for damaging the

²¹ Mukhtar Ahmad Briri, *al-Tahkīm al-tijārī al-dawlī: dirāsah khāṣṣah lil-qānūn al-misrī al-jadīd bi-sha'n al-tahkīm fī al-mawād al-madanīyah wa-al-tijārīyah*, al-Qāhirah: Dār al-Nahḍah al-‘Arabīyah, 1995, at 7-8.

²² Hong-Lin Yu *Supra* note 13, at 268.

²³ *Id.*

²⁴ *Id.* & Mostafa Al-Jammal & Okasha Abdula'al, *al-Tahkim fī al-elakat al-khasa al-dawlia wa-al-dakhlia*, Alexandria, 1998, at 597. "Arbitration in private international and national relations," Alexandria, 1998, at 597.

²⁵ Article 55 provides that [a]rbitral awards rendered in accordance with the provisions of the present Law have the authority of the *res judicata* and shall be enforceable in conformity with the provisions of this Law, the Egyptian Arbitration Law, Law No. 27/1994, available at <http://www.crcica.org.eg/LawNo271994.pdf> (last retrieved 1 Aug 2014).

²⁶ For example, article 57 of Egyptian Customs law forces owners of goods in case of disputes to arbitrate, Law No. 66, 1963, available at <http://www.wipo.int/wipolex/en/details.jsp?id=8343> (last retrieved 1 Aug, 2014) & Mahmud al-Sharqawi *Supra* note 17, at 15.

²⁷ Hong-Lin Yu *Supra* note 13, at 268 & Huda *Supra* note 17, at 31-32.

interests of the principle. Yet, the arbitrator is not prosecuted once he/she adjudicate against the parties' interests, the principles. Furthermore, the arbitrator must be financially independent from parties which does not exist in the agent's legal status.²⁸ If the arbitrator is independent financially, he/she will adjudicate impartially and independent, without being in favour of one party over the other. Finally, the contractual theory does not provide any kind of explanation for the immunity of arbitrators which is guaranteed by many legal systems such as the UK and the US.²⁹ Immunity is assured for arbitrators despite the existence of the arbitration agreement. For instance, the English House of Lords indicated in *Sutcliffe v. Thackrah and Others Respondents* that arbitrators enjoy the immunity same as judges:

It is well settled that judges, barristers, solicitors, jurors and witnesses enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial....since arbitrators are in much the same position as judges, in that they carry out more or less the same functions, the law has for generations recognized [sic] that public policy requires that they too shall be accorded the immunity to which I have referred.³⁰

Some scholars have tried to invent a new theory which they call the autonomous theory. According to its proponents, the autonomous theory refuses to favour the approaches of contractual and judicial theories to describe the nature of arbitration. It also rejects the hybrid theory for its unlimited application. The autonomous theory regards at the arbitration from a practical perspective.³¹ It tries to characterize the nature of arbitration according to its goals which are the flexibility and speed in settling disputes. In other words, supporters of the theory want scholars to consider arbitration as an instrument to achieve social and economic goals of international trade. Consequently, the use and purpose of arbitration is the real description of arbitration's nature and not national laws. Rubellin-Devichi, who invented the theory, believes that the arbitration has a private and autonomous nature which is different from other theories.³²

The autonomous theory provides a solution for settling disputes away from classical justice such as national rules and official courts where international trade finds obstacles such as the length of times and difficult legal systems. Consequently, Rubellin-Devichi believes that

²⁸ *Id.*

²⁹ *Id.*

³⁰ [1974] A.C. 727, at 757-758, available at <http://www.trans-lex.org/311320> (last retrieved Oct 23, 2014).

³¹ Hong-Lin Yu, *Supra* note 13, at 278. See Jacqueline Rybellin-Devichi, *L'arbitrage Nature Juridique Droit Interne Et Droit International Prive*, Paris, 1965 & Philippe Fauchard, *Le Statut de L'arbitre dans la jurisprudence Francaise de l'arbitrage*, 1996, 235 ets.

³² Hong-Lin Yu, at 278.

arbitration has its own legal system where the will of parties is autonomous. Parties can nominate any kind of law to adjudicate disputes whether national law, international law, general principles of international laws, good sense or *lex mercatoria*.³³ Proponents of the theory have invented what they call supra-national law which is a characteristic of international commercial arbitration. Supra-national law means that arbitration has its own law which must not be restricted to municipal laws or international laws. Parties themselves decide what laws are suitable for disputes on international trade. According to the theory, parties have an absolute autonomy to formulate rules that control subjective and objective issues without the interference of states.³⁴ Such autonomy will enhance the development of the ICA and its functioning parallel to international trade.³⁵ States where the award is enforced or arbitration exists do not have a supervisory power over the arbitration, awards or parties' autonomy. States' job, according to that, is only to enforce the award. As a result, awards can be enforced in all countries without objection, which is called delocalization.³⁶ For instance, in *Soleimany vs. Soliemany*, parties chose Jewish law to be applied to the dispute even though it was void in the English court. The latter refused arbitration because the contract is against public policy.³⁷

Although the theory has been supported by many scholars, others find that the autonomous theory does not provide a new explanation for the ICA and the power of arbitrators.³⁸ The theory states that the contractual theory does not describe the nature of arbitration when calling it a contract only, and the judicial theory limits arbitration to a judicial work only which are familiar to scholars.³⁹ Furthermore, the theory states that it is not suitable for the general rules of procedural laws to be applied to arbitration disputes. This might be acceptable in the cases of legislative vacuum, but in case the legislator formulates rules to manage arbitration procedure, such as in Egypt, arbitration might be considered as a judicial instrument similar as courts.⁴⁰ Moreover, it is hard to accept the absolute autonomy of parties' will without the supervisory power of states. Such an idea allows some merchants, companies and states to breach the public policy of weak and corrupted states.

³³ *Id.*, at 280-281.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ This issue will be discussed in-depth later on the public policy subdivision.

³⁸ Huda, *supra* note 17, at 39.

³⁹ *Id.*

⁴⁰ *Id.*

To sum up, it seems from the above that the autonomous theory is same as the contractual theory. Both theories are based on *pacta sunt servanda*, or the will of the parties. In my opinion, there is no need for such a distinction; the autonomous theory is the contractual theory. Therefore, arbitrators' duty in both theories is only to apply the parties' will. In the contractual theory, whether arbitrators' have a duty to report corruption or not, arbitrators do not have a legal duty to report corruption whether they are considered as agents, or contractors. If arbitrators are considered as agents, they do not have to report corruption. The agent agreement is controlled by the will of the parties. It cannot be imagined that the principle will provide the agent with power to report the principle's corruption. Furthermore, the agency agreement depends on the trust between the principle and the agent. Therefore, it can be said that there is no agency rules in any states that discuss the duty of agents to report corruption.

Moreover, if arbitrators are regarded as contractors, they do not have a duty to report corruption. The contractor is, for example, a person or company that is chosen to supply materials for construction works while the arbitrator is a person who is chosen to settle disputes between conflicting interests. As a result, in all national laws, arbitrators are not considered contractors. Yet, if arbitrators are regarded as contractors, it is hard to find a duty to report corruption on contractors in many national codes.

Furthermore, in autonomous theory or modern contractual theory, it can be said that arbitrators do not have a duty to report corruption. The autonomous theory provides parties only with the power in the ICA without giving states any supervisory power. If there is a crime/corruption, states do not need to be involved because international trade has its own means to solve the problem.

B. The Judicial Theory

The second theory is the judicial theory which is also known as the delegation theory. Judicial theory does not neglect the will of parties as a first step in creating the arbitration, yet it does not ignore the contractual theory whereby the arbitration is described as possessing a contractual nature. On the contrary, the judicial theory looks at arbitration as a judicial instrument although it needs parties' will to begin. According to the theory, arbitrators settle disputes between parties, and issue verdicts that are *res judicata*.⁴¹ The arbitrators' mission is

⁴¹ Huda, *Supra* note 17 at 40-41.

the essence of judicial work. Judicial work has three components which exist in arbitration.⁴² Those components are a claim, a dispute and a person who has legal power to settle the dispute.⁴³ Moreover, proponents contend that states have supervisory power over arbitration despite the will of the parties. According to jurisdictionalists, states, where arbitration is suited or where the award is enforced, provide arbitrators with power to play a judicial role, which is called the delegation theory.⁴⁴ According to the delegation theory, states have the exclusive right to manage their jurisdiction, and it is a feature of sovereignty. Therefore, states can transfer some of their prerogatives to any institution or individuals, such as the arbitrator:

[t]he state alone has the right to administer justice, so that if the law allows the parties to submit to arbitration, this institution could be exercising a public function, from which, logically, it must be concluded that the award is a judgment in the same sense as the decision rendered by a judge of the state.⁴⁵

The same approach can be seen in a judgment of the Egyptian Cassation Court which concludes that the courts only have the right to adjudicate disputes as a general rule, yet there is an exception where the legislator provides parties with permission to settle disputes by arbitration:

Even though, in general, the right to adjudicate disputes is restricted to courts, article 15, Law No. 46, 1972, the Egyptian legislator permits parties, as an exception in article 501-1 & 502-3, to have an arbitration agreement by which parties will nominate arbitrators. Those arbitrators will adjudicate disputes, and issue awards that have *the same nature of verdicts of courts*.⁴⁶

Moreover, some supporters contend that arbitrators and judges practice the same judicial work although arbitrators are chosen by parties not states. One of the proponents states that "[t]he arbitration process, is judicial in the sense that it is the process of jurisdiction conducted by a judge. That the judge is private judge does not affect the essentiality

⁴² Muhammad Abdulkhaliq Omar, *al-Nezām al-Qadā'i al-Madani, al-Qāhirah : Dār al-Nahḍah al-‘Arabīyah*, 1976, at 108, also mentioned in Huda, *Supra* note 17, 40-41.

⁴³ Busit, *Supra* note 12 at 40-41.

⁴⁴ Andrea Marco Steingruber, *Notion, Nature and Extent of Consent in International Arbitration*, Queen Mary Univ. London, 2009, at 73 & Busit, *Supra* note 12 at 40-41.

⁴⁵ Busit, *Supra* note 12, at 40.

⁴⁶ Appeal No. 2186, Judicial Year No.52, Feb 06, 1982, the Egyptian Cassation Court, available (in Arabic) at http://www.cc.gov.eg/Courts/Cassation_Court/All/Cassation_Court_Images.aspx?ID=111116391 (last retrieved Aug 3, 2014).

jurisdictional charter of the mechanism and operation."⁴⁷ Proponents add that "arbitrators are viewed as judges contractual chosen, performing functions assuming *analogous* to those of judges substitutes for state and similar responsibilities."⁴⁸ Indeed, the process of choosing arbitrators by parties instead of states does not make any difference in the judicial process of arbitration. The arbitration agreement should not drive scholars to neglect the essential goal of arbitration which is adjudicating disputes. Consequently, the theory demands all aspects of the arbitration process, time and limitations of arbitrators' power to be regulated by national laws which are chosen by parties, or the seat of law.⁴⁹ According to the proponents, arbitrators have the power to adjudicate within the parties' will which must not breach mandatory rules and public policy of national law:

[i]n other words, the various issues arising from international commercial arbitration, such as the validity of the arbitration agreement, the arbitral procedures, the arbitrator's power, the scope of submission and the enforceability of arbitral awards, have to be decided within the mandatory rules and public policy of the *lex fori*.⁵⁰

The jurisdictional theory finds its support where national courts practice a supervisory role over arbitration. For example, when national courts, where the award will be enforced or where the arbitration takes place, fill the gap in parties' arbitration agreement. The New York Convention (NYC) recognizes the right of national courts to practice supervisory power over the arbitration. The NYC in article V (2) (a) and (b) states that:

2. [r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) [t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (b) [t]he recognition or enforcement of the award would be contrary to the public policy of that country.⁵¹

The application of supervisory power of national courts, article V of the NYC, can be seen in many cases such as the *American Safety Equipment Corp. v. JP Maguire Co.*⁵² In this case, the courts refused the will of the parties to settle the dispute which includes a claim under

⁴⁷ Antoine Kassis, *The Questionable Validity of Arbitration and Awards under the Rules of International Chamber of Commerce*, Journal of International Arbitration, Vol. 6, 1989, at 99. Also mentioned in Huda *Supra* note 17 at 43 n° 2.

⁴⁸ Freidman, *International Arbitration*, Vol. 7, 1990, at 16 as reported in Huda *Supra* note 17 at 43 n° 2.

⁴⁹ Hong-Lin Yu, *Supra* note 13, at 258.

⁵⁰ *Id.*, at 40.

⁵¹ The New York Convention 1958.

⁵² 105 S Ct 3346 (2nd Cir 1968).

anti-trust law by the arbitration. The court states that "[a] claim under the anti-trust laws is not merely a private matter... [w]e don't believe Congress intended such claims to be resolved elsewhere than the courts."⁵³ As a result, proponents believe that the arbitrator's legal status is quasi-judicial. Arbitrators resemble judges by the laws of states, and therefore, they must observe public policy and mandatory rules.⁵⁴ Moreover, supporters argue that while judges are provided with power to settle disputes and are nominated directly by states, the nomination of arbitrators is a matter of parties.⁵⁵ Consequently, from the proponents' point of view of the jurisdictional theory, arbitrators exercise a judicial power.

However, the legal status of arbitrators and ad hoc arbitration has been criticized by some contractualists. In terms of legal status, they reject the similarity of arbitrators' job to judges. According to them, arbitrators do not have the power to create judicial precedent in the absence of rules while judges have. Also, on the ad hoc arbitration, some scholars state that the ad hoc arbitration has a contractual nature while institutional arbitration has a judicial basis. To some supporters of the judicial theory, both criticisms can be refuted. First, although arbitrators do not have the power to create precedents, they do have power to adjudicate within rules that already exist. If arbitrators lack some powers, this does not mean their job is not judicial work. Even the power of national judges is limited which does not deny the nature of their work as a judicial. For instance, some judges do not have power to adjudicate criminal disputes but civil or commercial disputes. Second, there is no point in differentiating between ad hoc arbitration and institutional arbitration. They both are instruments to settle disputes.

All in all, the judicial theory proposes that states have supervisory power over arbitration, as a private jurisdiction. Yet some wonder again if arbitrators, as private judges with limited power, have an obligation to report crimes according to the theory. In my opinion, the question should be answered by looking at the national rules. If there are clear rules about such an obligation, then arbitrators have to report. If there are no rules, it will be hard to put more obligations on arbitrators than what they recognize or afford. Therefore, national laws are the only instrument to show if arbitrators have a duty to report crimes or not according to the judicial theory. A focus on three sets of national laws from three different legal systems which are the US as a common law, Egypt as a civil law and Saudi Arabia as a *Sharia* law

⁵³ *Id.*

⁵⁴ Hong-Lin Yu, *Supra* note 13, at 260-261.

⁵⁵ *Id.*

system illustrate how national laws impact on arbitrators' duty to report corruption according to judicial theory.

1. Common Law - the U.S.A

The American corporations have international commercial relationships all over the world. Also, American courts have an influence over international arbitration as many awards are enforced in America. In a step to restrict corruption, the US has formulated many rules to combat corruption. It started with the Foreign Corrupt Practice Acts (FCPA) of 1977 to prevent American companies and individuals from bribing foreign public officials to gain business.⁵⁶ The FCPA criminalizes unlawful acts by foreigners or citizens while acting within American territory.⁵⁷ Although the FCPA does not mention any kind of duty to report corruption whether by citizens or experts, the Securities and Exchange Commission (SEC) rewards a blower whistle or blowers whistle 10 to 30 % of the collected sanction.⁵⁸ The reward is given to those who voluntarily inform the SEC about of breaches of the FCPA which leads to a monetary sanction beyond \$ 1 million USD.⁵⁹ Such a step may help to eliminate corruption; although reporting is required, it is "not imposed."⁶⁰

In addition to the FCPA, the American legislator has formulated the Annunzio-Wylie Act to combat money laundering. The Annunzio-While act requires customers and insiders to report any "suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act."⁶¹ Unlike the Annunzio-While act which requires a minimum amount, \$ 5,000 in some cases, to be reported, the Patriot Act of 2001 extends the duty of reporting to financial businesses.⁶² Moreover, the Sarbanes-Oxley Act of 2002 requires auditors and attorneys to report any suspicious business of their clients.⁶³ However, in this cases, the SEC demands that a private attorney to have credible

⁵⁶ *Foreign Corrupt Practices Act*, the U.S: Department of Justice, available at <http://www.justice.gov/criminal/fraud/fcpa/> (last retrieved May 11, 2014).

⁵⁷ Territorial Jurisdiction—15 U.S.C. § 78dd-3, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act, the U.S Department of Justice, Nov 14, 2012, at 11, available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> (last retrieved May 11, 2014).

⁵⁸ H.R.4173-466, the Securities and Exchange Commission, available at <https://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf> (last retrieved May 11, 2014).

⁵⁹ *Id.*

⁶⁰ C.A.S Nasarre, *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator*, TDM, May 2013, at 7.

⁶¹ *Id.*, at 7, See § 21.11 (a) of Suspicious Activity Report.

⁶² *Id.*

⁶³ *Id.*

evidence to report.⁶⁴ Indeed, the current rules do not cover international arbitrators for many reasons. First, the American rules cover specific professionals without referring to arbitrators by name. Second, the rules are extended beyond American citizens to crimes committed by anyone within American territory. In the US then, there are no legal obligations upon the arbitrators to report crimes.

2. Civil Law - Egypt

Unlike in the U.S common law system, the civil law system in Egypt depends more on codes. Under the Egyptian Penal Code, there is a vacuum legislation to fight corruption, bribery, on the international level.⁶⁵ For example, the Egyptian Penal Code does not provide a clear article that criminalizes bribing foreign officials. Furthermore, "many Egyptians government officials enjoy immunity from prosecution."⁶⁶ It will not be possible to prosecute public officials while they are in their positions. However, article 47 (a) of criminal procedure code presents an optional obligation to report corruption:

[a]ny person....who learns that an offence has been committed in respect of which proceedings have been instituted without a complaint being submitted....may inform the investigative judge or the [judicial] investigator or the Public Prosecution or any police station.⁶⁷

The article, indeed, asks citizens but for optional report. The Egyptian procedural code distinguishes between citizens and public servants. While there is no obligation on citizens to report crimes, article 48 of the code sets a legal duty on any public servant to inform the competent power:

[a]ny public servant who, in the course of performing his duties or as a consequence of performing his duties, learns that an offence has been committed or suspects that an offence has been committed...*must* immediately inform one of the persons specified in Article 47.⁶⁸

In Egypt, the legislator does not clarify the legal status of arbitrators, whether or not they are considered as public servants.

⁶⁴ *Id.*

⁶⁵ Abdul Rahim Sedky, *al-qānūn al-jnaiyy uww al-qism al-khas: jraiyy al-'atida' 'lā al-maslaha al-'amūmia*, al-Qāhirah : Dār al-Nahḍah al-'Arabīyah, 1995, at 53. "The Criminal Law and the Private Section: Offences Against Public Interest."

⁶⁶ *Business Climate Development Strategy: Phase 1 Policy Assessment-Egypt-Anti-Corruption*, Dec 2009, the MENA-OECD Initiative, at 6, available at <http://www.oecd.org/globalrelations/psd/46341460.pdf> (last retrieved May 15, 2014).

⁶⁷ Egyptian Criminal Procedure Code of 1971 As Amended to 14 March 2010.

⁶⁸ *Id.*

Nevertheless, the situation in dealing with anti-money laundering law is much easier. Article 8 of the Anti-Money laundering law asks financial institutions to report money laundering and suspect acts. Such a duty does not cover any individual but rather financial institutions and those who work in them. The article states that "[f]inancial institutions shall report to the [u]nit financial transactions suspected of involving money laundering or terrorism financing."⁶⁹ Therefore, it can be said that in Egypt, there is no obligation on arbitrators to report money laundering.

3. Saudi Arabia

Unfortunately, the Criminal Procedural Code of Saudi Arabia does not provide any obligation to report crimes nor the Penal Code. It seems the legislator does not give an attention to the issue of reporting corruption obligation. Yet, article 17 of the Saudi anti-bribery law rewards every informer that leads to the catching or help in catching criminals:

[e]very informer who gives information regarding an offence,...., be granted a reward of not less than 5,000 Rials and not exceeding one half of the confiscated property... but the Ministry of Interior may pay a sum higher than the sum which would be fixed in pursuance of this Article, subject to the approval of the Council of Ministers.⁷⁰

Although the anti-bribery law does not include any mention of reporting crimes, it is appropriate to discuss the idea of reporting crimes from the perspective of *Shari'a* law, *Hisba*, enjoying good and forbidding wrong,⁷¹ as long as *Shari'a* fills the vacuum legislation in Saudi legal system. For instance, article 1 of Saudi constitution states that "*God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution.*"⁷² Article 23 of the constitution restricts the power of *Hisba* to the state only which seems incompatible with *Shari'a*. Article 23 provides that "[t]he state protects Islam; it implements its *Shari'ah*; it orders people to do right and shun evil; it fulfils the duty regarding God's

⁶⁹ Law No. 80 of 2002 and its amendments, available at <http://www.cbe.org.eg/NR/ronlyres/5CD26DDC-B8AE-4314-8996-9A4D14E3B42F/1285/law80for2002anditsamendmentsEnglish.pdf> (last retrieved May 16, 2014).

⁷⁰ *Saudi Arabia: Anti-bribery Law*, Arab Law Quarterly, Brill, Vol. 9, No. 3 (1994), at 286.

⁷¹ *Hisba* is a method to keep everything is compatible with Islam or the law of God It has a specific conditions regarding to who practices it, in what way and how to protect the privacy. In my opinion, *Hisbah* is an ethical and religious rule to solve the problems of society, and that what legal systems with civil background try to do from ethical point of view although such systems may allow ethical rules to be mandatory in some crimes. For further information about *Hisba* or Enjoying good and Forbidding Wrong, See, Cooke, M. *Commanding Right and Forbidding Wrong in Islam Thought*, Cambridge University Press, 2000.

⁷² *Saudi Arabia Constitution*, available at http://www.law.yale.edu/rcw/rcw/jurisdictions/asw/saudiarabia/saudi_constitution.pdf (last retrieved May 17, 2014).

call."⁷³ Although arbitrators are not public officials according to Saudi arbitration law, they can participate in forbidding the wrong, or *Hisba*, as long as arbitrators are regarded as scholars. *Shari'a* provides not only the state with power of *Hisba*, commanding right and forbidding wrong, but also scholars. Yet, Saudi law does not oblige citizens to report bribery nor arbitrators. The Saudi anti-money laundering law, also, does not place a duty on citizens and arbitrators to report money laundering, only financial entities and its workers are required to do so.⁷⁴

C. Hybrid Theory:

The third theory which is called the hybrid theory is a mix of the both theories, contractual and judicial. Some scholars have tried to avoid the criticism of the contractual theory of arbitration by describing arbitration as having a combination of judicial and contractual nature. According to the hybrid theory, arbitration takes a position amid the theories that is comprised of both a consensual solution for disputes and a judicial one.⁷⁵ Arbitration starts with the will of the parties, a contractual nature, and it ends with an award that settles the dispute. Yet, the award will not take the judicial nature as a judgment until the award gains executive power.⁷⁶ Otherwise, the award will not have the power of *res judicata*.

Many legal systems and scholars prefer the hybrid theory. For instance, article 21 of the old Saudi arbitration law reflects the hybrid theory in dealing with the award; it considers the award by arbitrators after receiving the executive order as same as the judgment made by the courts that have issued the order.⁷⁷ In other word, awards have executive power is considered as national verdicts. Moreover, some scholars consider arbitration as a kind of solution which reconciles contradictory interests. The interest of parties which exist in the free will and the interest of states which exists in public policy. Therefore, using the hybrid theory to describe the nature of arbitration avoids the criticisms of both contractual and judicial theorists. Many scholars, arbitrators and judges take the hybrid theory seriously. Redfern and Hunter, for instance, states that arbitration has hybrid nature:

⁷³ *Id.*

⁷⁴ Article 7(a), *Anti-money Laundering Law & its Implementing Regulations*, Royal Decree No. M/39, 23 August 2003.

⁷⁵ Huda, *supra* note 17, at 35.

⁷⁶ *Id.*

⁷⁷ Arbitration Law, Issued by the Royal Decree No. M 46, 12/071403 AH, available (in Arabic) at <http://www.mci.gov.sa/LawsRegulations/SystemsAndRegulations/AbitrationSystem/Pages/9-2.aspx> (last retrieved Sep 1, 2014).

[i]nternational commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognize [sic] and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law.⁷⁸

According to the theory, both the desires of the parties and the states play a role in shaping the nature of arbitration, and thus in shaping the legal status of arbitrators. On the one hand, arbitration cannot be created without the will of parties; on the other hand, the process and enforcement of awards cannot contradict the mandatory rules or public policy of states. Concerning the legal status of arbitrators, arbitrators have a contractual relationship with parties.⁷⁹ The parties nominate the arbitrator who is best able to settle their dispute, and arbitrators derive their power from the parties' agreement, arbitration agreement. Yet, the power of arbitrators is restricted to the mandatory rules and public policy of enforcing states.⁸⁰ According to the hybrid theory, arbitrators have a contractual relationship with the parties similar to the contractual theory, yet arbitrators must adhere to public policy and the mandatory rules of states similar to the judicial theory.

Although the hybrid theory has many supporters, it has been criticized for combining both theories. Regarding the award, the theory states that the award will be considered as a verdict if it has execution order. Such a result contradicts the idea of arbitration which depends on the optional enforcement of the award as long as it is not against public policy or arbitrability rules.⁸¹ Furthermore, some question if the award does not have the order of execution, whether it will be considered as a verdict which contradicts delocalization theory. Some scholars criticize the hybrid theory for its description of arbitration as it starts with an agreement and ends with a judicial award. Yet, the theory does not describe the essence of

⁷⁸ *Id.*, at 275; Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, London, Sweet & Maxwell, 1991, at 8.

⁷⁹ Hong-Lin Yu, *Supra* note 13, at 277.

⁸⁰ It should be noticed that the nature of the award differs according to the jurisdictional, contractual, hybrid, autonomous theories. While some proponents of the contractual theory regards the award as a contract under agent theory, proponents of the jurisdictional theory believes that the award must be recognized as a judgment of national courts. However, the hybrid theory proponents look at the nature of the award in the middle between a judgment and award. Also, the autonomous theory proponents have their own view about the nature of the award. They think that the award must be enforced in countries, according to the delocalization theory, without interfering by states. See Busit *Supra* note 12, Hong-Lin Yu *Supra* note 13 & Redfern and Hunter *Supra* 5 note 33.

⁸¹ Huda, *supra* note 17, at 35.

arbitration which is an instrument to settle disputes.⁸² Moreover, some scholars believe that the hybrid theory describes the nature of optional arbitration, but it does not describe the nature of obligatory arbitration such as that found in article 57 of Egyptian Customs law.⁸³

In my opinion, obligatory arbitration is an exception for the general rule of arbitration which is optional. Obligatory arbitration, which some countries prefer in some commercial disputes, reflects the will of the government to solve disputes via arbitration. While in optional arbitration parties sign arbitration agreement before or after disputes arise, parties in obligatory arbitration know from the beginning that disputes arising from the contracts will be settled by arbitration. Therefore, I think the hybrid theory describes both kinds of arbitration whether obligatory or optional.

It is known that the hybrid theory consists of the judicial and contractual theories, yet some wonder what about arbitrators' obligation to report corruption? Is there an obligation? Within the hybrid theory, the arbitrators' legal status is regarded as a contractual. There is a contractual relationship between parties and arbitrators. Parties nominate arbitrators to settle disputes by the authorization of the parties and within the chosen rules. Furthermore, arbitrators must not breach public policy and the mandatory rules of states.⁸⁴ Under the hybrid theory it is hard to say whether there is an obligation to report crimes as long as there are no clear rules by states.⁸⁵

⁸² *Id.*

⁸³ Mahmud al-Sharqawi, *supra* note 16, at 13-14 & article 57 of Egyptian Customs law which forces owners of goods in case of disputes to arbitrate. *See Supra* note 26.

⁸⁴ Hong-Lin Yu, *Supra* note 13, at 277.

⁸⁵ In the next subdivisions, the paper will discover that arbitrators on the ICC follow a track same as the hybrid theory.

III. Conflict between Confidentiality, Mandatory Rules, and Public Policy⁸⁶

In this chapter, the paper discusses the conflict of interests between confidentiality and public policy. First part defines the meaning of *confidentiality* in the ICA, and its scope. This will give background about the importance of confidentiality. Second part defines public policy and its levels with some cases to show its importance in arbitration, and why there is controversy about whether to restrict it in favour of public interest, public policy or not. Such a step presents many problems which arise because of the difference of confidentiality between theory and practice.⁸⁷

A. Definition of Confidentiality

Confidentiality can be defined as an obligation that prohibits parties, plaintiffs, defendants or arbitrators, from disclosing information or documents which have a relation to the arbitration.⁸⁸ Any materials, testimonies or sessions are confidential. Yet, some international arbitration institutions and courts have their own definition of confidentiality. This part discusses the variation in the scope of confidentiality in some arbitration rules like LCIA and WIPO. Some institutions expand the definition to cover almost everything in favour of parties' interests, while others restrict it to balance the interest of states and parties.

1. Definition of Confidentiality in the AAA, UNCITRAL, LCIA and WIPO:

In this part, the paper presents the meaning of confidentiality in international rules to show that the scope of confidentiality is restricted or broadened upon international rules. Although many parties think that confidentiality separates their business from the public sphere which is mostly true, some international institutions do not regulate confidentiality related to arbitration. In the UNCITRAL, for example, confidentiality is not mentioned at all while some national rules, such as the Serbian rules of the foreign trade attached to the Trade

⁸⁶ There are many approaches to investigate the dilemma of arbitrators' duty to report by scholars. Some scholars figure out the dilemma by differentiate between common law and civil law, and the role of judges in both systems, adversary model & inquisitorial model. See S. Nadeau – Séguin, *Commercial Arbitration and Corrupt Practices: Should Arbitrators Be Bound by a Duty to Report Corrupt Practices?* TDM, V. 10, May 2013, at 8. In my opinion, the dilemma can also figure out by comparing between those who are in favour of free trade without borders on international trade, and others who are in favour of fair trade/restricted trade. Yet, I've chosen to figure out the problem as many did by comparing confidentiality and public policy because of its clarity.

⁸⁷ See Hwang, M & Chung, K, *Defining the indefinable Practical Problems of Confidentiality in Arbitration*, Journal of International Arbitration, 2009, available at <http://www.arbitration-icca.org/media/0/12641379548970/defining.pdf> (last retrieved Dec 9, 2014).

⁸⁸ Noussia, Kyriaki, *Confidentiality in International Commercial Arbitration: A Comparative Analysis of the Position Under English, US, Germany, and French Law*, Springer Heidelberg, 2009, at 1.

Chamber, cover only the confidentiality of hearings.⁸⁹ International rules of arbitral institutions and national laws deal with confidentiality in various ways. The London Court of International Arbitration (LCIA) formulates confidentiality as a general principle; the LCIA expands it to the award, documents and all materials that are related to the arbitration in article 30 (1).⁹⁰ Furthermore, the article states there is an exception to confidentiality in states of legal duty.⁹¹ In some circumstances, for instance, national courts might order to disclose materials to give executive power to the award. Furthermore, in notes for arbitrators in the London Court of International Arbitration (LCIA) India, note fourteen explains that article 30 of the LCIA India, which is similar to the original article 30 in the LCIA, "imposes duties of confidentiality on parties and *arbitrators*."⁹² Consequently, no parties and arbitrators have the right to disclose material or information that is created for the purpose of arbitration unless parties agree to the disclosure.

Article 30 of LCIA India requires the same duty as the arbitrators of the LCIA with the same exceptions, which is the legal duty. Yet, the article does not give a concrete answer to whether arbitrators have a duty to report crimes, corruption, or not. Article 30 mentions specific type of legal duty:

Unless the parties expressly agree ... disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a court or other judicial authority.⁹³

Furthermore, the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) state a duty to the arbitrators not to disclose materials related to the

⁸⁹ See *UNCITRAL Model Law on International Arbitration*, Jan 2008, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last retrieved Nov 19, 2013) & Hiber, D & Pavic, V, *Arbitration and Crime*, Journal of International Arbitration, Kluwer International law, 2008, at 465.

⁹⁰ Article 30 (1) provides that Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings *not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority*, See the *LCIA Arbitration Rules*, Jan 1, 1998, available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx (last visited Nov 15, 2013).

⁹¹ *Id.*

⁹² See *Notes for Arbitrators*, the LCIA India, at 4, available at http://www.lcia-india.org/Notes_For_Arbitrators.aspx (last visited Dec 16, 2013).

⁹³ LCIA India Arbitration Rules, April 17, 2010, available at <http://www.lcia-india.org/Arbitration.aspx#Article30> (last retrieved Nov 5, 2014).

arbitration in the article 6 (2), and extend confidentiality to the award.⁹⁴ Also, the arbitration rules of the International Chamber of Commerce (ICC) do not present more than a general principle of confidentiality.⁹⁵ The articles do not give any kind of duty of to report crimes. They restrict the work of ICC to commercial disputes. Article 1 (2) details the work of the ICC court to administer the resolutions of tribunals not to resolve disputes.⁹⁶ Moreover, the commercial arbitration rules of the American Arbitration Association (AAA) presents confidentiality as a general principle to all matters related to the arbitration and award "unless agreed to by parties or applicable law."⁹⁷ Yet, the AAA goes further and supplies the arbitrator with a right to inform the AAA of any circumstances, such as personal financial interest, that may influence the impartiality.⁹⁸ Although such opportunity is optional, it is ignored if parties or arbitrators fail to inform, or they pursue the tribunal.⁹⁹ The AAA paves a way showing the duties of arbitrators by creating an ethical code for them. For example, canon I (A) states "[a]n arbitrator....should recognize a responsibility to *the public*, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include *pro bono service* as an arbitrator where appropriate."¹⁰⁰ By

⁹⁴ See *ICIAD Convention, Regulations, and Rules*, at 106 & 122 available at

https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (last visited Nov 15, 2013).

⁹⁵ Article 6 states that the work of the Court is of a confidential nature, which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat, See *Appendix I of The ICC Arbitration Rules*, at 44, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> (last visited Nov 16, 2013).

⁹⁶ *Id.*, at 8.

⁹⁷ See *Methodology of Research: Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex, Commercial Dispute)*, October 1, 2013, available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail.jsessionid=r5LCSJvYRPZJMFmbsTX52wk3Q2vJWQ5pf1Lcbyv1WcYZHjNfRn8f!1064099277?_afWindowId=null&_afLoop=1348154171089049&doc=ADRS TG_004130&_afWindowMode=0&_adf.ctrl-state=94p0hv8cn_53%22%20%5C1%20%22@?_afWindowId=null&_afLoop=592320665952589&doc=ADR STG_004130&_afWindowMode=0&_adf.ctrl-state=1b43oq7f31_4#%40%3F_afWindowId%3Dnull%26_afLoop%3D1348154171089049%26_afLoop%3D592320665952589%26doc%3DADRSTG_004130%26doc%3DADRSTG_004130%26_afWindowMode%3D0%26_afWindowMode%3D0%26_afdf.ctrl-state%3D54jx0xk56_4 (last retrieved Nov 17, 2013).

⁹⁸ *Id.*, article 17 (1).

⁹⁹ Article 41. It should be noticed that article 17 presents any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, *shall* disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence [...] in accordance with the rule 41. See *Supra* note 25.

¹⁰⁰ The Code of Ethics for Arbitrators in Commercial Disputes, March 1, 2004, available at http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased (last retrieved Nov 17, 2013). Although the canon I of the code of ethics for arbitrators provide a duty of arbitrators to be responsible before the public, and pursue the dispute in favour of goodness, C.A.S Nasarre, in answering whether or not arbitrators have a duty to report crimes, focus, only, on the obligation of confidentiality of arbitrators before parties which exists in the AAA ethics code. See *Supra* note 60, at 18. In my opinion, Nasarre mentioned the obligation before the public and neglect the obligation before the public, which was not accurate. To show that the AAA, also, put an legal obligation on arbitrators in many levels, the article A-21 of the

analysing this article, the reader may think there is an ethical duty to report corruption, or at least prevent corruption by issuing the nullity of contract regarding to *pro bono* services. Additionally, arbitration rules of the World Intellectual Property Organization (WIPO) covers, indeed, confidentiality in the existence of arbitration, documents used or generated, arbitrators, witnesses, and award.¹⁰¹ In other words, the WIPO knows the importance of documents especially in the commercial field; therefore, it covers all issues that can damage parties' interests. Finally, as some scholars believe, parties should be aware that confidentiality does not apply to all arbitration, and there is variation extending confidentiality to the whole process of arbitration.¹⁰² The variation in defining confidentiality and its scope are flexible because many states want their jurisdictions to play a role in times of conflict between private interest and public policy. The flexibility in the meaning of confidentiality enhances the power of national courts to prevent the privilege of private interest over public one.

2. Classical Definition of Confidentiality, the UK Courts, and the Modern Definition, the Australian Courts

In the beginning, the paper discusses the meaning and scope of confidentiality in the English case law and Australian case law. Such a step presents an idea about the variation in understanding the scope of confidentiality among different legal systems.

While many international institutions for arbitration fail to give a clear theoretical answer to the concept of confidentiality and duty to disclose, many international courts provide a solution to the problem on a case by case basis. There are two juridical trends in defining confidentiality and its limits which are the classical school and the modern school. The jurisdiction of the classical school is represented by courts under English law, and the

optional appellate arbitration rules states that "[t]he parties and the appeal tribunal shall maintain the confidentiality of these proceedings *except* in the case of a judicial challenge or court order concerning the proceeding, *or as otherwise required by law.*" *See the Optional Appellate Arbitration Rules* Nov 1, 2013, at 12, available at

<http://www.adr.org/aaa/ShowProperty;jsessionid=hk8HS1hT2lhfKLq6F862y5J3YLHyGsmvb2rQd9n63chZrDJQytNp!1064099277?nodeId=/UCM/ADRSTAGE2016218&revision=latestreleased> (last retrieved Nov 18, 2013). The clause, or as otherwise required by law, gives an opportunity to ask whether arbitrators have a duty to report crimes as citizens, foreigners or arbitrators.

¹⁰¹ See articles 73, 74, 75, & 76, *WIPO Arbitration Rules*, Jan 2009, at 56-57, available at http://www.wipo.int/export/sites/www/freepublications/en/arbitration/446/wipo_pub_446.pdf (last retrieved Nov 18, 2013).

¹⁰² Marrs, S & Hance, J, *You Thought Arbitration was Confidential?* 2013, Beirne, Maynard & Parsons, L.L.P, at 1-2, available at http://www.iadcmeetings.mobi/assets/1/7/11.2_-_Marrs_-_You_Thought_Arbitration_Was_Confidential.pdf (last retrieved Nov 17, 2013).

jurisdiction of the modern school is presented by the Australian court.¹⁰³ In the English court, for example, in *Hassneh Insurance Co of Israel v. Mew*, the court believed that there is privacy in a hearing which extends to an implied duty of confidentiality in the ICA; the English court, Judge Colman, stated that the documents must be confidential as long as the hearings are held in private according to the arbitration agreement:

If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must be in principal extend to documents which are created for the purpose of that hearing.¹⁰⁴

Moreover, in *Ali Shipping Corp v Shipyard Trogir*, the English court reinforced its position regarding confidentiality. The Court of Appeal declared that confidentiality is implied, by law, to pleadings, proof of evidence, hearings and awards:

Held, allowing the appeal, that a term of confidentiality was implied by law not only to the award itself but also to pleadings, submissions and proofs of evidence. Confidentiality was subject to exception in the case of consent, *in the interests of justice*, or where it was reasonably necessary for the protection of the interests of a party to the arbitration. Injunctive relief should be available except in the case of *fraud* or abuse of process even if it might result in a tactical advantage to one party.¹⁰⁵

Unlike the classical school which believes that all materials in an arbitration must not be disclosed to support parties in another one, the modern school tries to balance public interest with the principle of confidentiality. The courts of the modern school believe that public interest prevails over confidentiality, so if materials related to an arbitration are important for public interest, parties can ask to disclose the materials in another arbitration process. The Australian High Court, for instance, in *Esso Australia Resources Ltd v. The Honourable Sidney James Plowman*, stated that documents are not confidential as a result of hearings confidentiality; absolute confidentiality is not a principle of international arbitration in Australia, and disclosing documents must prevail over confidentiality in favour of public interests:

When one party produces documents or discloses information to an opposing party in an arbitration that is to be heard in private, *the documents or information are not clothed with confidentiality merely because of the privacy of the hearing*. Nor does the use of a document in such proceedings make the document confidential. *Absolute confidentiality*

¹⁰³ Redfern & Hunter, *Supra note 5*, at 137-138.

¹⁰⁴ [1993] 2 Lloyd's Rep. 243.

¹⁰⁵ [1998] 1 Lloyd's Rep. 643.

of documents produced and information disclosed in an arbitration is not a characteristic of arbitrations in Australia. Accordingly, a party who enters into an arbitration agreement is not taken merely on that account to have contracted to keep absolutely confidential all documents produced and information disclosed to that party by another party in the arbitration...although the privacy of hearing should be respected, confidentiality was not an essential attribute of a private arbitration...*the public's legitimate interest in obtaining information about affairs of public authorities prevailed.*¹⁰⁶

In another case, *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*, the Australian Court of Appeal refused to apply the agreement of parties not to disclose confidential material, yet it asked that materials be disclosed in favour of public policy to protect the environment:

In the course of a lengthy commercial arbitration between the parties, the arbitrator made directions that documents prepared for the purposes of the arbitration or documents which would reveal the contents of the same, not be disclosed. The Commonwealth wished to *disclose certain of those documents to the Environment Protection Authority of New South Wales*, and they were also the subject of a request by a journalist under the *Freedom of Information Act 1982 (Cth)*. The Commonwealth sought by summons to set aside the arbitrator's directions as being beyond power. The trial judge dismissed the summons, holding that the Court had no power to intervene in the arbitration proceedings.¹⁰⁷

Although the English courts affirm confidentiality, and they believe that the ideal is to achieve *the interest of justice*, they do not mention the duty of arbitrators in the case of serving justice. They present a general duty to reveal information to help in supporting justice. They do not declare whether arbitrators have the right to play such a role or not. Similarly, the Australian Appeal Court does not cite the duty of arbitrators to release information though the appeal courts prefer public interest over the right of confidentiality.

B. Definition of Public Policy and Some Application

In this part, the paper will shed light on the public policies levels (1). It will, also, present some examples of the application content of public policy at contempt courts (2), and it will provide some example of disputes in which public policy was invoked by parties or arbitrators and how do they deal with.

¹⁰⁶ [1995] 128 ALR 391.

¹⁰⁷ [1995] 36 NSWLR 662.

Public policy is a vague and complex term that has evolved over time. What was accepted in the 20th century in a state may not be accepted in the 21st century in the same state.¹⁰⁸ Also, public policy can differ among states around the world. For instance, an award which is issued as a result of a dispute concerning alcoholic beverages may be challenged in Saudi Arabia while the award might not be in a different state. In other words, "public policy is a variable notion that is open-textured and flexible."¹⁰⁹ Public policy is an essential factor for an award to be enforced by states. Article V (2) of (b) of the New York Convention provides "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) [t]he recognition or enforcement of the award would be contrary to the public policy of that country."¹¹⁰

1. Public Policy Levels

There are three levels of public policy: national public policy, international public policy and transnational public policy.¹¹¹ At the national level, public policy reflects essential principles of state policy in social, economic, religious, political, legal and moral domains.¹¹² Some scholars define it as "a dynamic concept that evolves continually to meet the changing needs of society, including political, cultural, moral and economical dimensions."¹¹³ Some states, for instance, might find that disputes related to anti-trust law are not arbitrable in one time but are arbitrable in the future.¹¹⁴ Furthermore, public policy is defined as the representing of national standards and *mandatory laws* that can't be changed or derogated by parties.¹¹⁵ Therefore, domestic mandatory rules embody a part of national public policy while not international public policy. For instance, article 6 of the French Penal Code provides

¹⁰⁸ M. Hunter & G. Silva, *Transnational Public Policy and its Application in Investment Arbitrations*, the Journal of World Investment, 2003, at 367-368, available at http://www.arbitration-icca.org/media/0/12232929401680/martin_and_gui_conde_e_silva.pdf (last retrieved Sep 8, 2014).

¹⁰⁹ Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards under the New York Convention-With Particular Reference to Construction Disputes*, Journal of Int. Arb. 2007, at 11.

¹¹⁰ NY. Convention 1958.

¹¹¹ This categories of public policy are mentioned in M. Hunter & G. Silva *Supra* note 108 at 367-368.

¹¹² See M. Hunter & G. Silva *Supra* note 108 at 367 & Busit *Supra* note 12 at 49-50.

¹¹³ CS. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, Social Science Research Network, April 21, 2009, at 104, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394447 (last retrieved Sep 12, 2014).

¹¹⁴ In the American Safety Case, the US Supreme Court refused disputes which are related to Anti-trust law to be solved by arbitration while the Supreme Court accepted Mitsubishi case to be solved by arbitration. For more information See Redfern & Hunter, *Supra* note 5, at 127 & [1968] 391 F. 2d. 821 & [1985] 473 US 614.

¹¹⁵ Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, American Business Law Journal, Sep 1, 1988, at 513.

"[s]tatutes relating to public policy and morals may not be derogated from by private agreements."¹¹⁶ Morals are of a vague nature that evolves in public policies of different states. In case of corruption, for instance, some might think arbitrators duty to report corruption is kind of moral obligation while others think not. Another example is the *ad hoc* award of 1989 where a claimant, a Panamanian company, filed a case against a respondent, a Swiss company. The tribunal found that brokerage is not prohibited under Swiss law although brokerage is prohibited under foreign public law. Yet, it is not prohibited for arbitrators sitting in Switzerland and applying Swiss law.¹¹⁷ Consequently, national courts may decide the nullity of awards as long as the awards contradict with the national public policy of states. Some scholars think that article V (2) b deals with the negative public policy by which competent courts refuse to enforce awards against public policy.¹¹⁸ Nevertheless, national public policy is applied narrowly, by many industrialized countries, in favour of liberalizing international trade.¹¹⁹ In *Parsons & Whittemore*, for instance, the latter did not complete the construction of a paperboard mill in Egypt because of the Arab-Israel Six Day War. They claimed that applying the award in favour of the Egyptian Company, *Societe Generale de L'Industrie du Papier (RAKTA)*, was against U.S public policy as long as the US had cut all types of relations including diplomatic. *Parsons & Whittemore* argued that as "a loyal citizen" they refused to complete the construction. *Parsons & Whittemore* argued to define national public policy of the US through international politics. The Second Circuit rejected the definition of public policy by the appellant:

[i]n equating 'national' policy with United States 'public' policy, the appellant [Parsons & Whittemore] quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'¹²⁰

At the international level, international public policy consists of a narrower level of public policy or, in other words, domestic public policy. The principles of international public policy

¹¹⁶ French Civil Code 2006, available at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (last retrieved Sep 12, 2014).

¹¹⁷ Matthias Scherer, *Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals*, International Arbitration Law Review, 2002, at 29, also, it is mentioned in *Arbitration - Money Laundering, Corruption and Fraud*, Dossiers - ICC Institute of World Business Law *Supra* note 33, at 128.

¹¹⁸ A.N. Zhilsov, *Mandatory and Public Policy Rules in International Commercial Arbitration*, Netherlands International Law Review, Vol. 42, May 1995, at 95.

¹¹⁹ Harris, *Supra* note 109, at 14-16.

¹²⁰ *Id.*, at 13, *See*, also, 508 F.2d 969 (1974), available at <http://law.justia.com/cases/federal/appellate-courts/F2/508/969/367069/> (last retrieved Oct 25, 2014).

reflect the fundamental principles of the legal order in a concerned state.¹²¹ For example, the Second Circuit of the US Appeal Court refused to apply US public policy instead of international public policy. The court stated that "[e]nforcement of foreign arbitral awards may be denied...only where enforcement would violate the forum state's most basic notions of morality and justice."¹²² The fundamental principles cover international treaties, morals, natural laws, international customs that are accepted by the international community such as justice, *pacta sunt servanda*, and *contra bona more*.¹²³ In *Eco Swiss China Limited v Benetton Investment NV*, for example, the tribunal which was seated in the Netherlands adjudicated against Benetton for terminating the exclusive right by which Eco Swiss was given the right to sell clocks which bears the name of 'Benetton' by Bulova, in Europe. Yet, the award was challenged before a Dutch court by Benetton contending that the exclusive licensing agreement was anti-competitive under article 81 of the EC treaty, which reflects a part of international public policy. The Dutch court adjudicated in favour of Benetton, stating that an award which enforces an agreement of exclusive licensing is against public policy.¹²⁴ Advocate General Saggio stated before the ECJ that the Dutch court has the right to annul any award that contradicts with the EC competition laws on the grounds of public policy. According to some scholars, if international public policy is breached, parties will be prevented from invoking a foreign law, foreign verdict, or foreign award.¹²⁵ The International Law Association Committee on International Commercial Arbitration's (ILA) gives a similar definition of the international public policy. According to the report of the ILA, international public policy of any state consists of:

(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social, or economic interests of the State, these being known as "*lois de police*" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organizations (e.g., through international treaties).¹²⁶

In addition to domestic and international public policies, there is a third level of public policy which is transnational public policy. Transnational public policy is more uniform than the

¹²¹ See M. Hunter & G. Silva *Supra* note 108 at 367 & Busit *Supra* note 12 at 49-50.

¹²² 508 F.2d 969 (1974).

¹²³ Busit, *Supra* note 12, at 51, M. Hunter & G. Silva *Supra* note 108 at 367, & CS. Gibson, *Supra* note 113, n° 162 at 135.

¹²⁴ Redfern & Hunter, *Supra* note 5, at 150-151.

¹²⁵ CS. Gibson, *Supra* note 113, at 135.

¹²⁶ *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Conference Report New Delhi, the ILA, 2002, at 6, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/19> (last retrieved Sep 13, 2014).

international one, and was a narrower scope.¹²⁷ Transnational public policy is also regarded as *the truly international public policy*.¹²⁸ According to some scholars, transnational public policy "involves the identification of principles that are commonly recognized by political and legal systems around the world."¹²⁹ Others believe that transnational public policy is not only about fundamental values of human beings in "a specific society," but, about the values that are accepted by the international community.¹³⁰ The values must be supported by treaties and international declarations; otherwise, the values will not be recognized as transnational public policy.¹³¹ Transnational public policy, for instance, includes: (i) human rights principles on both civil and political levels; and (ii) protecting ethical values recognized by the international community.¹³² Moreover, there is a group who define transnational public policy as a reflection of the "*societas mercatorum*."¹³³ According to this point of view, the society of merchants has their own values at the international level which are utilized to enhance *fair international trade*. Such values which concern international trade by merchants *are accepted universally*, and they include *ethical principles* that exist in international commerce and regarded as supranational.¹³⁴ Consequently, fighting corruption is a part of transactional public policy because it enhances fair trade at the international level. For this reason, for example, Judge Lagergren stated that bribery is condemned in both French and Algerian jurisdictions. Furthermore, he contended that "bribery is contrary to good morals and to an international public policy common to the community of nations."¹³⁵

To sum up, the domestic level of public policy is wider than the international one, and the international one is wider than the transnational one. Domestic public policy might not be applied at the international level as long as it is not regarded as a part of international public policy. Furthermore, international public policy is accepted by many states, yet it is not considered as a part being of transnational public policy if it is not accepted universally.

¹²⁷ Chang-fa Lo, *Principles and Criteria for International and Transnational Public Policies in Commercial Arbitration*, Asia Arbitration Journal, 2008, at 82 & M. Hunter & G. Silva *Supra* note 108 at 367.

¹²⁸ Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, Melbourne Journal of International Law, Vol. 6, 2005, at 219.

¹²⁹ M. Hunter & G. Silva *Supra* note 108 at 367.

¹³⁰ Chang-fa Lo, *Supra* note 127, at 82.

¹³¹ *Id.*, at 82.

¹³² *Id.*, at 82-85.

¹³³ Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration*, Kluwer Law International, 2004, at 281.

¹³⁴ *Id.*, at 281-282.

¹³⁵ ICC Case No. 1110, *Arbitration International*, Vol. 10, 1994, at 294, & Sayed at 289. *Id.*, at 281-285.

2. Application of Public Policy Content

The levels of public policy and the way that courts of different legal systems apply is reflected in cases in which public policy is invoked according to article V (2) b of the NY. Conv. 1958. While there is no data in Egyptian and Saudi Arabian case law,¹³⁶ there are examples in UK and the US case law. It should be noticed, at the outset, that the UK and US are seen as industrialized countries which means they rarely refuse to enforce awards on the grounds of public policy.¹³⁷ They are considered as countries with a pro-enforcement bias of awards. Furthermore, the jurisdictions of both countries influence international arbitration and arbitral law globally.¹³⁸

a) UK Case Law

England plays a great role in international commerce, and it is a place where many awards are enforced. The English laws and courts have a stamp on the ICA. Therefore, the English case law presents a guide for the meaning of public policy. This part provides how public policy is utilized in the UK case law.

The UK jurisdiction, a country with an industrialized approach, has its own understanding of public policy. Such understanding varies among cases. What might be regarded as invoking public policy in one case might not be suitable for other cases. The *Soleimany v. Soleimany* and *Westcare Investment, Inc. v. Jugoimport-SP-DR Holdings* present clear examples of verdicts in which different meanings and levels of public policy lead to different results.

In the first case, *Soleimany v. Soleimany*, there was a contract between a son, the plaintiff, and his father, the defendant, to export Iranian carpets from Iran. Ding so is against Iranian revenue law and export controls. The son breached Iranian law by exporting carpets to the father by smuggling and bribing Iranian officials. Once the father sold the carpets in the UK and other places, a dispute arose between the son and the father about the commission. They both signed an arbitration agreement to settle the dispute using Jewish law, and asked the Beth Din (Court of Chief Rabbi) to adjudicate. The Beth Din found that the contract was illegal because it breached Iranian law, yet such an illegality did not affect the parties' rights according to Jewish law. The Beth Din issued an award in favor of the son to be paid £ 576,

¹³⁶ Kluwer Arbitration Database, reported in Harris, *Supra* note 109, at 21.

¹³⁷ Harris, *Supra* note 109, at 21.

¹³⁸ CS. Gibson, *Supra* note 113, at 128.

574 by the father. Nevertheless, when the court of appeal sought enforcement of the award, it held that the award cannot be enforced for breaching public policy of a friendly foreign state:

[w]here a foreign arbitration award was made pursuant to a valid arbitration agreement but was based on a contract which *was illegal under the law of a friendly foreign state* [emphases added] where that law governed the contract or the contract was to be performed in that state, the English court would not enforce that award on the grounds of public policy.¹³⁹

Thus, even illegality according to a foreign mandatory law can establish grounds for setting aside the award. The English High Court of Appeal issued that breaching the law of a friendly foreign state would not be tolerated.

However, in the second case, *Westacre Investment, Inc. v. Jugoinport-SP-DR Holdings*, the English court compared two levels of public policy to reach a different decision than the *Soleimany v. Soleimany* verdict. The first one of public policy supports the finality of the arbitral award reflecting a pro-enforcement bias while the second level of public policy fought illegal contracts.

In this case, the dispute arose out of a Consultancy Agreement between the Panamanian company, *Westacre*, on one side and the state Yugoslavian company, *Jugoinport*, on the other. *Jugoinport* appointed *Westacre* as a counsellor to sell weapons to the Kuwaiti Ministry of Defence. *Westacre* would receive 15 % of the deal between the Kuwaiti Ministry and *Jugoinport*. Nevertheless, *Jugoinport* terminated the contract with the Kuwaiti Ministry, and did not pay the fees to *Westacre*. According to the arbitration agreement, the ICC obliged *Jugoinport* to pay all outstanding fees to *Westacre*. The award was challenged by *Jugoinport* in Switzerland, yet the *Federal Swiss Tribunal* upheld it. *Jugoinport* challenged the enforcement of the award before the English court by alleging that there was no consultancy contract with *Westacre* except a contract which included bribing Kuwaiti officials. According to *Jugoinport*, paying a bribe to Kuwaiti officials to influence the Kuwaiti Ministry of Defence was against Kuwaiti public policy. Therefore, the English court balanced public policy which favoured enforcement of the award and the public policy which rejected enforcement of the award in illegal contracts. The English court considered public policy of the finality of the award:

¹³⁹ [1999] Q.B. 785.

Against these considerations, it is necessary to take into account the importance of sustaining the finality of international arbitration awards in a jurisdiction which is the venue of more international arbitrations than anywhere else in the world.¹⁴⁰

The court had ruled on the side of commercial interests:

On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption.¹⁴¹

The second decision of the English court reflects a pro-enforcement bias versus discouraging corruption. This is in spite of the fact that the UK is a part of the OECD Convention on Combating Bribery of Foreign Public Officials.¹⁴²

b) US Case Law

The same point of view of the English courts regarding balancing foreign public policy and mandatory rules can be observed American case law. The American courts, as in the English courts, reflect a pro-enforcement bias even though an award might contradict foreign mandatory laws or public policy. Many American cases provide examples of this approach such as *Northrop Corporation. v. Triad International Marketing S.A.* and *Lainiors-Trefileries-Cableries de Lens, S.A. v. Southwire Company*.

In *Northrop Corporation. v. Triad International Marketing S.A.*,¹⁴³ there was a contract in the form of a , marketing agreement, in which Northrop asked Triad to be the exclusive agent for marketing aircraft, maintenance services and equipment for the Saudi Air Force. In return, Northrop would give a commission on sales to Triad.¹⁴⁴ Northrop paid a part of the commission to Triad, but it stopped the rest of the commission when the Council of Ministers of Saudi Arabia issued Decree No. 1275 which prohibited pay commissions on military contracts.¹⁴⁵ The Decree was issued to prevent corruption and bribery on military contracts.¹⁴⁶ A dispute arose as a result of the preventing of the rest of the commission. Northrop and Triad had an agreement to settle disputes, related to the marketing agreement, according to

¹⁴⁰ [2000] Q.B. 288, also reported in Sayed, *Supra* note 133, at 52.

¹⁴¹ *Id.*, & also reported in Sayed, *Supra* note 133, at 53.

¹⁴² The award of the English court was issued in 2000 while the OECD convention came to force in 1999.

¹⁴³ 811 F.2d 1265.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ CS. Gibson, *Supra* note 113, n° 139 at 130-131.

paragraph 13 of the California law.¹⁴⁷ Consequently, Triad obtained an award against Northrop to be paid the rest of the commission. Although paragraph 13, also, mentioned that "the award of a majority of the arbitrators...shall be final and binding upon the parties,"¹⁴⁸ Northrop challenged the award on the ground that it was contrary to the public policy of Saudi Arabia. The commission would breach the Saudi decree. Furthermore, the Cal.Civ.Code 1511 prevents, as a matter of public policy, the enforcement of a contract that contradicts a foreign state's law.¹⁴⁹ However, the California Court of Appeal rejected this argument stating that the Decree of Saudi Arabia was made to prevent any additional costs on Saudi procurement not on Northrop.¹⁵⁰ Moreover, the payment of a sales commission is not prohibited under California law. Therefore, the court of appeal held that Triad has the right to the rest of its sales commission.

In *Lainiors-Trefileries-Cableries de Lens (LTCL), S.A. v. Southwire Company*,¹⁵¹ the federal district court refused to apply the French mandatory rules for contradicting the domestic public policy of the United States. The LCTA, a French manufacturer of steel wire and rope, had signed a purchase agreement with Southwire, an American company for cable products, to sell galvanized steel. The agreement had articles about disputes and interests. The first article provided that disputes would be adjudicated by Georgia law to the extent they did not contradict with French law. The second article stated that the price would be adjusted according to the world market price of steel wire based on the "world market price adjustment clause."¹⁵² As a result of the dispute, both companies asked for arbitration to interpret the world market price adjustment clause. The LTCL obtained an award against Southwire, and moved to enforce it in Georgia. Consequently, Southwire opposed the movement, and argued that the interest which was issued in the award according to French law is against Georgia law. The Federal court demands that the public policy of the United States be considered in this case. According to the court, the excess interest rate which is accepted by French law is not accepted by the public policy of the United States. Therefore, domestic public policy prevails over French mandatory law, and the rate of interest would be decreased to be compatible with the rate that is accepted by Georgia law.

¹⁴⁷ 811 F.2d 1265.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 484 F. Supp. 1063.

¹⁵² *Id.*

C. Confidentiality vs. Public Policy - Arbitrators' Duty to Report Crimes

Before balancing confidentiality and public policy interests, it is an essential to provide some examples of ICC & ICSID case law that deals with corruption. This will present an idea about the situation in which arbitrators find themselves balancing public interests, public policy, and private interests, confidentiality. Secondly, some opinions of scholars about arbitrators' duty might clarify how they think about the duty of arbitrators before corruption.

1. ICC & ICSID Case Law: Arbitrators & Corruption

This part presents some practical examples of arbitrators' role in case of corruption. Such examples show the difficulties encountered by arbitrators in cases of corruption while adjudicating such as the involvement of public officials, limited power and burden of proof. In case of corruption, arbitrators might play a positive role by redressing corruption.¹⁵³ They might, also, play a negative role by which they investigate whether or not the contract is corrupt.¹⁵⁴ As a result of arbitrators' judicial works, many scholars have asked for affirmative steps by arbitrators to report corruption.¹⁵⁵ Yet, arbitrators have their own experience by which they represent how they understand their duty, or mission, in case of corruption. Therefore, it is an indispensable step to present some examples of arbitrators' behavior in the face of corruption.¹⁵⁶

ICC Case no. 1110 of 1963, is a dispute raised between the claimant, an Argentinean engineer, and the defendant, a British Company. The defendant promised the claimant a 10 % commission on a contract if the latter could influence Argentinean authorities to sign contracts with the British company. The British company got one contract with the Argentine authority, but the Argentine engineer did not get the 10 % as promised for his favour. Therefore, they decided to settle the dispute via a tribunal. Although Judge Lagergren, the sole arbitrator, agreed that in the Person regime, it was not possible to have an investment contract without bribe public officials, he refused the jurisdiction over the corrupt contract:

¹⁵³ Mohamed Abdel Rouf, How Should International Arbitrators Tackle Corruption Issues? Foreign Investment Law Journal, 2009, at 117.

¹⁵⁴ *Id.*

¹⁵⁵ Michael Hwang & Kevin Lim, *Supra* note 9, 47-50.

¹⁵⁶ It should be noticed that awards in the ICA can be revised and vacated by national courts on the ground of public policy once a new facts of corruption appear. Yet, in the investment arbitration there is an absence of articles related to revising the awards on the ground of public policy although the international public policy plays a great role relating to state responsibility, *See* Abdel Rouf, *Supra* note 153, at 128-129.

[D]uring the Peron regime everyone wishing to do business in the Argentine was faced with the question of bribes...commissions to persons in a position to influence or decide upon public awards of contracts seems to have been more or less accepted or at least tolerated in the Argentine at that time [emphasis added].¹⁵⁷

Judge Lagergren added:

[A] case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or France or, for that matter, in any civilized country, nor in any arbitral tribunal [emphasis added].¹⁵⁸

Finally, he declared that he had no jurisdiction, and refused to participate in a corrupt act. Judge Lagergren did not allow such an agreement between parties to be enforced in any country.

Another example of arbitrators' role in case of corruption is the ICC Case no. 3916 of 1982 where the claimant, a director of an Iranian department, asked a Greek company to pay the Iranian director a 2 % of commission. In each contract the Greek company obtained from the Iranian government. The defendant paid several commissions to the Iranian director until the Iranian Revolution, of 1979, which ended the work of the Greek company in Iran. As a result, the Greek company did not pay the rest of the commissions, for there were no new contracts with the ex-Iranian government. The tribunal concluded that there was no chance of obtaining a contract with the ex-Iranian government without bribery before 1979. Furthermore, the Greek company had already paid commissions for contracts which had been obtained. As the contract to pay a commission was against public policy in both France and England, the contract was found to be null and void.¹⁵⁹ Here, also, the tribunal refused to find the contract legal that parties were looking for. The tribunal had stated that the commission for the contracts covered bribery.

The third example of how arbitrators prevent corruption is ICC Case no. 5622. In its award of August of 1982 and the second award of April 1992,¹⁶⁰ OTV, a French company, wanted to organize a tender requested by Algerian authority. Consequently, the French company signed

¹⁵⁷ *Collection of ICC Arbitral Awards 1996-2000*, Reprinted from Year Book Commercial Arbitration, Kluwer Law International, 2003, at 5-6.

¹⁵⁸ *Collection of ICC Arbitral Awards 1996-2000*, Reprinted from Year Book Commercial Arbitration, Kluwer Law International, 2003, at 5-6.

¹⁵⁹ *Id.*, at 121, for full award in French see *Collection of ICC Arbitral Awards 1974-1985*, Kluwer Law and Taxation Publishers, 1990, at 507-511.

¹⁶⁰ *Arbitration - Money Laundering, Corruption and Fraud*, Dossiers - ICC Institute of World Business Law, at 124-125.

a contract with Hilmarton, an English company, to give legal and fiscal advice to the former. According to the contract, OTV would pay "4 % of the total amount of the primary contract,"¹⁶¹ as a commission to Hilmarton, yet the French company paid only 2% of the commission. Consequently, Hilmarton asked for arbitration. The arbitrator questioned whether or not there was bribery. Consequently, he sought whether or not the contract was against Algerian law which prohibited trafficking influence,¹⁶² international public policy or Swiss public policy. The arbitrator found there was no bribery. Yet, he concluded the contract to be null and void, for it breached Algerian law, which prohibited using intermediaries to obtain contracts with public authorities. Furthermore, the contract breached moral standards implicit in Swiss law because the contract violated a foreign law.¹⁶³

On Nov 17, 1989, Hilmarton asked for an annulment of the award before the court of justice of the canton of Geneva. The court found that the breach of foreign law did not imply a breach of the moral standards of Swiss law. Moreover, the contract was arbitrary as long as it did not suggest bribery. Moreover, both parties knew that Hilmarton would breach Algerian law to obtain a contract. Therefore, the Swiss court stated that the award of the arbitrator was null.¹⁶⁴

In April 1992, Hilmarton resumed ICC arbitration under Swiss law. The first arbitrator was replaced by another who reached the same conclusion as the Swiss court. The unusual aspect is that the first award was in favour of OTV, the French company, enforced in France, and the second award was in favour of Hilmarton, the English company, enforced in the UK.¹⁶⁵

This case provides a clear example of the extent of arbitrators' power, and how such power might be neglected by international corporations which practice a kind of political economy. Both companies belong to industrialized countries, and both of them intended to breach a foreign mandatory rule of a developing country, Algeria. Furthermore, the British court favored the interest of Hilmarton in the second award while the French court favored the interest of OTV in the first award.

An additional example of arbitrators' role is found in ICSID Case No. ARB/00/7 of September 2006. Here a dispute arose between *World Duty Free Company Ltd (WDFC)*, the

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

claimant, vs. the *Republic of Kenya*, the respondent. The claimant signed a contract with the government of Kenya for construction, maintenance and operation of a duty-free complex at Nairobi and Mombassa International airports in 1989. The contract was signed for 10 years with an option for the company to renew the contract for another 10 years under the same conditions. The WDFC obtained the contract by bribing the former president of Kenya, Mr. Daniel arap Moi with \$ 2 million USD. Furthermore, the WDFC provided many Kenyan public officials with gifts. Yet, the Kenyan government did not respect the agreement, and expropriated the WDFC which led to losses for the owners of the WDFC. The Kenyan government rejected such claims, and responded by saying that the agreement was null for bribing the former president. The tribunal stated that Kenyan government did not prosecute the ex-president although he had left the position:

[m]oreover...the bribe was apparently solicited by the Kenyan president... [who] has now left the office and is no longer immune from suit under Kenyan constitution, it appears that no attempt has been made to prosecute him for corruption or to recover the bribe in civil proceedings.¹⁶⁶

The tribunal found that the agreement is null and void under the applicable law. Moreover, the arbitrators presented a clear image that the contract was made by bribing public officials, the president and others, yet the Kenyan government did not prosecute them although it had a knowledge of the corruption. In this case, arbitrators chose to adjudicate the nullity of the contract to prevent corruption from being a part of the international trade process.

In another and more recent ICSID case, Case No. ARB/10/3 of October 2013 between Metal-Tech Ltd, the claimant, vs. the Republic of Uzbekistan, the respondent, the tribunal decided that it has no jurisdiction over the dispute under the BIT and Uzbek law because of corruption.¹⁶⁷ Metal-Tech had signed a joint venture agreement with Uzmetal Technology, and two other Uzbekistani companies to produce and export molybdenum products.¹⁶⁸ On the one side, Metal-Tech paid 50% of Uzmetal's capital and contributed technology know-how. Furthermore, Metal-Tech would provide access to the international market. On the other side, the two Uzbekistani companies contributed the remaining 50% of Uzmetal Technology's capital. Furthermore, they would sell raw molybdenum exclusively to Uzmetal. According to the agreement, Uzmetal Technology had no right to sell molybdenum products

¹⁶⁶ ICSID Case No. ARB/00/7 - AWARD.

¹⁶⁷ ICSID Case No. ARB/10/3 – AWARD, at 128, available at <http://italaw.com/sites/default/files/case-documents/italaw3012.pdf> (last retrieved 14 Dec, 2014).

¹⁶⁸ *Id.*

but to Metal-Tech. Furthermore, Metal-Tech had the exclusive right to sell the products in the international market. In 2006, the public office of the Uzbekistani prosecutor started criminal proceeding against officials of Uzmetal who had abused their power and caused damage to Uzbekistan.¹⁶⁹ After a month, the Uzbekistani cabinet of ministers issued a resolution to cancel the exclusive right of Uzmetal to purchase the raw molybdenum from Uzbekistani companies. Subsequently, the Uzbekistani companies stopped contracts with Uzmetal which lead to the termination of Uzmetal and its liquidation.¹⁷⁰ After the failure of Metal-Tech's case before the Uzbekistani economic court, Metal-Tech, in 2010, filed a request to arbitrate before the ICSID. The respondent argued that the tribunal had no jurisdiction under the BIT and Uzbek law because the investment of the claimant was gained through corruption.¹⁷¹ Indeed, Metal-Tech had paid \$4 million USD to Uzbekistani public officials and consultants, but it had failed to prove there were any services or consultancies. One of the consultants was Mr. Sultanov who is the brother of the Uzbekistani prime minister. In the end, the tribunal concluded that it had no jurisdiction over the dispute because of the lack of consent of Uzbekistan according to article 8(1) of the BIT:

Uzbekistan's consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes "concerning an investment." Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.¹⁷²

In this case, the tribunal restricted its power to the contract between Metal-Tech and the Republic of Uzbekistan.

Finally, it is worth mentioning the case of *Himpurna California Energy and Pathua Power Ltd. vs. a State Electric Power Company (PLN) and the Republic of Indonesia*.¹⁷³ This case gives a real example where the arbitrator cannot report corrupting in the face of political power of governments. In this case, Himpurna filed a claim against the PLN and the Republic of Indonesia. Mr. Abdurrasyid, who was one of the three arbitrators, found that the contract

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*, Para 110.

¹⁷² *Id.*, at 128. It is weird that parties have not been punished but they have paid equally the costs.

¹⁷³ Priyatna Abdurrasyid, *Supra* note 8, at 29-30.

between Himpurna, the PLN and the government of Indonesia had been procured by bribery. Mr. Abdurrasyid was trying to invoke nullity of the contract before the tribunal, yet, he could not. On the way to attend the session, Indonesian diplomats led by force Mr. Abdurrasyid to a hotel in Amsterdam where the tribunal is set to prevent him not to attend the tribunal.¹⁷⁴ Such a clear example shows what arbitrators might face if they think they will report corruption.

To sum up, in the cases above, the tribunals did not go beyond the rule of nullity and avoidance of the agreement contracts. Moreover, the ICC and ICSID do not have jurisdiction over agreements that cannot be recognized under the applicable law according to the NY Convention 1958. Arbitrators work with different laws whether chosen by parties or international laws to prevent corruption. Yet, the power of tribunals to fight corruption is restricted by the lack of national and international support. Such support is manipulated and controlled by the political and economic interests of every country, developing and developed countries alike.

2. Scholars and Arbitrators' Duty before Corruption

Although ICC and ICSID cases have proved that arbitrators play a great role in preventing corruption to the extent that they can, law cases do not establish a precedent whereby arbitrators report corruption. Therefore, some scholars have tried to answer whether arbitrators have a legal duty to report corruption or not.

Redfern and Hunter, Alexis Mourre, and C.S.A Nasarre have written on arbitration and crime. Redfern and Hunter think that the duty of arbitrators to report crimes is an ethical obligation.¹⁷⁵ According to them, arbitrators' duty is to solve disputes before them as the arbitration agreement states.¹⁷⁶ They think arbitrators, in suspected incidents of corruption, have to ask parties to provide more documents to clarify whether there is a real dispute or not.¹⁷⁷ Yet, Redfern and Hunter do not mention obstacles that encounter arbitrators such as parties may refuse to submit such documents under arguments of national interest or parties may invoke legal professional privilege, for example.¹⁷⁸ In the case of laundering money, the

¹⁷⁴ *Id.*

¹⁷⁵ Redfern & Hunter, *Supra* note 5, at 538-541.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Bernardo M. Cremades & David J. A. Carins, *Transnational Public Policy in International Arbitral Decision-Making: the Cases of Bribery, Money Laundering and Fraud*, ICC Dossiers, at 84-85.

writers believe that arbitrators should set aside the dispute for there is no actual dispute.¹⁷⁹ Redfern and Hunter, furthermore, believe that bribery, fraud and laundering money are connected to each other in arbitration.¹⁸⁰ They think that in case of corruption, there are, also, crimes of bribery, laundering money or both and vice versa. So, when arbitrators and states prevent one of them, they prevent the other crimes because in the existence of bribery there is either fraud, laundering money or other kinds of corruption.

Alexis Mourre, in the article *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, agrees with Redfern and Hunter that the ICA must not be an instrument for guarding against corruption. He thinks that arbitration is a normal result of international business disputes. Arbitrators must have power to fight corruption in international trade. Arbitrators, in Mourre's opinion, are more experienced than judges to uncover crimes related to disputes before them. As a result, states must give arbitrators a chance to participate in discovering crimes more than judges. Unlike Redfern and Hunter who think arbitrators have an ethical duty to report crimes, Alexis thinks arbitrators are the "natural judges to fight crimes in international trade," and they have more than an ethical duty.¹⁸¹

Furthermore, McDougall in answering the question of arbitrators' duty divides the question into three parts. The first is whether international commercial arbitration has jurisdiction over a dispute to decide if there is a crime or not. Second, if it does have a jurisdiction, whether the tribunal should invoke international public policy to "hold invalid contract" Whether it invokes the mandatory law.¹⁸² He proposes that the tribunal has a role in the dispute to decide if there is crime or not, and it can refer to public international law and the mandatory law to decide if the dispute is void. Nevertheless, McDougall does not give an answer to the question of arbitrators' duty; he, furthermore, asks more questions such as to whom arbitrators should report? And whether arbitrators should raise the crime as their motion?¹⁸³

On the other hand, there are scholars who believe there is a legal duty on arbitrators to report corruption, for instance, Michael Hwang and Kevin Lim. They think that the question must

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Mourre, *Supra* note 10, at 95-97.

¹⁸² Andrew McDougall, International Arbitration and Money Laundering, HeinOnline, 20 Am. U. Int'l L. Rev. 1201 2004-2005, at 1043.

¹⁸³ *Id.*, at 1053-1054, In my opinion, the importance of McDougall paper springs from the fact that it discusses the ban of laundering money by most of states like the US, Egypt, Saudi Arabia, and many international conventions like the United Nation Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Vienna Convention, 1988").

be answered at the national level. The issue of corruption must be resolved by national laws in which members of the tribunals belong. So, arbitrators must, according to Hwang and Lim, report crimes to the courts that are more related to the dispute, and they must be immune from any legal consequences for their breach of the contractual relationship.¹⁸⁴ They derive the principle, that arbitrators must report crimes, from general rules that fight corruption and money laundering in many countries. For example, article 25 of the Scottish Arbitration Bill states that "(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure ... (c) is required... (iii) in order to enable any public body or office-holder to perform public functions properly, (e) is in the public interest, (f) is necessary in the interests of justice."¹⁸⁵ Furthermore, article 70 provides arbitrators with immunity for their actions unless in bad faith.¹⁸⁶ Although the opinion of Hwang and Lim can be recognized as one of the most persuasive answers, it harms parties if arbitrators made a mistake by disclosing confidential documents. Some scholars like Hwang and Lim would argue the disclosure is committed in good faith, but this raises other issues. Here, some wonder if legislators favor *the good faith principle* on confidential documents worth billions of dollars.

Moreover, in the article entitled, *International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator*, Nasarre follows the same track of Lim and Hwang to figure out the answer of arbitrators' duty in the case of crimes. He compares national laws, such as the national laws of the UK and the US, and international conventions, like the Civil Law Convention on Corruption, and the Criminal Law Convention on Corruption.¹⁸⁷ He concludes that most of the international conventions and jurisdictions do not embody more than a general obligation; most of the articles are directed towards public officials.¹⁸⁸ Consequently, he says that although arbitrators are not public officials and they can be removed by parties, their mission has a public aspect which prevails over the contractual relationship with parties. So, they have a duty to report crimes. In my opinion, if there is a duty of arbitrators to report crimes, there must be rights for them to have limited immunity of civil and criminal liability and protected from any insults by parties. On the one hand, they

¹⁸⁴ Michael Hwang & Kevin Lim, *Supra* note 9, at 47-50.

¹⁸⁵ *Passage of the Arbitration Scotland Bill (2009), the Scottish Parliament*, available at [http://www.scottish.parliament.uk/S3_Bills/Arbitration%20\(Scotland\)%20Bill/BBV138_Final.pdf](http://www.scottish.parliament.uk/S3_Bills/Arbitration%20(Scotland)%20Bill/BBV138_Final.pdf) (last retrieved Nov 25, 2013), at 24.

¹⁸⁶ *Id.*, at 42.

¹⁸⁷ Nasarre, *Supra* note 60, at 4-10.

¹⁸⁸ *Id.*, at 10.

must feel immune in case of the disclosure of confidential documents. On the other hand, they should recognize that they will not be immune in the case of bad faith. Such a balance between protecting arbitrators and parties will restrict breaches of both.

However, there are some scholars who refuse to place an obligation on arbitrators to report without a clear expression. Cremades and Carins say that "[s]uch a duty could only arise from express legislation in a jurisdiction to which the arbitral tribunal, or some of its members, were subject."¹⁸⁹ The same point has been concluded by a Working Group of the ICC. The Working Group said that "it appeared contrary to the nature of arbitration, contrary in particular to the trust that parties place in the arbitrator, for an arbitral tribunal to report the authorizes the offences found..."¹⁹⁰ In my opinion, the Working Group favors confidentiality over reporting crimes for three reasons. First, in international trade, confidentiality of parties might privilege over national public policy. The working group might consider that no states have claimed that they do not know about corruption. Second, arbitrators' job is to settle commercial disputes and issue nullity of corrupt contracts not to report corruption to states know about it. Third, Reporting corruption by arbitrators might expose arbitrators to danger such as Mr. Abdurasyid.

3. Arbitrators Duty to Report Crimes: Balancing between Confidentiality & Public Policy

Balancing between confidentiality and public policy at the domestic level might be easier than on the international level. On the domestic level, public policy prevails over confidentiality such as in the *Esso Australia Resources Ltd v. The Honourable Sidney James Plowman* case where both parties were Australian nationals and the competent court was Australian, too. If there was a case of corruption in a domestic arbitration, for example, the duty of domestic arbitrators to report corruption is clear. Such a duty springs from general rules, which deal with reporting crimes, national criminal laws, or national laws of arbitration if they exist. For instance, article 434-1 of French Penal Code provides a general duty to report crimes.¹⁹¹ Yet, on the international level, the situation is different and more complex. First of all, arbitrators deal with different legal systems such as civil, common legal systems

¹⁸⁹ Cremades & Carins, *Supra* note 178, at 84-85.

¹⁹⁰ ICC Report of Working Group on Criminal Law and Arbitration (Doc 420/492) as mentioned in Redfern & Hunter *Supra* note 5, at 340.

¹⁹¹ French Penal Code, available at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (last retrieved Oct 21, 2014).

or Shari'a. Furthermore, arbitrators might neglect some mandatory laws of countries in favor of other countries like in *Northrop Corporation. Vs. Triad International Marketing S.A.* Second, the nationality of arbitrators, nationality of parties, and locations of the tribunal and enforcement influence the way in which arbitrators deal with corruption. For instance, if the Scottish law obligates arbitrators to report corruption, what should arbitrators do if they do not have the English nationality, parties with different nationalities, or corruption having taken places in different places? The differences in nationality for parties, tribunals, and the seat of tribunal influence, also, the verdicts of competent courts in enforcing the award or not. Moreover, the legal status of arbitrators, which varies among legal systems influence his/her power. For instance, Libyan law refers arbitration to contractual theory which means legal background of Libyan arbitrators differ from the legal background of British arbitrators whose English courts refers arbitration to the hybrid theory.¹⁹² Accordingly, arbitrators' legal background is likely to influence the way in which arbitrators look at corruption and the duty to report it. For instance, in *Soleimany*, the Beth Din did not pay an attention to the illegal contract, for the illegality of the contract according to the Iranian law is not considered in Jewish law. Therefore, the Beth Din issued an award in favor of the son. Regardless of the Jewish law, parties, in the autonomous theory, can choose any kind of laws whether positive laws, natural laws, or general principals of law. If an arbitrator follows the autonomous theory, s/he will not go beyond what the arbitrator reached using Jewish law, and would issue a similar award. Third, the lack of laws, and sometimes unclear laws, restricts arbitrators' power and their ability to deal with corruption. Finally, political economy and absence of states political desire to fight corruption influence arbitrators' role. There have been, always, a difference between developing and developed countries where the latter benefit from corruption to the welfare of their economies. All of the above reasons and problems make it difficult to oblige arbitrators to report corruption.

Some scholars might consider arbitrators to be the guardians of international trade, and it will not be easy to say there is no obligation to report corruption. Yet, national courts do not consider corruption if it does not impact interests of their countries. In *Westacre*, for example, the English court found that the contract was illegal for bribing Kuwaiti officials according to the facts before it, yet the court weighted between two public policies: the public policy of the UK not to enforce illegal contracts and the public policy supporting the finality of the award. In the end, the court preferred the latter public policy, and enforced the award. The

¹⁹² Mukhtar Ahmad Briri, *Supra* note 21, at 7-13, & Redfern & Hunter, *Supra* note 78, at 8.

English court tried to justify its decision in several ways. First, it stated that “[m]inisters and government officials are in certain parts of the world customarily bribed to procure lucrative contracts for the suppliers of arms and the providers of building and construction projects.”¹⁹³ The English court was aware its award influence over the field of international arbitration. Therefore, it refused to create a precedent by neglecting the principle of an award finality. The court stated “[a]gainst these considerations it is necessary to take into account the importance of sustaining the finality of international arbitration awards in the jurisdiction which is the venue of more international arbitrations than anywhere else in the world.”¹⁹⁴ Second, the court tried to highlight the graveness of the illegality of bribery by comparing it with drug-trafficking to reach its decisions. It provided that “[n]o doubt, if it were proved that the underlying contract was, in spite of all outward appearances, one involving drug trafficking, the alleged offensiveness of the transactions would be such as to outweigh any countervailing consideration. Where, however, the degree of offensiveness is as far down the scare in the present case, I see no reason why the balance of policy should be against enforcement.”¹⁹⁵

The English court is aware of corruption dangers in transactions of international trade, especially in third world countries. Yet, the court knows that it does not have the appropriate instrument to report it. In brief, as in the *WDFC vs. Republic of Kenya*, the tribunal posited that the ex-president had not been prosecuted by the Kenyan government although the government knew about the corruption. Furthermore, in *Himpurna California Energy Ltd. vs. Perusahaan Listrik Negara (PLN)*, Mr. Priyatana Abdurrasyid who was an Indonesian arbitrator prevented by force by the Indonesian government from attending the tribunal, for he had intended to invoke the corruption of the contract. He stated that

I tried to argue that the condition of PLN then, actually resulted from a contract drawn up through KKN (corruption, collusion, and nepotism), where the foreign counterpart was required to hand over a portion of its shares to certain party in Indonesia without any payment of even one cent. *Thus, in my opinion, this case out to be handed over to the office of Attorney General for investigation. It was found out later on, however, that the Indonesian party disagreed, because the KKN issue involved various officials of the Republic of Indonesia, and would be revealed in the open. The President at that time was Habibie [emphasis added].*¹⁹⁶

¹⁹³ [2000] Q.B. 288, Also reported in Sayed, *Supra* note 133, at 52-53

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Priyatna Abdurrasyid, *Supra* note 8, at 30.

In the former case, an Indonesian arbitrator intended to report the General Attorney, yet the whole government was against him, and he was not able to protect either himself or his family. How can arbitrators have an obligation to report without being able to protect his family? In my opinion, corruption in international commerce cannot exist without the knowledge of the government. For all of these reasons, I think confidentiality should prevail and arbitrators do not have a duty to report corruption in the absence of political will. Moreover, deciding the nullity and voidness of the contract is registered in the International Center for Settlement of Investment Disputes (ICSID) and International Chamber of Commerce (ICC). Therefore, the competent states can have knowledge of corruption, and invoke corruption by states more appropriately than the reporting of corruption by arbitrators.

IV. Conclusion

Corruption is a wide spread phenomena. It exists mostly in every aspect of life and especially in the international trade where political economy has its great role. Arbitration, which is an instrument to settle disputes, has countered many disputes that include corruption. The precedents of ICC and ICSID show that once arbitrators counter illegal contracts, they always issue the nullity and void of contract. The reaction of arbitrators regarding illegal acts is exposed to debates among scholars. While some of them believe that arbitrators' job does not end with issuing the nullity and void of contracts, but with reporting corruption, others think that there is no legal duty to do so.

Yet, to answer whether there is a legal duty to report corruption or not, scholars and courts need first to clarify the legal status of arbitrators. Indeed, arbitrators' role is influenced by the nature of arbitration. There are many legal theories to describe the nature of arbitration, and each one provides parties, arbitrators, and states with restricted or expanded power. While the contract theory provides arbitrators with power to settle disputes within the scope of contracts, and look at arbitrators as agents, or contractors, the judicial theory consider arbitrators as judges but chosen by parties not states. Moreover, the hybrid theory and autonomous theory have their views regarding arbitrators' legal status which differ from the latter theories.

The variety of theories which might be followed by different legal systems and arbitrators would drive to different answers for arbitrators' duty to report in the ICA. The different answer for arbitrator's' duty to report corruption is enhanced by the fact that there is a vacuum legislation in both national and international levels. For example, the OECD anti-bribery, the European Convention on Corruption, and legislators of the US, Egypt and Saudi Arabia do not present a legal obligation on arbitrators to report. Such a vacuum drives legal scholars, arbitrators and courts to find their own answer. While scholars from civil legal systems might support arbitrates to report corruption, scholars from common legal systems might not. Moreover, the answer would differ among those who come from industrialized countries and those from consumer states.

Indeed, with the vagueness in arbitrators' duty to report or not, arbitrators have to balance between two conflicted interests which are confidentiality and public policy. On the one hand, there is a contractual relationship between parties and arbitrators not to disclose

information about the tribunal, especially documents. Confidentiality has different application among different legal systems. The English courts, for example, accept an absolute confidentiality while the Australian courts prefer the restricted confidentiality that does not contradict with public policy. On the other hand, arbitrators must make sure that awards do not breach public policy of countries. Indeed, competent states would not allow awards to breach public policy, yet there are different levels of public policy, domestic, international and transnational public policy.

All of the above discussed issues drive me to say that there is no legal duty to report corruption upon international arbitrators no matter how serious corruption is. In my opinion, there are many obstacles prevent issuing such a duty. First of all, there are no clear articles about arbitrators' duty on national and international systems. Second, industrialized countries would manipulate such article to pass interests of their citizens and corporation against consumer countries. Moreover, there are examples where national courts such as the English courts did not report corruption to competent states such as *Soleimany* and *Westcare* cases, and an example where the Kenyan government did not prosecute the ex-president although it knows. Therefore, it would be unfair step to formulate legal obligation upon international arbitrators to report where no real political desire of states exists to fight corruption. In my opinion, issuing the nullity and void is a brave step by international arbitrators to fight alone corrupted governments, and it is the only solution for illegal contracts in the absence of laws. Yet, some wonder if arbitrators will report corruption in the future.