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Nota Editorial

Este número 19 de *Derecho y Sociedad* continúa el trabajo iniciado en el N° 17, y continuado en el N° 18, para la recepción y arbitraje de los textos a ser publicados. Ha sido un proceso impulsado y liderado por el profesor Fernando Sanquírico Pittevil, al que ahora se ha sumado Rodrigo Farías Díaz.

A partir de este número, el Consejo Editorial de Derecho y Sociedad está conformado por Rodrigo Farías Díaz como Subdirector de la *Revista*, Carlos Sandoval como Subdirector del *Blog*, Fernando Sanquírico Pittevil como Asesor del Consejo Editorial, y quien suscribe como Director de la *Revista* y el *Blog*.

En este nuevo Número hemos publicado un conjunto de 11 trabajos.

Según hemos anunciado anteriormente, la Revista está disponible para su consulta en la nueva página web de la *Revista*: www.derysoc.com. Esa página web, además, aloja el *Blog de Derecho y Sociedad*, que pretender ser un lugar para el análisis y discusión de los temas que habitualmente tratamos en la *Revista*, pero de una forma más ágil e inmediata.

Carlos García Soto
Director

Derecho

The effect of the anti-corruption clause on international commercial contracts

Niloufar Hassanzadeh*

pp. 115-136
Invitado: 19 may 2022

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El efecto de la cláusula anticorrupción en los contratos comerciales internacionales

Resumen: La corrupción es una máquina de muerte que ataca constantemente el mundo de los negocios y el comercio. Se han adoptado varios instrumentos legales para controlar y detener la corrupción tras el nacimiento de un movimiento global anticorrupción durante las últimas tres décadas. Sin embargo, debido al carácter no vinculante de la mayoría de ellos, su aplicación es voluntaria. Por otro lado, los contratos comerciales internacionales necesitan una herramienta exclusiva para controlar este peligroso fenómeno. Una cláusula anticorrupción es una poderosa salvaguarda designada a tal efecto para combatir la corrupción. Sin embargo, depende de cómo las partes diseñen, redacten y apliquen la cláusula. Además, la sola presencia de esta cláusula en el contrato no es suficientemente eficaz. Una de las organizaciones que publicó un conjunto de modelos de cláusulas anticorrupción es la Cámara de Comercio Internacional. La Cláusula Anticorrupción 2012 de la CCI puede aplicarse a cualquier contrato. Las cláusulas anticorrupción protegen la confianza entre las partes contratantes y garantizan la fiabilidad de la otra parte a lo largo de las diferentes fases del contrato. También prevén posibles acciones correctivas en caso de infracción. Sin embargo, el primer paso es reunir pruebas fiables. El papel de los denunciantes en este sentido es innegable. Además, un sólido programa de cumplimiento corporativo puede apoyar las disposiciones anticorrupción a lo largo de las distintas fases del contrato. La lucha contra la corrupción es un proceso a largo plazo, pero el resultado obtenido salva vidas.

Palabras claves: Contratos internacionales | Corrupción | Cláusula anticorrupción de la CCI 2012 | Contrato comercial | Denuncia de irregularidades | Cumplimiento corporativo.

The effect of the anti-corruption clause on international commercial contracts

Abstract: Corruption is a death machine that constantly attacks the world of business and trade. Several legal instruments have been adopted to control and stop corruption following the birth of a global anti-corruption movement during the past three decades. However, due to the non-binding nature of most of them,

their application is voluntary. On the other hand, international commercial contracts need an exclusive tool to control this dangerous phenomenon. An anti-corruption clause is a powerful safeguard designated for this purpose to combat corruption. However, it depends on how the parties design, draft, and enforce the clause. Moreover, the sole presence of this clause in the contract is not efficient enough. One of the organizations that published a set of anti-corruption clause model is the International Chamber of Commerce. ICC Anti-Corruption Clause 2012 is capable of being applied to any contract. Anti-corruption clauses protect trust between contracting parties and guarantee the other party's reliability throughout different contract phases. It also provides for possible remedial actions in case of infringement. However, the first step is gathering reliable evidence. The whistleblowers' role in this regard is undeniable. Furthermore, a robust corporate compliance program can support the anti-corruption provisions throughout various contract phases. Fighting against corruption is a long-term process, but the achieved result is life-saving.

Keywords: International contracts | Corruption | ICC Anti-Corruption Clause 2012 | Commercial Contract | Whistleblower | Corporate compliance.

I. Introduction

In the global business sphere, corruption can play the role of a threatening enemy that destroys the reputation of significant actors and taints the commercial transaction. Corruption does not have an impact only on trade and commerce. It also puts an end to the story of ethics and morality. Besides social and ethical issues, corruption spoils the safe competition between business actors. It contaminates the contractual relationship while parties are in a joint agreement. Another side effect of this deadly virus is killing the trust between people and governments. It affects the world of business and the relationship between commercial actors. Moreover, it can lead to severe crimes which harm the whole society.

Nowadays, there is international concern about the adaption and enforcement of anti-corruption legislation at the domestic and global levels. The international movement against corruption needs the countries, entities, and private business actors to comply with anti-corruption programs rapidly. However, this is not the entire story. Even though many countries and international organizations have taken enormous steps to curb corruption during the last decade, few successes have been reported. It may be because while leaders have the necessary means to launch successful policies against corruption, they have little incentive to do so. They are often the ones who stand to gain the most from rents in a corrupt system.[1] Therefore, the political context must not be disregarded in the fight against corruption. Recognizing a country's specific political and economic situation is vital to combat this enemy. No one can find a similar strategy to efficiently fight against corruption in every state. Most of the time, National NGOs and civil society organizations have the best information about the situation in their countries. They have a better perception of the safest and most efficient ways to engage in anti-corruption projects.

There seems to be a consensus that battling corruption is a task too big to be met by criminal law alone. Other branches of law must also play a key role in this fight. Therefore, real contract law issues are at stake when contracts are tainted with corruption. The problems need to be addressed to protect victims

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[1] Bo Rothstein, "Anti-Corruption: A Big-Bang Theory," *QoG Working Paper*, no. 2007 (February 2009): 7, http://dx.doi.org/10.2139/ssrn.1338614.

and, at the same time, deter potential wrongdoers.[2] One of the best ways to combat corruption and secure a financial relationship is by drafting an anti-corruption clause in commercial contracts. A business relationship between different parties cannot be entirely safe if there is no safeguard to prohibit corruption from contaminating the contractual relationship. With an effective corporate compliance program, the anti-corruption clause can play a significant role in prohibiting corrupt practices. This article's central focus is on the ICC Anti-corruption Clause 2012. It is worth mentioning that before ICC Model Clause, there was not any specific international instrument demonstrating how an anti-corruption clause should be designed. ICC Model Clause shows how an anti-corruption clause can affect different phases of the contract and what kinds of legal features it has. This article frames a clear picture of an efficient anti-corruption clause in the international contract.

II. International legal framework against corruption

1. Notion of corruption

What is the precise definition of corruption? There is no universally recognized meaning to the term corruption, so the widespread condemnation of corruption is deceiving. In fact, a nearly infinite number of actions could be described as "corrupt"; however, at a legal level, an entirely different analysis may be required for each case. Thus, defining its subject matter is one of the most critical challenges facing the anti-corruption movement. There are many obstacles to overcome for each concept of corruption. The first challenge is national borders. It means that what may be unproblematic in one state can result in severe punishment in other regions. The second challenge concerned the inter-disciplinary boundaries. Therefore, corruption is not just a legal topic but is extensively researched in many scientific fields. The last obstacle is the intra-disciplinary boundaries. In this regard, different law branches have different perspectives to consider. Therefore, a working definition that fits the discussion of criminal law aspects of corruption might not be appropriate for the respective discussion of private law, tax law, or public procurement. Instead of providing a general definition of corruption for specific aspects of private law, it is interesting to examine which types of corruption courts, and arbitral tribunals typically en-

[2] Michael Joachim Bonell and Olaf Meyer, eds., *The impact of corruption on international commercial contracts* (New York: Springer, 2015), 1.

counter when determining international commercial contracts.[3] Therefore, it is impossible to have an exact definition at the international level. Because corruption can be defined and interpreted under many factors such as culture, language, law, and customs. However, a simple, narrow, and traditional definition of corruption is misusing or abusing public power for personal gain. Corruption has many forms and categories, and it can happen in the public or even private sphere. Nowadays, scholars view corruption as a broader phenomenon instead of emphasizing public corruption. Their definition covers private corruption between individuals engaged in commercial activities. From this perspective, these cross-cultural phenomena are acts of misusing power for personal gain. Due to this definition, private agents are also subject to this responsibility.[4]

2. Development of existing international legal framework against corruption

Corruption has always existed in the context of international commercial relationships. However, it has only been quite recently that several joint initiatives have been launched to deal with this widespread disease.[5] The current International anti-corruption legal framework has resulted from 20 years of efforts by various international organizations. There has been a starting point for the development of this legal framework. An International anti-corruption movement that shaped the current legal framework against corruption can be categorized into two periods. The first movement is five years, from 1975 until 1980. The first international organization to discuss corruption publicly was the United Nations (UN). And it did so before the anti-corruption movement developed. The UN's General Assembly adopted a resolution calling for international cooperation against corruption and bribery in international commercial transactions as early as 1975. However, since other institutions failed to follow suit, the resolution remained just a paper tiger.[6] In comparison, the second international movement started in 1995 and continues to our present time.[7] The result of the first global

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[3] Bonell and Meyer, *The impact of corruption on international commercial contracts*, 5.

[4] Daniel Kaufmann, "Myths and Realities of Governance and Corruption," *World Bank* (2005) Ch 2.1: 82, http://dx.doi.org/10.2139/ssrn.829244.

[5] Bonell and Meyer, *The impact of corruption on international commercial contracts*, 33.

[6] Dan Hough, *Corruption, Anti-Corruption and Governance* (London: Palgrave Macmillan London, 2013), 37.

[7] Padideh Ala'I, "Controlling Corruption in International Business: The International Legal Framework Knowledge for Sustainable Development: An Insight into the Encyclopedia of Life Support Systems." *Working Papers* 45 (2002): 1, https://rb.gy/xpgcio.

anti-corruption movement was two resolutions. The first outcome was a need for international action to combat corruption and bribery. The second result was a demand to criminalize the illegal payments in transnational commercial activities.[8] In the heart of the first international movement against corruption, an American national effort to combat bribery was an excellent motivation for developing the anti-corruption legal framework in the world. By adopting the Foreign Corrupt Practices Act (FCPA) in 1977, US Congress has generated the first legal statute to prevent transnational bribery. FCPA only covers the corrupt practices in the commercial context.[9] This legal statute contains both anti-bribery provisions and accounting transparency requirements.[10] US Department of Justice and the US Securities and Exchange Commission are American leaders in the international fight against corruption which are jointly responsible for enforcing the FCPA.[11] As a result of adopting FCPA, there is a high demand for Corporate Compliance Programs by any organization involved in legitimate business in a foreign country. These compliance programs are designed to detect and prevent corrupt payments to government officials. The term "corporate compliance program" refers to a formal plan laying out policies, procedures, and actions an organization uses to prevent and detect potential criminal or civil violations of laws and regulations. It extends beyond a corporate code of conduct since it is an operational program rather than merely ethical guidelines.[12] An effective corporate compliance program is beneficial. Not only can it reduce the risks of corruption, but also it protects the organization's good reputation in the event of any corrupt action by individuals.[13] It is true that the road to building an effective compliance program is long and never-ending. The Department of Justice (DOJ) provides a comprehensive description of a program's structure, known as the

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[8] Ala'I, "Controlling Corruption", 5-6.
[9] Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, "The International Legal Framework Against Corruption: Achievements and Challenges," *Melbourne Journal of International Law* 14, no.1 (2013): 205. https://search.informit.org/doi/abs/10.3316/agispt.20133030.
[10] Christopher Cook, Stephanie Connor, "The Foreign Corrupt Practices Act: An Overview," *New York, NY: Jones Day*, January 2010, https://rb.gy/i0mnpd.
[11] The United States department of justice, "An overview on the foreign corrupt practices Act", Updated February 3, 2017, https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.
[12] Ron Kral, "Effective Corporate Compliance Programs." *Corporate Compliance Insights*, December 3, 2010. https://rb.gy/gvxr2d.
[13] Cook and Connor, "The Foreign Corrupt Practices Act".

Guidelines for an Effective Compliance Program, and published this most recent update in June 2020.[14]

Compared to the first anti-corruption movement, the second movement, which started in 1995 until current days, viewed corruption as an economic problem rather than a political or moral one. During this period, scholars tried to focus on how corruption can affect economic development in a harmful way. The second movement, enriched by the previous movement, had successful outcomes. Due to the second movement in the first years of its existence, two international conventions were concluded to combat bribery and corruption. The first convention was The Inter-American Convention against Corruption (OAS Convention) in 1996. The second one was the Organization for Economic Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Anti-Bribery Convention) in 1997. The OECD Anti-Bribery Convention is a set of legally binding standards that criminalizes bribery of foreign public officials in international business transactions and encompasses several measures that enable this to be effective. The initiative is the first and only international anti-corruption instrument to focus on bribery's ‘supply side.’[15] It is the only international legally binding instrument among the key anti-corruption documents introduced by the OECD.[16] The recent 2021 recommendation published by the 'OECD working group on bribery' accompanied the previous recommendation in 2009. In this new recommendation, the signatories agree to take further measures to strengthen their efforts to prevent, detect, and investigate foreign bribery.[17]

Some of the other efforts in the second movement led to the birth of the Council of Europe Criminal Law Convention on Corruption and the Council of Europe Civil Law Convention on Corruption, both in 1999 and the United Nations Convention against Corruption of 2003.[18] Besides, voluntarily adopting codes of conduct in MNEs, international civil society groups’ supports, and

[14] “The Current State of Compliance Program”, Integrated Compliance Management: The Future of Compliance Programs, *GAN Integrity*, https://learn.ganintegrity.com/nur-006-evgrn.
[15] “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.” Organization for Economic Co-operation and Development, https://rb.gy/wbbkty.
[16] “Key OECD anti-corruption documents.” Organization for Economic Co-operation and Development, https://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm.
[17] “2021 OECD Anti-Bribery Recommendation.” Organization for Economic Co-operation and Development, https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm.
[18] Bonell and Meyer, *The impact of corruption on international commercial contracts*, 33.

adopting different initiatives by the United Nations were other outcomes of anti-corruption movement.[19] It is undeniable, however, that in addition to criminal law sanctions, the civil law consequences, including the invalidation of corrupt contracts and the possible loss of any contractual or restitutionary remedies arising from them, may under certain circumstances prove to be equally or even more effective at combating corruption.[20]

However, are these activities sufficient to curb corruption? Definitely, no. A major obstacle in evaluating the efficiency of anti-corruption initiatives is the difficulty in quantifying corruption. Current anti-corruption movements are mainly theoretical and analytical, ignoring the importance of actual data and numbers. Consequently, even though innovative and exciting anti-corruption programs are implemented, it is difficult to pinpoint their success or failure. A new methodology is needed to quantify and analyze corruption to ensure best practices are implemented to combat the problem.[21] Furthermore, it has long been established that transparency alone is insufficient for successfully tackling the issue of corruption globally. The scholars are still frustrated that many countries with transparency initiatives and right to information laws still arrest activists and civil society members. In addition, the element of transparency will be practical when related data is open, accessible, and used effectively. Unfortunately, there is a gap between the availability of data and its practical use in fighting corruption. Data disclosure alone is not sufficient. As a first step, data must be readily available in machine-readable formats that citizens and civil society can independently analyze. A second step is for the activists to use each data within its original region's unique political and economic context. Hence, it was discussed in the previous subsection that there is no exact definition of corruption due to international differences; there is also no single strategy to combat corruption effectively in every country. As a result, international actors must be aware of the political context of the countries in which they operate.[22]

[19] Ala'I, "Controlling Corruption," 7.
[20] Bonell and Meyer, *The impact of corruption on international commercial contracts*, 33.
[21] International Budget Partnership, "What's missing in the Fight against Corruption?", September 26, 2017. https://www.internationalbudget.org/2017/09/whats-missing-in-the-fight-against-corruption/.
[22] International Budget Partnership, "What's missing."

III. Specific introduction to an anti-corruption clause (ICC Model)

1. The history of development and origination of ICC Anti-Corruption Clause 2012

As discussed in the previous chapter, there is still a long way to curb corruption. However, an anti-corruption international legal framework helped companies and states control the corruption in the world sphere. Also, national laws like the UK Bribery Act (2010) or FCPA help countries that had a business related to the UK and USA fight against corruption. For example, this new UK law is not limited to foreign bribery. The British government developed a national and an international code of conduct against bribery.[23] However, the absence of a legal tool that explicitly regulates the contracts was visible. Generally speaking, contracts are an essential part of every business transaction. Without contracts, negotiations are worthless. Given the enormous economic importance of international commercial contracts, it is surprising that so little attention has been paid to the legal analysis of these agreements.[24] For many years, the only preventive action in drafting a contract was implementing the anti-corruption laws or companies' code of conduct. However, there was no guarantee that the parties would comply with the rules or follow those policies. Therefore, it was essential to create a balanced contractual tool for fighting corruption internationally. Finally, the International Chamber of Commerce (ICC) originated the first global Anti-Corruption Model Clause in 2012. ICC Anti-corruption Clause 2012 results from the joint effort by two ICC Commissions: The Commission on Corporate Responsibility and Anti-corruption; and The Commission on Business Law and Practice.[25]

ICC has had a solid and efficient character in taking action against corruption. This battle can be seen in many forms by adopting the relevant documents. Jean-Guy Carrier, ICC Secretary General, discussed the development of the ICC anti-corruption movement and the reason behind the origination of the ICC anti-corruption clause in the Foreword of this legal tool. Carrier explains that "ICC became the first International organization that issued the rules to con-

[23] Keith Thompson, "Does Anti-Corruption Legislation Work?," *Int'l Trade & Bus. L. Rev*, no. 16 (2013): 112, HeinOnline.
[24] Bonell and Meyer, *The impact of corruption on international commercial contracts*, 3.
[25] Lauri Railas, "Contractual Tool for Anti-Corruption has Launched: a Summary of the ICC Anti-corruption Clause 2012," *World Service Group*, February 2013, https://rb.gy/qxrugx.

demn all forms of corruption and urged the companies to put preventive measures to ban corruption from their transactions."[26] It has happened by adopting the ICC Rules on Combating Corruption in 1977. This set of rules which the ICC Commission prepared on Corporate Responsibility and Anti-corruption, was rewritten in 2011. To complete their work, ICC issued Model Clause one year after to help business actors "incorporate the newly revised ICC Rules on Combating Corruption 2011"[27] in their agreements, in whole or by reference. In the words of the ICC Secretary-General, the aim of adopting the 2012 ICC Model Clause is "to create trust and prevent the contractual relationships from being affected by the corruptive practice."[28]

ICC Anti-Corruption Clause consists of three sets of the model clause classified as options I, II, and III. Somehow, the first two options have the exact nature. Option I is a short text with the incorporation method referencing Part I of the ICC Rules on Combating Corruption 2011. While Option II offers a model clause incorporating the full text of the same section of the ICC Rules on Combating Corruption 2011 in the contract.[29] Option III is different from those options in nature and time. It has a sanction mechanism, and it was included in the last days of preparation of the ICC Anti-corruption clause. Option III is designed to reference a corporate anti-corruption compliance program described by Article 10 in the 2011 ICC Rules.[30]

It is reasonable to mention that ICC Clause is soft law independent of any national law but has counterparts in the legislation of most countries.[31] ICC Clause is adopted based on two purposes. The first purpose is to create trust between parties. The second one is "achieving a balance between the interest of Parties to avoid corruption and their need to ensure the attainment of the objectives of the Contract."[32] There are no black and white features when analyzing ICC Clause as a model clause that many firms can follow. There are advantages of implementing them on the one side and critical aspects on the other. Disad-

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[26] Jean-Guy Carrier, Foreword of *ICC Anti-corruption clause 2012* (Paris: Internacional Chamber of Commerce, 2012), 1, https://rb.gy/d3rozg.
[27] Carrier, Foreword, 1.
[28] Carrier, Foreword, 1.
[29] Railas, "Contractual Tool".
[30] Railas, "Contractual Tool".
[31] Railas, "Contractual Tool".
[32] International Chamber of Commerce, *ICC Anti-Corruption Clause 2012,* https://rb.gy/d3rozg.

vantages or black points are products of binding rules. However, the concerns are entirely different when we talk about soft law and recommendations.

2. Influence of specific legal system on ICC Anti-Corruption Clause 2012

ICC Anti-Corruption Clause is an international legal tool. It is complicated or ambiguous to label the international regulation as completely influenced by specific legal language. Drafting an international set of rules with a global spirit is not done by an individual country or the legal system. Admittedly, UK Bribery Act 2010 or FCPA is born from the Common Law system; however international instruments are not categorized according to their original system. The rational analysis considers whether the wording of the ICC Clause echoes the language of any previous legal instruments, or the taste of any specific section is similar to a particular doctrine in a legal system. While we cannot discuss the issue of influence, we can elaborate on the subject in another way. The language of Paragraph one in both options I and II reflect the same language in two anti-corruption conventions. These two conventions are the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003).[33]

Another issue about the ICC Anti-corruption Clause is that it is built on the doctrine of good faith. Paragraph one in options I and II of the Clause mentions this issue. Also, the doctrine of good faith exists under the elements of an excellent corporate anti-corruption compliance program, as described in Article10 of the 2011 ICC Rules on Combating Corruption. As mentioned earlier, Option III of the ICC Clause is made about Article 10 of 2011 ICC Rules on Combating Corruption.[34]

Generally speaking, the doctrine of good faith is an abstract term that means contracting parties should act honestly and without any fraud. This concept is well accepted under the Civil Law system and European law. Although the doctrine of good faith is a more civil law concept, it is also located under Common law jurisdictions. However, the implication of this concept by Common law judges in commercial litigation is broad and general.[35] Therefore, per-

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[33] *ICC Anti-Corruption Clause 2012,* 7.
[34] *ICC Anti-Corruption Clause 2012,* 7.
[35] Sana Mahmud, "Is There a General Principle of Good Faith Under English Law?," *Fenwick Elliott*, November 8, 2016, https://rb.gy/g27n2h.

haps we can infer that ICC Anti-corruption Clause 2012 has a civil law frame or is more European for two reasons. Firstly, the International Chamber of Commerce is located in Paris, France. Secondly, the concepts of this legal model clause are closer to the Civil law concepts.

IV. Effect of anti-corruption clause on different phases of the contract

1. Effects on pre-contractual phase

To discuss the effect of the anti-corruption clause on different phases of the contract, ICC Model Clause is a suitable example. In the introductory note of the ICC Anti-corruption Clause 2012, the general aim of adopting this legal tool is appropriately discussed. The purpose of the Clause is to "provide the parties with a contractual provision that will reassure them about the integrity of their counterparts."[36] These contractual obligations exist not only during the enforcement of the contract but also during the pre-contractual and post-contractual periods.

Paragraph one of both Options I and II of the ICC Anti-Corruption Clause is relevant to the pre-contractual phase. Trust and integrity are the critical notions in this paragraph. Integrity is the main element in every business relationship and plays a significant role in pre-contractual negotiations. There are two issues that contracting parties want to be sure about them during a pre-contractual period. Firstly, in the preparation phase, parties want to ensure that no traces of any forms of corruption exist directly or indirectly while negotiating or drafting the contract. Secondly, effective preventive measures to avoid any corruption in this phase are crucial. Each party wants to be sure that the other side is taking care of the contract by applying anti-corruption safeguards to "avoid that one of the other Party's subcontractors, agents, or other third parties engages in corrupt practices."[37] The best preventive measure to avoid corruption in the pre-contractual phase is adopting an effective corporate compliance program suitable for the particular situation of the contract. One of the effects of the Anti-corruption clause on the pre-contractual phase is protecting the contract from contamination by corrupt practices. ICC Clause tries to build a resistant castle and rescue the contractual relationship from ending while the parties are still in

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[36] *ICC Anti-Corruption Clause 2012,* 2.

[37] *ICC Anti-Corruption Clause 2012,* 7.

the pre-contractual phase. Paragraph 1 of Option I and II covers ten kinds of corrupt practices which can be prevented in the pre-contractual phase by adopting an anti-corruption clause. This list contains:

1. Active and passive corruption (extortion or solicitation)
2. Bribery
3. Trading in influence
4. Corruption of public officials
5. Private-to-private corruption
6. Corruption in the national, local, or international sphere
7. Corruption with or without the use of intermediaries
8. Bribery with money or through any other form of undue advantage
9. Bribery with or without laundered money

In conclusion, the effects of the Anti-corruption clause on the pre-contractual phase are building a genuine contractual relationship between the parties, trying to protect the contract, and avoiding a variety of corrupt practices by including them in the wording of the clause.

2. Effects on post-contractual phase

Paragraph two of Options I and II in the ICC Anti-Corruption Clause affects contractual and post-contractual periods. By this part of Clause, parties agree to avoid any forms of corruption during the lifetime of the contract and after its execution. It means that parties have to ensure each other that nothing will be obtained illegally or corrupt in any phase of the contract. Also, they have to prevent the other related third parties from any corrupt practice during these phases. However, the parties' non-corruptive undertaking differs from the undertaking of the third parties. The responsibility of the contracting parties to prevent the third parties from practicing corruption is limited to applying preventative measures. According to ICC Anti-Corruption Clause 2012, these reasonable precautions are: "instructing subcontractors, agents and other third parties neither to engage nor to tolerate that they engage in any corrupt practice; not using them as a channel for any corrupt practice; hiring them only to the extent appropriate for the regular conduct of the Party's business and not paying them more than a suitable remuneration for their legitimate services.[38]

[38] *ICC Anti-Corruption Clause 2012,* 9.

As a result, the importance of the anti-corruption clause and its implications on the different phases of the contract is undeniable. However, it is best to draft this clause properly so that everyone understands its actual effect. How an agreement and its clauses are outlined has a significant impact on the execution phase and during the pre-and post-contractual stages. It is impossible to invoke a null and void clause during the performance period. Consequently, if the contracting parties are willing to avoid corruption during their contractual relationship, they must ensure that the anti-corruption clause is appropriately drafted.

3. Effects on balance of power

The balance of power between contracting parties is always a concern. During the negotiation phase, the contracting parties seek maximum control and include favorable provisions in the contract. Every provision can affect the overall power distribution between the parties. As a result, the more powerful party is likely to benefit more from the agreement. Companies sometimes assume that if they do not pay the bribe, the other side will. Thus, they try to manipulate markets and contractual relationships to obtain more power. Although corruption may be an easy shortcut, its detrimental effects will undermine contractual agreements. By including the anti-corruption clause in the contracts, everyone has equal power in this context. By including an anti-corruption clause in commercial contracts, the more vulnerable party is guaranteed not to suffer from an unfair balance of power caused by corruption. In this way, the weaker side ensures that the unbalanced power distribution has some other reason than bribery. As a result, the parties feel they are all on the same level, and any power imbalance originates from the imbalance in bargaining power. It is an issue that arises in every contractual relationship, and as long as duress and coercion are not involved, the parties can resolve it safely.

4. Effects on enforcement of the contract

Contract enforcement is one of the leading pillars of the contract law. Generally speaking, an enforceable legally valid contract consists of the variety of promises which both sides of the agreement should fulfill. If the parties perform their duties, the contract is enforced. Presence of Anti-corruption clause assures the individuals that no corruptive action is involved in the phase of performance. If so, the contract is breached, and the innocent party can ask for damages. Even if all of the duties are fulfilled because they are performed by aids of corruption the contract is void. Anti-corruption clause helps the contract

to be enforced in a legally binding way. It guides the parties to understand pure performance is not sufficient in executing the agreement. How to perform and by which methods and aids are also crucial and compelling.

V. Critical aspects of anti-corruption clause

1. Regarding drafting

Generally speaking, a contract is a legally binding agreement between two or more parties that determines each party's obligations. These obligations might require the parties to do certain things or prevent the parties from doing certain things.[39] A variety of legal elements should be considered in drafting a contract. A valid contract needs explicit provisions. Explicit provisions show who the actors are, the rights and duties, and how the contract should be performed. In addition, they explain what the prohibitions are and how they can be managed if any wrong action occurs.

The structure of international commercial contracts is the same as any other contract. Parties consider some issues when drafting an effective anti-corruption clause in an international commercial agreement. Firstly, who is covered under this clause? Contracting parties are the only definite answer. However, what about the third parties? The company requires that its agents and similar intermediaries conform to anti-corruption provisions. Still, in other associations (such as suppliers, consortia, and joint ventures), the company may have insufficient power to insist on conformity to all elements of its anti-corruption safeguards. It may have to rely more heavily on due diligence for selecting the right employees.[40] The company must draft the contract and anti-corruption clause in a way to guarantee that third parties will comply with anti-bribery and corruption laws. An excellent example of controlling third parties is when some companies apply additional provisions for high-risk intermediaries interacting with the government. These provisions include detailed record-keeping requirements for meetings with officials and gifts and hospitality.[41]

[39] George Raptis, "What To Consider When Drafting a Contract?" *Legal Vision*, Updated November 1, 2021, https://legalvision.com.au/consider-drafting-contract/.
[40] "Managing Third Parties, 13.3.5 Contract." Global Anti bribery guidance: *Transparency International UK*, https://www.antibriberyguidance.org/guidance/13-managing-third-parties/guidance#10.
[41] "Managing Third Parties, 13.3.5 Contract."

Secondly, in drafting an anti-corruption clause, another critical aspect is identifying the prohibited actions. The first step is looking at the type of business or commercial activity subject to the contract. The clause can refer to any undue advantage in a general concept or specifically to bribery or any specific kind of corruption.

Thirdly, the presence of an active corporate compliance program at the beginning of the performance of the contract is crucial. This issue should be mentioned in the wording of the anti-corruption clause. It refers to what ICC Anti-Corruption Clause 2012 talks about applying reasonable preventive measures.[42] Moreover, article 10 of the ICC Rules on Combating Corruption 2011 lists 16 elements of a Corporate Compliance Program.[43] This article mentions that each entity is free to choose the preventive measures from this list that it considers the most suitable and proper prevention of corruption in specific circumstances.[44]

A key aspect of drafting a strong anti-corruption clause is to make sure that it is enforceable. Being poorly drafted is not only about the literature of the contract. It involves other factors which should be investigated during the negotiations. In addition to the critical aspects of drafting, the enforceability of the clauses is equally important.

2. Regarding enforcement

The enforceability of the anti-corruption clause in international commercial contracts is vital for protecting the contractual relationship. Enforcement of anti-corruption provisions enhances the predictability of business relations and reduces ambiguity by assuring the parties that corruption will not taint the ongoing contract. If anti-corruption provisions are not enforced, it stands as a barrier to business. To illustrate the enforcement aspect of the anti-corruption clause, the ICC model clause 2012 is an excellent example. The ICC anti-corruption clause is meant to be a balanced alternative that is neither particularly difficult for any parties nor creates unexpected consequences through its exploitation for commercial purposes. However, the enforcement of these clauses may cause some problems in some states. Consider this hypothetical case: In a contract

[42] *ICC Anti-Corruption Clause 2012,* p 3.
[43] International Chamber of Commerce, *ICC Rules on Combating Corruption 2011,* art. 10, https://rb.gy/4qyxgl.
[44] *ICC Rules on Combating Corruption 2011,* art. 10.

between two entities or one entity and a public sector, the presence of an anti-corruption clause is necessary at the request of one side. However, on the other hand, the requesting party does not respect the nature and requirements of this provision by not supervising its personnel or other third parties. As the anti-corruption clause binds both parties regardless of their status, there should be no appeal to the provision if the invoking party also breaches ICC Rules. This issue is not discussed in the ICC Clause but follows the general principles of contract law, such as the doctrine of good faith.[45] The hidden facts and features of this clause can be unveiled by reviewing breached contracts. However, the subject of the anti-corruption clause does not have many concluded legal cases. Also, if any exists, there is almost no access to the resources due to confidentiality.

VI. Remedies for infringement of anti-corruption clause

1. Evidence of infringement and the role of whistleblowers

The first step to remedy the infringement of the anti-corruption clause is to gather the relevant evidence. Contractual audit rights allow the innocent party to gather evidence of a contracting partner's violation. In commercial contracts, audit right clauses enable the contracting party to investigate the partner's documents. It is also possible to collect evidence of a breach by requesting that the breaching party voluntarily remedy its noncompliance with the anti-corruption clause. In some cases, however, the contracting party may not be aware of a practice of corruption among the contracting partners or related third parties. In this situation, whistleblowers can play a significant role in obtaining evidence of corruption and announcing it publicly. Whistleblowing is an anti-corruption tool. It is mainly demonstrated as an element of free speech and the right of individuals to express dissent.[46] Some scholars describe whistleblowing as a non-obligatory public action. Others involve whistleblowing with employment and define it as “The reporting by employees or former employees of employers' illegal, irregular, dangerous or unethical practices.”[47] Meanwhile, some legal scholars

[45] Railas, “Contractual Tool”.
[46] David Banisar, “Whistleblowing: International Standards and Developments”, in *Corruption and Transparency: Debating the Frontiers between State, Market and Society* (Washington D.C.: World Bank-Institute for Social Research, UNAM, 2011), 1, 3, https://ssrn.com/abstract=1753180.
[47] Banisar, “Whistleblowing”, 4.

argue that whistleblowing is a potential option for employees to report workplace misconduct.[48]

A whistleblower is a person who knows illegal activities such as corruption, bribery, or fraud within an organization. They can be an employee, supplier, contractor, client of that organization, or any other person outside the organization who becomes aware of wrongdoing. The whistleblower can expose wrongdoers internally or externally. A whistleblower who reports a crime to people inside the organization, such as senior officers, is acting as an internal whistleblower. The whistleblower may also come under the category of external whistleblowing if he or she reports misconduct to the media, government, or police outside the organization. Nowadays, whistleblowing laws are becoming more widespread in the world. This is still a relatively new phenomenon. Although around thirty countries have adopted national whistleblowing laws, only a few numbers of them have attempted to enact legislation that has general application. In many countries, the rules are limited in scope and provide few protections. The issue of disclosure receives aggressive feedback from many states or companies. Due to this circumstance, whistleblowers are constantly afraid of losing their jobs or even their lives. Hopefully, international pressure will push states to adopt effective whistleblowing laws and practices. It is unavoidable that effective whistleblowing laws will help the international fight against corruption combat this global crisis.[49]

2. Possible remedial actions

A violation of the anti-corruption provision or participation in corruption will generally have severe repercussions. The most common remedy is imposing criminal and civil sanctions on persons engaging in corruption. State governments have passed various laws and regulations in response to the international movement against corruption which was developed by adopting hard and soft law instruments. The objective was to punish the wrongdoers and compensate the innocent party. However, sometimes infringement of the anti-corruption clause cannot be remedied. It is due to the fact that the contracting parties never proceed to court but instead try to solve the issue within the business using some relational remedies. Moreover, this fact also raises one concern, which is why we

[48] Banisar, "Whistleblowing", 4.
[49] Banisar, "Whistleblowing", 54.

do not have many cases of corruption that have been concluded. Relational remedies mean that the name of the breaching party or the firm they represent will be added to the blacklist in the world of business. Due to their corruption, they cannot engage in business transactions for a prolonged period and suffer severe consequences. It may not be an entirely satisfactory solution. Nevertheless, it has a sanction feature, and when combined with the appropriate treatment, it can have a high impact. As a result, it benefits businesses and innocent parties and fights against corruption in financial transactions. ICC Model Clause 2012 provides more details about the remedy for infringement of the anti-corruption clause. Specifically, the model clause outlines the necessary remedies which can be taken by the breaching party. It includes a variety of actions such as:

> providing cooperation in evidentiary action in conducting an examination or calling for an external audit of the incident, issuing warnings, reorganizing work, terminating sub-contracts or contracts of employment with persons or employees involved in corruption, or correcting the detrimental economic effect on the other Party of any proven non-compliance by, for example, adjusting the amount of the price of the Contract.[50]

ICC's Anti-corruption clause also discusses two other issues under possible remedial actions. In the first place, the remedy relates to the seriousness of the violation. Without knowing the nature and situation of the case, it is impossible to discuss what kind of remedial action is sufficient.[51] Furthermore, in some cases, the appropriate remedy is to provide counterevidence, which states that there is no breach of the anti-corruption clause in the contract. As a result, the innocent party is aware that the other party is taking steps to correct the situation.[52] While it is accepted that the breaching party cannot correct all of the infringement, it still needs to rectify the non-compliance as much as possible.[53]

It is crucial to ask whether the infringement of the anti-corruption clause is a fundamental breach. Usually, a fundamental breach of contract occurs at the core of the contract and gives the innocent party the right to terminate it. As a consequence of a fundamental breach, the infringing party denies the innocent party the actual benefit they should otherwise receive from the contract's execu-

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[50] *ICC Anti-Corruption Clause 2012,* 9.
[51] *ICC Anti-Corruption Clause 2012,* 9.
[52] *ICC Anti-Corruption Clause 2012,* 9.
[53] *ICC Anti-Corruption Clause 2012,* 9.

tion. This event shakes the foundations of the contract and has serious consequences. Do the same consequences occur if an anti-corruption clause is breached? In a nutshell, yes. Any infringement of those provisions can result in termination or suspension of the contract. There has been a fundamental breach of contract because corruption makes the relationship impossible to continue. The wording of the anti-corruption clause illustrates how corruption can undermine the spirit of the agreement.

It is wise to note that there is typically an arbitration clause after the anti-corruption clause in the contract. It means the breach of the anti-corruption provision will bring the case to arbitration, and the contractual relationship will end. Therefore, if the anti-corruption clause is efficiently drafted in a contract, there is hope for a better future with a low rate of corruption in the business world.

VII. Conclusions

Close your eyes for a second and think about the destructive nature of bribery and corruption for all. This fatal disease has consequential effects on every part of the economy and society. Although the term corruption covers a broad range of human malpractices, bribery is one of the main tools of corruption. Establishing a solid partnership between different business actors and all economies in the world sphere is vital. Various anti-corruption tools exist, providing individual and collective actions to prevent and sanction these malpractices. Governments also have an incredibly significant duty. Corruption is harmful to development. Governments are led to interfere where they should not, and they are hindered from enacting and implementing policies where government involvement is essential. Governments must strengthen their operations and cooperate in combating corruption. During the last 100 years, many international and regional anti-corruption treaties have been adopted. Despite their shortcomings, all of them have positive aspects. However, the most critical question is: are these global and regional treaties impacting the business world's decrease in corruption? In reality, most of the anti-corruption instruments are soft laws. Also, some of the regional anti-corruption does not affect the condition of that region. Some of them are very young without any positive impact. The issue can be worse for areas with no anti-corruption instruments. Therefore, the business world needs another preventive measure to tackle this problem.

The anti-corruption clause is essential in every commercial contract. However, the actual function of this provision would be evident when it is combined

with a robust anti-corruption compliance program. All MNEs have an internal code of conduct, but how much are they preventive in reality? How much can they play a significant role in combating the corruption in entities? They are different anti-corruption compliance programs globally that companies can follow. Besides these programs, technology also helps companies to fight against corruption. If corruption can appear in every shape, we can combat it differently. Taking reasonable steps from the first point, such as: carefully drafting a contract, introducing an efficient corporate compliance program, applying preventive measures, and holding a monthly or annual meeting with staff, help the companies live in a business world without corruption. If the parties in the contract know how much corruption is harmful to their business character in the economic world, they will make the best effort to draft the most efficient anti-corruption clause. Admittedly, one action cannot solve a fundamental problem, even if the work taken is compelling. Corruption is a problem that cannot be resolved internationally while still alive at the domestic level. Every country has a crucial role in combating corruption. No matter how large or small, every company has an active effect on this journey. Every person can change this situation, and every contract matters because corruption can be challenged and vanish if every individual, no matter in what political or financial position, wishes so.

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