vii. Reference to a So-Called Consensus in Arbitration

It is often referred to the arbitration practice as a further evidence of the fact that the Arbitrators of international trade, following the conclusions of Judge Lagergren, have overwhelmingly considered that they were bound by a trans-national rule of public policy abhorrent of corruption.\(^\text{946}\) Observation of the arbitral practice suggests that a majority of the published arbitration cases on issues of intermediation in connection with government procurement do recognize that the prohibition of corruption is a universally shared value, which ought to be applied regardless of the parties’ agreement.

In *Westacre v. Jugoimport*, the arbitral Tribunal recognized that it was bound to give effect to the “provisions of the law which is excluded” only to the extent that they are part of the “ordre public international..., examples of this are provisions to fight corruption and bribery.”\(^\text{946}\)

[...]

In the great majority of countries, corrupt relations involve all grounds of prohibition at once. We have seen that from the repressive perspective, the prohibition of corruption violates good morals insofar as it constitutes an affront to the requirement of honesty in international trade. Corruption is also
regarded as violative of public policy insofar as it constitutes a disruption in the honest discharge of the public function. Those concerns prompted the enactment in many countries of laws to sanction the multifaceted manifestations of corruption, which makes corruption a problem of illegality as well.

We have seen that those concerns have also animated inter-national attention, which in turn yielded debates and instruments along the principles of condemnation and prohibition of corruption. While it may well be said that the values repugnant of corruption have managed to be embodied in numerous international conventions, the immanent application of such values beyond the circle of States which ratify those instruments, remains vigorously asserted. Many expressions have interchangeably been used in the literature and the available arbitral instances to refer to the general reach of those values. Such expressions included formulations like "good morals", "bonos mores", "ethics of international trade", and "transnational public policy."

The common theme that generally unites all the preceding considerations is that corruption involves matters of general interests. Its prohibition so it is

argued, aims at protecting the integrity of the public function and the honest conduct of trade. The need to protect the general interest renders the responses accorded to corruption rather emphatic. In particular, it is generally held that a contract involving corruption is null and void. This proposition is best articulated in article 8 of the Council of Europe's Civil Law Convention, which states the followung:

"Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void."

It is commonly asserted that such nullity is absolute because corruption affects the general interests. This in turn entails consequences as to the party authorized to invoke nullity as well as to the effect of such nullity on the rights and obligations arising out of the corrupt scheme.

(9) If corruption is ascertained, it will be declared illegal, immoral or in violation of public policy. It is sanctioned by nullity of the contract whose objects is corruption, despite the paradoxes in the implementation of nullity that the Arbitrator encounters. When an Arbitrator reaches this stage, his or her initial position no longer affects arbitral decision. The Arbitrator operates in strict compliance with the rule that sanctions corruption. However, a repressive initial position may drive an Arbitrator to consider alternative means of sanction, if no corruption is ascertained or if the existence of any universal condemnation is found too controversial. Such alternative sanctions may justify a refusal to enforce an intermediation contract, either for absence of evidence of
services rendered by the intermediary, or because of the intermediary’s fraudulent presentation of evidence during the arbitral proceedings.

945 See e.g., Jean-Baptiste Racine, L’arbitrage commercial international et l’ordre public, p. 394, par. 711.
1076 See supra p.291.
1077 See generally, Vincent Heuzé,”Corruption”, p.4, par. 22ff.

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery