2. Voidance of contract

Arbitral tribunals nowadays tend to address issues of corruption in terms of the admissibility of the claims, the legality of the contract or transnational public policy. Contracts tainted by corruption may be found void on the basis of national laws, international conventions and transnational public policy. For instance, Article 34 of the UN Convention against Corruption states:

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, State Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

and Article 8 of the Council of Europe Civil Law Convention on Corruption that:

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

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

Arbitral tribunals have consistently recognized that anti-corruption laws and treaties are an integral part of international public policy and have relied on these instruments to declare contracts tainted by corruption as being null and void. For instance, in ICC case 3913 the arbitral tribunal found that the claimant was a financial intermediary who received money, disguised as consultancy fees, to redistribute among the members of a network consisting of local persons in decision-making positions in an African country in order to secure public contracts. The arbitral tribunal held that bribes were illicit and immoral under French law and concluded that the consulting agreement was null and void. Similarly, in ICC case 8891 relating to the defendant's failure to pay the claimant the commission that had been agreed upon, the arbitral tribunal relied on the testimony of several witnesses to find that part of the commission was used to influence public officials in an attempt to obtain a higher price under two public contracts. As a result, the arbitral tribunal decided that the consulting contract was void and dismissed all claims.
In situations where a contract is found to be null and void due to corruption and both parties have acted unconscionably, the dismissal of all claims on the grounds of nemo auditor turpitudinem suam allegans may, perversely, result in a dishonest party being freed from the obligation to repay what it has received by illegal means. This situation has arisen in a number of ICC awards. For instance, in ICC case 13914 relating to a consultancy agreement in an African country, the arbitral tribunal found that there was convincing evidence that the commission paid by the respondent to the claimant was intended to be used to bribe state officials in order to win the contract. The arbitral tribunal declared the underlying contracts null and void and dismissed all claims. As the respondent knew this was the purpose of the commission, it could not recover monies paid under the agreement, since ‘what has been given with illegal intent cannot be reclaimed under theories of equity or unjust enrichment’. Likewise, in ICC case 13515, the arbitral tribunal found that an agreement for the payment of commission that was intended to allow illicit payments to be made to an official in an African country in order to win contracts was null and void, and that a party that had consciously participated in the illicit activities that led to the nullity of the contract could not recover the commission it had paid.

In a recent ICSID arbitration, where the claims were barred as a result of corruption, the arbitral tribunal clearly explained this predicament:

the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.

14 Section 23, Indian Contract Act, 1872; Article 169 (in relation to Article 167), Civil Code of the Russian Federation; Article 20, Swiss Law on Obligations.
15 See e.g. Center of Transnational Law, No. IV.7.2(a) Invalidity of Contract Due to Bribery, http://www.trans-lex.org.
16 http://www.conventions.coe.int
19 See hereinafter.
20 See hereinafter.

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery