No. IV.7.2 - Invalidity of contract due to bribery

(a) Contracts providing for the payment or transfer of bribes are void.

(b) Contracts procured by the payment or transfer of bribes are voidable by the innocent party pursuant to Principle IV.7.3.

(c) Any intentional offer, promise or transfer of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official or person who directs or works, in any capacity, for a private sector entity, for the benefit of that official or private party or for a third party, in order that the official or private party acts or refrains from acting in relation to the performance of his official or other duties, in order to obtain or retain business or other improper advantages in the conduct of international business constitutes a bribe.

Commentary:
1 The notion that contracts related to bribery can be void is derived from Principle IV.7.1. The illegality of bribery is part of transnational public policy (see infra 3). Bribery as defined in subsection (c) means any intentional offer, promise or transfer of money or of other advantages such as goods, property, privileges, objects of value, shares/stock options, promotion, sponsorship, donations etc. to a public official or the employee of a private party or for the benefit of a third party with the expectation that this official or employee favors the offering party or its principal, e.g. with respect to the awarding of a contract. Such payments or transfers are sometimes also called "kickback", "pot-de-vin", "baksheesh" or "secret commission". Bribery is one element of corruption which, in and of itself, has a wider scope in that it relates to any illegitimate use of office, and may include a range of different types of crime.

2 The distinction made in Subsections (a) and (b) is important. It is almost universally accepted today that a contract which has as its subject the payment (in case of money) or transfer (in case of non-monetary advantages) of a bribe (see infra para. 5) is void (Subsection (a)). The rights of the parties to such contracts deserve no legal protection. The denial of legal protection is intended to undermine the mutual trust between these parties and to encourage them to abandon their illegal promises. The legal situation with respect to the main contract between the innocent party and the bribe-giver is less clear. Some legal systems take an approach that is similar to the one taken with respect to contracts dealt with in Subsection (a) and declare such contracts void per se. Others take a more cautious approach and leave it to the innocent party to decide on the contract's validity. After all, one purpose of the legal rules dealing with bribery is to protect the innocent party. If, however, that party, in full knowledge of all circumstances and for whatever commercial reasons, does not want that protection, but wants to live with the contract in spite of the fact that it is tainted with bribery, there is no reason not to grant that party this option. In line with a recent trend, therefore, Subsection (b) provides that such contracts are not void per se, but can be avoided by the innocent party. The legal and commercial fate of the contract is thus placed in the hands of the innocent party as the direct victim of bribery. In cases where there is no innocent party, e.g. because all parties know that the contract was procured by bribery, there is no right to avoid and the contract remains valid.

3 In view of the detrimental effect of bribery to companies and national economies, this rule applies irrespective of the fact that corruption was and still is endemic in many countries. This is reflected, e.g., in the collection of relevant data and country-by-country bribery scores of the TRACE Matrix on Global Business Bribery. Like the prohibition of racial discrimination, child labor, money laundering, anti-competitive practices, terrorism or drug trafficking, the prohibition of bribery belongs to those fundamental values of morality and justice which are widely recognized by civilized nations around the globe. The Principle is therefore part of transnational public policy. The values and standards of transnational public policy reflect a minimum standard of conduct and behavior in international commercial relations. The fact that the prohibition of bribery belongs to these fundamental values is reflected by the increasing criminalization of bribery and the increasing number of anti-bribery laws and international anti-bribery recommendations and conventions. As a result of this dual significance of the prohibition of bribery, a violation of this rule not only leads to the invalidation of a contract which is based on or involves the payment or transfer of bribes. Arbitral awards involving such contracts can be set aside and their enforcement can be refused based on the public policy defense contained in, e.g. Art. 34 (2) (b) (ii) UNCITRAL Model.
Law on International Commercial Arbitration of 1986 and Art. V (2) (b) New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Also, because of its very strong public policy nature, arbitral tribunals which are faced with an issue of bribery must examine this issue *ex officio*, even if it is not argued by either side.

4 In arbitration proceedings where a case of corruption is alleged, the crucial issue typically is whether corruption has been demonstrated and proven by the party who is alleging it. Usually, direct evidence of corruption, such as contemporaneous documents or witness testimony, is available only in rare cases. Because arbitral tribunals are devoid of any power to compel third party witnesses or to open a criminal investigation, they must rely on circumstantial evidence in order to decide whether a case of corruption has occurred. Such circumstantial evidence may include the nature of the contractual obligation to be performed by the party that claims the payment of the money, the amount of the fee agreed upon by the parties and its relation to the value of the performance owed by the other party, the way in which this fee is to be calculated (lump sum or percentage fee), the payment terms (cash payments, payments to unrelated third parties) or the fact that the party claiming the money refuses to disclose information about its nature, organizational or personal structure. Sometimes payments under the contract are to be made to payment agents which are not identical with the receiving party or banks in off-shore jurisdictions which are known to have no or only very weak financial supervisory or legal enforcement authorities or the involvement of foundations of a non-commercial nature as payment-agents for the party which is to receive the money under the contract. Such factors may be taken into account by the arbitral tribunal in determining whether a contract is based on or involves the payment or transfer of bribes.

5 Often, the payment of bribes is disguised by the conclusion of a "consultancy" or "agency" agreement which contains the obligation of one party to pay a sum of money ("commission") for the performance of certain consultancy services by the other side. Such contracts are concluded, *e.g.* in the area of public procurement. In some cases, such agreements do not contain specific contractual obligations for the party which is to receive payment under the contract by the other party, but rather very vague "*best efforts*" undertakings. In such a case, a claim for payment based on the contract fails if the party claiming the payment is not in a position to *prove* the performance of the contract (*i.e.*, his activities owed to the other side) as a contractual prerequisite for the payment. In such a case, the arbitral tribunal can dismiss the claim without having to rule on the invalidity of the contract under the present Principle. If the arbitral tribunal decides to rule on the invalidity of the contract, the vagueness of the contractual obligations of the party which is claiming the money under the contract is another factor (*see supra* para. 4) to be taken into account by the tribunal.